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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas  
Mikell R. Scarborough, Master-In-Equity

Appellate Case No. 2022-001165

Michael D. Royal, Appellant,

v.

Free Kindergarten Association of Charleston, Respondent,

The Attorney General of the State of South Carolina and  
The Charleston County School District, Intervenors/Respondents.

**RECORD ON APPEAL – VOLUME 4**

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<sup>1</sup> Exhibits to the Notice of Appeal, designated to be included by CCSD, are contained in the Orders section of this Record (Entry numbers 1-3, 5-12) and were previously filed with this Court.

|                                      |   |                                          |
|--------------------------------------|---|------------------------------------------|
| STATE OF SOUTH CAROLINA              | ) | IN THE COURT OF COMMON PLEAS             |
|                                      | ) |                                          |
| COUNTY OF CHARLESTON                 | ) | C.A. No.: 2018-CP-10-5739                |
| Michael D. Royal,                    | ) |                                          |
|                                      | ) |                                          |
| Plaintiff,                           | ) |                                          |
|                                      | ) |                                          |
| v.                                   | ) |                                          |
|                                      | ) | <b>The Attorney General of the State</b> |
| Free Kindergarten Association of     | ) | <b>of South Carolina's</b>               |
| Charleston,                          | ) | <b>Memorandum of Law</b>                 |
|                                      | ) |                                          |
| Defendant,                           | ) |                                          |
|                                      | ) |                                          |
| The Attorney General of the State of | ) |                                          |
| South Carolina and The Charleston    | ) |                                          |
| County School District               | ) |                                          |
|                                      | ) |                                          |
| Intervenors                          | ) |                                          |
|                                      | ) |                                          |

The Attorney General (also referred to as "AG") of the State of South Carolina respectfully submits this Memorandum of Law related to the relevant legal issues in the above-referenced matter. This is an action for specific performance of a Real Estate Purchase and Sale Agreement. Because the Agreement is less than fair market value and contrary to public policy, the Attorney General asks the Court to deny the request for specific performance.

**Legal Issue #1: Did June Murray Wells have authority to execute the Agreement on behalf of the FKAC?**

The Attorney General is not taking a position on this issue.

**Legal Issue #2: When a nonprofit provides notice to the Attorney General, pursuant to section 33-31-1202, and the sale price is less than fair market value and the sale is contrary to public policy, what is the authority of the Attorney General in connection with such a proposed sale?**

Section 33-31-1202 is a notice provision to protect the public interest in connection with the sale of assets of a nonprofit. When a nonprofit attempts to sell its assets for less than fair

market value and the sale is contrary to public policy, the sale cannot proceed and any contract is void.

**1. General authority of Attorney General related to charitable trusts and nonprofits**

As the Court states in its Order granting the Attorney General's Motion to Intervene in this action, the FKAC was established for the charitable purpose of offering a free kindergarten education to poor children at a time when kindergarten programs cost money. The AG's role in supervising public charities and charitable trusts is well established in South Carolina. S.C. Code Ann § 1-7-130 provides "The Attorney General shall enforce the due application of funds given or appropriated to public charities within the State, prevent breaches of trust in the administration thereof . . ." S.C. Code § 62-7-405 governs charitable trusts and provides in relevant part: "(a) A charitable trust may be created for the . . . advancement of education . . . or other purposes, the achievement of which purposes is beneficial to the community . . . ( c) The settlor of a charitable trust, the trustee and the Attorney General, among others may maintain a proceeding to enforce the trust." The AG is the proper party to protect the interests of the public at large in the matter of administering or enforcing charitable trusts. *Epworth Children's Home v. Beasley*, 365 S.C. 157, 616 S.E.2d 710 (2005); *Watson v. Wall*, 229 S.C. 500, 93 S.E.2d 918 (1956). In addition, the South Carolina Nonprofit Corporation Act, authorizes the Attorney General to investigate the organization, conduct, and management of a nonprofit in the State. S.C. Code Ann. § 33-31-170.

**2. Section 33-31-1202(f)**

Section 33-31-1202(f), part of the South Carolina Nonprofit Corporation Act, states as follows: "A public benefit or religious corporation must give written notice to the Attorney General twenty days before it sells, leases, exchanges, or otherwise disposes of all, or

substantially all, of its property if the transaction is not in the usual and regular course of its activities unless the Attorney General has given the corporation a written waiver of this subsection.” The Official Comment to this section explains that a “sale or other disposition of all, or substantially all, of a corporation's property other than in the usual and regular course of its activities must meet the requirements set forth in [this section].”

### **3. Notice to the Attorney General**

By letter of April 4, 2018, counsel for the FKAC provided notice to the Attorney General’s Office of the sale. This was the first notice provided to the Attorney General, and it was the first time the Office was aware of the contract. Section 33-31-141 governs notice under the South Carolina Nonprofit Corporation Act and applies to the written notice requirement of section 33-31-1202(f). Section 33-31-141(b) explains as follows: “Notice may be communicated in person; by telephone, telegraph, teletype, facsimile transmission (FAX), or other form of wire or wireless communication; or by mail or private carrier. If these forms of personal notice are impracticable, notice may be communicated by a newspaper of general circulation in the area where published; or by radio, television, or other form of public broadcast communications.”

A Memorandum of Purchase and Sale Agreement, which did *not* include the sale price or the contract itself, was filed with the Charleston County Register of Deeds on April 23, 2013. This did not provide actual notice, as the AG was not aware of the proposed sale until April 4, 2018. Moreover, this filing did not provide effective or statutory notice to the Attorney General because it did not meet the requirements of section 33-31-141(b).

### **4. The role of the Attorney General is to protect the public interest in matters involving the sale of assets of a nonprofit**

There are several South Carolina cases discussing the AG's role in protecting the interests of the public at large in matters involving the sale of all, or substantially all, of the assets of a nonprofit corporation. In *Sisters of Charity v. Alan Wilson, Attorney General of South Carolina, et al.*, No. 2016-CP-40-00087, Providence Hospital, a nonprofit, sought to sell substantially all of its assets outside the ordinary course of business and obtained a contemporaneous appraisal which it provided to the AG along with notice of the sale as required by section 33-31-1202(f). The AG advised the parties it required court approval of the sale at the proposed price, although the price fell within the range of values in the appraisal. The *Sisters of Charity* court stated as follows: “The Attorney General is a party to this matter in his *parens patriae* capacity in accordance with his common law and statutory authority to protect the public interest and to enforce the due application of those funds given or appropriated to any charitable trust, and to protect the interests of the public at large in the matter of administering or enforcing charitable trusts.” See attached **Exhibit A**, Order of January 27, 2016, in *Sisters of Charity, supra* (citing *S.C. Dept. Mental Health v. McMaster*, 372 S.C. 175, 642S.E.2d 552 (2007); *Epworth Children's Home, supra*; *Furman University v. McLeod*, 238 S.C. 475, 120 S.E.2d 865 (1961); and S.C. Code Ann. §§ 1-7-130 and 62-7-405(c)).

In *South Carolina Dept. of Mental Health v. McMaster*, the Supreme Court accepted in its original jurisdiction an action as to whether certain property owned by the Department of Mental Health was held in trust, and whether and under what conditions it could be sold. The subsequent circuit court action seeking approval of the sale was *South Carolina Department of Mental Health, as Trustee, v. Alan Wilson, Attorney General, et al.*, 2011-CP-40-00875. In this action, the Department sought court approval of the sale of the property impressed with a charitable trust that had been the subject of the Supreme Court action of 2007. The Court

approved the sale of the property after expert testimony from an appraiser about the value of the property. See attached **Exhibit B**, Order authorizing and approving the sale of the Property.

**5. The sale for less than fair market value provides a private benefit to Michael Royal, and this is contrary to public policy because the seller is a public benefit nonprofit.**

In charitable matters, the Attorney General protects the public interest. Regarding the sale of nonprofit assets, he is concerned with whether the fair market value of the assets is maintained in the “charity stream” - so that the full value of the assets continues to be perpetually dedicated for charitable purposes. Ensuring that a proper valuation of the assets is accomplished is vitally important to protect this interest. An undervaluation, as would be the case involving a sale for less than fair market value, provides a benefit to private interests and to the detriment of the public--the ultimate, beneficial owner of the charitable entity’s assets. For example, a sale following an undervaluation of a non-profit assets results in a “gift” to the buyer of the difference between market value and the consideration based on an improper valuation. Such a “gift” to a private individual or for-profit entity may also constitute illegal “private inurement” under federal tax laws, for which the IRS assesses severe penalties and possible revocation of the entity’s federal tax exemption. See John W. Vinson, *The Charity Oversight Authority of the Texas Attorney General*, 35 St. Mary’s L.K. 243 (2004) (discussing the importance of valuation in the Attorney General’s review of a nonprofit conversion/sale). There is also a potential for inappropriately advantageous board member/officer remuneration deals to be cut at the expense of the public interest in the charitable entity. *Id.*

Because of these concerns, the main factor the Attorney General reviews is whether the property is being sold for fair market value. The fair market value is the price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's-length

transaction; it is the point at which supply and demand intersect. (*Black's Law Dictionary* 11th ed. 2019).

In the present case, the FKAC is a nonprofit corporation registered with the South Carolina Secretary of State. The Nonprofit Corporation Act explains that a “corporation” means a public benefit, mutual benefit, or religious corporation. This means that the entity cannot provide a private benefit. However, selling an asset for less than fair market value provides a private benefit to the buyer. In the present case, Mr. Royal, a private citizen, received as a benefit the difference in the fair market value and the purchase price. This benefit is a loss to the FKAC and ultimately a loss to the public, as it prevents the assets from remaining in the “charity stream.”

In *American Campaign Academy v. Commissioner*, 92 T.C. 1053 (1989), the U.S. Tax Court provided a definition of private benefit: “nonincidental benefits conferred on disinterested persons that serve private interests.” In the present case, the sale of the property for less than fair market value provided a nonincidental benefit to Michael Royal, a disinterested person, and this served his private interest rather than any public interest of the Free Kindergarten. The Court noted that a nonprofit’s conferral of benefits on disinterested persons may cause it to serve a private interest rather than a public one, as required by section 1.501(c)(3) of the Internal Revenue Code.<sup>1</sup> See also *Anclote Psychiatric Ctr., Inc. v. Comm’r*, 76 T.C.M. (CCH) 175 (T.C. 1998), *aff’d sub nom, Anclote Psychiatric v. Comr. of IRS*, 190 F.3d 541 (11th Cir. 1999), (finding that a sale for less than fair market value resulted in a “prohibited inurement.”).

**6. The Attorney General is regularly involved in matters related to the sale of assets of a nonprofit.**

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<sup>1</sup> The authority governing 501(c)(3) organizations provides guidance about nonprofits. The Attorney General recognizes that the FKAC is not a 501(c)(3) entity at this time.

The Attorney General is regularly involved in matters related to the sale of assets of a nonprofit. The normal procedure when the Office receives notice of a sale pursuant to section 33-31-1202(f) is to ask for information regarding the fair market value of the property, if such information has not been provided. If the Office reviews this information and finds that the sale is for fair market value and not against public policy, it will send a letter informing the parties that it has no objection to the sale. See attached **Exhibit C**, examples of recent letters from the Attorney General in response to notice received pursuant to section 33-31-1202(f).

The Attorney General has been involved in court actions related to section 3-31-1202(f), in addition to the *Sisters of Charity* action mentioned above. In *Sloan Brothers v. Resurrected Treasure Ministries*, the Attorney General was named as a party in a foreclosure action because, as the Plaintiff explained in the Complaint, the party being foreclosed upon was a nonprofit and the action involved the sale of all, or substantially all, of its assets. See attached **Exhibit D**, Summons and Complaint (without exhibits), *Sloan Brothers v. Resurrected Treasure Ministries*.

The court has approved the sale of assets of nonprofit in other instances that did not specifically relate to notice pursuant to section 33-31-1202. Although these actions were not specifically related to the statute at issue in the present case, they show the importance of notice to the Attorney General and court approval in connection with a nonprofit sale of assets. The cases also show that the Attorney General is the appropriate party to protect the public interest in connection with the sale of nonprofit assets. These cases includes the following:

- *Calhoun County Museum and Cultural Museum v. St. Matthew's Parish Episcopal Church and Alan M. Wilson, Attorney General of South Carolina*, 2010-ES-09-00029. This Plaintiff requested the Court confirm whether a Museum and Church had authority to sell their interests in a tract of land. See attached **Exhibit E**, Order for Declaratory Judgment regarding the Sale of Real and Personal Property.



- *Baptist Foundation of South Carolina, as Trustee, v. Baptist Foundation of South Carolina, et al.*, 2014-GC-26-22, 2013-ES-26-00279, In this action, the Court found that a nonprofit was able to sell certain real estate “subject to Court approval of the ultimate sales price[.]” See attached **Exhibit F**, Order Construing Will and Codicil, Declaration of Endowment, Modification of Trust, and Authorization to Sell Real Property.
- In its Order of September 30, 2019, in the above Baptist Foundation case, the Court reviewed a proposed real property transaction where there were two contracts under consideration by the Court. Regarding one contract, the court stated that it “cannot find support for the acceptance and approval of the [contract] where there is no appraisal or evidence that can support such a low purchase price.” In the case, the proposed price of \$120,000.00 was less than two appraisals finding the fair market value at \$195,000 and \$197,000. The Court approved another sale at a higher price. The Court noted that it had accepted and approved prior sales of Trust real property at 88% of fair market value and 125% of fair market value. See attached **Exhibit G**, Order Approving Purchase and Sale Agreement and Authorizing and Directing Sale of Real Property.

**7. The contract is against public policy.**

In addition to the fact that the contract price was less than fair market value, the Attorney General had other concerns when it reviewed the contract. These include the following:

- A closing date of April 9, 2018, which is 5 years after the contract date. Because property values can change over time, this was a concern. Given that the only information the Attorney General received regarding fair market value was the appraisal of Mr. Robinson effective December 19, 2012, the Attorney General obtained another appraisal from Mr. Robinson which valued the property effective June 18, 2018 at a much higher value. The requirements of the Federal National Mortgage Association (Fannie Mae) provide instruction and guidance related to the timing of an appraisal. Pursuant to B4-1.2-02, in connection with a Fannie Mae transaction, when the effective date of the original appraisal report is more than four months but less than 12 months from the date of the note and mortgage, the appraiser must perform an appraisal update. When the effective date of the original appraisal report is more than 12 months from the date of the note and mortgage, a new appraisal report is required.
- The parties were in unequal bargaining position, especially as related to real estate. Mr. Royal has a law degree and is a licensed attorney in New York State. He holds a JD and MBA from the University of Virginia and a Masters in Real Estate Finance from the University of Cambridge. Mrs. Wells, born in 1934,

was a College of Charleston graduate. She taught kindergarten for 40 years at the FKAC, and she was the Director of The Confederate Museum in Charleston for 40 years. Mr. Royal's real estate and educational background appeared to put him in an unequal bargaining position compared to Mrs. Wells.

- Paragraph 6 of the contract notes that the Purchaser shall bear any court costs associated with petitioning the Court to establish Mrs. Wells' authority to dispose of the property on behalf of the Seller. This provision suggests there was some concern as to her authority.<sup>2</sup>
- Paragraph 7 of the contract allows the Purchaser to back out of the contract if the proposed closing is scheduled after May 31, 2013, if he determines, in his sole discretion, that a purchase of the property "if not suitable for himself financially[.]" This allows the Purchaser to get out of the contract, but there is no comparable provision for the seller.

Determining whether a contract is void as against public policy is generally a question of law for the Court. *Palmetto Mortuary Transp., Inc. v. Knight Sys., Inc.*, 424 S.C. 444, 459, 818 S.E.2d 724, 733 (2018). In the present case, the contract is void because it is against public policy. Most significantly, the fact that a nonprofit is selling property for significantly less than fair market value is a sufficient reason to find that the contract cannot be enforced. The above aspects of the contract also provide additional reasons for the court to find the contract is against public policy. Even if any one individual factor would not be sufficient, the totality of the circumstances indicate that the contract is against public policy. See 30 S.C. Jur. *Contracts* § 4 ("As a general rule, agreements or contracts against established public policy are also illegal and will not be enforced.").

While two private individuals may agree to a price that is less than fair market value and may have unusual provisions in their contract, the situation is different for a nonprofit. This is why notice to the Attorney General is important. "Freedom of contract is subordinate to public policy, and agreements that are contrary to public policy are illegal." *Nationwide Mut. Ins. Co.*

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<sup>2</sup> Although the Attorney General does not take a position on this authority, he notes that this is an unusual provision.

*v. Rhoden*, 398 S.C. 393, 728 S.E.2d 477 (2012). While private parties are free to contract as they desire, when the public interest is involved, such as in the sale of a nonprofit's assets, public policy trumps the freedom of contract.

### Conclusion

Based on the forgoing reasons, the Attorney General respectfully asks the Court to deny the Plaintiff's request for specific performance of the purported and proposed contract between himself and the Defendant FKAC.

Respectfully submitted,

s/Mary Frances Jowers

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December 8, 2021

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

Sisters of Charity Providence Hospitals,  
Plaintiff/Petitioner,

Case No. 2016-CP-40-00087

vs.

ORDER

Alan Wilson, Attorney General of South  
Carolina; and The Sisters of Charity of St.  
Augustine Health System, Inc.,

Defendants/Respondents.

This matter came before the Court on January 27, 2016 pursuant to a Complaint/Petition of the Plaintiff/Petitioner, Sisters of Charity Providence Hospitals, a religious corporation incorporated as a South Carolina nonprofit corporation, seeking an Order approving the sale of substantially all of its assets. Plaintiff/Petitioner was represented by Matthew B. Roberts and William G. Newsome III; Defendant/Respondent Alan Wilson, Attorney General of South Carolina, was represented by Assistant Deputy Attorney General Mary Frances Jowers; and Defendant/Respondent The Sister of Charity of St. Augustine Health System, Inc., was represented by Matthew B. Roberts and William G. Newsome III.

Without objection, counsel for Plaintiff/Petitioner summarized the factual history of the proposed sale of its assets to Providence Holding Company, LLC ("LifePoint Sub"), an indirect wholly-owned subsidiary of LifePoint Hospitals Holdings, Inc., a Delaware corporation ("LifePoint"). Plaintiff/Petitioner intends to sell its assets and assets of its wholly-owned subsidiaries (the "Subject Assets") used in the operation of Providence Hospitals in Columbia, South Carolina, or office buildings, physician clinics, and other facilities associated with Providence Hospitals to LifePoint Sub, and Defendant The Sisters of Charity of St. Augustine

Health System, Inc., an Ohio nonprofit corporation ("SCHS") and the sole member of Plaintiff/Petitioner, and LifePoint entered into a letter of intent to that effect. In the letter of intent, the sales price for the Subject Assets is set for One Hundred Thirty Million Dollars (\$130,000,000), with adjustments for the amount of net working capital and expenses for certain capital expenditures (the "Sales Price"). Pursuant to the Letter of Intent, all of the Sales Price will be paid to Plaintiff/Petitioner at closing.

To support the Sales Price, Plaintiff/Petitioner obtained an appraisal of the Subject Assets by Value Management Group, LLC, dated October 13, 2015 (the "Appraisal"), prepared by Elliott Jeter, CFA, CPA/ABV. The Sales Price is within the Appraisal's range of value for the Subject Assets.

Plaintiff/Petitioner provided the Attorney General with written notice (the "Notice Letter") of its intent to sell all or substantially all of its assets other than in the usual and regular course of its activities pursuant to Section 33-31-1202 of the South Carolina Nonprofit Corporation Act of 1994 (the "Act"). The Attorney General advised Plaintiff/Petitioner that it would require prior court approval of the proposed sale at the stated Sales Price. The Attorney General is a party to this matter in his *parens patriae* capacity in accordance with his common law and statutory authority to protect the public interest and to enforce the due application of those funds given or appropriated to any charitable trust, and to protect the interests of the public at large in the matter of administering or enforcing charitable trusts. See *South Carolina Dep't of Mental Health v. McMaster, et al.*, 372 S.C. 175, 642 S.E.2d 552 (2007) (Attorney General is charged with the protection of public charities and is required to enforce the due application of fund given or appropriated to such charities); *Epworth Children's Home v. W. F. Beasley, et al.*, 365 S.C. 157, 616 S.E.2d 710 (2005); and *Furman Univ. v. McLeod*, 238 S.C. 475, 482, 120 S.E.2d 865, 868 (1961); also see S.C. Code Ann. §1-7-130 and S.C. Code Ann. § 62-7-405(c).

At the hearing, the Attorney General called as a witness John E. Gibson, Jr., CPA/ABV, CVA, who was qualified by the Court as an expert in business valuation. He testified that he was retained by Defendant Alan Wilson to conduct a technical review of the Appraisal. Mr. Gibson explained the published uniform standards that exist for appraisers regarding the methods and measures expected in producing a reliable appraisal. He stated that he reviewed the Appraisal applying those standards. It was his opinion that the Appraisal was in full accord with those standards and found the appraisal to be thorough and comprehensive. He also testified that he agreed with the Appraisal's conclusion regarding the fair market value of the Subject Assets, and that the Sales Price was a commercially reasonable price for the Subject Assets.

After carefully considering the evidence, testimony, exhibits and arguments of counsel, I make the following findings of fact and conclusions of law pursuant to Rule 52, SCRPC. To the extent any of the following finds of fact constitute conclusion of law, they are adopted as such, and to the extent that any conclusions of law constitute findings of fact, they are so adopted:

#### FINDINGS OF FACT

1. The Subject Assets consist of office buildings, physician clinics, and other facilities associated with Providence Hospitals located in Richland County, South Carolina.
2. As part of its efforts to sell the Subject Assets, Plaintiff/Petitioner arranged for and obtained an appraisal of the Subject Assets.
3. The Plaintiff/Petitioner's sole member, SCHS, and LifePoint have entered into a Letter of Intent to sell the Subject Assets for a Sales Price equal to One Hundred Thirty Million Dollars (\$130,000,000), with adjustments for the amount of net working capital and expenses for certain capital expenditures.
4. The Appraisal supports the sale of the Subject Assets for the Sales Price.

#### CONCLUSIONS OF LAW

1. The Sales Price and other terms of the sale set forth in the Letter of Intent are fair and reasonable.

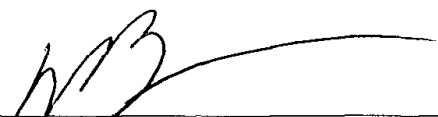
2. Pursuant to the South Carolina Nonprofit Corporations Act of 1994, 33-31-101, *et seq.*, the Plaintiff/Petitioner is authorized to sell the Subject Assets at the Sales Price and otherwise on terms consistent with the Letter of Intent.

3. The Attorney General has reviewed this matter in accordance with his common law and statutory authority and has no objection to the sale.

IT IS THEREFORE DECLARED AND ORDERED:

A. The sale of the Subject Assets by the Plaintiff/Petitioner at the Sales Price and otherwise on terms consistent with the Letter of Intent is hereby authorized and approved.

B. The Clerk of Court is directed to enter judgment on this Order authorizing and approving the sale of the Subject Assets pursuant to Rule 54(b) SCR.P.

  
The Honorable DeAndrea G. Benjamin,  
Circuit Judge

January 27, 2016  
Columbia, South Carolina

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

) IN THE COURT OF COMMON PLEAS

) Case No. 2011-CP-40-00875

) South Carolina Department of  
) Mental Health, as Trustee,  
) Plaintiff/Petitioner,

) vs.

) **ORDER**

) Alan Wilson, Attorney General of  
) South Carolina, and Hughes  
) Development Corporation  
) Defendants/Respondents.

2011 JUN 10 AM 11:05  
JEANETTE W. McBRIDE  
C.C.P. & G.S.  
RICHLAND COUNTY  
FILED

This matter came before me on June 8, 2011 pursuant to a Petition for Declaratory Relief filed by Plaintiff/Petitioner South Carolina Department of Mental Health (DMH) February 7, 2011. DMH seeks an Order approving the sale of certain DMH property impressed by a charitable trust and more fully described herein. DMH was represented by Mark W. Binkley and L. Kimble Carter; Defendant/Respondent Alan Wilson, Attorney General of South Carolina, was represented by Assistant Attorney General Mary Frances Jowers; and Defendant/Respondent Hughes Development Corporation was represented by Jack H. ("Ted") Tedards, Jr., with Robert E. Hughes, Jr., the president of Hughes Development Corporation, also being present.

The parties presented the Court with a Stipulation of Facts and Evidence. The parties stipulated that the real property which is the subject of this case is a parcel of land in the City of Columbia consisting of approximately one hundred sixty five (165) acres bounded by Bull Street, Colonial Drive, Calhoun Street, and Harden Street (the "Property"). The parties stipulated that the Property was previously the subject of litigation which determined that it is part of a larger parcel of land impressed with a charitable trust. The Supreme Court held that the doctrine of equitable deviation allows the property to be sold, and that "the proceeds from any sale of the



property must remain in trust for the benefit of DMH for the care and treatment of the mentally ill.” Dep’t of Mental Health v. McMaster, 372 S.C. 175, 642 S.E.2d 552 (2007). On December 2, 2010, the Mental Health Commission passed a resolution authorizing the State Director of DMH to enter into a Sale and Purchase Agreement with Hughes Development Corporation (“Hughes”) for a sale price of Fifteen Million Dollars (\$15,000,000). On December 16, 2010, the State Director of DMH signed a Sale and Purchase Agreement with Hughes (the “Agreement”). Pursuant to this Agreement, the purchase price is \$15,000,000.

The court first heard testimony from Campbell K. Kreps, Senior Broker with NAI Avant, the company selected by DMH to market the Property. NAI Avant was selected as broker following a Request for Proposal for real estate broker/marketing firm was issued by State Procurement. NAI Avant was awarded the contract for real estate broker/marketing of the Property in June 2008. Mr. Kreps described the efforts of DMH and NAI Avant in marketing the Property. Mr. Kreps noted the impact which a pre-existing re-development plan for the Property, known as the Duany Plan, had on the marketing of the Property. Mr. Kreps described the numerous reports commissioned by DMH for purposes of the sale, including arranging for a comprehensive survey of the Property, conducting a complete inspection and cost-estimate for the demolition and asbestos abatement of the dozens of buildings remaining on the Property, and initiating environmental assessments which led to an eventual Voluntary Clean-Up Contract with the Department of Health and Environmental Control. Mr. Kreps was of the opinion that the information contained in the survey and reports greatly aided in the marketing of the Property as they answered the types of questions a prospective buyer would have when considering a site such as the Property. He testified that NAI Avant is affiliated with network of national and international commercial real estate firms, and the company used a variety of marketing methods such as signage on the Property, mailings and brochures, e-mail and a dedicated internet website, to market the Property locally, nationally and internationally through its affiliate firms. Their



efforts generated contacts and queries about the Property from a number of prospective developers from throughout the United States and overseas.

Mr. Kreps also testified about the terms of the Sale and Purchase Agreement. Under the terms of the Agreement, the total amount due DMH for the Property in "as is" condition is Fifteen Million Dollars (\$15,000,000). The Agreement provides that DMH must obtain approval of the terms from a Court and the State Budget and Control Board, and Hughes will thereafter negotiate a development agreement with the City of Columbia re-zoning the property for development. After obtaining a re-zoning of the Property by the City of Columbia, Hughes, acting as the "Master Developer", will divide the Property into parcels. A parcel pricing agreement will be negotiated with DMH specifying a release price for each parcel, representing the amount for which DMH will transfer title to the parcel. Hughes will commence marketing the parcels of the Property seeking prices above the amounts due DMH for each parcel, or Hughes may choose to buy a parcel from DMH for the specified release price. The total amount due DMH for the parcels will aggregate to \$15,000,000. The Agreement provides for up to a seven year term for Hughes to purchase or sell the parcels, and provides for guaranteed minimum annual payments to DMH regardless of the pace of parcel sales. The Agreement also provides that, beginning in year four, DMH will receive 35% of the net proceeds from any parcel sale to a buyer other than Hughes.

Mr. Kreps testified that the Agreement provides protection for DMH in the event of a default by Hughes in several ways. First, substantial earnest money will be escrowed to guarantee Hughes' performance; second, DMH retains ownership of the Property until it receives the specified release price which is expected to represent the parcel's fair market value; and finally, the Agreement provides that in the event of a default DMH will receive all of Hughes' engineering studies and plans for the Property.

The court also heard testimony from George E. ("Jake") Knight, Jr., MAI, a certified general real estate appraiser, who was qualified by the Court as an expert in real estate appraisal. He was retained by DMH to appraise the Property. Mr. Knight described the assumptions he

employed in establishing the scope of work for his appraisal, the most significant being the Duany Plan's specifications concerning the types and densities of the recommended future uses for the Property, as well as which existing buildings on the Property would be retained and which demolished under the Plan. He testified that in arriving at a final appraisal he utilized two approaches, the sales comparison approach and the development approach. Mr. Knight summarized the methods and steps he employed in each approach in arriving at the Property's fair market value, which were \$17,303,724 and \$17,930,000, respectively. From those amounts, he then deducted the asbestos abatement and building demolition costs attributable to the buildings which were to be removed under the Duany Plan: \$5,833,438. After reconciling the resulting values under the two approaches, Mr. Knight testified that his opinion of the Property's fair market value as of December 30, 2010 is \$12,000,000.

Mr. Knight also testified that he calculated the present value of the guaranteed minimum annual payment amounts to DMH set forth in the Agreement over the 7 year term of the agreement, using a 6% government safe rate, and determined that it equated to an amount somewhat higher than \$12,000,000. It was his opinion that the minimum amount of money due DMH under the terms of the Agreement was therefore equal to or greater than the fair market value of the Property.

The Attorney General's Office called the final witness Joseph Rosen, MAI, SRA, a certified general real estate appraiser, who was qualified by the Court as an expert in real estate appraisal. He testified that he was retained by Defendant/Respondent Alan Wilson, State Attorney General, to conduct a review appraisal of the appraisal done by Mr. Knight for DMH. Mr. Rosen explained the published uniform standards which exist regarding the methods and measures expected in producing a reliable appraisal. He stated he reviewed the appraisal completed by Mr. Knight applying those standards. It was his opinion that Mr. Knight's appraisal conformed to the appropriate appraisal standards, was complete and accurate as to the scope of work, used adequate and relevant data, and used appropriate methods and techniques. Mr. Rosen also



testified that he agreed with Mr. Knight's conclusion regarding the fair market value of the Property.

After carefully considering the evidence, testimony, exhibits and argument of counsel, I make the following Findings of Fact and Conclusions of Law pursuant to Rule 52, SCRPC. To the extent any of the following findings of fact constitute conclusions of law, they are adopted as such, and to the extent that any conclusions of law constitute findings of fact, they are so adopted.

### **FINDINGS OF FACT**

1. The real property that is the subject of this case is that certain tract of land in Columbia, South Carolina which was the site of the South Carolina State Hospital, and is more fully described in the Sale and Purchase Agreement attached to the Stipulation of Facts and Evidence.
2. As part of its efforts to sell the property, DMH arranged for a complete survey of the Property, conducted inspections of the buildings on the Property to determine the presence of asbestos and the cost of asbestos abatement and also obtained cost-estimates for the demolition of the buildings remaining on the Property. DMH also initiated environmental assessments of the Property. In its efforts to sell the Property, DMH employed a commercial real estate broker, NAI Avant, which advertised and marketed the Property by various methods locally, nationally and internationally.
3. The Defendant/Respondent Hughes Development Corporation ("Hughes") entered into a Sale and Purchase Agreement for the Property with DMH dated December 16, 2010.
4. Under the terms of the Agreement, DMH must obtain approval of the terms from a Court and the State Budget and Control Board, and Hughes will thereafter negotiate a development agreement with the City of Columbia re-zoning the property for development.
5. Hughes will divide the Property into parcels after obtaining a re-zoning of the Property by the City of Columbia. Hughes thereafter will purchase the parcels or sell the parcels to sub-



developers, ultimately paying DMH a minimum of Fifteen Million Dollars (\$15,000,000) over a period not to exceed seven (7) years.

6. An Appraisal of the Property was obtained by DMH which concluded that its current fair market value is Twelve Million Dollars (\$12,000,000). An independent review appraisal conducted by an appraiser retained by the Attorney General of South Carolina confirmed that the DMH appraisal was prepared in accordance with all applicable standards, and the review appraiser agreed with the fair market value determined by the DMH appraisal.

7. Under the terms of the Agreement, DMH will retain ownership of the Property as Hughes endeavors to develop or sell it in parcels. DMH will transfer title of a parcel at the time of its sale for a pre-determined specified release price. The sum total of the release prices of the parcels will be \$15,000,000.

8. The Agreement requires Hughes to deposit One Million, Five Hundred Thousand Dollars (\$1,500,000) as Earnest Money to assure its performance, and contains other negotiated provisions intended to protect both parties from any breach by the other.

9. As DMH will continue to own portions of the Property as parcels are sold and re-development occurs, the Agreement requires DMH to prospectively execute certain documents requested by Hughes related to the Property which further the planned development of the Property, such as Protective Covenants, Conditions, Restrictions and Easements. The Agreement also provides that, beginning in year four, DMH will receive 35% of the net proceeds from any parcel sale to a buyer other than Hughes.

#### **CONCLUSIONS OF LAW**

A. The South Carolina Supreme Court held that the Property is impressed with a charitable trust. *S.C. Dept. of Mental Health v. McMaster*, 642 S.E.2d 552 (S.C. 2007). The Court went on to state that "given the change in circumstances in the care and treatment of mental health patients, we hold that the doctrine of equitable deviation may be employed to allow a sale of the



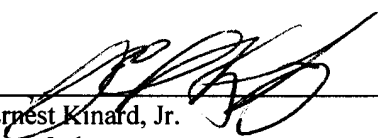
property with disbursement of the proceeds to be placed in trust for the benefit of DMH.” 642 S.E.2d at 554.

- B. DMH proceeded in a comprehensive, thorough and commercially reasonable manner in marketing the Property for sale.
- C. The purchase price and other terms of the Agreement are fair and reasonable.
- D. The sale of the Property is in the best interests of DMH and the beneficiaries of the charitable trust.

A handwritten signature in black ink, appearing to be a stylized 'R' or 'B' followed by a flourish.

IT IS THEREFORE DECLARED AND ORDERED:

- A. As explained by the Supreme Court, the doctrine of equitable deviation permits the South Carolina Department of Mental Health to sell the Property;
- B. The purchase price of \$15,000,000 due DMH under the terms of the Agreement is fair and reasonable;
- C. Consistent with the Agreement, after receiving approval by the State Budget and Control Board, the Property may be sold under the terms of the Agreement, provided that all proceeds shall be held in trust for the benefit of South Carolina Department of Mental Health for the care and treatment of persons with mental illness;
- D. The South Carolina Department of Mental Health, acting through its State Director or other duly designated agency officials, may grant any necessary Protective Covenants, Conditions, Restrictions and Easements and other documents related to the Property which are required for the Department to comply with the terms of the Agreement;
- E. The sale of the Property by DMH pursuant to the Agreement for the consideration set forth in the Agreement is hereby authorized and approved.
- F. The Clerk of Court is directed to enter judgment on this Order authorizing and approving sale of the Property pursuant to Rule 54(b) SCRCP.

  
\_\_\_\_\_  
J. Ernest Kinard, Jr.  
Circuit Judge

At Columbia, S.C.

6/10/11  
Date



Form 4

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF RICHLAND

CASE NO: 2011CP4000875

IN THE COURT OF COMMON PLEAS

South Carolina Department of Mental  
Health

vs.

Alan Wilson

Plaintiff

Defendant

**CHECK ONE:**

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCPP; ☐ Rule 41(a),  
SCRCPP (Vol. Nonsuit); ☐ Rule 43(k), SCRCPP (Settled); ☐ Other:

☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRCPP; ☐ Bankruptcy:

☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;

☐ Other: \_\_\_\_\_

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**

☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR  
ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:** ☒ See attached order; ☐ Statement of Judgment by the Court:

Dated at Columbia, South Carolina, this \_\_\_\_ day of \_\_\_\_\_, 2011.

\_\_\_\_\_  
**PRESIDING JUDGE**

This judgment was entered on the \_\_\_\_ day of \_\_\_\_\_, 2011, and a copy mailed first class this 13  
June 2011, to attorneys of record or to parties (when appearing pro se) as follows:

Larry Kimble Carter

\_\_\_\_\_  
**ATTORNEY(S) FOR THE PLAINTIFF(S)**

Mary Frances Jowers  
Jack H. Tedards Jr.

\_\_\_\_\_  
**ATTORNEY(S) FOR THE DEFENDANT(S)**

*Jeanette W. McBride*  
\_\_\_\_\_  
Clerk of Court

SCRCPP APP-24/FORM 4



STATE OF SOUTH CAROLINA  
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

Case No. 2020-CP-

Sloan Brothers, LLC,

Plaintiff,

vs.

Resurrected Treasure Ministries, Inc. f/k/a  
Buried Treasure Ministries, Inc.; the  
Estate of Martha Ann B. Evans by and  
through its Personal Representative  
Andrea Cureton; the South Carolina  
Department of Revenue; the South  
Carolina Attorney General,

Defendants.

## SUMMONS

Mortgage Foreclosure  
Deficiency Demanded  
Non-Jury

**YOU ARE HEREBY SUMMONED** and required to answer the Complaint herein, a copy of which is herewith served upon you, or otherwise appear and defend, and to serve a copy of your Answer to the said Complaint upon the subscriber at his offices, 1201 Main Street, 22<sup>nd</sup> Floor (29201-3226), Post Office Box 11889, Columbia, South Carolina 29211-1889, within thirty (30) days after the service hereof (except as to the Defendant United States of America, if named, shall have sixty (60) days after the service hereof), exclusive of the day of such service; and if you fail to answer the Complaint within the time period aforesaid, or otherwise appear and defend, the Plaintiff in this action will apply to the Court for the relief demanded therein, and judgment by default will be rendered against you for the relief demanded in the Complaint.

**YOU WILL ALSO TAKE NOTICE** that should you fail to Answer the foregoing Complaint, the Plaintiff will move for a general Order of Reference of this cause to the Master-in-Equity or Special Referee for this county, which Order shall, pursuant to Rule 53 of the South

Carolina Rules of Civil Procedure, specifically provide that the said Master-in-Equity or Special Referee is authorized and empowered to enter a final judgment in this cause.

This communication is an attempt to collect a debt, and any information obtained will be used for that purpose.

s/ Kathleen M. Muthig  
Kathleen M. Muthig  
SC Bar 100178

Haynsworth Sinkler Boyd, PA  
PO Box 11889  
Columbia, SC 29211-1889  
803.779.3080  
[kmuthig@hsblawfirm.com](mailto:kmuthig@hsblawfirm.com)

Attorneys for Plaintiff

October 14, 2020

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE

Case No. 2020-CP- \_\_\_\_\_

Sloan Brothers, LLC,

Plaintiff,

vs.

Resurrected Treasure Ministries, Inc. f/k/a  
Buried Treasure Ministries, Inc.; the  
Estate of Martha Ann B. Evans by and  
through its Personal Representative  
Andrea Cureton; the South Carolina  
Department of Revenue; the South  
Carolina Attorney General,

Defendants.

**COMPLAINT**  
Mortgage Foreclosure  
Deficiency Demanded  
Non-Jury

Plaintiff Sloan Brothers, LLC (“Plaintiff”), complaining of the above-captioned defendants, alleges as follows:

1. This is an action for foreclosure of a mortgage upon certain real estate in Greenville County, South Carolina.
2. Plaintiff is a limited liability company duly authorized to do business and doing business in South Carolina.
3. On information and belief, Resurrected Treasure Ministries, Inc. f/k/a Buried Treasure Ministries, Inc. (“Resurrected”) is a nonprofit corporation authorized to do business in the State of South Carolina.
4. The real property hereinafter described that is the subject of this foreclosure action is situated and located in Greenville, South Carolina; therefore, this Court has proper jurisdiction over the subject matter of and the parties to this action.

5. This foreclosure action is in compliance with the Supreme Court of South Carolina's May 6, 2020 and May 12, 2020 Administrative Orders ("Administrative Orders") because this action involves the foreclosure of a loan that is not a Federally Backed Mortgage Loan, as evidenced by the Certification of Compliance filed herewith.

6. The subject mortgage is not subject to modification under the Home Affordable Modification Program (HMP) for residential loans owned, securitized or guaranteed by the Federal National Mortgage Association (Fannie Mae) or the Federal Home Loan Mortgage Corporation (Freddie Mac). Plaintiff is not a participant in the HMP.

7. This foreclosure action is exempt from the Supreme Court of South Carolina's May 2, 2011 Administrative Order ("Administrative Order") because this action involves the foreclosure of a commercial loan. As such, the subject property is not Owner-occupied dwellings as defined in the Administrative Order, as evidenced by the Certificate of Exemption.

8. Martha Ann B. Evans passed away on January 11, 2020, and her estate is being probated in the Greenville County Probate Court under Case Number 2020-ES-23-00364 (the "Estate").

9. Andrea Cureton is serving as personal representative for the Estate.

10. The South Carolina Attorney General is named pursuant to S.C. Code Ann. § 33-31-1431(d) and § 33-31-1202(f) in order to give notice of the commencement of this proceeding involving, upon information and belief, an asset that constitutes substantially all of the assets of a nonprofit corporation which is a charity or religious corporation.

11. For valuable consideration given, on or about January 31, 2014, Martha Ann B. Evans, individually, and Resurrected executed and delivered to Plaintiff a note in the original principal amount of One Hundred Twenty Thousand and 00/100 (\$120,000.00) Dollars (the "Note"). A true and correct copy of the Note is attached hereto as **Exhibit A**.

12. To secure repayment of the Note and the debt evidenced thereby, Resurrected executed and delivered unto Plaintiff a Bond for Title, which was recorded on January 31, 2014, in the Register of Deeds Office for Greenville County in Book 2438 at Page 3878. The Bond for Title encumbered property at issue in this case with the address of 904 White Horse Road, Greenville, SC 29606 (the “Mortgaged Property”). A true and correct copy of the Bond for Title is attached hereto as **Exhibit B**.

13. On July 15, 2016, Plaintiff deeded the Mortgaged Property to Resurrected, at which point interest in the property transferred to Resurrected, cancelling the Bond for Title. The Deed was recorded on July 19, 2016, in the Register of Deeds Office for Greenville County in Book 2492 at Page 2311. A true and correct copy of the Deed is attached hereto as **Exhibit C**.

14. Upon cancellation of the Bond for Title, and in order to secure the repayment of the Note and the debt evidenced thereby, Resurrected executed and delivered unto Plaintiff a Mortgage of Real Estate dated July 15, 2016 (“Mortgage”), whereby Resurrected mortgaged to Plaintiff the Mortgaged Property. The Mortgage was recorded on July 19, 2016, in the Register of Deeds Office for Greenville County in Book 5348 at Page 2105. Due to a scrivener's error, the Mortgage references the incorrect date of the Note. A true and correct copy of the Mortgage is attached hereto as **Exhibit D** and its terms thereof are incorporated herein by reference.

15. The Mortgaged Property is more fully described as follows:

All that certain piece, parcel or lot of land situate, lying and being in the State of South Carolina, County of Greenville, being shown and designated on plat prepared by T.H. Walker, Jr. dated February 3, 1997, entitled “Boundary Survey for E.O. Pickelsimer Estate” recorded on August 5, 1997 in Plat Book 36A at Page 91, less however, the 0.589 acres, shown on said plat that fronts on Athelone Avenue. The property conveyed herein has the metes and bounds as shown on said plat.

This being the same property acquired by Resurrected Treasure Ministries, Inc. by deed of Sloan Brothers, LLC dated July 15, 2016, and recorded on July 19, 2016, in the Register of Deeds Office for Greenville County in Book 2492 at Page 2311.

TMS No.: 374-2-14, 10, 10.1, 11

Property Address: 904 White Horse Road, Greenville County, South Carolina.

16. On August 13, 2019, Resurrected and Martha Ann B. Evans, individually, executed a Note Modification. A true and correct copy of the Note Modification is attached hereto as **Exhibit E** and its terms thereof are incorporated herein by reference.

17. Resurrected is the legal owner of the Mortgaged Property.

18. The above-referenced Mortgage constitutes a valid first priority mortgage lien on the Mortgaged Property.

19. The Note and Mortgage provide that upon the failure by Resurrected or the Estate to make payments thereunder when due, the entire outstanding balance under the Note and Mortgage shall at the option of Plaintiff, become immediately due and payable, and Plaintiff may foreclose the Mortgage.

20. The Estate and Resurrected are in default under the terms of the Note by failing to make payments when due.

21. Plaintiff has and does hereby elect to declare the total unpaid balance of principal and interest on the Note due and payable and does hereby elect to foreclose the Mortgage, reserving, however, any and all other rights and remedies Plaintiff may have under the Note and Mortgage including the right to a deficiency judgment and the right to judgment against any other person or entity liable for the debt.

22. There is due and owing on the Note, as of October 6, 2020, the total sum of Ninety Four Thousand Fourteen and 38/100 (\$94,014.38) Dollars consisting of:

|                                  |                    |
|----------------------------------|--------------------|
| Principal Balance                | \$87,349.90        |
| Accrued but unpaid interest      | \$6,114.48         |
| Late Charges                     | \$550.00           |
| <b>Total balance on the Note</b> | <b>\$94,014.38</b> |

Interest continues to accrue at 6.5% *per annum*.

23. Plaintiff has placed this matter with the undersigned attorneys for collection.

24. If Plaintiff secures the Mortgaged Property being foreclosed herein, Plaintiff's costs of securing said premises should be added to any judgment rendered on its behalf. If Plaintiff pays any utility charges constituting a lien on said premises, Plaintiff's costs should be added to any judgment rendered on its behalf.

25. Plaintiff does not waive, but specifically demands judgment against the Estate and Resurrected for the full amount found to be due to Plaintiff on the Note and Mortgage held by Plaintiff, with the right to enter a personal deficiency judgment against both Resurrected and the Estate, jointly and severally, for any deficiency in this action remaining on the Note and Mortgage after the sale of the Mortgaged Property.

26. Upon information and belief, the defendants below named claim or may claim a subordinate lien or junior interest upon or interest in the subject property, and in the event there is a surplus from the sale of the subject property, the validity, priority and the amount of any such lien claim will be determined at a hearing subsequent to the sale, in accordance with Rule 71(c) SCRCF. The subject defendant(s) are further made a party due to the similarity in names to the primary defendant(s) against whom they claim or may claim a lien as follows:

(a) The defendant the South Carolina Department of Revenue by virtue of the following: (i) tax lien against Resurrected in the original amount of \$820.34 filed on February 20, 2020, Lien ID 524130; (ii) tax lien against Resurrected in the original amount of \$835.45 filed on November 22, 2019, Lien ID 536278; (iii) tax lien against Resurrected in the original amount of \$706.22 filed on May 21, 2020, Lien ID 575065; (iv) tax lien against Resurrected in the original amount of \$692.29 filed on September 8, 2020, Lien ID 723579; (v) tax lien against

Thomas R. Delahunt d/b/a Buried Treasure in the original amount of \$1,491.49 filed on September 7, 2016, Lien ID 31366; (vi) tax lien against Thomas R. Delahunt d/b/a Buried Treasure in the original amount of \$310.33 filed on November 8, 2013, Lien ID 460190; (vii) tax lien against Thomas R. Delahunt d/b/a Buried Treasure in the original amount of \$2,252.06 filed on May 20, 2014, Lien ID 473502; (viii) tax lien against Thomas R. Delahunt d/b/a Buried Treasure in the original amount of \$2,260.39 filed on June 23, 2014, Lien ID 489886; (ix) tax lien against Thomas R. Delahunt d/b/a Buried Treasure in the original amount of \$2,294.39 filed on May 19, 2014, Lien ID 492958; (x) tax lien against Thomas R. Delahunt d/b/a Buried Treasure in the original amount of \$2,258.26 filed on July 22, 2014, Lien ID 506270; and (xi) tax lien against Thomas R. Delahunt d/b/a Buried Treasure in the original amount of \$753.06 filed on November 8, 2013, Lien ID 522654.

**WHEREFORE**, Plaintiff prays that:

1. The indebtedness due on the Note and Mortgage be computed, ascertained and established by this Court, together with all accrued interest, all costs of this action and other costs of collection incurred by Plaintiff, including reasonable attorneys' fees, and that Plaintiff be granted judgment of foreclosure of the Note and Mortgage against the Defendants in that amount;
2. This Court issue its order:
  - a. Declaring Plaintiff's Mortgage be a valid first priority mortgage lien upon the Mortgaged Property;
  - b. Declaring the Bond for Title be cancelled of record;
  - c. Directing that Plaintiff's Mortgage described herein be foreclosed and the Mortgaged Property hereinabove described be sold in accordance with the law and practices of this Court and that the Defendants and all other persons claiming by,



through or under them be barred and forever foreclosed of all right, title and interest and equity of redemption in and to the Mortgaged Property or any part thereof;

d. Directing that out of the proceeds of the sale of the Mortgaged Property, after the costs of this action and of such sale have been deducted, Plaintiff be paid in full the amount due on the Note, with interest thereon, and attorneys' fees as set out above, and all amounts that it may hereafter and prior to such sale have to pay pursuant to the provisions of the Mortgage with the surplus, if any, to be distributed according to law;

e. That if the proceeds of the public sale be insufficient to fully satisfy the indebtedness owed pursuant to the Note, plus expenses, costs, and attorneys' fees, that Plaintiff have judgment for the deficiency against the Estate; and

e. Granting Plaintiff such other and further relief as to this Court may deem just and proper.

s/ Kathleen M. Muthig  
Kathleen M. Muthig  
SC Bar 100178

Haynsworth Sinkler Boyd, PA  
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803.779.3080  
[kmuthig@hsblawfirm.com](mailto:kmuthig@hsblawfirm.com)

Attorneys for Plaintiff

October 14, 2020

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF CALHOUN )

**IN THE PROBATE COURT**  
 CASE NUMBER: 2010-ES-09-00029.

Calhoun County Museum and )  
 Cultural Center )

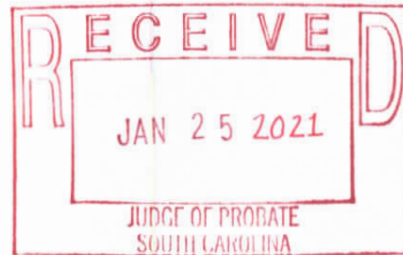
Petitioner, )

**ORDER FOR DECLARATORY JUDGMENT  
 REGARDING THE SALE OF REAL AND  
 PERSONAL PROPERTY**

v. )

St. Matthew's Parish Episcopal )  
 Church and Alan M. Wilson, )  
 Attorney General of South Carolina )

Respondents )



**THIS MATTER COMES BEFORE THE COURT** upon the filing of a Summons and Petition for Declaratory Judgment regarding the sale of Real and Personal Property on October 1, 2020, by the Calhoun County Museum and Cultural Center (“the Museum”). St. Matthew’s Parish Episcopal Church a/k/a The Vestry and Church Wardens of the Episcopal Church of the Parish of Saint Matthew (“the Church”) and Alan M. Wilson, Attorney General (“Attorney General”) were named as Respondents. Respondent, the Attorney General, was named as a party to this action because of his legal authority over charitable trusts pursuant to S. C. Code Ann. §62-7-201(a) 1976, as amended.

The Petition requested that this Court confirm if the Museum, along with the Church, had the authority to sell their respective interests, as Trustees, in the tract of land known as “Houser Woods”, subject to any Restrictive Easements and Covenants. The Petition also requested for

this Court to confirm if the Museum, as Trustee, had the authority to sell its interest in the tracts of land known as Tract B and Tract C, subject to any Restrictive Easements and Covenants. (Houser Woods, Tract B, and Tract C are hereinafter referred to collectively as the “Subject Property”).

Lastly, the Petition requested the Court clarify if the Museum, as Trustee, had the authority to sell (or dispose of) certain duplicate and personal and household effects (“Personal and Household Effects”) it also held in trust.

All real and personal property subject to this Declaratory Judgment Action came from the Estate of C. Richard Banks and was devised to the Museum and Church to be held in separate trusts, each benefiting the Museum and Church respectively. Such Estate is on file with the Calhoun County Probate Court, which file is numbered 2010-ES-09-00029. Mr. Bank’s Will requested that the Personal Representative of his Estate sell certain portions of the Subject Property, however, the property was not sold during the administration of his estate. As to the other portions of the Subject property, the Will remained silent in regards to the sale of the same during administration of the Estate. Moreover, the trusts created for the Museum and the Church under Mr. Bank’s Will remained silent as to if the Trustees had the authority sell property in trust for their benefit.

A virtual hearing (because of the ongoing COVID-19 pandemic) regarding the Petition was held at 10:30 AM on Tuesday, January 19, 2021. In attendance were Debbie Roland (“Mrs. Roland”), Director of the Museum, along with the Museum’s attorneys, Jonathan E. Spitz and John D. Kornegay, III; attorney for the Church, Francis Mack (“Mr. Mack”); and Mary Frances Jowers (“Mrs. Jowers”), attorney representing the Office of the South Carolina Attorney General.

At the hearing, Mrs. Roland made it abundantly clear that she was in attendance at the request of the Historical Commission in her official capacity as Museum Director. Mrs. Roland testified that she understood that if the Museum was granted permission to sell its interest in the Subject Property it would need to be appraised at fair market value. She also testified that the funds from the sale of such property would be used to improve and renovate the “Bungalow House” (also held in trust by the Museum); this would further the intent of Mr. Banks as expressed in his Will, conforming to the purposes of the Trust created thereunder.

Mrs. Roland testified that there would not be sufficient funds from the sale of the Subject Property to complete the improvement and renovation of the Bungalow House; to that end she did not anticipate that any excess funds would be available to utilize for other trust purposes. Lastly, Mrs. Roland testified as to the need to sell or otherwise dispose of duplicate personal and house effects, held in trust, which initially were in the Bungalow House, currently in several storage units.

Thereafter, Mrs. Jowers requested that if the Court granted permission to the Museum and Church to sell their respective interests in the Subject Property, each time a portion of their respective interests were sold, the Museum and the Church would provide notice of such sell via regular mail and include a copy of the appraisal of the property sold to the Attorney General’s Office. Mrs. Jowers also noted for the record the purpose of the Attorney General being named a party, to protect the interests of unspecified charitable beneficiaries, thereby protecting the public at large.

Mr. Mack stated that the initial Trustees for the Church’s Trust had resigned and the Vestry of the Church had become the Successor Trustee for the Church. Mr. Mack confirmed that any funds received from the sale of its interest in the Subject Property would be held in trust



and used pursuant to the terms of Mr. Bank's Will. He stated that prior to the Church selling any interest in its portion of the Subject Property, it agreed to the property being appraised at fair market value. Lastly, he stated that the Church would provide notice to the Attorney General's Office upon the sale of any portion of its interest in the Subject Property via regular mail; included with such notice would be an appraisal of the parcel sold.

After reviewing the filed pleadings with the court and other evidence the Court makes the following:

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The Probate Court of Calhoun County has subject matter jurisdiction of these proceedings pursuant to S. C. Code Ann. §62-7-201(a) 1976, as amended.
2. Venue is proper in Calhoun County pursuant to S.C. Code Ann 62-7-204, 1976, as amended, as the principal place of administration of the trusts created under Mr. Bank's Will are in Calhoun County.
3. Pursuant to the S.C. Code Ann. §§ 15-53-10 *et seq.* and S.C. Code Ann. § 62-7-201 (a)(1), the Court concludes that the Museum, along with the Church, have the authority to sell their respective interests, as Trustees, in the tract of land known as "Houser Woods", subject to any Restrictive Easements and Covenants.
4. Pursuant to the S.C. Code Ann. §§ 15-53-10 *et seq.* and S.C. Code Ann. § 62-7-201 (a)(1), the Court further concludes that the Museum, as Trustee, has the authority to sell its interest in the tract of land known as Tract B and Tract C, subject to any Restrictive Easements and Covenants.
5. Pursuant to the S.C. Code Ann. §§ 15-53-10 *et seq.* and S.C. Code Ann. § 62-7-201 (a)(1), the Court additionally concludes, the Museum, as Trustee, also has the authority to

sell (or dispose of) certain duplicate and personal and household affects it also holds in trust.

**THEREFORE, IT IS HEREBY ORDERED THAT:**

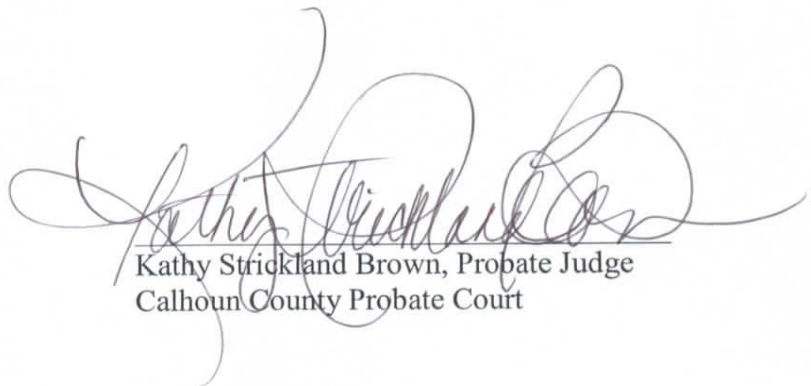
1. Pursuant to S.C. Code Ann. §§ 15-53-10 *et seq.* and S.C. Code Ann. § 62-7-201, (a)(1), the Court finds that the Museum, along with the Church, have the authority to sell their respective interests, as Trustees, in the tract of land known as Houser Woods, subject to any Restrictive Easements and Covenants.
2. Prior to any portion of Houser Woods being sold, the Museum and the Church will have an appraisal completed which shall reflect the fair market value of their respective interests in any such portion offered for sale.
3. Upon the sale of any portion of Houser Woods, the Museum and the Church will provide notice of the sale of their respective interests in any such portion to the South Carolina Attorney General's Office via regular United States Mail, included with such notice shall be a copy of the appraisal referenced in Paragraph 2 above.
4. Pursuant to S.C. Code Ann. §§ 15-53-10 *et seq.* and S.C. Code Ann. § 62-7-201, (a)(1), the Court finds that the Museum, as Trustee, has authority to sell its interest in Tract B and Tract C, subject to any Restrictive Easements and Covenants.
5. Prior to any portion of Tract B or Tract C being sold, the Museum will have an appraisal completed which shall reflect the fair market value in any such portion of the said Tracts offered for sale.
6. Upon the sale of any portion of Tract B or Tract C, the Museum will provide notice of the sale of any such portion of the said Tracts to the South Carolina Attorney General's

Office via regular United States Mail, included with such notice shall be a copy of the appraisal referenced in Paragraph 5 above.

7. Pursuant to S.C. Code Ann. §§ 15-53-10 *et seq.* and S.C. Code Ann. § 62-7-201, (a)(1), the Court finds that the Museum, as Trustee, has the authority to sell, or otherwise dispose of, the Personal and Household Effects, initially in the Bungalow House.
8. The proceeds from the sale of any and all property and/or goods associated with this action held in Trust for the benefit of the Museum shall be used to further the purposes of the Museum's said trust.
9. The proceeds from the sale of any and all property and/or goods associated with this action held in Trust for the benefit of the Church shall be used to further the purposes of the Church's said trust.

**T IS SO ORDERED.**

January 25, 2021  
St. Matthews, South Carolina



Kathy Strickland Brown, Probate Judge  
Calhoun County Probate Court

STATE OF SOUTH CAROLINA )

IN THE PROBATE COURT

COUNTY OF HORRY )

CASE Nos.: 2013 GC-26- ZZ

2013-ES-26-00279

IN THE MATTER OF THE )  
 MARJORIE S. DIX )  
 PERPETUAL ENDOWMENT FUND )  
 DATED FEBRUARY 29, 1972 )

Baptist Foundation of South Carolina, as )  
 Trustee of the Marjorie S. Dix )  
 Trust/Perpetual Endowment Fund )  
 dated February 29, 1972, and as Personal )  
 Representative of the Estate of Marjorie )  
 S. Dix, )

Petitioner, )

v. )

Baptist Foundation of South Carolina, )  
 SC Baptist Ministries for the Aging, Inc. )  
 (Bethea Baptist Home), Connie Maxwell )  
 Children's Home, Rehobeth Baptist )  
 Church, Pisgah United Methodist )  
 Church, and American Cancer Society, as )  
 beneficiaries of the Marjorie S. Dix )  
 Trust/Perpetual Endowment Charitable )  
 Fund dated February 29, 1972; and )  
 South Carolina Attorney General Alan )  
 Wilson, )

Respondents. )

ORDER CONSTRUING  
 WILL AND CODICIL, DECLARATION  
 OF ENDOWMENT,  
 MODIFICATION OF TRUST, AND  
 AUTHORIZATION TO SELL REAL  
 PROPERTY

2014 APR - 1 PM 2:55  
 DEBORAH W. EVERS  
 PROBATE JUDGE  
 HORRY COUNTY, SC

THIS MATTER COMES BEFORE THE COURT upon the filing of a Summons and  
 Petition for Construction of Will and Codicil, Declaration of Endowment, and Authorization to  
 Sell Real Property on December 6, 2013, by attorney A. Bennett Evers on behalf of Baptist  
 Foundation of South Carolina (hereinafter "the Baptist Foundation"), in its capacity as Personal  
 Representative of the Estate of Marjorie S. Dix and as Trustee of the Marjorie S. Dix  
 Testamentary Trust.



Among other things, the Petition asks that the Court declare that the devise to the Baptist Foundation is a charitable bequest to a perpetual endowment fund or charitable trust; modify the terms of the First Codicil to the Decedent's Last Will and Testament under the doctrine of equitable deviation to provide the Baptist Foundation with authority to sell the Decedent's real properties; and authorize the Baptist Foundation to market and sell the Decedent's real properties and to invest the proceeds from the sale according to the terms of the Decedent's Will and First Codicil and the terms and provisions of the Fund.

A Lis Pendens was filed with the Clerk of Court for Horry County on March 12, 2014, as well as with this Court on March 17, 2014.

As evidenced by the consents in the Court's file, all Respondent beneficiaries accepted service of the Pleadings, waived the notice of hearing requirement, and consented to the relief requested in the Pleadings including the sale of the real properties. Respondent South Carolina Attorney General, named as a party to this action because of the Attorney General's statutory and Common Law authority over charitable trusts, was served with the Pleadings and timely filed an Answer asking that this Court protect the interests of the charitable beneficiaries.

Based on the allegations in the Petition, the Consents filed by all interested parties, and other documents filed with the Court, the Court hereby makes the following:

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. Marjorie S. Dix died testate on January 5, 2013; therefore, the Court has jurisdiction of the above matter pursuant to S.C. Code Ann. § 62-1-302(a)(1), 1976, as amended. The original proceedings for probate and appointment were proper in Horry County; therefore, venue for all subsequent proceedings is proper in the Horry County Probate Court.

2. The Probate Court has exclusive jurisdiction over the internal affairs of trusts,

both inter vivos and testamentary, including those concerning the administration, construction, and distribution of trusts. S.C. Code Ann. §§ 62-1-302(a)(3) and 62-7-201(a), 1976, as amended. The Court has personal jurisdiction over the Trustee and all Trust beneficiaries under S.C. Code Ann. § 62-7-202, 1976, as amended.

3. The entirety of the trust property is located in Horry County, South Carolina, the Trust Fund is a testamentary trust created by the Decedent's Last Will and Testament and First Codicil, and the Decedent's Estate is currently being administered in the Horry County Probate Court; therefore, venue is proper in the Horry County Probate Court pursuant to S. C. Code Ann. § 62-7-204(a), 1976, as amended.

4. The Decedent's Last Will and Testament devises the whole of her Estate to the Baptist Foundation as the sole rest and residue devisee, in trust, with the instruction that the Baptist Foundation distribute stated percentages of the net income thereof to the following beneficiaries: Three (3%) percent to the Baptist Foundation to be used by the Baptist Foundation to help pay its administrative costs and expenses; with the remaining ninety-seven (97%) percent distributed in equal shares to the SC Baptist Ministries for the Aging, Inc. (Bethea Baptist Home), Connie Maxwell Children's Home, Rehobeth Baptist Church, and Pisgah United Methodist Church. The Will is on file with the Court and incorporated herein by reference.

5. On December 4, 1979, the Decedent executed a First Codicil to her Will (hereinafter "the First Codicil"), amending her Will to add the American Cancer Society as an additional beneficiary of the remaining ninety-seven (97%) percent of the net income. The First Codicil is on file with the Court and incorporated herein by reference.

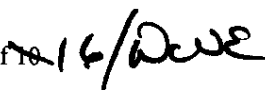
6. Historically, the Baptist Foundation treats such "in trust" devises to it as charitable bequests to a perpetual endowment fund in the decedent's name. Upon receipt of such

devises, the Baptist Foundation establishes a perpetual endowment fund under which it manages and invests the devised assets for the benefit of the decedent's identified charitable beneficiaries. The Baptist Foundation makes annual endowment distributions consisting of investment income to the charitable beneficiaries according to the terms of the perpetual endowment as identified from the decedent's Will, trust, or other testamentary instrument.

7. Based on the consents of all identified charitable beneficiaries, the Court finds that the "in trust" devise to the Baptist Foundation is consistent with the terms of the Decedent's Will and First Codicil, is in the best interests of the charitable beneficiaries, constitutes a charitable bequest to a perpetual endowment fund/trust for the benefit of the charitable beneficiaries, and the Baptist Foundation, as Trustee, is authorized to establish the perpetual endowment fund in the name of Marjorie S. Dix, having all rights, power, duties, and discretionary authority as would a trustee of a trust under S.C. Code Ann. § 62-7-814 to -816, 1976, as amended.

8. The Decedent's Will does not provide any powers to the Baptist Foundation as Trustee or Personal Representative.

9. Item II of the First Codicil amended the Decedent's Will to provide the Baptist Foundation with certain powers and authority related to the Decedent's Real Properties, including selling timber, expending such funds as is necessary for the maintenance of the real property, and leasing, renting, or otherwise making use of the real property to its highest value. However, the First Codicil further amended the Will to provide that "the real property held under this trust shall not under any circumstances be sold or conveyed or exchanged for other real property, but it is the express intent and desire of the Settlor and Testator herein that the real property held under the provisions of this trust shall be held in trust in perpetuity."



10. “A charitable trust may be created for the relief of distress or poverty, the advancement of education or religion, the promotion of health, scientific, literary, benevolent, governmental or municipal purposes, or other purposes, the achievement of which purposes is beneficial to the community.” S.C. Code Ann. § 62-7-405(a), 1976, as amended. “A charitable trust is defined as a fiduciary relationship with respect to property arising as a result of a manifestation of an intention to create it, and subjecting the person by whom the property is held to equitable duties to deal with property for a charitable purpose.” South Carolina Department of Mental Health v. McMaster, 624 S.E.2d 552, 555, 372 S.C. 175, 180 (2007) (citing Restatement (2<sup>nd</sup>) Trusts § 348 (1959)). “No formality in the use of language is necessary in order to create a public charitable trust. The courts look to the purpose for which the gift was made, rather than to the particular words used to designate that purpose.” Harter v. Johnson, 122 S.C. 96, 115 S.E. 217 (1922).

11. While the Supreme Court of South Carolina has rejected the doctrine of *cy pres*, the appellate courts “have approved of and applied the doctrine of equitable deviation, which ‘permits deviation from a term of the trust if, owing to circumstances not known to the settler and not anticipated by him, compliance would defeat or substantially impair the accomplishment of the purposes of the trust. Under these circumstances a court may direct or permit a trustee to accomplish acts that are unauthorized or even forbidden by the terms of the trust.’” Epworth Children’s Home v. Beasley, 365 S.C. 157, 616 S.E.2d 710, 717 (2005) (citing Colin McK. Grant Home v. Medlock, 292 S.C. 466, 473, 349 S.E.2d 655, 659 (Ct. App. 1996)). The doctrine of equitable deviation is codified at S.C. Code Ann. § 62-7-413, 1976, as amended (providing that “if a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful...the court may deviate from the terms of the trust to modify or terminate the trust by

directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable intent").

12. The primary purpose of the "in trust" devise to the Baptist Foundation under the Will and First Codicil is to generate and pay over in distribution a portion of the net income of the charitable trust/perpetual endowment fund to the identified charitable beneficiaries for their uses and purposes.

13. The real property of the Decedent's Estate consists of three (3) unimproved parcels all located in Horry County, hereinafter "the Real Properties", as follows:

| <u>Parcel</u>  | <u>Location</u>       | <u>TMS Number</u> | <u>Tax Assessor Value</u> |
|----------------|-----------------------|-------------------|---------------------------|
| Lot 24 Block F | Surfside Floral Beach | 195-04-11-024     | \$200,000.00              |
| 46 Acres       | Gallivants Ferry      | 080-00-01-005     | \$309,800.00              |
| Black Island   | Pee Dee River         | 091-17-01-013     | \$ 81,300.00              |

14. At the time the Decedent executed her Will in 1972 and the First Codicil in 1979, the Decedent owned the Real Properties and additional real properties which were generating significant income through rental and tobacco quota payments.

15. However, the Real Properties are not currently income-producing, are not generating rental income, the tobacco quota payments are scheduled to end in 2014, and may only generate minimal future income. Additionally, the forty-six (46) acre tract near Gallivants Ferry was clear cut by the Decedent prior to her death and any source of income from timber cannot be generated until reforested.

16. That neither the Baptist Foundation nor the identified charitable beneficiaries is in possession of or has presented any evidence suggesting it was the Decedent's intent that the Real Properties never be sold so that the Real Properties may be preserved for the use, enjoyment, and benefit of future generations (i.e., maintained in its natural state for environmental or

conservation purposes). Rather, based on the terms of the Decedent's Will and First Codicil and the consents of the parties, the Court finds it was the Decedent's intention that the Real Properties provide the beneficiaries with income for future generations.

17. Due to changes in property holdings and changes in circumstances since the Decedent's execution of the First Codicil in 1979, as detailed above, the limitation on the Trustee's ability to market and sell the Real Properties makes the Decedent's charitable purpose impracticable, impossible to achieve, and defeats or substantially impairs the achievement of the purposes stated by the Decedent. Additionally, the costs and expenses of ownership of the Real Properties, including, but not limited to, annual real property taxes, liability insurance, and maintenance and upkeep costs, will continue depleting cash reserves of the Fund to make charitable distributions.

18. Therefore, the Court finds that the Baptist Foundation's request to modify the terms of the First Codicil limiting the trustee's ability to sell the Real Properties is proper under the doctrine of equitable deviation, is in the best interests of the beneficiaries, and the First Codicil shall be modified to remove the provisions restricting the Baptist Foundation's authority to sell, convey, or otherwise exchange real property.

19. As such the Baptist Foundation in its capacity as Trustee is authorized to market and sell the Real Properties and shall invest the proceeds from such sale in the perpetual endowment fund or trust established in the Decedent's name with the investment income administered and distributed to the identified charitable beneficiaries according to the terms of the First Codicil and the guidelines of the trustee and in keeping with the Decedent's charitable intent.

20. With the exception of the modification of the provisions removing the restriction

on the sale of real property, all other terms and provisions of the Decedent's Will and First Codicil related to the perpetual endowment or trust with the Baptist Foundation as trustee shall remain in full force and effect.

**THEREFORE, IT IS HEREBY ORDERED:**

A. That the devise to the Baptist Foundation "in trust" is a charitable bequest to a perpetual endowment fund/trust for the benefit of the stated charitable beneficiaries;

B. That the Baptist Foundation is authorized and shall establish the Marjorie S. Dix Perpetual Endowment with the Baptist Foundation as Trustee assuming to all the rights, power, duties, and discretionary authority as would a trustee of a trust under S.C. Code Ann. §§ 62-7-814 to -816, 1976, as amended;

C. That the Baptist Foundation, in its capacity as Personal Representative, is authorized to and shall distribute the real properties to the Trustee of the Marjorie S. Dix Perpetual Endowment;

D. That under the doctrine of equitable deviation, the First Codicil is modified to remove any and all provisions restricting or limiting the Baptist Foundation's authority to sell, convey, or otherwise exchange the real properties owned by the Decedent at the time of her death, and all other terms and provisions of the Decedent's Will and First Codicil related to the perpetual endowment or trust with the Baptist Foundation as trustee shall remain in full force and effect.

E. That subject to Court approval of the ultimate sales price, the Baptist Foundation as Trustee of the Marjorie S. Dix Perpetual Endowment is authorized to market and sell the real properties owned by the Decedent at the date of her death;

F. That at such time as a contract of sale is entered into with a prospective purchaser,

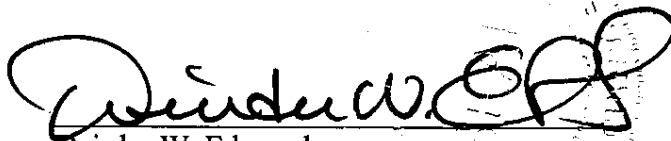
the Baptist Foundation, upon motion and after notice to all interested parties, shall submit said contract, along with a current appraisal performed by a licensed appraiser, to the Court for final approval and issuance of a Supplemental Order approving the same, with a hearing if requested by the parties or directed by the Court;

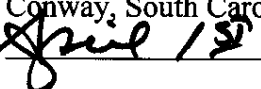
G. That the Baptist Foundation shall invest the proceeds from the sale of the real properties in the perpetual endowment/trust established in the name of Marjorie S. Dix with the investment income distributed to the charitable beneficiaries according to the terms and provisions of the Decedent's Will and First Codicil and the terms of the perpetual endowment/trust; and,

H. That the Baptist Foundation is authorized to take any and all actions necessary to effectuate the sale of the real properties and to execute any and all documents related to the sale of the real properties including, but not limited to, contracts, deeds, closing statements and affidavits, and other real estate closing documents necessary to consummate the sale of the real properties.

I. That nothing prohibits the Baptist Foundation or charitable beneficiaries from seeking such other and further Order as may be necessary to implement the provisions hereof.

**AND IT IS SO ORDERED.**

  
Deirdre W. Edmonds  
Horry County Probate Judge

Conway, South Carolina  
, 2014

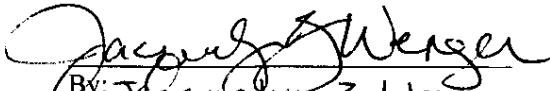
PROBATE COURT  
HORRY COUNTY, SC  
2014 APR -1 PM 2:55  
DEIRDRE W. EDMONDS  
PROBATE JUDGE



WE CONSENT:

BAPTIST FOUNDATION OF SOUTH CAROLINA,  
Personal Representative/Trustee

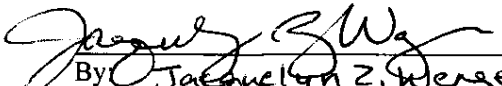
PISGAH UNITED METHODIST CHURCH

  
By: Jacquelyn Z. Wenger  
Its: Personal Representative

By:  
Its:

BAPTIST FOUNDATION OF SOUTH CAROLINA,  
Beneficiary

REHOBETH BAPTIST CHURCH

  
By: Jacquelyn Z. Wenger  
Its: Vice President of Administration  
and Communications

By:  
Its:

AMERICAN CANCER SOCIETY

The South Carolina Attorney General has no  
objection to this Order

By:  
Its:

By:  
Its:

SC BAPTIST MINISTRIES FOR THE AGING, INC.  
(BETHEA HOME)

By:  
Its:

CONNIE MAXWELL CHILDREN'S HOME

By:  
Its:

PROBATE COURT  
HONORARY COUNTY, SC  
2014 APR -1 PM 2:55  
DEIRDRE W. EDMONDSON  
PROBATE JUDGE

**WE CONSENT:**

BAPTIST FOUNDATION OF SOUTH CAROLINA, PISGAH UNITED METHODIST CHURCH  
Personal Representative/Trustee

By: \_\_\_\_\_  
Its: \_\_\_\_\_

By: \_\_\_\_\_  
Its: \_\_\_\_\_

BAPTIST FOUNDATION OF SOUTH CAROLINA, REHOBETH BAPTIST CHURCH  
Beneficiary

By: \_\_\_\_\_  
Its: \_\_\_\_\_

By: \_\_\_\_\_  
Its: \_\_\_\_\_

AMERICAN CANCER SOCIETY

The South Carolina Attorney General has no  
objection to this Order

By: \_\_\_\_\_  
Its: \_\_\_\_\_

*Bill M. Roberts*  
By: *Bill M. Roberts*  
Its: *SENIOR COUNSEL*

By: \_\_\_\_\_  
Its: \_\_\_\_\_

SC BAPTIST MINISTRIES FOR THE AGING, INC.  
(BETHEA HOME)

By: \_\_\_\_\_  
Its: \_\_\_\_\_

CONNIE MAXWELL CHILDREN'S HOME

By: \_\_\_\_\_  
Its: \_\_\_\_\_

*11/16/2021*

PROBATE COURT  
HOLLY COUNTY, SC  
2014 APR - 1 PM 2:55  
DEIRDRE W. EDMONDS  
PROBATE JUDGE

**WE CONSENT:**

BAPTIST FOUNDATION OF SOUTH CAROLINA,  
Personal Representative/Trustee

PISGAH UNITED METHODIST CHURCH

By: \_\_\_\_\_  
Its: \_\_\_\_\_

By: \_\_\_\_\_  
Its: \_\_\_\_\_

BAPTIST FOUNDATION OF SOUTH CAROLINA,  
Beneficiary

REHOBETH BAPTIST CHURCH

By: \_\_\_\_\_  
Its: \_\_\_\_\_

By: \_\_\_\_\_  
Its: \_\_\_\_\_

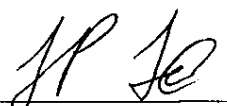
AMERICAN CANCER SOCIETY

The South Carolina Attorney General has no  
objection to this Order

By: \_\_\_\_\_  
Its: \_\_\_\_\_

By: \_\_\_\_\_  
Its: \_\_\_\_\_

SC BAPTIST MINISTRIES FOR THE AGING, INC.  
(BETHEA HOME)

 *President/CEO*  
By: Mr. Thomas P. Turner III  
Its: President/CEO

CONNIE MAXWELL CHILDREN'S HOME

By: \_\_\_\_\_  
Its: \_\_\_\_\_

*12/16/2021*

PROBATE COURT  
HONOLULU COUNTY, SC  
2014 APR -1 PM 2:55  
DEIRDRE W. EDMONDSON  
PROBATE JUDGE

**WE CONSENT:**

BAPTIST FOUNDATION OF SOUTH CAROLINA,  
Personal Representative/Trustee

PISGAH UNITED METHODIST CHURCH

By: \_\_\_\_\_  
Its: \_\_\_\_\_

By: \_\_\_\_\_  
Its: \_\_\_\_\_

BAPTIST FOUNDATION OF SOUTH CAROLINA,  
Beneficiary

REHOBETH BAPTIST CHURCH

By: \_\_\_\_\_  
Its: \_\_\_\_\_

By: \_\_\_\_\_  
Its: \_\_\_\_\_

AMERICAN CANCER SOCIETY

The South Carolina Attorney General has no  
objection to this Order

By: \_\_\_\_\_  
Its: \_\_\_\_\_

By: \_\_\_\_\_  
Its: \_\_\_\_\_

SC BAPTIST MINISTRIES FOR THE AGING, INC.  
(BETHEA HOME)

By: \_\_\_\_\_  
Its: \_\_\_\_\_

CONNIE MAXWELL CHILDREN'S HOME

By: \_\_\_\_\_  
Its: \_\_\_\_\_

*Via President*

13 of 16 / Dec 8

Page 10 of 10

PROBATE COURT  
LIBERTY COUNTY, SC  
2014 APR - 1 PM 2:55  
DEIRDRE W. EDMONDS  
PROBATE JUDGE

**WE CONSENT:**

BAPTIST FOUNDATION OF SOUTH CAROLINA,  
Personal Representative/Trustee

PISGAH UNITED METHODIST CHURCH

By:  
Its:

Christopher H. Pearce, Esq.  
By: Christopher H. Pearce, Esq.  
Its: Attorney - At-Law

BAPTIST FOUNDATION OF SOUTH CAROLINA,  
Beneficiary

REHOBETH BAPTIST CHURCH

By:  
Its:

By:  
Its:

AMERICAN CANCER SOCIETY

The South Carolina Attorney General has no  
objection to this Order

By:  
Its:

By:  
Its:

SC BAPTIST MINISTRIES FOR THE AGING, INC.  
(BETHEA HOME)

By:  
Its:

CONNIE MAXWELL CHILDREN'S HOME

By:  
Its:

PROBATE COURT  
Horry County, SC  
2014 APR -1 PM 2:55  
DEIRDRE W. EDMONDS  
PROBATE JUDGE

14 APR 16/2016  
Page 10 of 10

WE CONSENT:

BAPTIST FOUNDATION OF SOUTH CAROLINA, PISGAH UNITED METHODIST CHURCH  
Personal Representative/Trustee

By: \_\_\_\_\_  
Its: \_\_\_\_\_

By: \_\_\_\_\_  
Its: \_\_\_\_\_

BAPTIST FOUNDATION OF SOUTH CAROLINA, REHOBETH BAPTIST CHURCH  
Beneficiary

By: \_\_\_\_\_  
Its: \_\_\_\_\_

By: *Rev. Larry F. Johnson*  
Its: *PASTOR*

AMERICAN CANCER SOCIETY

The South Carolina Attorney General has no  
objection to this Order

By: \_\_\_\_\_  
Its: \_\_\_\_\_

By: \_\_\_\_\_  
Its: \_\_\_\_\_

SC BAPTIST MINISTRIES FOR THE AGING, INC.  
(BETHEA HOME)

By: \_\_\_\_\_  
Its: \_\_\_\_\_

CONNIE MAXWELL CHILDREN'S HOME

By: \_\_\_\_\_  
Its: \_\_\_\_\_

*15 of 16 DWE*  
Page 10 of 10

PROBATE COURT  
Horry County, SC  
2014 APR -1 PM 2:55  
DEIRDRE W. EDMONDS  
PROBATE JUDGE

**WE CONSENT:**

BAPTIST FOUNDATION OF SOUTH CAROLINA,  
Personal Representative/Trustee

PISGAH UNITED METHODIST CHURCH

By:  
Its:

By:  
Its:

BAPTIST FOUNDATION OF SOUTH CAROLINA,  
Beneficiary

REHOBETH BAPTIST CHURCH

By:  
Its:

By:  
Its:

AMERICAN CANCER SOCIETY

The South Carolina Attorney General has no  
objection to this Order

By:  
Its:

*Mary Frances Jowers*  
By: Mary Frances Jowers  
Its: Assistant Attorney General

SC BAPTIST MINISTRIES FOR THE AGING, INC.  
(BETHEA HOME)

By:  
Its:

CONNIE MAXWELL CHILDREN'S HOME

By:  
Its:

PROBATE COURT  
Horry County, SC  
2014 APR -1 PM 2:55  
DEBORAH W. EDWARDS  
PROBATE JUDGE

*16 g/16/2023*  
Page 10 of 10

STATE OF SOUTH CAROLINA )  
COUNTY OF HORRY )

IN THE PROBATE COURT  
CASE NO: 2014-GC-26-00022

IN THE MATTER OF THE )  
MARJORIE S. DIX )  
PERPETUAL ENDOWMENT FUND )  
DATED FEBRUARY 29, 1972 )

PROBATE COURT  
HORRY COUNTY, SC  
2019 SEP 30 P 12:49  
KATHY G. WARD  
PROBATE JUDGE

Baptist Foundation of South Carolina, as )  
Trustee of the Marjorie S. Dix )  
Trust/Perpetual Endowment Fund )  
dated February 29, 1972, )  
Petitioner, )

v. )

ORDER APPROVING PURCHASE  
AND SALE AGREEMENT AND  
AUTHORIZING AND DIRECTING  
SALE OF REAL PROPERTY

Baptist Foundation of South Carolina, )  
SC Baptist Ministries for the Aging, Inc. )  
(Bethea Baptist Home), Connie Maxwell )  
Children's Home, Rehobeth Baptist )  
Church, Pisgah United Methodist )  
Church, and American Cancer Society, as )  
beneficiaries of the Marjorie S. Dix )  
Trust/Perpetual Endowment Charitable )  
Fund dated February 29, 1972; )  
South Carolina Attorney General Alan )  
Wilson; Timothy Holden; and Mickey )  
Howell and Anna G. Howell, )

[Galivants Ferry ± 70 Acres]

Respondents. )

**THIS MATTER COMES BEFORE THE COURT** upon the filing of a Summons and Petition to Approve Purchase and Sale Agreement and Authorize Sale of Real Property [Galivants Ferry ± 70 Acres] (hereinafter "the Petition") on January 7, 2019, by attorneys A. Bennett Evers, Esq. and Carlos W. Gibbons Jr., Esq. on behalf of the Baptist Foundation of South Carolina (hereinafter the "Baptist Foundation"), as Trustee of the Marjorie S. Dix Perpetual Endowment Fund hereinafter the "Fund" or the "Trust"). The Petition asks the Court to approve the sale of the Galivants Ferry Property and determine whether it is in the best interests of the Trust and Trust



beneficiaries that the sale should be in accordance with the Holden Contract or the Howell Contract.

All Respondents were properly served with the Summons and Petition as evidenced by the proofs of service on file with the Court. Answers to the Petition were timely served and filed by Respondent Timothy Holden, Respondent Mickey Howell and Anna G. Howell (hereinafter collectively "Respondent Howell"), Respondent Pisgah United Methodist Church, and Respondent South Carolina Attorney General Alan Wilson. The following Respondents did not serve and file an Answer or other responsive pleading, but did file a written Consent to Sale indicating their agreement to the sale pursuant to the contract sales price of \$187,000.00 as set forth in the Howell Contract: SC Baptist Ministries for the Aging, Inc. (Bethea Baptist Home), Connie Maxwell Children's Home, Rehobeth Baptist Church, and American Cancer Society.

A hearing was scheduled to be held on June 19, 2019. Present at the hearing were: Petitioner Baptist Foundation and its counsel Carlos W. Gibbons Jr., Esq. and A. Bennett Evers, Esq.; Respondent Timothy G. Holden and his attorney Brooke Eaves Wright, Esq.; Respondent Attorney General Alan Wilson by and through Assistant Deputy Attorney General Mary Frances G. Jowers, Esq.; Respondent Pisgah United Methodist Church and its attorney Christopher H. Pearce, Esq.; Respondent Mickey Howell and Anna G. Howell and their attorney G. Michael Smith, Esq. Also present at the hearing were Jacquelyn Z. Wenger, Vice President and Director of Development at the Baptist Foundation (hereinafter "Ms. Wenger"), and Corey E. Flowers of Flowers Forestry, LLC (hereinafter "Mr. Flowers"), the real estate broker for the Baptist Foundation as Trustee.

The Court heard and received testimony from Mr. Flowers and Ms. Wenger regarding the facts and circumstances related to the valuation, listing, and sale of the Galivants Ferry Property.

A Timeline of events surrounding the Holden Contract and Howell Contract was testified to by Mr. Flowers and Ms. Wenger and entered into evidence. The events testified to in the Timeline are incorporated into this Order to provide greater detail by way of background. The Court received no testimony from any other witness or party.

Upon review of the allegations set forth in the Pleadings and all supporting documents filed therewith, and after receiving arguments of counsel, testimony, and evidence offered at hearing, the Court makes the following:

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The current action involving the Marjorie S. Dix Perpetual Endowment Fund (hereinafter the “Fund”) and the sale of Fund assets remains before this Court pursuant to this Court’s April 1, 2014 Order Construing Will and Codicil, Declaration of Endowment, Modification of Trust, and Authorization to Sell Real Property (hereinafter the “Order”). See also S.C. Code Ann. §§ 62-1-302(a)(3) and 62-7-201(a), 1976, as amended (providing the Probate Court has exclusive jurisdiction over the internal affairs of trusts, both inter vivos and testamentary, including those concerning the administration, construction, and distribution of trusts); and S.C. Code Ann. § 62-7-202, 1976, as amended (providing the Probate Court has personal jurisdiction over the Trustee and all Trust beneficiaries).

2. The entirety of the Fund property is located in Horry County. Therefore, venue is proper in the Horry County Probate Court pursuant to S.C. Code Ann. § 62-7-204(a), 1976, as amended.

3. The Order authorizes the Baptist Foundation to market and sell those certain real properties distributed to the Trustee of the Fund from the Estate of Marjorie S. Dix (2013-ES-26-00279).

4. Further, the Order requires that after “a contract of sale is entered into with a prospective purchaser, the Baptist Foundation, upon motion and after notice to all interested parties, shall submit said contract, along with a current appraisal performed by a licensed appraiser, to the Court for final approval and issuance of a Supplemental Order approving the same, with a hearing if requested by the parties or directed by the Court.”

5. At issue presently, is the sale of the last remaining tract generally known as the Galivants Ferry Property, consisting of approximately 70 Acres, consisting of Tracts 10, 11, 13, 14, and 40, identified as TMS #080-00-01-005.

6. A cash offer of One Hundred and Twenty Thousand Dollars and 00/100 (\$120,000.00) to purchase the Galivants Ferry Property was submitted by Respondent Timothy Holden, and accepted by the Baptist Foundation. A Purchase and Sale Agreement (hereinafter the “Holden Contract”) memorializing the same was subsequently executed January 8, 2016 (date of last signing), conditioned on the purchase price being approved by this Court. The Holden Contract was entered into evidence.

7. The Holden Contract included the following condition in “Item 11 – Special Conditions”:

The Seller recognizes that the purchase price included in this Agreement must be approved by the Horry County Probate Court in compliance with the terms of the *Order Construing Will and Codicil, Declaration of Endowment, Modification of Trust, and Authorization to Sell Real Property in the Matter of the Marjorie S. Dix Perpetual Endowment Fund* and signed by Judge Deirdre W. Edmonds, Probate Judge, on April 1, 2014. If such purchase price is not approved, this Agreement shall be rendered null and void.

8. Ms. Wenger testified that the Baptist Foundation through its counsel notified all charitable beneficiaries of the proposed offer and the Baptist Foundation’s intention to accept the same upon their consent, and instructed the charitable beneficiaries to confirm their consent to the

same or contact the Baptist Foundation or the Court to demand a hearing or otherwise object to the proposed sale.

9. Ms. Wenger further testified that in response to the Baptist Foundation's notice, beneficiary Pisgah United Methodist Church (hereinafter "Pisgah UMC") held a special meeting of the Pisgah UMC Trustees to consider and approve the Holden Contract and that Pisgah UMC, through its legal counsel, thereafter notified the Baptist Foundation that it did not approve of the purchase price and objected to the Holden Contract.

10. Mr. Flowers testified that he is a registered forester in both North Carolina and South Carolina, a certified general real estate appraiser, and real estate agent, and that he is the Trustee's agent in the sale of the Galivants Ferry Property.

11. Mr. Flowers further testified that Mr. Holden had the Galivants Ferry Property surveyed, and based on a reduction in the acreage Mr. Holden communicated to him another offer of \$110,000.00 for the purchase of the Galivants Ferry Property.

12. Mr. Flowers testified that he notified Mr. Holden there was an issue with his current contract offer of \$120,000 and reduced offer in that one of the Trust beneficiaries objected to the sales price.

13. Mr. Flowers testified that over the course of June 2016 through August 2016, he received continued communications from Mr. Holden which included increased offers of \$130,000.00 on or about June 17, 2016, and \$150,000.00 on or about August 29, 2016.

14. According to Ms. Wenger, the Baptist Foundation was poised to accept Mr. Holden's offer of \$150,000 and that she directed the Trustee's attorney to prepare a new contract with a purchase price of \$150,000.00, which was prepared but was never signed by the Baptist Foundation or Mr. Holden.

15. On or about November 3, 2016, Mr. Flowers testified that he received a written all cash offer from Respondent Mickey Howell to purchase the Galivants Ferry Property for \$175,000.00.

16. On or about November 15, 2016, according to Ms. Wenger and Mr. Flowers the Baptist Foundation received an offer of \$185,000 from another prospective buyer.

17. After continued negotiations, an all cash offer of \$187,000.00 was submitted by Respondent Howell, and accepted by the Baptist Foundation. A Purchase and Sale Agreement (hereinafter the "Howell Contract") memorializing the same was subsequently executed December 5, 2016 (date of last signing), conditioned on the purchase price being approved by this Court. The Howell Contract was entered into evidence.

18. The Howell Contract included the following condition in "Item 11 – Special Conditions":

The Seller recognizes that the purchase price included in this Agreement must be approved by the Horry County Probate Court in compliance with the terms of the *Order Construing Will and Codicil, Declaration of Endowment, Modification of Trust, and Authorization to Sell Real Property* in the Matter of the Marjorie S. Dix Perpetual Endowment Fund and signed by Judge Deirdre W. Edmonds, Probate Judge, on April 1, 2014. Seller warrants that it will take all reasonable steps and actions within its control to obtain an Order approving and authorizing the sale prior to Closing Date set forth herein. However, Seller cannot guarantee or state with certainty that the Court will issue the Order prior to the time set for Closing. Closing may be extended by mutual agreement of the Parties in order to allow Seller to obtain an Order of the Horry County Probate Court authorizing the sale. If such purchase price is not approved, this Agreement shall be rendered null and void and the Earnest Money returned and released to the Buyer.

19. An original Appraisal prepared by J. Brian Donovan and Sam P. Perry, State Certified General Real Estate Appraisers, both of Jayroe Appraisal Company was obtained indicating that the Galivants Ferry property has an appraised value of One Hundred Ninety-five

Thousand Dollars and 00/100 (\$195,000.00) as of June 30, 2014, the effective date of the appraisal. The Jayroe Appraisal was attached to the Petition and entered into evidence.

20. Based on the survey showing a reduction in the acreage, and Mr. Holden's reduced offer, Ms. Wenger and Mr. Flowers both testified that the Baptist Foundation obtained a second more current appraisal. This second Appraisal was prepared by Dwight L. Stewart Jr., State Certified General Real Estate Appraiser and Registered Forester, of Dwight L. Stewart Jr. and Associates, LLC, indicating that the Galivants Ferry Property has an appraised value of One Hundred Ninety-seven Thousand Five Hundred Dollars and 00/100 (\$197,500.00) as of May 6, 2016, the effective date of the appraisal. The Stewart Appraisal was attached to the Petition and entered into evidence.

21. The Stewart Appraisal is dated within four months of the Holden Contract and seven months of the Howell Contract, and this Court finds the Stewart Appraisal, which took into account the reduced acreage of the Gallivants Ferry Property, constitutes a current appraisal as contemplated by the Order.

22. It is the well settled law of this State that a trustee has a particular duty of loyalty owed to the trust beneficiaries. See McNeil v. Morrow, 30 S.C. Eq. (9 Rich.Cas.) 172 (S.C. 1832); Cartee v. Lesley, 920 S.C. 333, 350 S.E.2d 388 (S.C. 1986); Yates v. Yates, 292 S.C. 49, 354 S.E. 2d 800 (S.C. Ct. App. 1987). Section 62-7-802(a) of the South Carolina Trust Code explicitly provides "[a] trustee shall administer the trust solely in the interests of the beneficiaries." "And where, as here, a trust has two or more beneficiaries, the duty of loyalty includes a duty to "act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests." Dereede v. Karp (In re Deborah Dereede Living Tr.) (S.C. App., 2019).

23. In considering both the Holden Contract and the Howell Contract in the framework of the best interests of the beneficiaries, and in giving due regard to the beneficiaries' interests, the Court finds that the contract with the highest and best purchase price is the contract that should be approved and accepted by this Court.

24. The Court cannot find support for the acceptance and approval of the Holden Contract's \$120,000.00 purchase price<sup>1</sup> when there is no appraisal or evidence that can support such a low purchase price. The purchase price of \$120,000.00 is wholly inadequate and without support in the record which includes the Jayroe Appraisal from 2014 setting forth a fair market value of \$195,000.00 and the Stewart Appraisal from May 2016 setting forth a fair market value of \$197,500.00.

25. On the contrary, this Court finds that the purchase price of the Howell Contract's \$187,000.00 to be reasonable and more in line with the fair market value of the property as supported by the original Jayroe Appraisal and the current Stewart Appraisal. The purchase price of the Howell Contract is 95% of the appraised fair market value. It should be noted that this Court has accepted and approved prior sales of Trust real properties at 88% of fair market value and 125% of fair market value.

26. Accordingly, the Court finds it to be in the best interests of the beneficiaries that the highest and best offer should be accepted by the Trustee and approved by the Court.

**THEREFORE, IT IS HEREBY ORDRED:**

A. That the Howell Contract in the amount of \$187,000.00 is approved.

B. That the Baptist Foundation, as Trustee of Marjorie S. Dix Perpetual Endowment Fund, is authorized to take any and all actions necessary to effectuate the sale of the Galivants

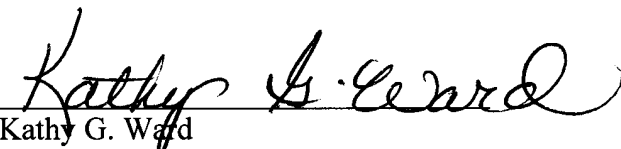
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<sup>1</sup> The Court makes no finding as to any allegation concerning the disputed discrepancy, deficiency, or existence of the Holden and Howell Contracts as that matter is properly before the Court of Common Pleas.

Ferry Property pursuant to the terms and conditions of the Howell Contract, and to execute any and all documents related to the sale of the Galivants Ferry Property including, but not limited to, contracts, deeds, closing statements and affidavits, and other real estate closing documents necessary to consummate the sale of the Galivants Ferry Property; and,

C. That all terms and provisions of this Court's Order Construing Will and Codicil, Declaration of Endowment, Modification of Trust, and Authorization to Sell Real Property filed April 1, 2014, shall remain in full force and effect to the extent not superseded by this Order.

**AND IT IS SO ORDERED.**

  
Kathy G. Ward  
Horry County Probate Judge

Conway, South Carolina  
9/30, 2019



## **TIMELINE**

7/31/2015 – Listed with Flowers Forestry

10/5/15 – \$85,000 offer (Fullwood)

10/29/15 – \$120,000 formal offer (Holden)

11/16/2015 – Baptist Foundation signed contract with "Item 11 – Special Conditions: The Seller recognizes that the purchase price included in this Agreement must be approved by the Horry County Probate Court in compliance with the terms of the *Order Construing Will and Codicil, Declaration of Endowment, Modification of Trust, and Authorization to Sell Real Property in the Matter of the Marjorie S. Dix Perpetual Endowment Fund* and signed by Judge Deirdre W. Edmonds, Probate Judge, on April 1, 2014. If such purchase price is not approved, this Agreement shall be rendered null and void."

1/8/16 – Holden signed contract and submitted escrow check for \$5000

1/12/16 – Attorney Evers sent notice of pending sale to endowment beneficiaries

1/20/16 – Special meeting of Pisgah UMC Trustees (1/19) – they did not approve of the price

2/16/16 – Holden submitted a new offer of \$110,000

3/1/16 – Pisgah Trustees met on 2/29 and rejected the new offer

3/3/16 – Flowers contacted Holden to tell him the offer was rejected

6/17/16 – Flowers talked to Holden on the phone – new verbal offer of \$130,000 including the cost of the survey when he indicated was somewhere around \$3000

8/5/16 – Flowers received another call from Holden about the \$130,000 offer with survey

8/29/16 – Flowers received another verbal offer from Holden - \$150,000

10/31/16 – Copy of a new contract (with \$150,000 offer) submitted to Wenger and Holden for review / contract was never signed by either

11/1/16 – Contract was revised by Evers and resubmitted / never signed

11/1/16 – Evers said that Inabinet (Holden's original attorney) was still holding earnest money

11/3/16 – Offer from Howell of \$175,000 cash

11/3/16 – Letter from bank verifying that Mr. Howell had cash to fund offer

11/15/16 - \$185,000 offer from Chris Barnhill / Crawford

11/17/16 – Updated offer from Howell at \$187,000

11/17/16 – Flowers talked to Holden and he is out. Holden told Flowers to call his attorney to get a copy of the survey. Contacted Evers to call Holden's attorney and to work up a contract for Howell.

11/18/16 – Evers received a call from Inabinet (Holden's attorney) and asked us to hold off signing any contract until he spoke with Mr. Holden that day

11/21/16 – Evers has not heard from Inabinet / will try to email to get an answer

11/22/16– Evers is calling Inabinet since there was no response to email

11/23/16 – Evers calls Inabinet again

11/29/16 – Evers heard from Holden's attorney. Holden indicated they would have an answer in the morning regarding the survey.

11/30/16 – No additional word from Holden. Contract sent to Howell for review.

12/2/16 – Per Howell's request, revised contract to put deed in his wife's name.

12/5/16 – Wenger signed new contract and emailed to Flowers

12/9/16 – Flowers indicated contract was accepted and title work begun

12/15/16 – Flowers receives a call from McGuire firm

|                                                  |   |                                 |
|--------------------------------------------------|---|---------------------------------|
| STATE OF SOUTH CAROLINA                          | ) | IN THE COURT OF COMMON PLEAS    |
|                                                  | ) | FOR THE NINTH JUDICIAL CIRCUIT  |
| COUNTY OF CHARLESTON                             | ) | CASE NO.: 2018-CP-10-05739      |
|                                                  | ) |                                 |
| Michael D. Royal,                                | ) |                                 |
|                                                  | ) |                                 |
| Plaintiff,                                       | ) |                                 |
|                                                  | ) | <b>DEFENDANT CHARLESTON</b>     |
|                                                  | ) | <b>COUNTY SCHOOL DISTRICT'S</b> |
| vs.                                              | ) | <b>PRE-TRIAL BRIEF</b>          |
|                                                  | ) |                                 |
| Free Kindergarten Association of Charleston,     | ) |                                 |
| The Attorney General of the State of South       | ) |                                 |
| Carolina, and Charleston County School District, | ) |                                 |
|                                                  | ) |                                 |
| Defendants.                                      | ) |                                 |

**(1) A concise, non-argumentative statement of the facts of the case:**

The Free Kindergarten Association of Charleston (FKAC) was established as a nonprofit corporation on January 24, 1901. The mission of the FKAC was to provide a free kindergarten education to students whose parents could not afford to pay for a kindergarten program during a time when kindergarten programs cost money. Over time, public schools took over this role. FKAC has not operated as a kindergarten since the 2000s. Aside from miscellaneous personal property of de minimus value, the only asset of the Free Kindergarten is real property and improvements located at 34 Pitt Street.

In 1951, the South Carolina General Assembly enacted Act (47) 546, currently SC Code § 59-17-70, which reads as follows:

Upon consolidation of any two or more school districts, all property, real and personal, and all assets of the districts forming the consolidated school district shall become the property of the consolidated district and all liabilities of the consolidating districts shall become the obligations of such consolidated district. Each such consolidated district shall be a body politic and corporate and its board of trustees shall have such powers as are provided by law.

Prior to 1951, twenty-one independent school districts operated within Charleston County, including Charleston School District #20. In 1951, the South Carolina General Assembly consolidated the twenty-one districts into eight districts. At that time, Charleston County District #20, encompassing the City of Charleston, became one of the eight separate school districts in Charleston County. Until 1967, the eight districts existed as totally separate entities, with each district responsible for its own fiscal and administrative operations.

In 1967, the South Carolina General Assembly enacted Act 340, 1967 S.C. Acts 340 (“Act 340” or “the Act”). Act 340 became effective July 1, 1968 and created the Charleston County School District. Act 340 designated the Charleston County School District a body of politic and corporate as provided in Section 21-111 of the Code of Laws of South Carolina, 1962, and vested Charleston County School District “with all powers, duties, and assets” of the eight school districts.

The eight districts continued their existence as special districts for administrative purposes only as set forth in Act 340 and were labeled “constituent districts.” Charleston School District 20, denominated as Constituent District 20 pursuant to Act 340, remains as one of the eight constituent districts in Charleston County.

Constituent District 20 continues to cover downtown Charleston and encompasses the schools located on the Charleston peninsula. Under Section 1 of Act 340, the constituent districts retained their independent boards of trustees and independent administrative authority, subject in certain instances to the approval of the Charleston County School District, over the very distinct and limited functions expressly delegated to the constituent districts, including, Constituent District 20, in Act 340.

The very limited and specific authority reserved to the eight constituent districts, including Constituent District 20, at the time of enactment of Act 340, was expressly set forth in Sections 6, 7 and 8 of the Act, and included: (1) employment and assignment of teachers or other professional employees; (2) employment of constituent district personnel; (3) pupil assignments and student discipline; and (4) limited oversight over school bus transportation.

Since the enactment of Act 340, the powers of the constituent districts have been reduced. Specifically, in 2007, Sections 6 and 8 of Act 340 were deleted and the Charleston County School District Board of Trustees was vested with complete power to employ and assign teachers and personnel for the efficient operations of schools as well as the complete control over the appointment of principals.

None of the limited functions reserved to the eight constituent districts retain or grant property rights to the constituent districts under Act 340. Instead, Act 340 and SC Code § 59-17-70, as well as the general law in South Carolina vest Charleston County School District with all property, real and personal, and all assets of the eight constituent districts within Charleston County.

On February 5, 1971, the South Carolina Secretary of State certified an amendment to the charter of FKAC pursuant to a Resolution of FKAC, authorized and certified by a majority of the Board of Directors, whereby FKAC resolved that “[i]n the event of dissolution, the residual assets of the Free Kindergarten will be turned over to Charleston School District #20.”

Aside from miscellaneous personal property of de minimus value, the real property and improvements located at 34 Pitt Street, Charleston, SC (“Pitt Street property”) constitutes the last remaining asset of FKAC. CCSD claims a current and vested beneficial and/or equitable interest in the Pitt Street property and/or proceeds of sale therefrom, with the right to the transfer of legal title to said property (including possession thereof) to CCSD upon dissolution of FKAC.

Plaintiff, Michael D. Royal, commenced this action for breach of contract and specific performance of a Real Estate Purchase and Sales Agreement (“Agreement”) dated April 23, 2013 involving the sale of 34 Pitt Street, the last remaining asset of FKAC.

On April 4, 2018, FKAC’s legal counsel notified the Attorney General of the State of South Carolina (SCAG) of the proposed sale, as required by S.C. Code Ann. § 33-31-1202(f), and counsel for FKAC sent the SCAG a copy of the Agreement. This was the first notice the SCAG received regarding the sale, though the Agreement is dated April 23, 2013.

On June 1, 2018, FKAC’s legal counsel notified CCSD that FKAC had given notice to the SCAG of the pending sale under the Agreement. This was the first notice CCSD received regarding the pending sales transaction under the five-year old Agreement. CCSD disputes the authority of June Murray Wells to execute the Agreement on behalf of FKAC and asserts the Agreement is null and void and unenforceable as a matter of law.

The purchase price in the Agreement is \$315,200, and the Agreement states the closing date is April 9, 2018 “or on such prior date chosen by the Seller upon reasonable notice to the purchaser.”

Upon notice of the proposed sale, the SCAG requested information about the current fair market value of the real property, but no appraisal or other evidence was provided other than an appraisal from December 9, 2012, months before execution of the Agreement and over five years prior to the notice. Given the lack of information about the fair market value, the SCAG obtained an updated appraisal from the same appraiser reflecting the fair market value was \$522,500 as of June 7, 2018. The SCAG subsequently advised the parties that he would not consent to the sale because the purchase price was substantially below current market value, in addition to the concerns about the Agreement’s unusual provisions.

Counsel for FKAC provided the SCAG with notice of this action and a copy of the pleadings on December 7, 2018 via email. The SCAG filed a Motion to Intervene which was granted by Order filed July 10, 2019.

Counsel for FKAC also provided CCSD with notice of this action and a copy of the pleadings on December 7, 2018 via email. CCSD filed a Motion to Intervene which was granted by Order filed August 22, 2019. The Court’s Order granting CCSD’s intervention ruled:

“...Charleston County School District #20’s interest in the Pitt Street property, and the property and/or all proceeds of sale therefrom, shall inure to the benefit of the Charleston County School District. Accordingly, this Court concludes the Charleston County School District has the legal authority to protect and enforce its interest in this property and/or all proceeds of sale therefrom, in the courts of the State of South Carolina. Accordingly, the Charleston County School District is the proper entity to intervene in this action.”

**Order Granting Motion of Charleston County School District to Intervene, Pg. 14 (filed August 22, 2019).**

Upon intervening in this action, CCSD filed a responsive pleading to Michael D. Royal’s Complaint, including, *inter alia*, a request for Declaratory Judgment and award of attorney’s fees.

**(2) An objective statement of the facts in controversy:**

Blended questions of fact and law in dispute include:

- (a) Did a Board of Directors exist for FKAC at the time of execution of the Agreement?
- (b) Was June Murray Wells a Director on an existing Board of Directors of FKAC at the time of execution of the Agreement?
- (c) Was the Agreement approved by an existing Board of Directors of FKAC?
- (d) Did FKAC have members at the time of execution of the Agreement?
- (e) Was June Murray Wells a member of FKAC at the time of execution of the Agreement?
- (f) Was the Agreement approved by the members of FKAC?
- (g) Did Michael D. Royal pay FKAC the consideration required for full performance under the terms and conditions of the Agreement?

**(3) The legal issues involved. This includes the law applicable to the cause of action and to the defense.**

- (a) Did June Murray Wells have authority to execute the Agreement on behalf of FKAC?
- (b) Did June Murray Wells execution of the Agreement constitute a violation of nonprofit, charitable trust laws and federal tax laws?
- (c) Did FKAC have a duly and lawfully constituted Board of Directors existing or acting in compliance with the Nonprofit Act of South Carolina at the time of the execution of the Agreement?
- (d) Did FKAC have duly and lawfully nominated and elected members existing and acting in compliance with the Nonprofit Act of South Carolina at the time of the execution of the Agreement?
- (e) Was the Agreement approved in compliance with the Nonprofit Act of South Carolina?
- (f) Did the Agreement provide for consideration required for full performance under the terms and conditions of the Agreement? When a nonprofit provides notice of a

property sale to the SCAG, pursuant to SC Code § 33-31-1202, and the sale price is less than fair market value and the sale is contrary to public policy, what is the authority of the SCAG in connection with such a proposed sale, and does that authority include the right to refuse to approve the proposed sale of the property.?

- (g) Is the Real Estate Purchase and Sales Agreement invalid, null and void and unenforceable as a matter of law?
- (h) Is declaratory judgment in favor of CCSD proper in this action?

The legal issues above will be governed by the general laws and principles of contract law, the Nonprofit Act of South Carolina, charitable trust laws, the doctrine of *parens patriae*, and federal tax laws.

**(4) A listing of exhibits, indicating those to which there is disagreement and a listing of witnesses who may be called and, if available, their address and phone number:**

The Defendant, Charleston County School District, may present any of the following persons as witnesses at the trial of this case:

- a. Michael D. Royal, via excerpts of written transcripts of Michael D. Royal dated May 5, 2021, December 2, 2021 and December 3, 2021 and/or in court testimony of Michael D. Royal.  
Care of Plaintiff's counsel.
- b. June Murray Wells, via video and written transcript of deposition of June Murray Wells, 30(b)(6) of Free Kindergarten Association of Charleston, dated January 9, 2020 together with admissible exhibits.
- c. CCSD, via excerpts of written transcript of Rule 30(b)(6) deposition of Charleston County School District through its Designated Representative Jeffery Thomas Borowy, dated November 22, 2021 and/or in court testimony of Jeffery Thomas Borowy, Chief Operating Officer, of CCSD.  
Care of CCSD's counsel.
- d. Carter Rowson  
6 Pitt Street  
Charleston, SC 29412  
843/259-0651
- e. Michael Robinson, MAI, SRA  
Charleston Appraisal Services, Inc.  
304 Meeting Street, Suite 201  
Charleston, SC 29401  
(843) 723-6257
- f. Robert J. McGahey, III, MAI  
Charleston Area Appraisals



246 Mathis Ferry Road, Suite 200  
 Mount Pleasant, SC 29464  
 (843) 901-0084

g. Jill Hunter Powell  
 Care of Counsel for the Confederate Museum

h. Treadwell Josey  
 Buist Byars & Taylor  
 652 Coleman Blvd.  
 Suite 200  
 Mt. Pleasant, SC 29464  
 843/856-4488

i. Janet Davis  
 Buist Byars & Taylor  
 652 Coleman Blvd.  
 Suite 200  
 Mt. Pleasant, SC 29464  
 843/856-4488

j. CCSD reserves the right to call other witnesses named in discovery and/or called as witness(es) at trial by any and all of the parties to this litigation.

The Defendant, Charleston County School District, may offer into evidence any of the documents/tangible objects contained in CCSD's Exhibit List attached hereto. CCSD further reserves the right to offer into evidence any of the documents/tangible objects contained in the exhibit lists of any and all of the parties to this action.

**(5) Any unusual problems relating to evidence to be introduced, such as “Business Records as Evidence Act,” hearsay, use of depositions, etc.**

(a) Presentation of June Murray Wells’ videotaped/stenographic deposition, taken January 9, 2020.

(b) Issuance of Written Orders on Motions heard at the Pre-trial conference held on November 22, 2021, including:

- (1) CCSD’s Notice of Motion and Motion to Dismiss filed August 22, 2021
- (2) CCSD’s Petition for Rule to Show Cause and Expedited Review and Notice of Motion for Sanctions and Fifth Motion to Compel filed October 11, 2021
- (3) CCSD’s Notice of Motion and Third Motion for Sanctions and Sixth Motion to Compel filed November 11, 2021
- (4) CCSD’s Notice for Continuance filed November 11, 2021 (bench ruling denied this motion at the hearing)



- (5) CCSD's Motion to Modify Plaintiff's Notice of Rule 30(b)(6) Deposition and to Quash and Motion for Protective Order filed November 11, 2021 (bench ruling limited additional 30(b)(6) testimony)
- (6) Royal's Motion to Compel Discovery filed November 17, 2021
- (7) Royal's Motion to Strike Defendant CCSD's Expert Designation and Testimony filed November 19, 2021 (bench ruling denied this motion at the hearing)
- (8) Patrick Stringer's Motion to Withdraw as Counsel for Free Kindergarten filed November 22, 2021 (bench ruling denied this motion at hearing)
- (9) Royal Motion for Partial Summary Judgment filed November 24, 2021 (taken under advisement at Pre-Trial Hearing)

(c) Outstanding Motions Pending for Hearing, including:

- (1) CCSD's Motion to Strike Plaintiff's Expert Designation of Royal filed December 3, 2021
- (2) CCSD's Motion for Summary Judgment Filed December 5, 2021
- (3) CCSD's Motion to Strike Plaintiff's 2<sup>nd</sup> Expert Designation of Bishop filed December 6, 2021
- (4) CCSD's Motion for Reconsideration filed December 10, 2021
- (5) CCSD Motion in Limine filed December 13, 2021 (Royal Expert Designation and Testimony)
- (4) CCSD Motion in Limine filed December 13, 2021 (Bishop Expert Designation and Testimony)
- (5) CCSD Motion in Limine filed December 13, 2021 (Standing)

**(6) Any unusual question or matter which should be brought to the attention of the court.**

*See* , CCSD answer to Section 5 above.

**(7) A statement that settlement negotiations were attempted before the date the pre-trial hearing and status of settlement negotiations.**

The parties have discussed mediation, but have been unable to reach a consensus as to the scheduling and completion of mediation. Accordingly, the parties have not conducted mediation at this time. CCSD is not aware of any current settlement negotiations or discussions.

SIGNATURE PAGE FOLLOWS

Respectfully submitted,

LAW OFFICE OF A. BRIGHT ARIAIL, LLC

By: s/A. Bright Ariail

A. Bright Ariail (SC BAR 69570)

125E Wappoo Creek Drive, Suite 202

Charleston, South Carolina 29412

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125E Wappoo Creek Drive, Suite 202

Charleston, South Carolina 29412

*Attorneys for Charleston County School District*

Charleston, South Carolina

December 13, 2021

12/13/2021

**CCSD AMENDED EXHIBIT LIST**

| <u>Date</u>       | <u>Title</u>                                                          |
|-------------------|-----------------------------------------------------------------------|
| 1/24/1901         | Certificate of Incorporation                                          |
| 03/15/1905        | Constitution and Charter                                              |
| 1/20/1931         | SC SOS Amendment changing name to FKAC                                |
| 05/01/1951        | FKAC Meeting Minutes                                                  |
| 05/04/1951        | Newspaper Article "Kindergarten Group Relects Mrs. Withington"        |
| 1/16/1971         | Application for Amendment of Eleemosynary Charter                     |
| 05/02/1971        | Amendment re dissolution                                              |
| 11/25/1993        | Agmt FK and Confederate Museum                                        |
| 11/21/2012        | Royal Email to Robinson                                               |
| 11/21/2012        | Draft PSA version 1                                                   |
| 11/27/2012        | Draft PSA version 2                                                   |
| 11/28/2012        | Draft PSA version 3                                                   |
| 11/30/2012        | Draft PSA version 4                                                   |
| 08/01/2013        | Royal Email to Robinson                                               |
| 09/12/2012        | Appraisal by Robinson                                                 |
| 1/13/2013         | Draft PSA verison 5                                                   |
| 1/14/2013         | Royal cover letter to Wells                                           |
| 1/14/2013         | Draft PSA version 6                                                   |
| 03/13/2013        | Cassina Letter                                                        |
| 07/04/2013        | Draft PSA version 7                                                   |
| 4/23/2013         | PSA Executed                                                          |
| 4/23/2013         | Memo of PSA filed at RMC                                              |
| 4/23/2013         | Cashiers Check \$5k to June Wells                                     |
| 5/29/2013         | Royal email/letter to Carducci                                        |
| 11/06/2013        | Cassina Letter                                                        |
| 12/08/2013        | Email Royal to Oostdyk and Charles Royal                              |
| 12/03/2013        | Emails between Royal and Rowson                                       |
| 1/26/2015         | Ltr Royal to Wells                                                    |
| 11/24/2015        | Email Wells to Royal                                                  |
| 01/12/2015        | Email Royal to Van Hewett                                             |
| 03/30/2016        | Email Royal to Wells                                                  |
| 1/19/2017         | Emails between Royal and Rowson                                       |
| 09/03/2018        | Email Royal to Josey                                                  |
| 3/19/2018         | Email Royal to Stringer                                               |
| 04/04/2018        | Email Jant Davis to Stringer                                          |
| 04/04/2018        | Stringer Notice to AG                                                 |
| 04/04/2018        | Ltr Stringer to Davis                                                 |
| 06/04/2018        | Email Janet Davis to Stringer                                         |
| 4/11 and 24, 2018 | Addenda to PSA                                                        |
| 11/05/2018        | Stringer letter to Royal                                              |
| 01/06/2018        | Letter Stringer to Ham                                                |
| 07/06/2018        | Appraisal by Robinson                                                 |
| 7/27/2018         | Crooks letter to Stringer and Jowers                                  |
| 11/30/21          | McGahey Appraisal Report dated August 5, 2021 (2nd Update - 11/30/21) |
| 11/02/2021        | Royal email to Stringer                                               |
| Dec-21            | FKAC and CCSD Stipulations                                            |
| 09/01/2020        | Video and Original deposition transcript of June Wells                |
| 5/25/2021         | Excerpts of deposition transcript of William Wells                    |
| 11/22/21          | Excerpts of deposition transcript of Jeffery Borowy                   |
| Various           | Excerpts of deposition transcripts of Michael D. Royal                |
|                   | Exhibits for Impeachment                                              |
|                   | Demonstrative Exhibits                                                |
|                   | Exhibits for Rebuttal                                                 |

12/13/2021

**CCSD AMENDED EXHIBIT LIST (dates corrected 12/14)**

|    | <u>Date</u>       | <u>Title</u>                                                          |
|----|-------------------|-----------------------------------------------------------------------|
| 1  | 1/24/1901         | Certificate of Incorporation                                          |
| 2  | 1901              | Constitution and Charter                                              |
| 3  | 1/20/1931         | SC SOS Amendment changing name to FKAC                                |
| 4  | 10/01/1951        | FKAC Meeting Minutes                                                  |
| 5  | 05/04/1951        | Newspaper Article "Kindergarten Group Relects Mrs. Withington"        |
| 6  | 1/16/1971         | Application for Amendment of Eleemosynary Charter                     |
| 7  | 02/05/1971        | Amendment re dissolution                                              |
| 8  | 11/25/1993        | Agmt FK and Confederate Museum                                        |
| 9  | 11/21/2012        | Royal Email to Robinson                                               |
| 10 | 11/21/2012        | Draft PSA version 1                                                   |
| 11 | 11/27/2012        | Draft PSA version 2                                                   |
| 12 | 11/28/2012        | Draft PSA version 3                                                   |
| 13 | 11/30/2012        | Draft PSA version 4                                                   |
| 14 | 01/08/2013        | Royal Email to Robinson                                               |
| 15 | 12/09/2012        | Appraisal by Robinson                                                 |
| 16 | 1/13/2013         | Draft PSA verison 5                                                   |
| 17 | 1/14/2013         | Royal cover letter to Wells                                           |
| 18 | 1/14/2013         | Draft PSA version 6                                                   |
| 19 | 03/13/2013        | Cassina Letter                                                        |
| 20 | 04/07/2013        | Draft PSA version 7                                                   |
| 21 | 4/23/2013         | PSA Executed                                                          |
| 22 | 4/23/2013         | Memo of PSA filed at RMC                                              |
| 23 | 4/23/2013         | Cashiers Check \$5k to June Wells                                     |
| 24 | 5/29/2013         | Royal email/letter to Carducci                                        |
| 25 | 06/11/2013        | Cassina Letter                                                        |
| 26 | 08/12/2013        | Email Royal to Oostdyk and Charles Royal                              |
| 27 | 12/03/2013        | Emails between Royal and Rowson                                       |
| 28 | 1/26/2015         | Ltr Royal to Wells                                                    |
| 29 | 11/24/2015        | Email Wells to Royal                                                  |
| 30 | 12/01/2015        | Email Royal to Van Hewett                                             |
| 31 | 03/30/2016        | Email Royal to Wells                                                  |
| 32 | 1/19/2017         | Emails between Royal and Rowson                                       |
| 33 | 03/09/2018        | Email Royal to Josey                                                  |
| 34 | 03/29/2018        | Email Royal to Stringer                                               |
| 35 | 04/04/2018        | Email Jant Davis to Stringer                                          |
| 36 | 04/04/2018        | Stringer Notice to AG                                                 |
| 37 | 04/04/2018        | Ltr Stringer to Davis                                                 |
| 38 | 04/06/2018        | Email Janet Davis to Stringer                                         |
| 39 | 4/11 and 24, 2018 | Addenda to PSA                                                        |
| 40 | 05/11/2018        | Stringer letter to Royal                                              |
| 41 | 06/01/2018        | Letter Stringer to Ham                                                |
| 42 | 06/07/2018        | Appraisal by Robinson                                                 |
| 43 | 7/27/2018         | Crooks letter to Stringer and Jowers                                  |
| 44 | 02/11/2021        | Royal email to Stringer                                               |
| 45 | 11/30/21          | McGahey Appraisal Report dated August 5, 2021 (2nd Update - 11/30/21) |
| 46 | Dec-21            | FKAC and CCSD Stipulations                                            |
| 47 | 09/01/2020        | Video and Original deposition transcript of June Wells                |
| 48 | 5/25/2021         | Excerpts of deposition transcript of William Wells                    |
| 49 | 11/22/21          | Excerpts of deposition transcript of Jeffery Borowy                   |
| 50 | Various           | Excerpts of deposition transcripts of Michael D. Royal                |
| 51 |                   | Exhibits for Impeachment                                              |
| 52 |                   | Demonstrative Exhibits                                                |
| 53 |                   | Exhibits for Rebuttal                                                 |

|                                      |   |                                          |
|--------------------------------------|---|------------------------------------------|
| STATE OF SOUTH CAROLINA              | ) | IN THE COURT OF COMMON PLEAS             |
|                                      | ) |                                          |
| COUNTY OF CHARLESTON                 | ) | C.A. No.: 2018-CP-10-5739                |
|                                      | ) |                                          |
| Michael D. Royal,                    | ) |                                          |
|                                      | ) |                                          |
| Plaintiff,                           | ) |                                          |
|                                      | ) |                                          |
| v.                                   | ) |                                          |
|                                      | ) | <b>The Attorney General of the State</b> |
| Free Kindergarten Association of     | ) | <b>of South Carolina's</b>               |
| Charleston,                          | ) | <b>Pre-Trial Brief Supplement</b>        |
|                                      | ) |                                          |
| Defendant,                           | ) |                                          |
|                                      | ) |                                          |
| The Attorney General of the State of | ) |                                          |
| South Carolina and The Charleston    | ) |                                          |
| County School District               | ) |                                          |
|                                      | ) |                                          |
| Intervenors                          | ) |                                          |
|                                      | ) |                                          |

The Attorney General (also referred to as "AG") of the State of South Carolina respectfully submits this Supplement to the Pre-Trial Brief in the above-referenced matter to provide an update regarding number 4 of the pre-trial brief.

- (4) **A listing of exhibits, indicating those to which there is disagreement and a listing of witnesses who may be called and, if available, their address and phone number.**

The Attorney General's Office may call Mike Robinson, appraiser, Charleston Appraisal Services, Inc., 304 Meeting Street, #201, 843-723-6256. Mr. Robinson's appraisal of June 7, 2018, may be offered as an Exhibit. The Attorney General reserves the right to call other witnesses listed in response to discovery.

Respectfully submitted,

s/Mary Frances Jowers  
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Attorney General

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Senior Assistant Deputy Attorney General  
MARY FRANCES JOWERS  
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Attorneys for South Carolina Attorney  
General Alan Wilson

December 14, 2021

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

Michael D. Royal,

Civil Action No. 2018-CP-10-05739

Plaintiff,

vs.

Free Kindergarten Association of Charleston,  
The Attorney General of the State of South  
Carolina, and Charleston County School  
District,

Defendants.

**PLAINTIFF MICHAEL D. ROYAL'S  
MEMORANDUM IN OPPOSITION TO  
CCSD'S MOTION IN LIMINE WITH  
RESPECT TO PLAINTIFF'S PRE-TRIAL  
BRIEF CLAIMS OF LACK OF  
STANDING AND THE NON-EXISTENCE  
OF A JUSTICIABLE CONTROVERSY**

Plaintiff Michael D. Royal ("Plaintiff" or "Royal"), by and through his undersigned counsel, respectfully submits this Memorandum in Opposition to CCSD's Motion in Limine with Respect to Plaintiff's Pre-Trial Brief Claims of Lack of Standing and the Non-Existence of a Justiciable Controversy (the "Motion" or "Motion in Limine"). CCSD, in lieu of timely filing a Pre-Trial Brief, has instead opted to file motion after motion addressing issues to be decided at trial.

CCSD contends that this Court's grant of permissive intervention is determinative of substantive issues in this case and asks that this Court prohibit Plaintiff from introducing any evidence on the issues of standing and justiciable controversy. CCSD's position is neither supported by this Court's ruling nor the relevant caselaw. Accordingly, Plaintiff respectfully requests that this Court deny CCSD's motion and reserve for trial the material issues of fact as to whether CCSD is a proper party in this action and further, whether a justiciable controversy exists as to CCSD's claims against Plaintiff.

**BRIEF STATEMENT OF PERTINENT FACTS**

The Court is well-versed in the circumstances of this case. Accordingly, only the facts pertinent to this memorandum are set forth below. Plaintiff initiated this action to enforce a real

estate contract for the purchase of 34 Pitt Street in Charleston, SC from Defendant Free Kindergarten Association of Charleston (“FKAC”), executed on April 23, 2013 (the “PSA”). The PSA provided for a delayed closing at the behest of the seller, FKAC. Ultimately in May of 2018, FKAC preemptively breached the contract and refused to close without approval from the Attorney General of the State of South Carolina (the “AG”). After the AG refused to approve the sale, and FKAC refused to close, Plaintiff filed suit in December of 2018. The AG then sought to intervene as a matter of right pursuant to Rule 24(a), SCRCP.

CCSD became involved when it was notified by FKAC that Charleston School District #20 might have an interest in the proceeds of the sale pursuant to a 1971 Resolution of FKAC which provided, in part, “. . . [i]n the event of dissolution, the residual assets of Free Kindergarten Association will be turned over to Charleston School District #20, part of the South Carolina State School System for general use in this said Charleston School District #20.” See Exhibit A attached hereto (“1971 FKAC Resolution”). Premised solely on the 1971 FKAC Resolution, CCSD sought to intervene in this action, moving under both Rules 24(a) and (b), SCRCP, asserting it could intervene as a matter of right, or alternatively, was permissively allowed. See CCSD’s Motion to Intervene.

## LEGAL ISSUES

### I. Permissive Intervention Is Merely Procedural and Not Substantive.

CCSD filed its Motion to Intervene on February 7, 2019, following the lead of the AG, which filed its Motion to Intervene on January 28, 2019. CCSD claimed it was entitled to intervene both as a matter of right and permissively. The AG, however, sought to intervene solely as a matter of right. A hearing was held on June 4, 2019. At the June 9, 2019 hearing on both motions, this Court carefully considered CCSD’s intervention arguments under both Rule 24(a) and 24(b) and



specifically determined that CCSD was only entitled to intervene permissively. Conversely, this Court ruled that the AG could intervene as a matter of right and specifically noted: “The school district -- I’m less sure about their matter of right, but I do think that they certainly have a permissive right to intervene . . .” Transcript of June 4, 2019 Hearing, p. 20:12-16 (emphasis added) attached hereto as **Exhibit B**. The Court explained to Plaintiff: “[a]nd again, they only seek to intervene at this point in time, so it’s really more of a procedural motion . . .” *See id.* at p. 19:12-14.

The Court specifically noted that there was a dilemma as to whether CCSD or Charleston School District No. 20 (“CSD No. 20”) was the proper party and inquired of CCSD as to whether CSD No. 20 still existed as an entity. *See id.*, at 29:15-20. CCSD answered in the affirmative, confirming that CSD No. 20 still existed as an entity. *See id.* The Court expressly granted “[CCSD] the right to intervene under permissive language as opposed to a matter of right, 24(b), Rule 24(b)” and left open the question as to whether CCSD or CSD No. 20 was the proper party to this action. *See id.*, at 29:22-25. This was based in part on the Court’s familiarity with a previous case in which CCSD and CSD No. 20 were opposing parties. *See id.*, at 30:6-10. Thus, the Court directed CCSD to speak with counsel for CSD No. 20 to resolve the dilemma. *See id.*, at 30:6-10.

The Court’s intent was further memorialized in its Form 4 Order entered June 6, 2019, a mere two days after the hearing in which it ruled as follows: “[a]fter the Court’s review of the parties’ memoranda and oral arguments, the AG’s motion to intervene as a matter of right is GRANTED pursuant to 24(a)(1) SCRCP. The Charleston County School District’s Motion to Intervene is GRANTED, as permissive intervention, pursuant to Rule 24(b), SCRCP. Formal order to follow.” *See* Form 4 Order dated June 7, 2019 attached hereto as **Exhibit C**. A formal

order was drafted by CCSD and later entered by the Court on August 22, 2019. *See* **Exhibit D** attached hereto (the “August 22 Order”).

South Carolina courts have consistently recognized that permissive intervention should be liberally granted when claims or defenses have a common question of law or fact to “encourage the disposition of all the claims or defenses in one action rather than a multiplicity of actions.” *See S.C. Tax Commission v. Union City Treasurer*, 295 S.C. 257, 263, 368 S.E. 2d 72, 75 (Ct. App. 1988). Allowing CCSD to intervene in this action was simply a matter of procedural efficiency and did not constitute a substantive ruling.

II. **The Standard Applied for a Determination of Permissive Intervention Is Vastly Different from the Burden of Proof at Trial.**

To intervene permissively, a party must only show that its claim or defense has a question of law or fact in common. *See* Rule 24(b) of the South Carolina Rules of Civil Procedure and *Kiawah Resort Assoc., L.P vs Kiawah Island Cmty, Ass’n, Inc.*, 421 S.C. 538, 551, 808 S.E.2d 521, 528 (Ct. App. 2017). Counsel for CCSD acknowledged as much in her statement to the Court, claiming “[i]ntervention should be liberally granted. There are minimal burdens that we have to reach here today.” *See* Ex. B, p. 16:24-25 and p. 17:1. A ruling on intervention is a procedural, not a substantive determination, as acknowledged by the Court, Plaintiff and CCSD. Despite the Court ruling that CCSD’s intervention was a permissive one, CCSD continues to argue that the Court has ruled it has proven an interest in the subject property and/or the proceeds of its sale.

Counsel for CCSD dramatically proclaimed at the pre-trial status conference that it was “most disturbing” that Plaintiff sought to ask CCSD’s 30(b)(6) designee questions regarding the relationship between CCSD and CSD No. 20. *See* Transcript of November 29, 2021 Pre-Trial Conference, attached hereto as **Exhibit E**, p.23:4-8. CCSD went on to claim that the August 22, 2019 Order “identified Charleston County School District as the proper party” and further that

“[i]t’s the law of the case” *See* Ex. E, at 23:23-25 and 24:1-3. As recognized by the South Carolina Supreme Court, an unappealed ruling becomes the law of the case. *See ML-Lee Acquisition Fund, LP v. Deloitte & Touche*, 327 S/C 238, 489 S.E.2d 470 (S.C. 1997). This Court’s ruling on CCSD’s Motion to Intervene was an interlocutory order which is not immediately appealable. *See* Rule 72, SCRCF, and S.C. Code Ann. § 14-3-330. The intent of both Rule 72 and § 14-3-330 was to reduce appeals of interlocutory orders and require a final judgment on the merits before appealing. *See id.* This Court’s ruling on CCSD’s motion to intervene was not a judgment on the merits and therefore interlocutory in nature and not appealable. *See Ex Parte Capital U-Drive-It, Inc.*, 369 S.C.1, 630 S.E.2d 464 (2006). Accordingly, CCSD’s argument that the Court’s ruling on intervention constitutes the law of case is without merit.

When the Court specifically inquired of Plaintiff’s counsel as to whether Plaintiff contested the school district’s interest in the property, counsel for Plaintiff emphatically stated: “[w]e’re definitively contesting their interest in the property. But we understand that your Honor has ruled the school district is entitled to intervene.” *See* Ex. E, p. 31:8-16. The Court’s colloquy with counsel for Plaintiff clearly establishes that whether CCSD is a proper party with an interest in the subject assets was not determined by the ruling on intervention. Moreover, the August 22 Order drafted by CCSD cuts against its assertions. “The present case is still at the earliest stages of litigation . . . the parties have not engaged in written discovery . . . No factual or legal issues have been litigated.” Ex. D, at p. 8.

III. The Order Submitted by CCSD Is Contrary to this Court’s Oral Ruling at the Hearing and its June 2019 Form 4 Order.

As noted above, the Court verbally ruled as to CCSD’s Motion to Intervene at the hearing on June 6, 2019, stating “I’m going to grant [CCSD] the right to intervene. I’m going to do that under permissive language as opposed to a matter of right, 24(b), Rule 24(b)[.].” *See* Ex. B, p.

29:22-25. This Court then issued a directive to CCSD and the AG to prepare formal orders “that says exactly what we’ve talked about here today.” *See id.* p. 31:13-16. The Court asked for the Orders to be submitted within 15 to 20 days of the hearing, entrusting CCSD to submit an Order that complied with the Court’s oral rulings. The Order that was ultimately submitted, almost two months later, far exceeds the bounds of the Court’s oral ruling and Form 4 Order. *See* Ex. D.

Although the August 22 Order does indicate the intervention of CCSD was permissive, it goes on to include thirty (30) Findings of Fact, most of which were not discussed or ruled upon at the hearing. The most significant deviation from the Court’s ruling was the final section of the Order, which contains the unwarranted conclusion that “Charleston County School District#20’s interest in the Pitt Street property, and the property and/or all proceeds of sale therefrom, shall inure to the benefit of the Charleston County School District.” Ex. D, p. 14. There is no possible interpretation of the evidence submitted to that date, the Court’s ruling at the hearing, or its Form 4 order that supports this determination. The hearing was on CCSD’s Motion to Intervene, a procedural matter, not a substantive one. Allowing CCSD to profit from the “poetic license” it took in crafting the Order is inequitable and contrary to established law with regard to permissive intervention under Rule 24(b).

#### IV. The Issue of Standing Is Substantive and Still Ripe for Determination

This Court specifically recognized there was a dilemma as to whether CCSD or CSD No. 20 was the proper party to this action. *See* Ex. B, at 29:15 – 30:18. This dilemma was occasioned by the express language of the 1971 FKAC Resolution, which specifically names CSD No. 20 as the beneficiary, not CCSD. *See* Ex. A.<sup>1</sup> For this reason, the Court directed CCSD to consult with

---

<sup>1</sup> Importantly, the 1971 FKAC Resolution was approved after 1967 Act No. 340, which CCSD relies upon to assert entitlement to CSD No. 20’s beneficial interest.

legal counsel for CSD No. 20. *See* Ex. B, p. 29:15-20 and p. 30:1-12. However, CCSD has never provided evidence it satisfied the Court's directive.

Through its careful crafting of the August 22 Order, CCSD attempted to resolve, in its favor, the "dilemma" as to whether CCSD, rather than CSD No. 20, is the proper party, thereby expanding upon the Court's oral ruling. After the hearing, Counsel for CCSD sent a letter to the Court, couched as verification of the Court's directive to consult with CSD No. 20 as to the litigation. *See* **Exhibit F** attached hereto, Letter from CCSD to the Court dated June 24, 2019; Ex. B, at 30:1-12. In support of its Motion to Intervene, CCSD proffered statutory and common law, and recited historical information about the formation of the various school districts. *See* Ex. G.

This letter, however, failed to satisfy the Court's requirement that CCSD consult with CSD No. 20. *See id.*; Ex. B, at 30:1-12. Instead, in a letter the next day, CCSD wrote that it had consulted with CCSD officials as to whether CCSD was indeed the proper party. *See* **Exhibit G** attached hereto, June 25, 2019 letter from CCSD to the Court. The certification that it asked an entity if it thinks it should be a party to litigation, when it has already moved to intervene in said litigation, is not only nonsensical but also disregarded the Court's instructions. *See* Ex. G; Ex. B, at 30:1-12..

In its Answers to Plaintiff's Interrogatories served in the fall of 2021, CCSD continued to promote the illusion that CSD No. 20 had been consulted. Specifically, in response to Interrogatory No. 17, which asks CCSD to detail its efforts to consult with CSD No. 20 in accordance with the Court's directive at the hearing, CCSD affirmatively and definitively stated "[t]he undersigned counsel consulted with legal counsel for School District 20 in accordance with counsel's colloquy with the Court as set forth in the transcript of the June 4, 2019 hearing." *See* CCSD's Answers to Plaintiff's First Set of Interrogatories, at No. 17, attached hereto as **Exhibit**

H<sup>2</sup>. This assertion directly conflicts with the testimony of CCSD's 30(b)(6) designee, Jeffrey Borowy, who testified he "was not aware of any formal presentation made to Constituent District 20 by [CCSD] related to this property" and nor was he aware of "any discussions from our staff to that board (CSD No. 20) related to this issue." *See* 30(b)(6) Deposition of CCSD, p. 112:1-22 and p. 113:1-21, attached hereto as **Exhibit I**.

On November 11, 2021, apparently recognizing the inaccuracy in its original response, CCSD supplemented its response to Interrogatory No. 17, stating "the undersigned counsel consulted orally with General Counsel for the Charleston County School District, in accordance and satisfaction with counsel's colloquy with the Court as set forth in the transcript of the June 4, 2019 hearing." *See* CCSD's Second Supplemental Answers to Plaintiff's First Set of Interrogatories, at No. 17, attached hereto as **Exhibit J**. By its admission, this consultation did not take place with counsel or representatives for CSD No. 20, but with General Counsel for CCSD. Yet CCSD admits that CSD No. 20 is a separate entity, and communications between the two are not subject to a blanket claim of privilege, supporting the need for a separate inquiry. *See* Ex. I, p. 113:23-25 and p. 114:1-8. The determination as to standing to interfere with the PSA should be made by the Court based upon its review of the entirety of the evidence, and not based entirely upon substantive language inserted into an Order on a procedural issue.

### **CONCLUSION**

For the reasons set forth above, Plaintiff respectfully requests that the Court deny CCSD's Motion in Limine and reserve its judgment as to these substantive issues of this action for the impending trial.

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<sup>2</sup> Royal's First Set of Interrogatories served on CCSD included 18 interrogatories. CCSD's answers mislabeled their answer to interrogatory 18 as an answer to Interrogatory 17. In this **Exhibit H**, Royal has highlighted the answer cited to herein.

s/ Evan P. Williams  
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Mt. Pleasant, SC 29464  
843.881.1623

*ATTORNEYS FOR PLAINTIFF*  
*MICHAEL D. ROYAL*

December 14, 2021  
Mt. Pleasant, South Carolina

## **Exhibit I**

CCSD's 30(b)(6) Deposition Excerpts dated November  
22, 2021

Plaintiff Michael D. Royal's Memorandum in Opposition to CCSD's Motion  
in Limine With Respect to Plaintiff's Pre-Trial Brief Claims of Lack of  
Standing and the Non-Existence of a Justiciable Controversy

*Michael D. Royal*

v.

*Free Kindergarten Association of Charleston, The Attorney General of the State of South  
Carolina, and Charleston County School District*

Civil Action No. 2018-CP-10-05739  
Charleston County Court of Common Pleas



1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS  
 2 COUNTY OF CHARLESTON 9TH JUDICIAL CIRCUIT  
 3 - - -  
 4 MICHAEL D. ROYAL, :  
 :  
 5 Plaintiff, :  
 : CASE NO.  
 6 vs. :  
 : 2018-CP-10-05739  
 7 FREE KINDERGARTEN ASSOCIATION :  
 OF CHARLESTON, THE ATTORNEY :  
 8 GENERAL OF THE STATE OF SOUTH :  
 CAROLINA, and CHARLESTON :  
 9 COUNTY SCHOOL DISTRICT, :  
 :  
 10 Defendants. :  
 11

12 30(b)(6) DEPOSITION OF CHARLESTON COUNTY SCHOOL  
 DISTRICT through its designated representative  
 13 JEFFREY THOMAS BOROWY

14  
 15 DATE TAKEN: Monday, November 22, 2021  
 16 TIME BEGAN: 9:37 a.m.  
 17 TIME ENDED: 12:57 p.m.  
 18 LOCATION: Charleston County School  
 District Office  
 19 75 Calhoun Street  
 Charleston, South Carolina  
 20  
 21 REPORTED BY: Marie H. Bruegger, RPR, CRR  
 EveryWord, Inc.  
 P.O. Box 1459  
 22 Columbia, South Carolina 29202  
 803-212-0012  
 23  
 24  
 25

1 question.

2 MS. ARIAIL: Still outside the scope of  
3 the 30(b)(6) designation.

4 MR. WILLIAMS: No. It was a topic -- it  
5 was a topic in the -- you didn't object to  
6 that topic. It's Topic 15.

7 BY MR. WILLIAMS:

8 Q Mr. Borowy, I'd like you to answer the  
9 question.

10 MS. ARIAIL: Objection stands.

11 THE WITNESS: So what was the question  
12 again?

13 BY MR. WILLIAMS:

14 Q Has Charleston County School District  
15 spoken with Constituent District Number 20 about  
16 this litigation?

17 MS. ARIAIL: Same objection. You can  
18 answer.

19 THE WITNESS: So I'm not aware of any  
20 formal presentation made to Constituent  
21 District 20 by me or my staff related to this  
22 property.

23 BY MR. WILLIAMS:

24 Q As the person designated to testify on  
25 behalf of the school district, are you aware of

1 anyone at Charleston County School District  
2 speaking with District Number 20 about this  
3 litigation?

4 MS. ARIAIL: Same objection.

5 THE WITNESS: Anyone within the district?

6 BY MR. WILLIAMS:

7 Q Within Charleston County School District.

8 A School district. I am not aware of any  
9 discussions from our staff to that board related to  
10 this issue.

11 Q So you're not aware if District Number 20  
12 thinks it should be a party to this case?

13 MS. ARIAIL: Same objection.

14 THE WITNESS: I am not -- since they  
15 haven't been asked -- if they haven't been  
16 asked, I can't answer the question whether  
17 that they would, but this issue, as I  
18 mentioned earlier, doesn't fall within their  
19 responsibility, their administrative  
20 responsibility, so they wouldn't be consulted  
21 or they wouldn't be asked.

22 BY MR. WILLIAMS:

23 Q Within those discovery responses there --  
24 feel free to look, but I think it's Number 17 --  
25 does Charleston County School District contend that

1 all communications with District Number 20 are  
2 protected by attorney-client privilege?

3 MS. ARIAIL: Same objection.

4 THE WITNESS: No. I don't -- I don't  
5 contend that all of the documents or  
6 discussion between Constituent District 20 and  
7 us are attorney-client privilege or protected.  
8 I don't agree with that.

9 (Plaintiff's Exhibit 22, Order in  
10 Marvin Stewart v. CCSD Case, was marked  
11 for identification.)

12 BY MR. WILLIAMS:

13 Q And Exhibit 22 is an order from the  
14 Charleston County Court of Common Pleas dated  
15 February 22nd, 2008. Have you seen this document  
16 before?

17 A No, I have not.

18 MS. ARIAIL: I'm going to object to any  
19 testimony related to this document pursuant to  
20 the designation under the 30(b)(6) notice.

21 MR. WILLIAMS: And I would state that it  
22 is included within the discovery request and  
23 responses of Charleston County School District  
24 that is a topic of the 30(b)(6) deposition not  
25 objected to by the school district.

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March 30, 2022

**VIA E-FILING**

The Honorable Julie J. Armstrong  
Charleston County Clerk of Court  
100 Broad Street  
Charleston, SC 29401

**Re: *Michael D. Royal v. Free Kindergarten Association of Charleston, et al.***  
**Civil Action No. 2018-CP-10-05739**

Dear Ms. Armstrong:

This firm represents Plaintiff Michael D. Royal ("Plaintiff") in the above-captioned matter. As requested by the Court, Plaintiff is filing his exhibits admitted at the trial of this action. Below is an index or list of the same for reference, which was circulated to counsel of record on December 23, 2021, as evidenced by the email correspondence that is enclosed and filed herewith.

| <b><u>Exhibit Number</u></b> | <b><u>Document Description</u></b>                                                         | <b><u>Doc. Date</u></b> |
|------------------------------|--------------------------------------------------------------------------------------------|-------------------------|
| Plaintiff's Robinson 1       | Appraisal of the Property, as of December 19, 2012, by Charleston Appraisal Services, Inc. | 12/19/2012              |
| Plaintiff's Ex. 1            | December 3, 2011 Picture of Property                                                       | 12/3/2011               |
| Plaintiff's Ex. 2            | December 3, 2011 Picture of Property                                                       | 12/3/2011               |
| Plaintiff's Ex. 3            | December 3, 2011 Picture of Property                                                       | 12/3/2011               |
| Plaintiff's Ex. 4            | Email from Michael Royal to Secretary of State's Office                                    | 12/7/2011               |
| Plaintiff's Ex. 7            | News and Courier Article regarding June Wells                                              | 10/8/1990               |
| Plaintiff's Ex. 8            | Royal's Calendar Reminder (Subject: Meet June Wells at 34 Pitt Street)                     | 11/4/2012               |
| Plaintiff's Ex. 9            | Email to Michael Royal from Mike Robinson                                                  | 11/12/2012              |

|                     |                                                                                                                                         |              |
|---------------------|-----------------------------------------------------------------------------------------------------------------------------------------|--------------|
| Plaintiff's Ex. 10  | January 14, 2013 letter from Royal to June Wells w/ enclosed proposed PSA (v6)                                                          | 01/14/2013   |
| Plaintiff's Ex. 11  | Real Estate Purchase and Sale Agreement                                                                                                 | 04/23/2013   |
| Plaintiff's Ex. 12  | Letter from Lawrence A. Dodds, Jr. to FKAC/June Wells with Draft Lease                                                                  | 11/22/1993   |
| Plaintiff's Ex. 13  | S.C. Department of Revenue Withholding Tax Change of Records/Reorder Form addressed to FKAC c/o June Wells                              | 1/1/1997     |
| Plaintiff's Ex. 14  | FKAC's Letter Replying to S.C. Tax Commission's Letter of 1/8/1997                                                                      | 3/4/1997     |
| Plaintiff's Ex. 15  | Letter from S.C. Department of Revenue to FKAC c/o June Wells                                                                           | 3/19/1997    |
| Plaintiff's Ex. 16  | FKAC's Resolution Designating Bank Depository                                                                                           | 06/25/1997   |
| Plaintiff's Ex. 17  | State of SC Notice of Failure to File Quarterly Tax Return                                                                              | 6/27/1997    |
| Plaintiff's Ex. 18  | FKAC's Employer's Quarterly Federal Tax Return                                                                                          | 6/26/1997    |
| Plaintiff's Ex. 19  | Fixed Rate Certificate from First Federal of Charleston                                                                                 | 7/3/1997     |
| Plaintiff's Ex. 20  | FKAC checks to S.C. Department of Revenue and S.C. Employment Security Commission                                                       | 9/11/1997    |
| Plaintiff's Ex. 21  | Letter from the S.C. Employment Security Commission to FKAC                                                                             | 9/22/1997    |
| Plaintiff's Ex. 22  | IRS Employer's Quarterly Federal Tax Return Form addressed to FKAC c/o June Wells                                                       | Rev. 01/2001 |
| Plaintiff's Ex. 23  | Bank Statement for FKAC/Marion Hanckel Kindergarten sent care of June Wells                                                             | 12/31/2001   |
| Plaintiff's Ex. 24  | Various Utility Bills addressed to FKAC c/o June Wells                                                                                  | 2003-2009    |
| Plaintiff's Ex. 25  | Various Bank Correspondence Addressed to FKAC c/o June Wells                                                                            | 2004-2011    |
| Plaintiff's Ex. 26  | Undated blank check from a Wachovia account in the name of FKAC/Marion Hanckel Kindergarten c/o June Wells                              | Undated      |
| Plaintiff's Ex. 27A | Application to Board of Architectural Review from FKAC/June Wells seeking to repair roof; payment receipt; approved application; permit | 6/19/2009    |

|                     |                                                                                                             |            |
|---------------------|-------------------------------------------------------------------------------------------------------------|------------|
| Plaintiff's Ex. 27  | Handwritten Letter from June Wells to Charleston County Dept of Revenue Collections and enclosed FKAC check | 3/25/2010  |
| Plaintiff's Ex. 28  | Letter from the AG's Office to June Wells/FKAC                                                              | 11/12/2010 |
| Plaintiff's Ex. 29  | Order of the Charleston County Probate Court                                                                | 11/23/2010 |
| Plaintiff's Ex. 29A | Affidavit of June Murray Wells                                                                              | 11/23/2010 |
| Plaintiff's Ex. 30  | Check from FKAC to Charleston County Revenue Collections                                                    | 12/22/2012 |
| Plaintiff's Ex. 31  | Memorandum of Purchase and Sale Agreement                                                                   | 4/23/2013  |
| Plaintiff's Ex. 32  | Letter from Royal to Colleen Carducci (City of Charleston)                                                  | 5/29/2013  |
| Plaintiff's Ex. 38  | Quitclaim Deed from the City of Charleston to FKAC                                                          | 10/3/2013  |
| Plaintiff's Ex. 46  | Letter from Michael Royal to FKAC/June Wells                                                                | 11/10/2014 |
| Plaintiff's Ex. 47  | Letter from Michael Royal to FKAC/June Wells                                                                | 1/26/2015  |
| Plaintiff's Ex. 54  | Email Correspondence between William Wells and Michael Royal                                                | 1/11/2018  |
| Plaintiff's Ex. 54A | Email Correspondence between William Wells and Michael Royal                                                | 3/13/2013  |
| Plaintiff's Ex. 55  | Email Correspondence between Royal, FKAC, Tread Josey and Bill Wells                                        | 3/29/2018  |
| Plaintiff's Ex. 56  | FKAC's Notice of Sale to AG and cover letter                                                                | 4/4/2018   |
| Plaintiff's Ex. 57  | Executed 1st Addendum to the Real Estate Purchase and Sale Agreement                                        | 4/11/2018  |
| Plaintiff's Ex. 58  | FKAC's 1901 Constitution and Charter                                                                        | 1901       |
| Plaintiff's Ex. 59  | FKAC's Certificate of Incorporation                                                                         | 1/24/1901  |
| Plaintiff's Ex. 60  | FKAC Resolution to Amend Charter                                                                            | 1/14/1931  |
| Plaintiff's Ex. 61  | FKAC's Application for Amendment of Charter                                                                 | 1/16/1971  |
| Plaintiff's Ex. 62  | Secretary of State's Certification of FKAC's Amendment to Charter                                           | 2/5/1971   |
| Plaintiff's Ex. 63  | Certificate of Existence of FKAC executed by the S.C. Secretary of State                                    | 8/23/2013  |
| Plaintiff's Ex. 65  | 2nd Addendum to the Purchase and Sale Agreement                                                             | 4/24/2018  |

|                    |                                                                                                    |                       |
|--------------------|----------------------------------------------------------------------------------------------------|-----------------------|
| Plaintiff's Ex. 66 | Defendant FKAC's Answers to Plaintiff Michael Royal's First Requests for Admission                 | 10/11/2021            |
| Plaintiff's Ex. 67 | Emails between Tread Josey and the AG's Office                                                     | 4/17/2018 - 4/19/2018 |
| Plaintiff's Ex. 68 | Letter to AG's Office from Michael Royal                                                           | 4/20/2018             |
| Plaintiff's Ex. 69 | Various emails between Michael Royal, the AG's Office, FKAC, and Tread Josey                       | 4/25/2018 - 5/18/2018 |
| Plaintiff's Ex. 70 | Letter to Plaintiff Royal from FKAC                                                                | 5/11/2018             |
| Plaintiff's Ex. 71 | Email from Michael Royal to FKAC and Tread Josey                                                   | 5/14/2018             |
| Plaintiff's Ex. 74 | Transcript of Deposition of CCSD's Rule 30(b)(6), SCRCF, Designee Jeffrey Borowy                   | 11/22/2021            |
| Plaintiff's Ex. 75 | S.C. Secretary of State Online Business Entity Profile for FKAC                                    | 11/6/2018             |
| Plaintiff's Ex. 76 | South Carolina 1900 Act No. 219 (with cover email from S.C. State Library to Royal dated 12/9/021) | 2/19/1900             |
| Plaintiff's Ex. 77 | Affidavit of Jill Hunter Powell (filed in C/A No. 2018-CP-10-5739 on 6/17/2021)                    | 6/17/2021             |
| Plaintiff's Ex. 78 | Defendant CCSD's Answer to Plaintiff's First Set of Interrogatories                                | 10/1/2021             |
| Plaintiff's Ex. 79 | Plaintiff's and FKAC's Stipulation of Fact                                                         | 10/1/2021             |
| Plaintiff's Ex. 80 | AG's Responses to Plaintiff's First Requests for Admission                                         | 10/8/2021             |
| Plaintiff's Ex. 81 | FKAC's Answers to Plaintiff's First Set of Interrogatories                                         | 10/11/2021            |
| Plaintiff's Ex. 82 | The AG's Responses to Plaintiff's First Set of Interrogatories                                     | 10/20/2021            |
| Plaintiff's Ex. 83 | UDC and Museum's Answers to Royal's First Request for Admissions                                   | 10/21/2021            |
| Plaintiff's Ex. 84 | CCSD's Answers to Plaintiff's First Requests for Admission                                         | 10/22/2021            |
| Plaintiff's Ex. 85 | Defendant CCSD's Answers to Plaintiff's Second Set of Interrogatories                              | 10/25/2021            |
| Plaintiff's Ex. 86 | Defendant CCSD's 1st Supplemental Answers to Plaintiff's 1st Set of Interrogatories                | 11/19/2021            |



|                    |                                                                                     |            |
|--------------------|-------------------------------------------------------------------------------------|------------|
| Plaintiff's Ex. 87 | Defendant CCSD's 2nd Supplemental Answers to Plaintiff's 1st Set of Interrogatories | 11/19/2021 |
| Plaintiff's Ex. 88 | Defendant CCSD's 1st Supplemental Answers to Plaintiff's 2nd Set Interrogatories    | 11/19/2021 |
| Plaintiff's Ex. 89 | Defendant CCSD's 3rd Supplemental Answers to Plaintiff's 1st Set of Interrogatories | 11/22/2021 |
| Plaintiff's Ex. 90 | Defendant CCSD's 2nd Supplemental Answers to Plaintiff's 2nd Set of Interrogatories | 11/28/2021 |
| Plaintiff's Ex. 91 | Defendant CCSD's 4th Supplemental Answers to Plaintiff's 1st Set of Interrogatories | 12/8/2021  |
| Plaintiff's Ex. 92 | Defendant CCSD's Answers to Plaintiff's 3rd Interrogatories                         | 12/8/2021  |
| Plaintiff's Ex. 93 | CCSD's Verification of Answers to Plaintiff's Interrogatories                       | 12/13/2021 |
| Plaintiff's Ex. 94 | The AG's Verification of AG's Responses to Plaintiff's Interrogatories              | 12/14/2021 |

Please let us know if we can provide any further information.

Yours Sincerely,



Evan P. Williams

cc via NEF service and e-filing:

A. Bright Ariail, Esq.  
Warren W. Ariail, Esq.  
Mary Frances Jowers, Esq.  
Kristin Simons, Esq.  
Patrick F. Stringer, Esq.  
Joseph K. Qualey, Esq.  
Zac Smith, Esq.

Enclosure(s)

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

Michael D. Royal,

Case No. 2018-CP-10-05739

Plaintiff,

**PLAINTIFF'S NOTICE OF MOTION  
AND MOTION TO RECONSIDER**

vs.

Free Kindergarten Association of Charleston,  
The Attorney General of the State of South  
Carolina, and Charleston County School  
District,

Defendants.

TO: THE ABOVE-NAMED DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

YOU WILL PLEASE TAKE NOTICE THAT Plaintiff Michael D. Royal ("Plaintiff" or "Royal"), by and through his undersigned counsel, respectfully moves this Court, pursuant to Rule 59(e), SCRCF, to reconsider and alter or amend its Order (hereinafter the "Order") entered on March 31, 2022, following the trial of this case, which made certain findings of facts and conclusions of law inconsistent with the trial record in this case. Plaintiff respectfully requests that this Court reconsider and alter or amend its Order as specified herein, based upon the grounds set forth below:

1. The Order omitted rulings on certain motions made prior to and/or during trial, namely: a) CCSD's Motion to Reconsider and to Alter or Amend Pursuant to SCRCF 59(e) and Applicable Law, filed December 10, 2021; and CCSD's Motion in Limine with Respect to Plaintiff's Pre-Trial Brief Claims of a Lack of Standing and the Non-Existence of a Justiciable Controversy Involving Charleston County School District, filed December 13, 2021.

2. The Order contains findings of fact that were not supported or proven by evidence in the record. Specifically, the Order's findings set forth in the subparagraphs below are not supported.

a. The record does not establish the Order's finding that "[d]uring the 20th century, public schools took on the role of providing kindergarten education to children in S.C." Order 3.

b. The mission of Defendant Free Kindergarten Association of Charleston ("FKAC") is not shown by evidence in the record. *Id.*

c. The record does not show that the 1971 resolution to amend FKAC's charter was authorized by a majority of the Board of Directors of FKAC. *Id.* The corporate charter was introduced into evidence, and Royal testified that it made no reference to a board of directors. *See* Transcript of the December 15, 2021 Trial ("Tr.") 169:7-25, 170:1-3;<sup>1</sup> *see also* Plaintiff's Trial Ex. 58. No evidence was given by any party of any election of a board of directors. The sole testimony with regard to FKAC came from the Plaintiff as to his reliance on those documents to establish June Wells' authority to act on behalf of FKAC.

d. No entities exist by the name of Charleston County School District #20 or Charleston County School Constituent District #20. Order 3-4, 21, 22.

e. No evidence exists in the record to support the Order's summary of and conclusions as to 1967 S.C. Act 340 and the effect thereof. Order 3-4, 20-22.

f. No evidence exists as to the last date that the kindergarten was operated by FKAC on the subject property, which bears the address of 34 Pitt Street, Charleston, South Carolina 29401 (the "Property"). Order 4.

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<sup>1</sup> Copies of the transcript excerpts cited herein are attached hereto as **Exhibit A**.

g. Regarding proof of June Wells' authority to conduct business on behalf of FKAC, the record shows that Plaintiff relied on many additional documents than the three (3) listed in the Order (Order 5-6) and many facts in addition to the fact that she was the only person with access to the Property (Order 5). This finding directly contradicts the abundance of uncontroverted evidence submitted and testified to by Plaintiff which established June Wells' authority. *See* Tr. 107:4-25, 109, 110:8-25, 111:1-17, 114:16-25, 116:15-25, 117:8-14, 118:11-17, 119:12-15 and 120:5-23.

h. The Order's finding that Royal did not rely upon FKAC's Resolution Designating Bank Depository dated June 25, 1997 (Plaintiff's Trial Ex. 16) ("1997 Resolution") as evidence of June Wells' authority (Order 6) is directly contradicted by the record. Plaintiff specifically testified that he relied upon the 1997 Resolution as evidence of Ms. Wells' authority. Tr. 119:3-24 and 120:1-25. Additionally, the Order's finding that there is no indication that Ms. Wells signed the 1997 Resolution as a member of FKAC's Board of Directors is unsupported by the record. Order 6.

i. The record does not support the Order's summary of and conclusions as to the 2010 affidavit of June Wells (Plaintiff's Trial Ex. 29A), namely as it relates to the authority of June Wells to act on behalf of FKAC. *Compare* Order 6, *with* Tr. 127:25 – 128:15, 129:12 – 130:24, 132:24 – 133:20. Indeed, opposing counsel argued that the instant litigation is related to the Charleston County Probate Court case in which the affidavit was filed and relied upon in a final order (Plaintiff's Trial Ex. 29). *See* Tr. 128:22 – 129:9. The affidavit clearly supports Ms. Wells' authority to sell the Property.

j. There is no evidence in the record proving that June Wells received a Letter or Notice of Intent to purchase the property for \$400,000. Order 7. No letter of intent was

admitted into evidence, nor was there any evidence of a viable purchase offer for that amount being made to FKAC or Ms. Wells. Additionally, letters of intent are customarily not binding on either party, and the record contains no evidence of any other proposed term of the purported letter of intent, making it impossible for the Court to determine that the letter offered economic value to FKAC exceeding that offered by Royal in the executed PSA. Accordingly, the Order erred by twice indicating that the Property's value may have been \$400,000 rather than the appraised value of \$315,200.

k. The record is devoid of any evidence that FKAC was "never ready to close" at any point from April 2013 to March 2018. *Compare* Order 7, with Tr. 105:1-12, 147:19-25, 148, 149:1-9, 150:2-4, 150:23-25, 151:1-25, 152:22-25; 153, 154:1-22, 164:22-25, 165:1-10, *and* Pl.'s Trial Exs. 46, 47, and 55.

l. The record contains no evidence which shows that FKAC was never in a position to close. Order 8; *see, e.g.*, Plaintiff's Trial Ex. 66 (FKAC admitting that, as of March 29, 2018, it intended to close on the Property and prior to April 2018 it was unaware of any alleged requirement that the AG approve of the subject sale).

m. Michael Robinson, MAI, SRI, of Charleston Appraisal Services, was solely qualified in the field of real estate appraising and was not qualified as an expert in the areas of mortgage or institutional lending. *See* Tr. 20:2-20. Therefore, the record contains no evidence to support the Court's findings on those topics. Order 8. Moreover, lending institution preferences have no bearing on this case as the subject transaction did not involve lender financing. *See* PSA (Pl.'s Trial Ex. 11) at ¶ 2.b.

n. No evidence exists in the record to establish that FKAC provided a copy of the real estate purchase and sale agreement at issue (Plaintiff's Trial Ex. 11) ("Agreement"

or “PSA”) to the AG because it was required to do so by S.C. Code Ann. §33-31-1202(f). Order 7. Nor does the statute contain any such requirement.

3. The Order omitted material facts demonstrated by evidence in the record. Specifically, the Order failed to consider the established facts set forth in the subparagraphs below.

a. FKAC’s charter was amended in 1971 pursuant to a resolution voted upon and authorized by the members of the FKAC, not its Board of Directors (Order 3). *See* Plaintiff’s Trial Exs. 61, 62.

b. FKAC, via counsel, stipulated that June Wells was the sole member of FKAC from November 23, 2010 until the date of her death, November 29, 2020. *See* Tr. 163:5-25, 164:1-10; Pl.’s Trial Ex. 66.

c. The overwhelming amount of evidence submitted by Plaintiff establishing June Wells’ authority. *See* Tr. 107:4-25, 109, 110:8-25, 111:1-17, 114:16-25, 116:15-25, 117:8-14, 118:11-17, 119:12-15, 120:5-23, 125:3-18, 127:25, 128:1-21, 130:14-25, 250:6-17, 268:12-25, 269:1-12, 275:13-17, 283:2-17, 286:5-9. *see also* Plaintiff’s Trial Exs. 12-26, 27A, 27-29, 29A, 30, 32, 38. The Court acknowledged Plaintiff’s abundance of support on the issue and allowed a cumulative proffer and admission of all of the documents relied upon as establishing authority. *See* Tr. 283:2-20

d. FKAC’s pleadings admit that Wells was authorized to sell the Property on behalf of FKAC. *See* FKAC’s Answer to Complaint at ¶7 (stating that if June Wells is the sole surviving member of FKAC, then she is “authorized to sell the aforesaid [P]roperty”); *see also* FKAC’s Reply to Crossclaim at ¶2 (stating that “Ms. June Murray Wells (‘Ms. Wells’) was and is the duly authorized director and last surviving member of the Free

Kindergarten Association of Charleston and that as such she has authority and had authority since approximately 1990 to represent the Free Kindergarten Association of Charleston.”).

e. The Order failed to specify the final deadline by which Royal and FKAC were to close on the transaction, which does not correspond to the date of appraisal valuation used as the opinion of fair market value.

f. Evidence that FKAC’s closing attorney opened a bank account for FKAC and prepared or had a deed prepared in preparation for closing. *See* Tr. 164: 22-25, 165:1-10; Pl.’s Trial Ex. 55.

g. Unrefuted evidence that Plaintiff acted in good faith in his dealings with FKAC, even at one point turning down a purchase opportunity offered to him by Wells which would have placed him in a financially beneficial position and FKAC in a financially less advantageous position than that of the PSA. Tr. 153:13 – 154:1, 209:4-9, 258:20 – 259:1-10, 264:13-23; Pl.’s Trial Ex. 47.

h. Unrefuted evidence that Plaintiff relied upon the contract to his detriment, solving title and tax problems for FKAC, developing a strategy for consolidation of storage units to save FKAC money, and physically assisting FKAC with moving the contents out of the building on the Property. Additionally, at all times after contract execution Plaintiff remained financially able to close. Tr. 103:12-24, 139:4-25, 140:1-7, 141:17-27, 142-146, 147:1-12; Pl.’s Tr. Exs. 32, 37, and 38

i. Evidence that FKAC rejected Plaintiff’s initial offer because it contained a firm and near closing date, which thereby led Plaintiff to revise his offer to provide an extremely flexible closing date so as to alleviate FKAC’s concerns about removing the

contents from the Property. *See* Tr: 87 -90, 92, 93, 94, 95:1-6 and 262:17-21; *see also* Plaintiff's Tr. Exs. 10 and 11.

j. Unrefuted evidence that the PSA's provision allowing FKAC to choose a closing date was inserted solely to suit FKAC's needs and was a provision solely in favor of FKAC. *See* Tr. 92:25, 93-94, 95:1-6, 103:25 – 106:3; *see also* Plaintiff's Trial Exs. 10 and 11.

k. Plaintiff's testimony that he intended to close and that his belief, based upon overt acts by FKAC and Ms. Wells, was that FKAC intended to close. Tr. 147:19-25, 148, 149:1-9, 150:2-4, 150:23-25, 151, 152:22 – 154:22, 164:22 – 165:10; Plaintiff's Trial Exs. 46, 47, and 55.

l. Plaintiff's reliance on FKAC's actions in hiring a closing attorney, opening a bank account and having a deed prepared as indicative of FKAC's intent to close. Tr. 162:26-25, 163:12-20, 164:22-25, 165:1-10; Plaintiff's Trial Exs. 55 and 66.

m. Plaintiff's actions to advance and facilitate the closing by assisting June Wells in the consolidation of her storage units and the removal of the contents of the Property. Tr. 146:9 – 147:1-8, 149:23 – 150:1.

4. Prior to the close of Plaintiff's presentation of evidence at trial, The Attorney General of the State of South Carolina (the "AG"), moved for non-suit as to whether the subject real estate "contract and [] potential sale was against public policy because it was less than fair market value." Tr. 324:18 – 325:14. The Court erred by considering and granting the AG's motion for non-suit. Rule 41(b), SCRPC, clearly and plainly provides that a defendant may only make such a motion "[a]fter the plaintiff in an action tried by the court without a jury **has completed the presentation of his evidence**[".]” Rule 41(b), SCRPC (emphasis added); *see also Johnson v. J.P.*



*Stevens & Co., Inc.*, 308 S.C. 116, 118, 417 S.E.2d 527, 528-529 (1992) (“Rule 41(b) allows the judge as the trier of facts to weigh the evidence, determine the facts and render a judgment against the plaintiff at the close of his case if justified.” (emphasis added)). Because Plaintiff had not finished presenting his case in chief (*see* Tr. 324:20 – 325:4), the Order erred as a matter of law.

5. The Order erred in granting the AG’s motion for non-suit because the AG’s motion was based on an alleged defense to enforcement of the subject contract, that it was purportedly contrary to public policy. However, Rule 41(b) motions for non-suit are only permitted on the basis that Plaintiff did not demonstrate a right to relief on his claims. The AG did not argue that Plaintiff failed to establish the elements of his breach of contract and specific performance claims.

a. Moreover, the record shows that Plaintiff demonstrated a right to relief on his claims. The testimony given at trial and the exhibits entered are replete with evidence of a valid contract, a breach of the same by FKAC in failing to timely close, partial execution of the contract by Royal, and Royal’s readiness, willingness, and ability to close on the transaction. *See, e.g.*, Tr. 147:19 – 149:9, 150:2-4, 150:23 – 154:22, 164:22 – 165:10; Plaintiff’s Trial Exs. 46, 47, and 55.

b. The Court also found in favor of Plaintiff on the primary issue of June Wells’ authority to execute the PSA and sell the Property on behalf of FKAC. *See* Tr. 339:14-20. The Court even stated that “if this were a private contract between two parties, I would uphold [Plaintiff’s] argument[.]” to enforce the PSA. Tr. 337:15-25. To present a right to relief in his case in chief, Plaintiff was only required to establish the elements of his two claims, but there is no requirement that he defeat opposing parties’ defenses, such as the AG’s claimed ability to invalidate contracts.

6. As to Ms. Wells' 2010 affidavit (Pl.'s Trial Ex. 29A) and the related Probate Court order (Pl.'s Trial Ex. 29), which the Order found that Royal relied upon as establishing Ms. Wells' authority, the Order unnecessarily and prejudicially editorialized the content of those documents, specifically by inserting the phrase "[not authority]" within the documents' text to equate capacity with lack of authority. Order 5-6 (finding that Exs. 29 and 29A stated that Ms. Wells had "capacity [not authority] to act on behalf of the [FKAC]").

7. The Order erred by quoting piecemeal parts of Plaintiff's Pre-Trial Brief (without citation thereto) out of context such that it misstated Plaintiff's contention as to the AG's authority. *Compare* Order 13 ("The Plaintiff contends that the Attorney General's authority pursuant to section 33-31-1202(f) is "detrimental to the public benefit"), *with* Pl.'s Pre-Trial Brief at 18-19 ("The Attorney General has made sweeping claims that his *parens patriae* authority allows him to invalidate a binding real estate contract freely entered into by FKAC and Royal."), *and* Pl.'s Pre-Trial Brief at 20 ("The parties disagree as to whether the AG has the authority to review and disapprove of the PSA and the sale contemplated therein."). Plaintiff's contention is that S.C. Code Ann. § 33-31-1202(f) does not provide the AG with the authority to review and invalidate a binding contract.

8. Additionally, the Order erred in concluding that Royal argued that the Memorandum of Purchase and Sale Agreement (Pl.'s Trial Ex. 31) ("Memorandum of PSA") provided notice to the AG. Order 11. The trial record contains no such contention by Royal.

9. The Order erred in considering and/or applying law that is inapplicable to the case at hand. This includes the errant considerations set forth in the following subparagraphs.

a. The Order erred by considering and applying the South Carolina Probate Code, S.C. Code Ann. § 62-7-101, *et seq.* (Order 11, 13), which does not apply to this

litigation, as said code only applies to express trusts and trusts created pursuant to statute, judgment, or decree. *See* S.C. Code Ann. § 62-7-102. This case does not involve an express trust, and no trust relating to FKAC, charitable or otherwise, has been created pursuant to any statute, judgment, or decree. Indeed, there was no claim or request in this case for the Court to find that a charitable trust existed, and no such finding was made in the Order.

b. The Order erred in considering U.S. Tax Court opinions (Order 17-18), IRS penalties affecting federal tax-exempt status (Order 15), and a law school journal article regarding authority of the Texas Attorney General (*id.*), none of which have any bearing on or relevance to this case.

c. The Order erred in relying upon inapplicable opinions concerning comity and interstate commerce (*Wiggins v. Postal Telegraph Co.*, 125 S.E. 568 (1924)), injuries incurred in a train collision (*Hinnant v. S. Ry. Co.*, 100 S.E. 709 (1919)), recovery of a gambling loss (*Berkebile v. Outen*, 426 S.E.2d 760 (1993)), enforcement of a private construction contract (*W & N Const. Co. v. Williams*, 472 S.E.2d 622 (1996)), and an unconstitutional statute (*Ricks v. Ficken*, 312 S.E.2d 715 (1984)). Order 19-20.

d. The Order erred in its heavy reliance upon pleadings filed in other cases and unpublished opinions, which have no precedential value, in reaching legal conclusions. *See* Order 12 (applying *S.C. Dep't of Mental Health v. Wilson*, Civil Action No. 2011-CP-40-00875); *see also id.* at 13 (discussing *Sisters of Charity v. Wilson*, Case No. 2016-CP-40-00087); *see also id.* at 14 (analyzing allegations in the Complaint filed in *Sloan Bros. v. Resurrected Treasure Ministries*, Civil Action No. 2020-CP-23-04725); *see also id.* (discussing *Calhoun Cty. Museum and Cultural Museum v. St. Matthew's Parish Episcopal*

*Church*, Case No. 2010-ES-09-00029); *see also id.* at 14-15 (considering two orders filed in *Baptist Found. of S.C., as Trustee v. Baptist Found. of S.C.*, Case Nos. 2014-GC-26-22, 2013-ES-26-00279).

e. The Order erred in considering the Uniform Declaratory Judgments Act, S.C. Code Ann. § 15-53-10, *et seq.*, in deciding on CCSD's request to recover attorneys' fees (Order 23), as no evidence was offered regarding CCSD's declaratory judgment claim and said claim was not adjudicated.

10. The case law relied upon in the Order to invalidate the PSA due to the AG's purported authority over nonprofit contracts is distinguishable from, and inapplicable to, the facts at hand, as discussed in the following subparagraphs.

a. The Order relied upon *Epworth Children's Home v. Beasley*, 365 S.C. 157, 616 S.E.2d 710 (2005) to find AG authority to disapprove of a sale. However, the opinion concerned a trustee's mismanagement of a testamentary trust which allocated funding and assets to a nonprofit corporation; thus, the funding testamentary trust was the charitable trust at issue. Therefore, the opinion's findings as to charitable trusts, which pertained to the management of testamentary trusts, should not be applied to the instant case which does not involve any testamentary or other express trust.

b. In *South Carolina Dept. of Mental Health v. McMaster*, 372 S.C. 175 (2007), the South Carolina Supreme Court found that "the doctrine of equitable deviation should be utilized to allow the property to be sold." *Id.* at 184. Thus, if the opinion should be utilized, it should be as support for FKAC proceeding with the PSA's sale to Royal for fair market value, with the resulting proceeds held in trust. Moreover, the Supreme Court relied upon language in the subject deeds conveying the property as a gift "for the

charitable purposes of the State Hospital for the Insane[,]” and the hospital’s continued funding by the General Assembly, as support for finding a charitable trust existed. *Id.* at 182-83. Conversely, FKAC purchased the Property for monetary consideration, and was funded solely by private investments. *See* Tr. 80:15-21, 81:19-24, 142:8-12, 192:6-15; *see also* Plaintiff’s Trial Exs. 32 and 38.

c. In addition to providing no precedential value as an unpublished trial court opinion, *Sisters of Charity v. Wilson*, Civil Action No. 2016-CP-40-00087 (Jan. 27, 2016) is factually distinct from the instant case in several significant respects. First, the opinion gives no indication that an actual contract was ever entered into between the parties. Rather, only a letter of intent (“LOI”) was mentioned as setting forth the sale terms, and the opinion made no mention of any closing date. Thus, in reading the opinion, there is no way to determine the duration of time between the execution of the LOI and the transaction’s closing. As a result, the opinion does not provide a basis for voiding the PSA based upon the AG’s determination as to a date of valuation. Additionally, the *Sister of Charity* sales price did not match the appraised value of the property, but the Court determined that it fell within an acceptable range of values and upheld the sale price.

11. The Court erred in its interpretation and application of law.

a. The Court erred by failing to recognize that FKAC is not subject to or governed by the South Carolina Nonprofit Corporation Act of 1994, S.C. Code Ann. § 33-31-101, *et seq.* (the “1994 Act”). *See* Plaintiff’s Memorandum in Opposition to Defendant Charleston County School District’s Motion for Summary Judgment filed December 14, 2021, pp. 2-3 (and exhibits cited therein, admitted as Pl.’s Trial Exs. 59, 63, 76); *see also* Tr. 301:1 – 303:8. No evidence was presented showing that FKAC is a public benefit,

mutual benefit, or religious corporation as defined in the 1994 Act, or that FKAC was otherwise subject to the 1994 Act. Even though Plaintiff presented evidence on the issue, the Order made no evaluation or determination as to whether FKAC was governed by the 1994 Act.

b. Plaintiff, the buyer under the PSA, was not required to give notice to the AG of the PSA or sale of the Property. Order 7, 11, 16; *see also* S.C. Code Ann. § 33-31-1202(f). Nor is there any factual or legal basis for finding that Plaintiff was required to give notice of the PSA to CCSD. *See* Order 7, 11. Likewise, there is no requirement that the Memorandum of PSA recorded in the Register of Deeds Office ((Pl.'s Trial Ex. 31) include the purchase price or be enrolled with the R.O.D. in the AG's or CCSD's name. *See id.*

c. The Order omitted key portions of opinions quoted within the Order that support enforcement of the PSA and sale. *See* Order 12-13 (“The Court approved the sale of the property after expert testimony from an appraiser which showed that the sale price was consistent with his opinion about the value of the property.”) (quoting *S.C. Dep’t of Mental Health v. Wilson*, Civil Action No. 2011-CP-40-00875); *see also id.* 15 (“the court stated that it ‘cannot find support for the acceptance and approval of the [contract] where there is no appraisal or evidence that can support’” the purchase price) (quoting *Baptist Found of S.C., as Trustee v. Baptist Found. of S.C.*, Case Nos. 2014-GC-26-22, 2013-ES-26-00279). In the instant matter, the expert appraiser offered by the AG testified that he performed an appraisal of the Property in December 2012 that valued the property at \$315,200 (Tr. 30:24 – 31:5), which is the sale price in the PSA.

d. The Court erred by concluding that the PSA violated public policy (Order 16-20). South Carolina law is well established that contracts freely entered into by willing parties for consideration are valid, and public policy dictates those agreements should be enforced. *See, e.g., Carolina Amusement Co. v. Connecticut Nat'l Life Co.*, 313 S.C. 215, 437 S.E.2d 122, 126 (Ct. App. 1993); *see also Restatement (Second) of Contracts* § 24 (1981) (“an offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.”). Moreover, no party entered evidence to show the contract was against any public policy – the only argument made was that the AG believed the sale price, which was equal to the Property’s appraised value at the time of contract and acceptable to FKAC, to be less than fair market value as of an arbitrary date in June of 2018. Additionally, the delayed closing date was chosen by, and allowed solely to accommodate, FKAC and its inability to clear the Property of its contents. The delayed closing therefore should not be used to deprive Plaintiff of his contract rights. Plaintiff was under no notice requirement for the transaction. Any notice requirement was on the part of FKAC, not Plaintiff. The appraisal commissioned by the AG does not contain a valuation date that is reasonably related to the transaction at issue, as dictated by South Carolina law. *See infra* ¶ 12.a. There is simply no evidence to support a finding that the purchase price was inadequate as of the date of the PSA. Moreover, the record is wholly devoid of any evidence the contract was contrary to public policy. Rather, the record conclusively establishes that there was a willing buyer for the fair market value price set forth in the PSA. *See* Tr. 30:21-25, 31:1-8, 79:18 – 80:1, 219:11-13, 221:19-25, and 222:7-16.

e. Relatedly, the Order erred as it failed to state which public policy was purportedly violated by the PSA (unless the public policy is the AG's opinion as to a proper valuation date). Additionally, the Order contains no legal standard by which to determine if an agreement violates public policy.

f. Contrary to the Order's conclusions, S.C. Code Ann. § 33-31-1202(f) does not provide the AG with authority to object to or approve or disapprove of a sale. Order 7-8, 11-15, 23 (awarding FKAC's attorneys' fees be paid from the sale proceeds because it had to defend against claims "as a result of its refusal to close without the consent of the Attorney General"). Section 33-31-1202(f) provides:

A public benefit or religious corporation must give written notice to the Attorney General twenty days before it sells, leases, exchanges, or otherwise disposes of all, or substantially all, of its property if the transaction is not in the usual and regular course of its activities unless the Attorney General has given the corporation a written waiver of this subsection.

S.C. Code Ann. § 33-31-1202(f).

g. The only authority granted by the statute is to require notice of a sale of all or substantially all of a nonprofit corporation's assets. *See id.* The Order erred in finding that the only logical conclusion of the statute's purpose was to allow the AG to voice objection (or consent) to a sale. Order 11. Yet neither the record nor the Order contains any legal support for that conclusion. Indeed, a fair reading of the statute could logically conclude that its purpose was to allow the AG to determine if he or she should file an action to dissolve the company under S.C. Code Ann. § 33-31-1430(a)(1).<sup>2</sup>

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<sup>2</sup> A determination as to FKAC should have been made in 2010, when the AG provided June Wells with an affidavit for execution which stated that Wells consented to the termination of FKAC's sole source of funding, and that the kindergarten on the Property "is not currently operating . . . and does not have plans to begin operating again." Pl.'s Trial Ex. 29A at ¶¶ 5, 7, 8; *see also* Pl.'s Trial Ex. 28.



h. As the Order relied upon S.C. Code Ann. § 33-31-1202 as providing the AG authority over nonprofit contracts, it erred in failing to recognize that § 33-31-1202(a)-(b) provide that a nonprofit corporation may dispose of all, or substantially all, of its property without the AG's approval.

i. The Order erred as it cited to and quoted statutory and common law but failed to apply said law to the facts of the case.

12. The Order ignored or failed to consider or apply controlling precedent, constituting reversible error. These errors include failure to consider or apply the following:

a. The Order erred as it failed to recognize that the proper valuation date for real property under South Carolina law is the date of contract. *See Shannon v. Freeman*, 109 S.E. 406 (1921) (“the question of adequacy of price must be considered *as of the date of the contract*, and the subsequent enhancement in value would not justify refusal of specific performance.”) (emphasis in original) (citing 3 Elliott on Contracts, § 2286 stating “the mere fact that the subject matter of the contract subsequently increased in value would be no defense to a suit for specific performance.”). The adequacy of the sales price in the PSA at issue must be determined as of the date the contract was entered pursuant to well-established principles of South Carolina law.

b. The Court failed to consider or apply S.C. Code Ann. § 33-31-304, which provides that “the validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act[,]” except “in a proceeding brought against the corporation to enjoin an act where a third party has not acquired rights. The proceeding may be brought by the Attorney General, a director, or by a member or members in a derivative proceeding.” S.C. Code Ann. § 33-31-304(a)-(b). Thus, any challenge to

FKAC's execution of the PSA on the basis that June Wells purportedly lacked authority was improper, as no permissible action was brought in accordance with § 33-31-304.

c. Along the same vein, the Order failed to consider S.C. Code Ann. § 33-31-302, which provides that nonprofit corporations have "the same powers as an individual to do all things necessary or convenient to carry out its affairs including, without limitation, power . . . to sell, convey, mortgage, pledge, lease, exchange, and otherwise dispose of all or any part of its property." S.C. Code Ann. § 33-31-302(5).

d. The Order failed to consider that Plaintiff, shortly after the PSA's execution, obtained a certificate of existence for FKAC from the Secretary of State (Pl.'s Trial Ex. 63), which "may be relied upon as conclusive evidence that the domestic or foreign corporation is in existence or is authorized to transact business in this State." S.C. Code Ann. § 33-31-128(c). When analyzed with subparagraphs b. and c. above, there is no doubt that FKAC had unfettered authority to decide to sell the Property to Plaintiff, free of interference.

e. As supported by the other grounds set forth herein, the Order erred by not considering the totality of the circumstances relevant to whether the PSA was contrary to public policy.

f. The Order ignored public policies in favor of enforcing the Agreement, such as the freedom to contract, good faith and fair dealing, and reliance upon the statutory laws governing nonprofit operations.

g. The Order directs that FKAC be dissolved after the Property's sale, but no proceeding has been initiated to allow for judicial dissolution under S.C. Code Ann. § 33-31-1430.

13. The Order erred by making conclusions of law not supported by the record. These errant legal conclusions in the Order included:

a. The Order does not set forth a supporting source for its conclusion that the AG is concerned with whether the value of nonprofit assets is “maintained in the ‘charity stream[.]’” Nor does the Order attempt to define the quoted term, “charity stream.”

b. Relatedly, the Order failed to take notice of the fact that the AG stated that he has no opinion as to the proper entity entitled to receive FKAC’s residual assets upon dissolution. *See* Pl.’s Trial Ex. 82 at no. 17. It is unclear, then, how the AG plans to maintain FKAC’s residual assets in the nebulous charity stream.

c. The Order erred in concluding that a sale of an undervalued non-profit asset “provides a benefit to private interests” and “results in a ‘gift’ to the buyer[.]” Order 15. The record does not contain support for this finding and the Order failed to set forth legal support. The Order also erred in comparing the PSA’s sale to an “illegal ‘private inurement’ under federal tax laws[.]” *Id.*

d. The Order erred in concluding that FKAC “was never a willing seller” under the PSA because FKAC declined to proceed with the sale. Order 16. Such a finding must assume there is no contract law and eliminates the right of any purchaser to bring a strict performance claim – any breaching party could simply state that there was no willing seller because the seller never declined to close.

e. Additionally, the finding that FKAC was not a willing seller because the AG did not approve the sale is in direct conflict with the Order’s conclusion that the Court, not the AG, has the authority to approve of the sale.

f. The Order's conclusion that "FKAC did not indicate any willingness to close until" April 2018 is unsupported by the record. *See* Tr. 147:19-25, 148, 149:1-9, 150:2-4, 150:23-25, 151, 152:22 – 154:22, 164:22 – 165:10; Plaintiff's Trial Exs. 46, 47, and 55.

g. The Order erred in its determination of the evidentiary value of the June Wells' 2010 affidavit and FKAC's 1997 Resolution. These documents were not submitted as proof that the sale of the Property was authorized or that June Wells was given specific authority to execute such a sale. They were submitted as part of a group of cumulative evidence relied upon by Plaintiff in evaluating June Wells' authority to act on behalf of FKAC. Order 6; *see* Tr. 102:6 – 103:24; Pl.'s Trial Exs. 16, 29, and 29A

h. The Order erred in concluding that CCSD is entitled to the sale proceeds of FKAC's asset, the Property, as CCSD, nor any other party, presented any evidence or argument at trial to support the finding. *See, e.g.*, Tr. 324:7-18. Moreover, evidence exists which contradicts, or casts doubt upon, this finding. Such evidence includes the deposition testimony of the CCSD's Rule 30(b)(6), SCRCF, designee, as well as the AG's statement that it has no opinion as to the entity entitled to receive those sale proceeds. *See* Pl.'s Trial Ex. 74 (Transcript of the Rule 30(b)(6) Deposition of CCSD), at 114:13-115:23 (When asked how constituent district 20 is related to CCSD, the witness answered, "I don't know."); *see* Pl.'s Trial Ex. 82 at no. 17.

14. There is no evidence in the record to support a finding that the parties were unequal in bargaining power. No evidence was proffered relating to June Wells' comparative bargaining position in the contract negotiation, or Ms. Wells' real estate acumen. The factual findings concerning Plaintiff's educational and work background were solicited through deposition

testimony, but his deposition was not introduced at trial nor did he testify at trial regarding his educational or professional background. Similarly, no evidence was introduced at trial relating to Ms. Wells' educational and work background.

a. Additionally, the Order erred in considering bargaining power, as no party made any allegation that Royal held, or took advantage of, superior bargaining power to FKAC. Moreover, there is no legal precedent that the presence of unequal bargaining power renders a contract in violation of public policy.

15. The Order contains contradictory findings or conclusions. The Order concluded that FKAC was not a willing seller, and that it could not close on the transaction, because the AG would not give his approval for the same. *See* Order 16. However, the Order also found that the AG has authority only to object to a sale, and that the Court must render approval or disapproval. *See* Order 14.

16. The Order erred in ignoring or failing to consider or analyze the legal standard for determining a person's authority to act on behalf of a corporation or entity, including the doctrines of actual and apparent authority.

17. The Order's finding that June Wells did not have any type of authority to execute the PSA on behalf of FKAC for the sale of the Property (Order 10) is inconsistent with and contradicted by the evidence and the Court's findings and rulings made at trial. After consideration of the substantial amount of evidence relating to Ms. Wells' authority, the Court decided at trial that it was "going to find that she did have the authority to act[.]" Tr. 339:14-17; *see also* Tr. 57:25 – 59:25, 75:11 – 77:11, 305:6 – 308:6, 317:25 – 318:9, 320:3 – 321:14 (containing discussion of evidence supporting actual and apparent authority of June Wells to act for FKAC).

a. Further supporting a finding that Ms. Wells had authority, the Court, at trial, held that the contract would be valid and enforceable except for the fact that it involved a nonprofit entity, which made the contract and transaction subject to the AG's review and approval. Tr. 335:16 – 337:20, 341:22 – 342:10, 343:7-18 (the Court found “that the contract is not to be enforced between the parties because they did not get approval from the Attorney General's office. . . if [Royal] were in a private contract with the other opposing party, they wouldn't have to do that.”).

18. Additionally, the Order erred in considering and ruling upon the issue of June Well's authority as part of the AG's motion for non-suit. Order 9-10. The issue of June Wells' authority was not encompassed within the AG's motion for nonsuit – the AG only moved for non-suit as to whether “this contract and this potential sale was against public policy because it was less than fair market value.” Tr. 324:18 – 325:14. In fact, the AG stated at trial that it was “not taking a position on authority[.]” Tr. 326:20-24; *see also* Tr. 308:24-25.

19. A considerable portion of the Order is devoted to determining whether FKAC gave the AG statutory notice of the sale under S.C. Code Ann. § 33-31-1202 via correspondence dated April 4, 2018. No party disputed that said communication provided statutory notice to the AG.

WHEREFORE, Plaintiff Michael D. Royal, for the grounds and reasons set forth herein, respectfully requests that this Court reconsider its March 31, 2022 Order, and alter or amend the same as set forth herein. The instant motion is timely filed under Rule 59(e), SCRCPP, and the undersigned hereby certifies and affirms, pursuant to Rule 11, SCRCPP, that consultation with opposing counsel regarding the matters contained in this motion would serve no useful purpose.

[SIGNATURE FOLLOWS]

s/Evan P. Williams

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*COUNSEL FOR PLAINTIFF*

*MICHAEL D. ROYAL*

April 8, 2022

Mt. Pleasant, South Carolina

|                                    |   |                                                  |
|------------------------------------|---|--------------------------------------------------|
| STATE OF SOUTH CAROLINA            | ) | IN THE COURT OF COMMON PLEAS                     |
|                                    | ) | NINTH JUDICIAL CIRCUIT                           |
| COUNTY OF CHARLESTON               | ) | CASE NO.: 2018-CP-10-5739                        |
|                                    | ) |                                                  |
| Michael D. Royal                   | ) |                                                  |
|                                    | ) |                                                  |
| Plaintiff,                         | ) | <b><u>DEFENDANT CHARLESTON COUNTY SCHOOL</u></b> |
|                                    | ) | <b><u>DISTRICT'S NOTICE OF MOTION AND</u></b>    |
| vs.                                | ) | <b><u>MOTION TO EXCLUDE AND STRIKE</u></b>       |
|                                    | ) |                                                  |
| Free Kindergarten of Charleston,   | ) |                                                  |
| The Attorney General of the State  | ) |                                                  |
| Of South Carolina and the          | ) |                                                  |
| Charleston County School District, | ) |                                                  |
|                                    | ) |                                                  |
| Defendants.                        | ) |                                                  |

TO: THE ABOVE-NAMED PLAINTIFF, MICHAEL D. ROYAL AND DEFENDANTS, FREE KINDERGARTEN OF CHARLESTON AND THE ATTORNEY GENERAL OF THE STATE OF SOUTH CAROLINA, AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that the Defendant, Charleston County School District ("CCSD"), by and through its undersigned counsel, will move before the presiding Judge or Master in Equity of the Ninth Judicial circuit at a time and place to be arranged by the Court and counsel involved for an Order excluding and striking the documents designated and attached as "Exhibits 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27A, 27, 30, 54A, 71, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, and 94" in Plaintiff, Michael Royal's counsel's letter to The Honorable Julie J. Armstrong, Charleston County Clerk of Court, dated March 30, 2022, wherein Plaintiff seeks to file these documents as "trial exhibits" in the trial of this action. This Motion is made pursuant to the South Carolina Rules of Civil Procedure and South Carolina Rules of Evidence and seeks an order excluding and striking the above-referenced documents from the court record in this matter.

This Motion is made on the grounds set forth in the letter of the undersigned counsel for CCSD, dated April 8, 2022, and attached hereto as Exhibit 1.

This Motion is based upon, supported by, and made upon the grounds set forth herein, as well as the duly recorded official transcript of the trial before this court, the complete files and records in this action, any oral arguments and oral and documentary evidence as may be allowed at the hearing of this motion, any affidavits and/or supporting memorandums of law that may be provided prior to or at the hearing of this motion, and any applicable statutory, regulatory and case law, and rules of court.



Respectfully submitted,

LAW OFFICE OF A. BRIGHT ARIAIL, LLC

By: /s/ A. Bright Ariail  
A. Bright Ariail (SC BAR 69570)  
125E Wappoo Creek Drive, Suite 202  
Charleston, South Carolina 29412

Warren W. Ariail (SC BAR 6514)  
ARIAIL LAW FIRM, LLC  
125E Wappoo Creek Drive, Suite 202  
Charleston, South Carolina 29412

*Attorneys for Charleston County School District*

April 8, 2022  
Charleston, South Carolina

Rule 11, SCRCF Certification:

Undersigned counsel certifies that she has not contacted counsel for Plaintiff concerning this Notice of Motion and Motion to Exclude and Strike insomuch as consultation would serve no useful purpose.

By: /s/ A. Bright Ariail  
A. Bright Ariail

April 8, 2022

# Law Office of A. Bright Ariail, LLC

April 8, 2022

**VIA EMAIL AND E-FILE**

The Honorable Mikell R. Scarborough  
Charleston County Judicial Center  
100 Broad Street, Suite 266  
Charleston, SC 29401

Re: Michael D. Royal v. Free Kindergarten Association of Charleston *et al.*  
*C/A No. 2018-CP-10-5739*

Dear Judge Scarborough:

I am in receipt of two letters from Bybee & Tibbal's dated March 30, 2022; specifically, 1) a cover letter accompanying various documents it has filed purportedly as "exhibits admitted at the trial of this action" which includes an index of those documents (the "Document Letter"), and 2) a letter providing three additional comments related to the proposed orders filed in this matter (the "Order Letter").

By this letter, I am responding to the Document Letter and Comment III. of the Order Letter on behalf of Charleston County School District ("CCSD"). Please be advised that CCSD is filing a Motion to Exclude and Strike certain documents filed by Plaintiff as "trial exhibits" contemporaneously with this letter.

Concerning the documents which Plaintiff claims are "exhibits admitted at the trial of this action", CCSD offers the following comments and objections:

1. CCSD agrees with the Index of Exhibits found on Pages 4 – 6 of the transcript of the trial of this matter. This index provides a list of documents identified and indicates, by exhibit number, if they were received into evidence. Additionally, it indicates that documents identified by the Plaintiff as Exhibits 12, 13 and 14 were received as proffers, not exhibits.
2. With the exception of the documents discussed in Comment 1 above, no other documents listed in the Document letter and filed with the Charleston County Clerk of Court via e-filing were authenticated, offered into evidence or admitted into evidence.

bright@brightariaillaw.com

125E Wappoo Creek Drive  
Suite 202  
Charleston, SC 29412

843/814-8805

EXHIBIT 1

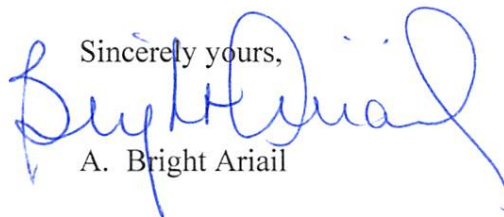
R. p. 1509

3. With the exception of the documents discussed in Comment 1 above, many of the other documents listed in the Document letter and filed via e-filing were not even identified during the trial of this matter.
4. With the exception of the documents discussed in Comment 1 above, neither CCSD nor any other defendant was given the opportunity to object to the admission of these documents.
5. With the exception of Documents 12, 13 and 14, no other documents were specifically proffered during the trial of this matter. While some discussions were held, there was never any indication by Plaintiff of which numbered documents it wanted proffered.
6. Contrary to Plaintiff's contention that Mr. Stringer, counsel for Free Kindergarten Association of Charleston ("FKAC"), "opened the door" on certain unspecified documents during his cross-examination of Royal, Mr. Stringer's questioning only addressed 1) Exhibit 11 – Purchase and Sale Agreement, 2) a county tax record which was not admitted, and 3) that there were ". . . no bylaws that you were aware of pointing Ms. Wells as a director, board member, or anything else . . ." and ". . . no resolution allowing her to sign the contract . . ." See Tr. 201: 5-14.
7. CCSD attaches hereto a Table of Objections to Proposed Exhibits which provides specific objections to each objectionable document. See Exhibit A.

**Charleston County School District hereby objects to any and all purported exhibits other than the exhibits contained within the Index of Exhibits found on Pages 4-6 of the transcript of the trial of this matter. See Exhibit B.**

Thank you for your consideration in this matter.

With kindest regards, I am

Sincerely yours,  
  
 A. Bright Ariail

Enclosure

cc: All counsel of record (via email only)

| <b><u>PLAINTIFF'S<br/>EXHIBIT NUMBER</u></b> | <b><u>DOCUMENT DESCRIPTION</u></b>                               | <b><u>CCSD'S OBJECTIONS TO PROPOSED EXHIBIT</u></b>                                                                                                                                                                                                                                                                                                                                                                        |
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| 12                                           | Letter from Dodds to Wells "with Draft Lease" (11/22/93)         | Accepted as Proffer Only - Defendant CCSD objects to this document being filed as an exhibit as follows:<br><ol style="list-style-type: none"> <li>1) Document was incomplete as it did not include the "Draft Lease"</li> <li>2) Inadequate/No Foundation</li> <li>3) No testimony as it who prepared it</li> <li>4) Not authenticated</li> <li>5) Hearsay</li> <li>6) Not admitted into evidence by the Court</li> </ol> |
| 13                                           | SC Dept of Revenue Withholding Tax Change of Address Form (1997) | Accepted as Proffer Only - Defendant CCSD objects to this document being filed as an exhibit as follows:<br><ol style="list-style-type: none"> <li>1) Inadequate/No Foundation</li> <li>2) No testimony as it who prepared it</li> <li>3) Not authenticated/ not certified business record</li> <li>4) Hearsay</li> <li>5) Not admitted into evidence by the Court</li> </ol>                                              |
| 14                                           | Letter from Teresa Miller to Cheryl Ramsey (3/4/97)              | Accepted as Proffer Only - Defendant CCSD objects to this document being filed as an exhibit as follows:<br><ol style="list-style-type: none"> <li>1) Inadequate/No Foundation</li> <li>2) No testimony as it who prepared it</li> <li>3) Not authenticated</li> <li>4) Hearsay</li> <li>5) Not admitted into evidence by the Court</li> </ol>                                                                             |
| 15                                           | SC Dept of Revenue Letter to FKAC (3/19/97)                      | Accepted as Proffer Only - Defendant CCSD objects to this document being filed as an exhibit as follows:<br><ol style="list-style-type: none"> <li>1) Inadequate/No Foundation</li> <li>2) No testimony as it who prepared it</li> <li>3) Not authenticated/ not certified business record</li> <li>4) Hearsay</li> <li>5) Not admitted into evidence by the Court</li> </ol>                                              |

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| 17 | SC Dept of Revenue Notice (6/27/97)                                                                                                                                          | Defendant CCSD objects to this document being filed as an exhibit as follows:<br>1) Not identified and/or marked during trial as an Exhibit<br>2) No Foundation<br>3) No testimony as to who prepared it<br>4) Not authenticated/ not certified business record<br>5) Hearsay<br>6) Not offered as exhibit by Plaintiff<br>7) No opportunity for opposing counsel to object to this document<br>8) Not admitted into evidence by the Court                                                                                                                                               |
| 18 | FKAC Quarterly Federal Tax Return (6/26/97)                                                                                                                                  | Defendant CCSD objects to this document being filed as an exhibit as follows:<br>1) Not identified and/or marked during trial as an Exhibit<br>2) No Foundation<br>3) No testimony as to who prepared it<br>4) Not authenticated/ not certified business record<br>5) Hearsay<br>6) Not offered as exhibit by Plaintiff<br>7) No opportunity for opposing counsel to object to this document<br>8) Not admitted into evidence by the Court                                                                                                                                               |
| 19 | Duplicate of First Federal Fixed Rate Certificate (Original dated May 9, 1991, Duplicate dated 7/3/97)<br>Corporate Resolution (7/3/97); and<br>Signatory Cards (2) (3/5/97) | Defendant CCSD objects to these three documents being filed as an exhibit as follows:<br>1) Documents are individual documents from various different dates and therefore are not related/not a single, integrated document<br>2) Not identified and/or marked during trial as an Exhibit<br>3) No Foundation<br>4) No testimony as to who prepared it<br>5) Not authenticated/ not certified business record<br>6) Hearsay<br>7) Not offered as exhibit by Plaintiff<br>8) No opportunity for opposing counsel to object to this document<br>9) Not admitted into evidence by the Court |
| 20 | Various FKAC checks signed by Wells (all dated September 11, 1997)                                                                                                           | Defendant CCSD objects to this document being filed as an exhibit as follows:<br>1) Not identified and/or marked during trial as an Exhibit                                                                                                                                                                                                                                                                                                                                                                                                                                              |

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|    |                                                                                    | <ul style="list-style-type: none"> <li>2) No Foundation</li> <li>3) No testimony as it who prepared it</li> <li>4) Not authenticated/ not certified business record</li> <li>5) Hearsay</li> <li>6) Not offered as exhibit by Plaintiff</li> <li>7) No opportunity for opposing counsel to object to this document</li> <li>8) Not admitted into evidence by the Court</li> </ul>                                                                                                                                                          |
| 21 | Letter from SC Employment Security Commission (9/22/1997)                          | <p>Defendant CCSD objects to this document being filed as an exhibit as follows:</p> <ul style="list-style-type: none"> <li>1) Not identified and/or marked during trial as an Exhibit</li> <li>2) No Foundation</li> <li>3) No testimony as it who prepared it</li> <li>4) Not authenticated/ not certified business record</li> <li>5) Hearsay</li> <li>6) Not offered as exhibit by Plaintiff</li> <li>7) No opportunity for opposing counsel to object to this document</li> <li>8) Not admitted into evidence by the Court</li> </ul> |
| 22 | Blank Employer's Quarterly Federal Tax Form, Addressed to FKAC c/o Wells (undated) | <p>Defendant CCSD objects to this document being filed as an exhibit as follows:</p> <ul style="list-style-type: none"> <li>1) Not identified and/or marked during trial as an Exhibit</li> <li>2) No Foundation</li> <li>3) No testimony as it who prepared it</li> <li>4) Not authenticated/ not certified business record</li> <li>5) Hearsay</li> <li>6) Not offered as exhibit by Plaintiff</li> <li>7) No opportunity for opposing counsel to object to this document</li> <li>8) Not admitted into evidence by the Court</li> </ul> |
| 23 | Bank Statement from Southtrust Bank for FKAC c/o Wells (12/31/2001)                | <p>Defendant CCSD objects to this document being filed as an exhibit as follows:</p> <ul style="list-style-type: none"> <li>1) Not identified and/or marked during trial as an Exhibit</li> <li>2) No Foundation</li> <li>3) No testimony as it who prepared it</li> <li>4) Not authenticated/ not certified business record</li> </ul>                                                                                                                                                                                                    |

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|    |                                                                                | <ul style="list-style-type: none"> <li>5) Hearsay</li> <li>6) Not offered as exhibit by Plaintiff</li> <li>7) No opportunity for opposing counsel to object to this document</li> <li>8) Not admitted into evidence by the Court</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                                              |
| 24 | Various Utility Bills addressed to FKAC and City of Charleston (various dates) | <p>Defendant CCSD objects to these documents being filed as an exhibit as follows:</p> <ul style="list-style-type: none"> <li>1) Documents are individual documents from various different dates and therefore not related/not a single document</li> <li>2) Not identified and/or marked during trial as an Exhibit</li> <li>3) No Foundation</li> <li>4) No testimony as to who prepared it</li> <li>5) Not authenticated/ not certified business record</li> <li>6) Hearsay</li> <li>7) Not offered as exhibit by Plaintiff</li> <li>8) No opportunity for opposing counsel to object to this document</li> <li>9) Not admitted into evidence by the Court</li> </ul> |
| 25 | Various Letters from Wachovia Bank (various dates)                             | <p>Defendant CCSD objects to these document being filed as an exhibit as follows:</p> <ul style="list-style-type: none"> <li>1) Documents are individual documents from various different dates and therefore not related/not a single document</li> <li>2) Not identified and/or marked during trial as an Exhibit</li> <li>3) No Foundation</li> <li>4) No testimony as to who prepared it</li> <li>5) Not authenticated/ not certified business record</li> <li>6) Hearsay</li> <li>7) Not offered as exhibit by Plaintiff</li> <li>8) No opportunity for opposing counsel to object to this document</li> <li>9) Not admitted into evidence by the Court</li> </ul>  |
| 26 | Blank Check                                                                    | <p>Defendant CCSD objects to this document being filed as an exhibit as follows:</p> <ul style="list-style-type: none"> <li>1) Not identified and/or marked during trial as an Exhibit</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |

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|      |                                                                     | <ul style="list-style-type: none"> <li>2) No Foundation</li> <li>3) No testimony as it who prepared it</li> <li>4) Not authenticated/ not certified business record</li> <li>5) Hearsay</li> <li>6) Not offered as exhibit by Plaintiff</li> <li>7) No opportunity for opposing counsel to object to this document</li> <li>8) Not admitted into evidence by the Court</li> </ul>                                                                                                                                                                                                                                                    |
| 27 A | Various documents related to roof repair                            | <p>Defendant CCSD objects to this document being filed as an exhibit as follows:</p> <ul style="list-style-type: none"> <li>1) Documents are individual documents and not a single document</li> <li>2) Not identified and/or marked during trial as an Exhibit</li> <li>3) No Foundation</li> <li>4) No testimony as it who prepared it</li> <li>5) Not authenticated/ not certified business record</li> <li>6) Hearsay</li> <li>7) Not offered as exhibit by Plaintiff</li> <li>8) No opportunity for opposing counsel to object to this document</li> <li>9) Not admitted into evidence by the Court</li> </ul>                  |
| 27   | Handwritten letter with purported attachments                       | <p>Defendant CCSD objects to this document being filed as an exhibit as follows:</p> <ul style="list-style-type: none"> <li>1) It is unclear of the second page documents were part of the page one document</li> <li>2) Not identified and/or marked during trial as an Exhibit</li> <li>3) No Foundation</li> <li>4) No testimony as it who prepared it</li> <li>5) Not authenticated/ not certified business record</li> <li>6) Hearsay</li> <li>7) Not offered as exhibit by Plaintiff</li> <li>8) No opportunity for opposing counsel to object to this document</li> <li>9) Not admitted into evidence by the Court</li> </ul> |
| 30   | Check from Wells (Not FKAC as indicated by Plaintiff)<br>(12/22/12) | <p>Defendant CCSD objects to this document being filed as an exhibit as follows:</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |



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|     |                                                                                                                                                                                                                                                                          | <ol style="list-style-type: none"> <li>1) Not identified and/or marked during trial as an Exhibit No Foundation</li> <li>2) No testimony as it who prepared it</li> <li>3) Not authenticated/ not certified business record</li> <li>4) Hearsay</li> <li>5) Not offered as exhibit by Plaintiff</li> <li>6) No opportunity for opposing counsel to object to this document</li> <li>7) Not admitted into evidence by the Court</li> </ol>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| 54A | As listed by Plaintiff, this is "Email Correspondence between William Wells and Michael Royal . . .[dated] 3/13/13". This is incorrect; rather, per the transcript at 160, this is an Email from Stringer to Royal, cc: Tread Josey and Bill Wells dated March 13, 2018. | <p>Defendant CCSD objects to this document being filed as an exhibit as follows:</p> <ol style="list-style-type: none"> <li>1) Not offered as exhibit by Plaintiff</li> <li>2) No opportunity for opposing counsel to object to this document</li> <li>3) Not admitted into evidence by the Court</li> </ol>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| 71  | Email Royal to Stringer, cc: Josey (5/14/18)                                                                                                                                                                                                                             | <p>Defendant CCSD objects to this document being filed as an exhibit as follows:</p> <ol style="list-style-type: none"> <li>1) Not offered as exhibit by Plaintiff</li> <li>2) No opportunity for opposing counsel to object to this document</li> <li>3) Not admitted into evidence by the Court</li> </ol>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| 74  | Transcript of Deposition of CCSD 30(b)(6) designee (11/22/21)                                                                                                                                                                                                            | <p>Defendant CCSD objects to this document being filed as an exhibit as follows:</p> <ol style="list-style-type: none"> <li>1) <b>Use of the transcript of this witness in the trial of this matter, rather than his live testimony, is inappropriate insomuch as he was available and does not otherwise meet the requirements of SCRCP 32(a)(3) which allows for the use of a deposition rather than live testimony.</b></li> <li>2) <b>Counsel for Plaintiff indicated during trial that he would only enter excerpts of this deposition as an exhibit; accordingly, counsel for CCSD objected to this during the trial insomuch as had not provided counsel for CCSD with the excerpts of the 30(b)(6) deposition of CCSD that it intended to enter at least one day prior to trial per SCRCP 32(a)(5).</b></li> <li>3) Not included in plaintiff's trial notebook or otherwise provided to opposing counsel during trial</li> <li>4) Not identified and/or marked during trial as an Exhibit</li> </ol> |

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|    |                                            | <ul style="list-style-type: none"> <li>5) No Foundation</li> <li>6) Not authenticated/ not certified business record</li> <li>7) Hearsay</li> <li>8) Not offered as exhibit by Plaintiff</li> <li>9) No opportunity for opposing counsel to object to this document</li> <li>10) Not admitted into evidence by the Court</li> </ul>                                                                                                                                                                                                                                                                                                                      |
| 75 | SC SOS Business Entity Profile (11/6/18)   | <p>Defendant CCSD objects to this document being filed as an exhibit as follows:</p> <ul style="list-style-type: none"> <li>1) Not included in plaintiff's trial notebook or otherwise provided to opposing counsel during trial</li> <li>2) Not identified and/or marked during trial as an Exhibit</li> <li>3) No Foundation</li> <li>4) No testimony as it who prepared it</li> <li>5) Not authenticated/ not certified business record</li> <li>6) Hearsay</li> <li>7) Not offered as exhibit by Plaintiff</li> <li>8) No opportunity for opposing counsel to object to this document</li> <li>9) Not admitted into evidence by the Court</li> </ul> |
| 76 | SC 1900 Act 219 w/email (date is redacted) | <p>Defendant CCSD objects to this document being filed as an exhibit as follows:</p> <ul style="list-style-type: none"> <li>1) Not included in plaintiff's trial notebook or otherwise provided to opposing counsel during trial</li> <li>2) Not identified and/or marked during trial as an Exhibit</li> <li>3) No Foundation</li> <li>4) No testimony as it who prepared it</li> <li>5) Not authenticated/ not certified business record</li> <li>6) Hearsay</li> <li>7) Not offered as exhibit by Plaintiff</li> <li>8) No opportunity for opposing counsel to object to this document</li> <li>9) Not admitted into evidence by the Court</li> </ul> |
| 77 | Affidavit of Jill Hunter Powell (6/17/21)  | <p>Defendant CCSD objects to this document being filed as an exhibit as follows:</p> <ul style="list-style-type: none"> <li>1) Not included in plaintiff's trial notebook or otherwise provided to opposing counsel during trial</li> <li>2) Not identified and/or marked during trial as an Exhibit</li> </ul>                                                                                                                                                                                                                                                                                                                                          |

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|    |                                                                                                                                | <ul style="list-style-type: none"> <li>3) No Foundation</li> <li>4) No testimony as it who prepared it</li> <li>5) Not authenticated</li> <li>6) Hearsay</li> <li>7) Not offered as exhibit by Plaintiff</li> <li>8) No opportunity for opposing counsel to object to this document</li> <li>9) Not admitted into evidence by the Court</li> </ul>                                                                                                                                                                                                                                                                        |
| 78 | Defendant CCSD's Answers to Plaintiff's First Set of Interrogatories to Intervenor Charleston County School District (10/1/21) | <p>Defendant CCSD objects to this document being filed as an exhibit as follows:</p> <ul style="list-style-type: none"> <li>1) Not included in plaintiff's trial notebook or otherwise provided to opposing counsel during trial</li> <li>2) Not identified and/or marked during trial as an Exhibit</li> <li>3) No Foundation</li> <li>4) No testimony as it who prepared it</li> <li>5) Not authenticated</li> <li>6) Hearsay</li> <li>7) Not offered as exhibit by Plaintiff</li> <li>8) No opportunity for opposing counsel to object to this document</li> <li>9) Not admitted into evidence by the Court</li> </ul> |
| 79 | Plaintiff's and FKAC's Stipulation of Fact (10/1/21)                                                                           | <p>Defendant CCSD objects to this document being filed as an exhibit as follows:</p> <ul style="list-style-type: none"> <li>1) Not included in plaintiff's trial notebook or otherwise provided to opposing counsel during trial</li> <li>2) Not identified and/or marked during trial as an Exhibit</li> <li>3) No Foundation</li> <li>4) No testimony as it who prepared it</li> <li>5) Not authenticated</li> <li>6) Hearsay</li> <li>7) Not offered as exhibit by Plaintiff</li> <li>8) No opportunity for opposing counsel to object to this document</li> <li>9) Not admitted into evidence by the Court</li> </ul> |

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| 80 | Response to Plaintiff's First Requests for Admission to Intervenor the Attorney General of the State of South Carolina (10/8/21)              | <p>Defendant CCSD objects to this document being filed as an exhibit as follows:</p> <ol style="list-style-type: none"> <li>1) Not included in plaintiff's trial notebook or otherwise provided to opposing counsel during trial</li> <li>2) Not identified and/or marked during trial as an Exhibit</li> <li>3) No Foundation</li> <li>4) No testimony as it who prepared it</li> <li>5) Not authenticated</li> <li>6) Hearsay</li> <li>7) Not offered as exhibit by Plaintiff</li> <li>8) No opportunity for opposing counsel to object to this document</li> <li>9) Not admitted into evidence by the Court</li> </ol> |
| 81 | FKAC's Answers to Plaintiffs First Set of Interrogatories (10/11/21)                                                                          | <p>Defendant CCSD objects to this document being filed as an exhibit as follows:</p> <ol style="list-style-type: none"> <li>1) Not included in plaintiff's trial notebook or otherwise provided to opposing counsel during trial</li> <li>2) Not identified and/or marked during trial as an Exhibit</li> <li>3) No Foundation</li> <li>4) No testimony as it who prepared it</li> <li>5) Not authenticated</li> <li>6) Hearsay</li> <li>7) Not offered as exhibit by Plaintiff</li> <li>8) No opportunity for opposing counsel to object to this document</li> <li>9) Not admitted into evidence by the Court</li> </ol> |
| 82 | AG of SC's Responses to Plaintiff's First Set of Interrogatories to Intervenor the Attorney General of the State of South Carolina (10/20/21) | <p>Defendant CCSD objects to this document being filed as an exhibit as follows:</p> <ol style="list-style-type: none"> <li>1) Not included in plaintiff's trial notebook or otherwise provided to opposing counsel during trial</li> <li>2) Not identified and/or marked during trial as an Exhibit</li> <li>3) No Foundation</li> <li>4) No testimony as it who prepared it</li> <li>5) Not authenticated</li> <li>6) Hearsay</li> </ol>                                                                                                                                                                                |

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|    |                                                                                                                              | 7) Not offered as exhibit by Plaintiff<br>8) No opportunity for opposing counsel to object to this document<br>9) Not admitted into evidence by the Court                                                                                                                                                                                                                                                                                                                                                           |
| 83 | Charleston Chapter No. 4 UDC and the Confederate Museum's Answers to First Set of Requests Admission by Plaintiff (10/21/21) | Defendant CCSD objects to this document being filed as an exhibit as follows:<br>1) Not included in plaintiff's trial notebook or otherwise provided to opposing counsel during trial<br>2) Not identified and/or marked during trial as an Exhibit<br>3) No Foundation<br>4) No testimony as it who prepared it<br>5) Not authenticated<br>6) Hearsay<br>7) Not offered as exhibit by Plaintiff<br>8) No opportunity for opposing counsel to object to this document<br>9) Not admitted into evidence by the Court |
| 84 | Defendant CCSD's Responses to Plaintiff's First Requests for Admission (10/22/21)                                            | Defendant CCSD objects to this document being filed as an exhibit as follows:<br>1) Not included in plaintiff's trial notebook or otherwise provided to opposing counsel during trial<br>2) Not identified and/or marked during trial as an Exhibit<br>3) No Foundation<br>4) No testimony as it who prepared it<br>5) Not authenticated<br>6) Hearsay<br>7) Not offered as exhibit by Plaintiff<br>8) No opportunity for opposing counsel to object to this document<br>9) Not admitted into evidence by the Court |
| 85 | Defendant CCSD's Answers to Plaintiff's Second Set of Interrogatories (10/25/21)                                             | Defendant CCSD objects to this document being filed as an exhibit as follows:<br>1) Not included in plaintiff's trial notebook or otherwise provided to opposing counsel during trial<br>2) Not identified and/or marked during trial as an Exhibit                                                                                                                                                                                                                                                                 |

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|    |                                                                                                     | <ul style="list-style-type: none"> <li>3) No Foundation</li> <li>4) No testimony as it who prepared it</li> <li>5) Not authenticated</li> <li>6) Hearsay</li> <li>7) Not offered as exhibit by Plaintiff</li> <li>8) No opportunity for opposing counsel to object to this document</li> <li>9) Not admitted into evidence by the Court</li> </ul>                                                                                                                                                                                                                                                                        |
| 86 | Defendant CCSD's First Supplemental Answers to Plaintiff's First Set of Interrogatories (11/19/21)  | <p>Defendant CCSD objects to this document being filed as an exhibit as follows:</p> <ul style="list-style-type: none"> <li>1) Not included in plaintiff's trial notebook or otherwise provided to opposing counsel during trial</li> <li>2) Not identified and/or marked during trial as an Exhibit</li> <li>3) No Foundation</li> <li>4) No testimony as it who prepared it</li> <li>5) Not authenticated</li> <li>6) Hearsay</li> <li>7) Not offered as exhibit by Plaintiff</li> <li>8) No opportunity for opposing counsel to object to this document</li> <li>9) Not admitted into evidence by the Court</li> </ul> |
| 87 | Defendant CCSD's Second Supplemental Answers to Plaintiff's First Set of Interrogatories (11/19/21) | <p>Defendant CCSD objects to this document being filed as an exhibit as follows:</p> <ul style="list-style-type: none"> <li>1) Not included in plaintiff's trial notebook or otherwise provided to opposing counsel during trial</li> <li>2) Not identified and/or marked during trial as an Exhibit</li> <li>3) No Foundation</li> <li>4) No testimony as it who prepared it</li> <li>5) Not authenticated</li> <li>6) Hearsay</li> <li>7) Not offered as exhibit by Plaintiff</li> <li>8) No opportunity for opposing counsel to object to this document</li> <li>9) Not admitted into evidence by the Court</li> </ul> |

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| 88 | Defendant CCSD's First Supplemental Answers to Plaintiff's Second Set of Interrogatories (11/19/21)  | <p>Defendant CCSD objects to this document being filed as an exhibit as follows:</p> <ol style="list-style-type: none"> <li>1) Not included in plaintiff's trial notebook or otherwise provided to opposing counsel during trial</li> <li>2) Not identified and/or marked during trial as an Exhibit</li> <li>3) No Foundation</li> <li>4) No testimony as it who prepared it</li> <li>5) Not authenticated</li> <li>6) Hearsay</li> <li>7) Not offered as exhibit by Plaintiff</li> <li>8) No opportunity for opposing counsel to object to this document</li> <li>9) Not admitted into evidence by the Court</li> </ol> |
| 89 | Defendant CCSD's Third Supplemental Answers to Plaintiff's First Set of Interrogatories (11/22/21)   | <p>Defendant CCSD objects to this document being filed as an exhibit as follows:</p> <ol style="list-style-type: none"> <li>1) Not included in plaintiff's trial notebook or otherwise provided to opposing counsel during trial</li> <li>2) Not identified and/or marked during trial as an Exhibit</li> <li>3) No Foundation</li> <li>4) No testimony as it who prepared it</li> <li>5) Not authenticated</li> <li>6) Hearsay</li> <li>7) Not offered as exhibit by Plaintiff</li> <li>8) No opportunity for opposing counsel to object to this document</li> <li>9) Not admitted into evidence by the Court</li> </ol> |
| 90 | Defendant CCSD's Second Supplemental Answers to Plaintiff's Second Set of Interrogatories (11/28/21) | <p>Defendant CCSD objects to this document being filed as an exhibit as follows:</p> <ol style="list-style-type: none"> <li>1) Not included in plaintiff's trial notebook or otherwise provided to opposing counsel during trial</li> <li>2) Not identified and/or marked during trial as an Exhibit</li> <li>3) No Foundation</li> <li>4) No testimony as it who prepared it</li> <li>5) Not authenticated</li> <li>6) Hearsay</li> </ol>                                                                                                                                                                                |

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|    |                                                                                                                    | 7) Not offered as exhibit by Plaintiff<br>8) No opportunity for opposing counsel to object to this document<br>9) Not admitted into evidence by the Court                                                                                                                                                                                                                                                                                                                                                           |
| 91 | Defendant CCSD's Fourth Supplemental Answers to Plaintiff's First Set of Interrogatories (12/8/21)                 | Defendant CCSD objects to this document being filed as an exhibit as follows:<br>1) Not included in plaintiff's trial notebook or otherwise provided to opposing counsel during trial<br>2) Not identified and/or marked during trial as an Exhibit<br>3) No Foundation<br>4) No testimony as it who prepared it<br>5) Not authenticated<br>6) Hearsay<br>7) Not offered as exhibit by Plaintiff<br>8) No opportunity for opposing counsel to object to this document<br>9) Not admitted into evidence by the Court |
| 92 | Defendant CCSD's Answers to Plaintiff's Third Set of Interrogatories (12/8/21)                                     | Defendant CCSD objects to this document being filed as an exhibit as follows:<br>1) Not included in plaintiff's trial notebook or otherwise provided to opposing counsel during trial<br>2) Not identified and/or marked during trial as an Exhibit<br>3) No Foundation<br>4) No testimony as it who prepared it<br>5) Not authenticated<br>6) Hearsay<br>7) Not offered as exhibit by Plaintiff<br>8) No opportunity for opposing counsel to object to this document<br>9) Not admitted into evidence by the Court |
| 93 | Defendant CCSD's Verification of Answers to Plaintiff's First, Second and Third Sets of Interrogatories (12/13/21) | Defendant CCSD objects to this document being filed as an exhibit as follows:<br>1) Not included in plaintiff's trial notebook or otherwise provided to opposing counsel during trial<br>2) Not identified and/or marked during trial as an Exhibit                                                                                                                                                                                                                                                                 |



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|    |                                                                                       | <ul style="list-style-type: none"> <li>3) No Foundation</li> <li>4) No testimony as it who prepared it</li> <li>5) Not authenticated</li> <li>6) Hearsay</li> <li>7) Not offered as exhibit by Plaintiff</li> <li>8) No opportunity for opposing counsel to object to this document</li> <li>9) Not admitted into evidence by the Court</li> </ul>                                                                                                                                                                                                                                                                        |
| 94 | Defendant The Attorney General of the State of South Carolina Verification (12/14/21) | <p>Defendant CCSD objects to this document being filed as an exhibit as follows:</p> <ul style="list-style-type: none"> <li>1) Not included in plaintiff's trial notebook or otherwise provided to opposing counsel during trial</li> <li>2) Not identified and/or marked during trial as an Exhibit</li> <li>3) No Foundation</li> <li>4) No testimony as it who prepared it</li> <li>5) Not authenticated</li> <li>6) Hearsay</li> <li>7) Not offered as exhibit by Plaintiff</li> <li>8) No opportunity for opposing counsel to object to this document</li> <li>9) Not admitted into evidence by the Court</li> </ul> |

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STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

Michael D. Royal,

Case No. 2018-CP-10-05739

Plaintiff,

vs.

**PLAINTIFF'S NOTICE OF AMENDED  
MOTION AND AMENDED MOTION TO  
RECONSIDER**

Free Kindergarten Association of Charleston,  
The Attorney General of the State of South  
Carolina, and Charleston County School  
District,

Defendants.

TO: THE ABOVE-NAMED DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

YOU WILL PLEASE TAKE NOTICE THAT Plaintiff Michael D. Royal ("Plaintiff" or "Royal"), by and through his undersigned counsel, respectfully moves this Court, pursuant to Rule 59(e), SCRCPP, to reconsider and alter or amend its Order entered on March 31, 2022 (hereinafter the "Order"), which made findings of facts and conclusions of law following the trial of this case. Plaintiff respectfully requests that this Court reconsider and alter or amend its Order as specified herein, based upon the grounds set forth below:

1. The Order omitted rulings on certain motions made prior to and/or during trial, namely: a) CCSD's Motion to Reconsider and to Alter or Amend Pursuant to SCRCPP 59(e) and Applicable Law, filed December 10, 2021; and CCSD's Motion in Limine with Respect to Plaintiff's Pre-Trial Brief Claims of a Lack of Standing and the Non-Existence of a Justiciable Controversy Involving Charleston County School District, filed December 13, 2021.

2. The Order contains findings of fact that were not supported or proven by evidence in the record. Specifically, the Order's findings set forth in the subparagraphs below are not supported.

a. The record does not establish the Order's finding that "[d]uring the 20th century, public schools took on the role of providing kindergarten education to children in S.C." Order 3.

b. The mission of Defendant Free Kindergarten Association of Charleston ("FKAC") is not shown by evidence in the record. *Id.*

c. The record does not show that the 1971 resolution to amend FKAC's charter was authorized by a majority of the Board of Directors of FKAC. *Id.* The corporate charter was introduced into evidence, and Royal testified that it made no reference to a board of directors. *See* Transcript of the December 15, 2021 Trial ("Tr.") 169:7-25, 170:1-3;<sup>1</sup> *see also* Plaintiff's Trial Ex. 58. No evidence was given by any party of any election of a board of directors. The sole testimony with regard to FKAC came from the Plaintiff as to his reliance on those documents to establish June Wells' authority to act on behalf of FKAC.

d. No entities exist by the name of Charleston County School District #20 or Charleston County School Constituent District #20. Order 3-4, 21, 22.

e. No evidence exists in the record to support the Order's summary of and conclusions as to 1967 S.C. Act 340 and the effect thereof. Order 3-4, 20-22.

f. No evidence exists as to the last date that the kindergarten was operated by FKAC on the subject property, which bears the address of 34 Pitt Street, Charleston, South Carolina 29401 (the "Property"). Order 4.

g. Regarding proof of June Wells' authority to conduct business on behalf of FKAC, the record shows that Plaintiff relied on many additional documents than the three (3) listed in the Order (Order 5-6) and many facts in addition to the fact that she was the

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<sup>1</sup> Copies of the transcript excerpts cited herein are attached hereto as **Exhibit A**.

only person with access to the Property (Order 5). This finding directly contradicts the abundance of uncontroverted evidence submitted and testified to by Plaintiff which established June Wells' authority. *See* Tr. 107:4-25, 109:1 – 111:17, 114:16-25, 116:15-25, 117:8-14, 118:11-17, 119:12-15, 120:5-23.

h. The Order's finding that Royal did not rely upon FKAC's Resolution Designating Bank Depository dated June 25, 1997 (Plaintiff's Trial Ex. 16) ("1997 Resolution") as evidence of June Wells' authority (Order 6) is directly contradicted by the record. Plaintiff specifically testified that he relied upon the 1997 Resolution as evidence of Ms. Wells' authority. Tr. 119:3-24 and 120:1-25. Additionally, the Order's finding that there is no indication that Ms. Wells signed the 1997 Resolution as a member of FKAC's Board of Directors is unsupported by the record. Order 6.

i. The record does not support the Order's summary of and conclusions as to the 2010 affidavit of June Wells (Plaintiff's Trial Ex. 29A), namely as it relates to the authority of June Wells to act on behalf of FKAC. *Compare* Order 6, with Tr. 127:25 – 128:15, 129:12 – 130:24, 132:24 – 133:20. Indeed, opposing counsel argued that the instant litigation is related to the Charleston County Probate Court case in which the affidavit was filed and relied upon in a final order (Plaintiff's Trial Ex. 29). *See* Tr. 128:22 – 129:9. The affidavit clearly supports Ms. Wells' authority to sell the Property.

j. The Order cited the wrong paragraph of the PSA for its quotation of the same, contained on page 18 of the Order. That provision is found in paragraph 8 of the PSA, not paragraph 7. *Compare* Order 18, with Pl.'s Trial Ex. 11 at ¶ 8.

k. There is no evidence in the record proving that June Wells received a Letter or Notice of Intent to purchase the property for \$400,000. Order 7. No letter of intent was

admitted into evidence, nor was there any evidence of a viable purchase offer for that amount being made to FKAC or Ms. Wells. Additionally, letters of intent are customarily not binding on either party, and the record contains no evidence of any other proposed term of the purported letter of intent, making it impossible for the Court to determine that the letter offered economic value to FKAC exceeding that offered by Royal in the executed PSA. Accordingly, the Order erred by twice indicating that the Property's value may have been \$400,000 rather than the appraised value of \$315,200.

l. The record is devoid of any evidence that FKAC was "never ready to close" at any point from April 2013 to March 2018. *Compare* Order 7, with Tr. 105:1-12, 147:19 – 149:9, 150:2-4, 150:23 – 154:22, 164:22-25, 165:1-10, and Pl.'s Trial Exs. 46, 47, 55.

m. The record contains no evidence which shows that FKAC was never in a position to close. Order 8; *see, e.g.*, Plaintiff's Trial Ex. 66 (FKAC admitting that, as of March 29, 2018, it intended to close on the Property and prior to April 2018 it was unaware of any alleged requirement that the AG approve of the subject sale).

n. Michael Robinson, MAI, SRI, of Charleston Appraisal Services, was solely qualified in the field of real estate appraising (Order 8 n.3) and was not qualified as an expert in the areas of mortgage or institutional lending. *See* Tr. 20:2-20. Therefore, the record contains no evidence to support the Court's findings on those topics. Order 8. Moreover, lending institution preferences have no bearing on this case as the subject transaction did not involve lender financing. *See* PSA (Pl.'s Trial Ex. 11) at ¶ 2.b.

o. No evidence exists in the record to establish that FKAC provided a copy of the real estate purchase and sale agreement at issue (Plaintiff's Trial Ex. 11) ("Agreement"



or “PSA”) to the AG because it was required to do so by S.C. Code Ann. §33-31-1202(f).  
Order 7. Nor does the statute contain any such requirement.

3. The Order omitted material facts demonstrated by evidence in the record. Specifically, the Order failed to consider the established facts set forth in the subparagraphs below.

a. FKAC’s charter was amended in 1971 pursuant to a resolution voted upon and authorized by the members of the FKAC, not its Board of Directors (Order 3). *See* Plaintiff’s Trial Exs. 61, 62.

b. FKAC, via counsel, stipulated that June Wells was the sole member of FKAC from November 23, 2010 until the date of her death, November 29, 2020. *See* Tr. 163:5 – 164:10; Pl.’s Trial Ex. 66.

c. The overwhelming amount of evidence submitted by Plaintiff establishing June Wells’ authority. *See* Tr. 107:4 – 111:17, 114:16-25, 116:15-25, 117:8-14, 118:11-17, 119:12-15, 120:5-23, 125:3-18, 127:25 – 128:21, 130:14-25, 250:6-17, 268:1 – 269:12, 275:13-17, 283:2-17, 286:5-9; *see also* Plaintiff’s Trial Exs. 12-26, 27A, 27-29, 29A, 30, 32, 38. The Court acknowledged Plaintiff’s abundance of support on the issue and allowed a cumulative proffer and admission of all of the documents relied upon as establishing authority. *See* Tr. 283:2-20

d. FKAC’s pleadings admit that Wells was authorized to sell the Property on behalf of FKAC. *See* FKAC’s Answer to Complaint at ¶7 (stating that if June Wells is the sole surviving member of FKAC, then she is “authorized to sell the aforesaid [P]roperty”); *see also* FKAC’s Reply to Crossclaim at ¶2 (stating that “Ms. June Murray Wells (‘Ms. Wells’) was and is the duly authorized director and last surviving member of the Free

Kindergarten Association of Charleston and that as such she has authority and had authority since approximately 1990 to represent the Free Kindergarten Association of Charleston.”).

e. The Order failed to specify the final deadline by which Royal and FKAC were to close on the transaction, which does not correspond to the date of appraisal valuation used as the opinion of fair market value.

f. Evidence that FKAC’s closing attorney opened a bank account for FKAC and prepared or had a deed prepared in preparation for closing. *See* Tr. 164: 22 – 165:10; Pl.’s Trial Ex. 55.

g. Unrefuted evidence that Plaintiff acted in good faith in his dealings with FKAC, even at one point turning down a purchase opportunity offered to him by Wells which would have placed him in a financially beneficial position and FKAC in a financially less advantageous position than that of the PSA. Tr. 153:13 – 154:1, 209:4-9, 258:20 – 259:1-10, 264:13-23; Pl.’s Trial Ex. 47.

h. Unrefuted evidence that Plaintiff relied upon the contract to his detriment, solving title and tax problems for FKAC, developing a strategy for consolidation of storage units to save FKAC money, and physically assisting FKAC with moving the contents out of the building on the Property. Additionally, at all times after contract execution Plaintiff remained financially able to close. Tr. 103:12-24, 139:4 – 140:7, 141:17 – 147:12; Pl.’s Trial Exs. 32, 37, and 38

i. Evidence that FKAC rejected Plaintiff’s initial offer because it contained a firm and near closing date, which thereby led Plaintiff to revise his offer to provide an extremely flexible closing date so as to alleviate Wells’ concerns about removing the

contents from the Property. *See* Tr. 87:1-8, 92:20 – 95:6, 104:3 – 106:2, 262:17-21; *see also* Pl.’s Trial Exs. 10 and 11.

j. Unrefuted evidence that the PSA’s provision allowing FKAC to choose a closing date was inserted solely to suit Wells’ preferences and was a provision solely in favor of the seller. *See id.*

k. Plaintiff’s testimony that he intended to close and that his belief, based upon overt representations and acts by FKAC and Ms. Wells, was that FKAC intended to close. Tr. 147:19 – 149:21, 150:2-4, 150:23 – 154:22, 164:22 – 165:10; Plaintiff’s Trial Exs. 46, 47, 55. Likewise, the Order failed to consider the uncontroverted evidence demonstrating that FKAC and June Wells continuously led Royal to believe that a closing of the Agreement was imminent. *See, e.g., id.*

l. Plaintiff’s reliance on FKAC’s actions in hiring a closing attorney, opening a bank account and having a deed prepared as indicative of FKAC’s intent to close. Tr. 162:26-25, 163:12-20, 164:22-25, 165:1-10; Plaintiff’s Trial Exs. 55 and 66.

m. Plaintiff’s actions to advance and facilitate the closing by assisting June Wells in the consolidation of her storage units and the removal of the contents of the Property. Tr. 146:9 – 147:1-8, 149:23 – 150:1.

4. The Order erred in failing to consider testimony of Michael Robinson, the AG’s expert appraiser, indicating that Mr. Robinson’s appraisal report in 2018 did not consider the probability of the Property owner obtaining a demolition permit in relation to the fact that the building on the Property, by 2018, was considered a historic structure under an ordinance of the City of Charleston. Thus, the Order erred in concluding that the contract price was below the fair market value of the Property as of 2018.

5. Prior to the close of Plaintiff's presentation of evidence at trial, The Attorney General of the State of South Carolina (the "AG"), moved for non-suit as to whether the subject real estate "contract and this potential sale was against public policy because it was less than fair market value." Tr. 324:18 – 325:14. The Court erred by considering and granting the AG's motion for non-suit. Rule 41(b), SCRPC, clearly and plainly provides that a defendant may only make such a motion "[a]fter the plaintiff in an action tried by the court without a jury **has completed the presentation of his evidence**["]." Rule 41(b), SCRPC (emphasis added); *see also Johnson v. J.P. Stevens & Co., Inc.*, 308 S.C. 116, 118, 417 S.E.2d 527, 528-529 (1992) ("Rule 41(b) allows the judge as the trier of facts to weigh the evidence, determine the facts and **render a judgment against the plaintiff at the close of his case if justified**." (emphasis added)). Because Plaintiff had not finished presenting his case in chief (*see* Tr. 324:20 – 325:4), the Order erred as a matter of law.

6. The Order erred in granting the AG's motion for non-suit because the AG's motion was based on an alleged defense to enforcement of the subject contract, that it was purportedly contrary to public policy. However, Rule 41(b) motions for non-suit are only permitted on the basis that Plaintiff did not demonstrate a right to relief on his claims. The AG did not argue that Plaintiff failed to establish the elements of his breach of contract and specific performance claims.

a. Moreover, the record shows that Plaintiff demonstrated a right to relief on his claims. The testimony given at trial and the exhibits entered are replete with evidence of a valid contract, a breach of the same by FKAC in failing to timely close, partial execution of the contract by Royal, and Royal's readiness, willingness, and ability to close on the transaction. *See, e.g.*, Tr. 147:19 – 149:9, 150:2-4, 150:23 – 154:22, 164:22 – 165:10; Plaintiff's Trial Exs. 46, 47, and 55.

b. The Court also found in favor of Plaintiff on the primary issue of June Wells' authority to execute the PSA and sell the Property on behalf of FKAC. *See* Tr. 339:14-20. The Court even stated that "if this were a private contract between two parties, I would uphold [Plaintiff's] argument[]" to enforce the PSA. Tr. 337:15-25. To present a right to relief in his case in chief, Plaintiff was only required to establish the elements of his two claims, but there is no requirement that he defeat opposing parties' defenses, such as the AG's claimed ability to invalidate contracts.

7. As to Ms. Wells' 2010 affidavit (Pl.'s Trial Ex. 29A) and the related Probate Court order (Pl.'s Trial Ex. 29), which the Order found that Royal relied upon as establishing Ms. Wells' authority, the Order unnecessarily and prejudicially editorialized the content of those documents, specifically by inserting the phrase "[not authority]" within the documents' text to equate capacity with lack of authority. Order 5-6 (finding that Exs. 29 and 29A stated that Ms. Wells had "capacity [not authority] to act on behalf of the [FKAC]").

8. The Order erred by quoting piecemeal parts of Plaintiff's Pre-Trial Brief (without citation thereto) out of context such that it misstated Plaintiff's contention as to the AG's authority. *Compare* Order 13 ("The Plaintiff contends that the Attorney General's authority pursuant to section 33-31-1202(f) is "detrimental to the public benefit"), *with* Pl.'s Pre-Trial Brief at 18-19 ("The Attorney General has made sweeping claims that his *parens patriae* authority allows him to invalidate a binding real estate contract freely entered into by FKAC and Royal. Such a claim, in actuality, is detrimental to the public benefit."), *and* Pl.'s Pre-Trial Brief at 20 ("The parties disagree as to whether the AG has the authority to review and disapprove of the PSA and the sale contemplated therein."). Plaintiff's contention is that S.C. Code Ann. § 33-31-1202(f) does not

provide the AG with the authority to review and invalidate a binding contract. Plaintiff has never argued in this case that any South Carolina statutory law is damaging to the public interest.

9. Additionally, the Order erred in concluding that Royal argued that the Memorandum of Purchase and Sale Agreement (Pl.'s Trial Ex. 31) ("Memorandum of PSA") provided notice to the AG. Order 11. The trial record contains no such contention by Royal.

10. The Order erred in considering and/or applying law that is inapplicable to the case at hand. This includes the errant considerations set forth in the following subparagraphs.

a. The Order erred by considering and applying the South Carolina Probate Code, S.C. Code Ann. § 62-7-101, *et seq.* (Order 11, 13), which does not apply to this litigation, as said code only applies to express trusts and trusts created pursuant to statute, judgment, or decree. *See* S.C. Code Ann. § 62-7-102. This case does not involve an express trust, and no trust relating to FKAC, charitable or otherwise, has been created pursuant to any statute, judgment, or decree. Indeed, there was no claim or request in this case for the Court to find that a charitable trust existed, and no such finding was made in the Order.

b. The Order erred in considering U.S. Tax Court opinions (Order 17-18), IRS penalties affecting federal tax-exempt status (Order 15), and a law school journal article regarding authority of the Texas Attorney General (*id.*), none of which have any bearing on or relevance to this case.

c. The Order erred in relying upon inapplicable opinions concerning comity and interstate commerce (*Wiggins v. Postal Telegraph Co.*, 125 S.E. 568 (1924)), injuries incurred in a train collision (*Hinnant v. S. Ry. Co.*, 100 S.E. 709 (1919), recovery of a gambling loss (*Berkebile v. Outen*, 426 S.E.2d 760 (1993)), enforcement of a private

construction contract (*W & N Const. Co. v. Williams*, 472 S.E.2d 622 (1996)), and an unconstitutional statute (*Ricks v. Ficken*, 312 S.E.2d 715 (1984)). Order 19-20.

d. The Order erred in its heavy reliance upon pleadings filed in other cases and unpublished opinions, which have no precedential value, in reaching legal conclusions. See Order 12 (applying *S.C. Dep't of Mental Health v. Wilson*, Civil Action No. 2011-CP-40-00875); see also *id.* at 13 (discussing *Sisters of Charity v. Wilson*, Case No. 2016-CP-40-00087); see also *id.* at 14 (analyzing allegations in the Complaint filed in *Sloan Bros. v. Resurrected Treasure Ministries*, Civil Action No. 2020-CP-23-04725); see also *id.* (discussing *Calhoun Cty. Museum and Cultural Museum v. St. Matthew's Parish Episcopal Church*, Case No. 2010-ES-09-00029); see also *id.* at 14-15 (considering two orders filed in *Baptist Found. of S.C., as Trustee v. Baptist Found. of S.C.*, Case Nos. 2014-GC-26-22, 2013-ES-26-00279).

e. The Order erred in considering the Uniform Declaratory Judgments Act, S.C. Code Ann. § 15-53-10, *et seq.*, in deciding on CCSD's request to recover attorneys' fees (Order 23), as no evidence was offered regarding CCSD's declaratory judgment claim and said claim was not adjudicated.

11. The case law relied upon in the Order to invalidate the PSA due to the AG's purported authority over nonprofit contracts is distinguishable from, and inapplicable to, the facts at hand, as discussed in the following subparagraphs.

a. The Order relied upon *Epworth Children's Home v. Beasley*, 365 S.C. 157, 616 S.E.2d 710 (2005) to find AG authority to disapprove of a sale. However, the opinion concerned a trustee's mismanagement of a testamentary trust which allocated funding and assets to a nonprofit corporation; thus, the funding testamentary trust was the charitable

trust at issue. Therefore, the opinion's findings as to charitable trusts, which pertained to the management of testamentary trusts, should not be applied to the instant case which does not involve any testamentary or other express trust.

b. In *South Carolina Dept. of Mental Health v. McMaster*, 372 S.C. 175 (2007), the South Carolina Supreme Court found that "the doctrine of equitable deviation should be utilized to allow the property to be sold." *Id.* at 184. Thus, if the opinion should be utilized, it should be as support for FKAC proceeding with the PSA's sale to Royal for fair market value, with the resulting proceeds held in trust. Moreover, the Supreme Court relied upon language in the subject deeds conveying the property as a gift "for the charitable purposes of the State Hospital for the Insane[,]" and the hospital's continued funding by the General Assembly, as support for finding a charitable trust existed. *Id.* at 182-83. Conversely, FKAC purchased the Property for monetary consideration, and was funded solely by private investments. *See* Tr. 80:15-21, 81:19-24, 142:8-12, 192:6-15; *see also* Plaintiff's Trial Exs. 32 and 38.

c. In addition to providing no precedential value as an unpublished trial court opinion, *Sisters of Charity v. Wilson*, Civil Action No. 2016-CP-40-00087 (Jan. 27, 2016) is factually distinct from the instant case in several significant respects. First, the opinion gives no indication that an actual contract was ever entered into between the parties. Rather, only a letter of intent ("LOI") was mentioned as setting forth the sale terms, and the opinion made no mention of any closing date. Thus, in reading the opinion, there is no way to determine the duration of time between the execution of the LOI and the transaction's closing. As a result, the opinion does not provide a basis for voiding the PSA based upon the AG's determination as to a date of valuation. Additionally, the *Sister of*



*Charity* sales price did not match the appraised value of the property, but the Court determined that it fell within an acceptable range of values and upheld the sale price.

12. The Court erred in its interpretation and application of law.

a. The Court erred by failing to recognize that FKAC is not subject to or governed by the South Carolina Nonprofit Corporation Act of 1994, S.C. Code Ann. § 33-31-101, *et seq.* (the “1994 Act”). *See* Plaintiff’s Memorandum in Opposition to Defendant Charleston County School District’s Motion for Summary Judgment filed December 14, 2021, pp. 2-3 (and exhibits cited therein, admitted as Pl.’s Trial Exs. 59, 63, 76); *see also* Tr. 301:1 – 303:8. No evidence was presented showing that FKAC is a public benefit, mutual benefit, or religious corporation as defined in the 1994 Act, or that FKAC was otherwise subject to the 1994 Act. Even though Plaintiff presented evidence on the issue, the Order made no evaluation or determination as to whether FKAC was governed by the 1994 Act.

b. Plaintiff, the buyer under the PSA, was not required to give notice to the AG of the PSA or sale of the Property. Order 7, 11, 16; *see also* S.C. Code Ann. § 33-31-1202(f). Nor is there any factual or legal basis for finding that Plaintiff was required to give notice of the PSA to CCSD. *See* Order 7, 11. Likewise, there is no requirement that the Memorandum of PSA recorded in the Register of Deeds Office ((Pl.’s Trial Ex. 31) include the purchase price or be enrolled with the R.O.D. in the AG’s or CCSD’s name. *See id.*

c. Opinions quoted within, and relied upon in, the Order to invalidate the PSA in actuality provide support for enforcement of the PSA and sale. *See* Order 12-13 (“The Court approved the sale of the property after expert testimony from an appraiser which

showed that the sale price was consistent with his opinion about the value of the property.”) (quoting *S.C. Dep’t of Mental Health v. Wilson*, Civil Action No. 2011-CP-40-00875); see also *id.* 15 (“the court stated that it ‘cannot find support for the acceptance and approval of the [contract] where there is no appraisal or evidence that can support’” the purchase price) (quoting *Baptist Found of S.C., as Trustee v. Baptist Found. of S.C.*, Case Nos. 2014-GC-26-22, 2013-ES-26-00279). In the instant matter, the expert appraiser offered by the AG testified that he performed an appraisal of the Property in December 2012 that valued the property at \$315,200 (Tr. 30:24 – 31:5), which is the sale price in the PSA.

d. The Court erred by concluding that the PSA violated public policy (Order 16-20). South Carolina law is well established that contracts freely entered into by willing parties for consideration are valid, and public policy dictates those agreements should be enforced. See, e.g., *Carolina Amusement Co. v. Connecticut Nat’l Life Co.*, 313 S.C. 215, 437 S.E.2d 122, 126 (Ct. App. 1993); see also *Restatement (Second) of Contracts* § 24 (1981) (“an offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.”). Moreover, no party entered evidence to show the contract was against any public policy – the only argument made was that the AG believed the sale price, which was equal to the Property’s appraised value at the time of contract and acceptable to FKAC, to be less than fair market value as of an arbitrary date in June of 2018. Additionally, the delayed closing date was chosen by, and allowed solely to accommodate, FKAC. The delayed closing therefore should not be used to deprive Plaintiff of his contract rights. Plaintiff was under no notice requirement for the transaction. Any notice requirement was

on the part of FKAC, not Plaintiff. The appraisal commissioned by the AG does not contain a valuation date that is reasonably related to the transaction at issue, as dictated by South Carolina law. *See infra* ¶ 12.a. There is simply no evidence to support a finding that the purchase price was inadequate as of the date of the PSA, which is the valuation date to be considered under South Carolina law. *See id.* Moreover, the record is wholly devoid of any evidence the contract was contrary to public policy. Rather, the record conclusively establishes that there was a willing buyer and a willing seller for the fair market value price set forth in the PSA. *See* Tr. 30:21 – 31:8, 79:18 – 80:1, 219:11-13, 221:19 – 222:16.

e. Relatedly, the Order erred as it failed to state which public policy was purportedly violated by the PSA (unless the public policy is the AG’s opinion as to a proper valuation date). Additionally, the Order contains no legal standard by which to determine if an agreement violates public policy.

f. Contrary to the Order’s conclusions, S.C. Code Ann. § 33-31-1202(f) does not provide the AG with authority to object to or approve or disapprove of a sale. Order 7-8, 11-15, 23 (awarding FKAC’s attorneys’ fees be paid from the sale proceeds because it had to defend against claims “as a result of its refusal to close without the consent of the Attorney General”). Section 33-31-1202(f) provides:

A public benefit or religious corporation must give written notice to the Attorney General twenty days before it sells, leases, exchanges, or otherwise disposes of all, or substantially all, of its property if the transaction is not in the usual and regular course of its activities unless the Attorney General has given the corporation a written waiver of this subsection.

S.C. Code Ann. § 33-31-1202(f).

g. The only authority granted by the statute is to require notice of a sale of all or substantially all of a nonprofit corporation’s assets. *See id.* The Order erred in finding

that the only logical conclusion of the statute's purpose was to allow the AG to voice objection (or consent) to a sale. Order 11. Yet neither the record nor the Order contains any legal support for that conclusion. Indeed, a fair reading of the statute could logically conclude that its purpose was to allow the AG to determine if he or she should file an action to dissolve the company under S.C. Code Ann. § 33-31-1430(a)(1).<sup>2</sup>

h. As the Order relied upon S.C. Code Ann. § 33-31-1202 as providing the AG authority over nonprofit contracts, it erred in failing to recognize that §§ 33-31-1202(a)-(b) provide that a nonprofit corporation may dispose of all, or substantially all, of its property without the AG's approval. Therefore, the ability of nonprofit entities to carry out such transactions is public policy in South Carolina.

i. The Order erred as it cited to and quoted statutory and common law but failed to apply said law to the facts of the case.

13. The Order ignored or failed to consider or apply controlling precedent. These errors include failure to consider or apply the following:

a. The Order erred as it failed to recognize that the proper valuation date for real property under South Carolina law is the date of contract. *See Shannon v. Freeman*, 109 S.E. 406 (1921) ("the question of adequacy of price must be considered *as of the date of the contract*, and the subsequent enhancement in value would not justify refusal of specific performance.") (emphasis in original) (citing 3 Elliott on Contracts, § 2286 stating "the mere fact that the subject matter of the contract subsequently increased in value would

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<sup>2</sup> A determination as to FKAC should have been made in 2010, when the AG provided June Wells with an affidavit for execution which stated that Wells consented to the termination of FKAC's sole source of funding, and that the kindergarten on the Property "is not currently operating . . . and does not have plans to begin operating again." Pl.'s Trial Ex. 29A at ¶¶ 5, 7, 8; *see also* Pl.'s Trial Ex. 28.

be no defense to a suit for specific performance.”). The adequacy of the sales price in the PSA at issue must be determined as of the date the contract was entered pursuant to well-established principles of South Carolina law.

b. The Court failed to consider or apply S.C. Code Ann. § 33-31-304, which provides that “the validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act[,]” except “in a proceeding brought against the corporation to enjoin an act where a third party has not acquired rights. The proceeding may be brought by the Attorney General, a director, or by a member or members in a derivative proceeding.” S.C. Code Ann. § 33-31-304(a)-(b). Thus, any challenge to FKAC’s execution of the PSA on the basis that June Wells purportedly lacked authority was improper, as no permissible action was brought in accordance with § 33-31-304.

c. Along the same vein, the Order failed to consider S.C. Code Ann. § 33-31-302, which provides that nonprofit corporations have “the same powers as an individual to do all things necessary or convenient to carry out its affairs including, without limitation, power . . . to sell, convey, mortgage, pledge, lease, exchange, and otherwise dispose of all or any part of its property.” S.C. Code Ann. § 33-31-302(5).

d. The Order failed to consider that Plaintiff, shortly after the PSA’s execution, obtained a certificate of existence for FKAC from the Secretary of State (Pl.’s Trial Ex. 63), which “may be relied upon as conclusive evidence that the domestic or foreign corporation is in existence or is authorized to transact business in this State.” S.C. Code Ann. § 33-31-128(c). When analyzed with subparagraphs b. and c. above, there is no doubt that FKAC had the authority to decide to sell the Property to Plaintiff on terms agreeable to FKAC alone, without interference from or the approval of the AG. The Order failed to

consider that these provisions of South Carolina statutory law are expressions of South Carolina public policy which contradict the Order's holdings.

e. As supported by the other grounds set forth herein, the Order erred by not considering the totality of the circumstances relevant to whether the PSA was contrary to public policy.

f. The Order ignored public policies in favor of enforcing the Agreement, such as the freedom to contract, good faith and fair dealing, and reliance upon the statutory laws governing nonprofit operations.

g. The Order directs that FKAC be dissolved after the Property's sale, but no proceeding has been initiated to allow for judicial dissolution under S.C. Code Ann. § 33-31-1430.

14. The Order erred by making conclusions of law not supported by the record. These errant legal conclusions in the Order included:

a. The Order does not set forth a supporting source for its conclusion that the AG is concerned with whether the value of nonprofit assets is "maintained in the 'charity stream[.]'" Nor does the Order attempt to define the quoted term, "charity stream."

b. Relatedly, the Order failed to take notice of the fact that the AG stated that he has no opinion as to the proper entity entitled to receive FKAC's residual assets upon dissolution. *See* Pl.'s Trial Ex. 82 at no. 17. It is unclear, then, how the AG plans to maintain FKAC's residual assets in the nebulous charity stream.

c. The Order erred in concluding that a sale of an undervalued non-profit asset "provides a benefit to private interests" and "results in a 'gift' to the buyer[.]" Order 15. The record does not contain support for this finding and the Order failed to set forth legal

support. The Order also erred in comparing the PSA's sale to an "illegal 'private inurement' under federal tax laws[.]" *Id.*

d. The Order erred in concluding that FKAC "was never a willing seller" under the PSA because FKAC declined to proceed with the sale. Order 16. Such a finding must assume there is no contract law and eliminates the right of any purchaser to bring a strict performance claim – any breaching party could simply state that there was no willing seller because the seller never declined to close.

e. Additionally, the finding that FKAC was not a willing seller because the AG did not approve the sale is in direct conflict with the Order's conclusion that the Court, not the AG, has the authority to approve of the sale.

f. The Order's conclusion that "FKAC did not indicate any willingness to close until" April 2018 is unsupported by the record. *See* Tr. 147:19-25, 148, 149:1-9, 150:2-4, 150:23-25, 151, 152:22 – 154:22, 164:22 – 165:10; Plaintiff's Trial Exs. 46, 47, and 55.

g. The Order erred in its determination of the evidentiary value of the June Wells' 2010 affidavit and FKAC's 1997 Resolution. These documents were not submitted as proof that the sale of the Property was authorized or that June Wells was given specific authority to execute such a sale. They were submitted as part of a group of cumulative evidence relied upon by Plaintiff in evaluating June Wells' authority to act on behalf of FKAC. Order 6; *see* Tr. 102:6 – 103:24; Pl.'s Trial Exs. 16, 29, and 29A.

h. The Order erred in considering paragraph 8 of the PSA, providing the purchaser with a termination right, as support for its decision that the PSA violated public policy. Order 18-19. There is no legal basis for finding that "unusual provisions" in a

contract make it contrary to public policy. *Id.* Additionally, the Order omitted any discussion of the trial evidence explaining the existence of paragraph 8 of the Agreement, erred in failing to state that the evidence showed that paragraph 8 was entirely moot because all the evidence showed that Royal always was able to and desired to close on the contract as quickly as possible. *See* Tr. 147:25 – 148:7, 210:23 – 212:11, 245:10-14, 247:13 – 248:4.

i. The Order indicates that Royal’s position in the Agreement was akin to an option (Order 18) but does not consider whether Royal gave adequate consideration for such an “option,” and failed to set forth any reasoning as to why FKAC would be prohibited from entering into an agreement of the type that it did. In its comparison of the PSA to an option, the Order fails to note that Royal paid a \$5,000 deposit which would not have been returned to Royal if he had not been able to close because of financial impossibility on the closing date chosen by FKAC.

j. The Order erred in finding that paragraph 6 of the PSA, regarding seller providing documentation of June Wells’ authority, is proof that Royal had any question that Ms. Wells had authority to bind FKAC to the contract. Order 18. All of the evidence proves that Royal had no question about Ms. Wells’ authority and establishes the rationale for the PSA’s inclusion of the language in question. *See, e.g.*, Tr. 90:22 – 92:19, 200:13 – 201:4 (Royal’s testimony distinguishing between his reasonable belief of authority as compared to specific documentation to satisfy third parties, such as title companies), 202:16 – 203:4 (“I had every reason to believe that [Wells] did have authority when she signed [the PSA].”).



k. The Order failed to consider the many PSA provisions in favor the buyer which supported enforcement, as well as testimony regarding the same. Such provisions included paragraphs 4 and 5 of the PSA, of which the Order errantly indicates is supportive of voiding the contract.

l. The Order erred in concluding that CCSD is entitled to the sale proceeds of FKAC's asset, the Property, as neither CCSD, nor any other party, presented any evidence or argument at trial to support the finding. *See, e.g.*, Tr. 324:7-18. Moreover, evidence exists which contradicts, or casts doubt upon, this finding. Such evidence includes the deposition testimony of the CCSD's Rule 30(b)(6), SCRCF, designee, as well as the AG's statement that it has no opinion as to the entity entitled to receive those sale proceeds. *See* Pl.'s Trial Ex. 74 (Transcript of the Rule 30(b)(6) Deposition of CCSD), at 114:13-115:23 (When asked how constituent district 20 is related to CCSD, the witness answered, "I don't know."); *see* Pl.'s Trial Ex. 82 at no. 17.

15. There is no evidence in the record to support a finding that the parties were unequal in bargaining power. No evidence was proffered relating to June Wells' comparative bargaining position in the contract negotiation, or Ms. Wells' real estate acumen. The factual findings concerning Plaintiff's educational and work background were solicited through deposition testimony, but his deposition was not introduced at trial nor did he testify at trial regarding his educational or professional background. Similarly, no evidence was introduced at trial relating to Ms. Wells' educational and work background.

a. Additionally, the Order erred in considering bargaining power, as no party made any allegation that Royal held, or took advantage of, superior bargaining power to

FKAC. Moreover, there is no legal precedent that the presence of unequal bargaining power renders a contract in violation of public policy.

16. The Order contains contradictory findings or conclusions. The Order concluded that FKAC was not a willing seller, and that it could not close on the transaction, because the AG would not give his approval for the same. *See* Order 16. However, the Order also found that the AG has authority only to object to a sale, and that the Court must render approval or disapproval. *See* Order 14.

17. The Order erred in ignoring or failing to consider, analyze, or apply the legal standards for determining a person's authority to act on behalf of a corporation or entity, including the doctrines of actual and apparent authority.

18. The Order's finding that Royal was the final witness in Plaintiff's case in chief (Order 9) is not supported by the record.

19. The Order's finding that June Wells did not have any type of authority to execute the PSA on behalf of FKAC for the sale of the Property (Order 10) is inconsistent with and contradicted by the evidence and the Court's findings and rulings made at trial. After consideration of the substantial amount of evidence relating to Ms. Wells' authority, the Court decided at trial that it was "going to find that she did have the authority to act[.]" Tr. 339:14-17; *see also* Tr. 57:25 – 59:25, 75:11 – 77:11, 305:6 – 308:6, 317:25 – 318:9, 320:3 – 321:14 (containing discussion of evidence supporting actual and apparent authority of June Wells to act for FKAC).

a. Further supporting a finding that Ms. Wells had authority, the Court, at trial, held that the contract would be valid and enforceable except for the fact that it involved a nonprofit entity, which made the contract and transaction subject to the AG's review and approval. Tr. 335:16 – 337:20, 341:22 – 342:10, 343:7-18 (the Court found "that the

contract is not to be enforced between the parties because they did not get approval from the Attorney General's office. . . if [Royal] were in a private contract with the other opposing party, they wouldn't have to do that.”).

20. Additionally, the Order erred in considering and ruling upon the issue of June Well's authority as part of the AG's motion for non-suit. Order 9-10. The issue of June Wells' authority was not encompassed within the AG's motion for nonsuit – the AG only moved for non-suit as to whether “this contract and this potential sale was against public policy because it was less than fair market value.” Tr. 324:18 – 325:14. In fact, the AG stated at trial that it was “not taking a position on authority[.]” Tr. 326:20-24; *see also* Tr. 308:24-25.

21. A considerable portion of the Order is devoted to determining whether FKAC gave the AG statutory notice of the sale under S.C. Code Ann. § 33-31-1202 via correspondence dated April 4, 2018. No party disputed that said communication provided statutory notice to the AG.

WHEREFORE, Plaintiff Michael D. Royal, for the grounds and reasons set forth herein, respectfully requests that this Court reconsider its March 31, 2022 Order, and alter or amend the same as set forth herein. The instant motion is timely filed under Rule 59(e), SCRCPP, and the undersigned hereby certifies and affirms, pursuant to Rule 11, SCRCPP, that consultation with opposing counsel regarding the matters contained in this motion would serve no useful purpose.

[SIGNATURE FOLLOWS]

s/Evan P. Williams

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*MICHAEL D. ROYAL*

April 10, 2022

Mt. Pleasant, South Carolina

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

Michael D. Royal,

Civil Action No. 2018-CP-10-05739

Plaintiff,

vs.

Free Kindergarten Association of  
Charleston, The Attorney General of the  
State of South Carolina, and Charleston  
County School District,

**PLAINTIFF'S MEMORANDUM IN  
OPPOSITION TO DEFENDANT  
CHARLESTON COUNTY SCHOOL  
DISTRICT'S MOTION TO EXCLUDE  
AND STRIKE**

Defendants.

Plaintiff Michael D. Royal ("Plaintiff" or "Royal"), by and through his undersigned counsel, respectfully submits this Memorandum in Opposition to Defendant Charleston County School District's ("CCSD") Motion to Exclude and Strike. For the grounds and reasons set forth herein, Plaintiff requests that this Court deny CCSD's motion.

**INTRODUCTION**

Plaintiff initiated this action on December 4, 2018, seeking specific performance of a real estate contract validly entered into with Defendant Free Kindergarten Association of Charleston ("FKAC"). In the summer of 2019, the Court granted CCSD's request for permissive intervention under Rule 24(b), SCRCP, based solely upon CCSD's claim of purported entitlement to any proceeds from subject property's sale. Once joined, CCSD assaulted Plaintiff with motion after motion, filing no less than twenty-five (25), many of which requested sanctions and fees.

The trial of this action took place on December 15, 2021. The only rulings at trial were (1) June Wells had authority to enter into the contract with Royal; and (2) the Attorney General of the State of South Carolina ("AG") had the authority to intervene in and approve (or disapprove) of the property's sale to Royal. No ruling was made as to CCSD's claim to the proceeds of any sale.

Moreover, CCSD submitted no evidence and failed to conclusively prove any issue. Despite the Court's instruction at trial that the AG or FKAC draft the proposed final order,<sup>1</sup> CCSD filed its own proposed order. And, in one last attempt to hijack the substantial disputes of this case, CCSD filed the instant motion on April 8, 2022, objecting to certain trial exhibits entered by Plaintiff. Said exhibits have no bearing upon or relevance to CCSD's tertiary claim to the proceeds of any sale to the property at issue. Moreover, CCSD's motion is untimely, without merit, and premised upon objections that CCSD has waived.

### **FACTUAL AND PROCEDURAL BACKGROUND**

As the Court is well aware of the underlying facts of this case, the procedural history and factual background sections of Plaintiff's Pre-Trial Brief, filed December 8, 2021, are incorporated herein for convenience. Following trial, Plaintiff's counsel, on December 23, 2021, provided all parties with a list of Plaintiff's exhibits admitted into evidence at trial and a copy of said exhibits. See **Exhibit B** attached hereto, December 2021 emails between counsel.<sup>2</sup> The AG filed his trial exhibit on March 10, 2022, and Royal's trial exhibits were filed on March 30, 2022. The Court entered an Order on March 30, 2022 containing its findings of facts and conclusions of law of the case. On April 8, 2022, CCSD moved to exclude and strike Plaintiff's Exhibits 12 through 15, 17 through 27, 27A, 30, 54A, 71, and 74 through 94.

### **STANDARD OF REVIEW**

CCSD cited no authority which allows or provides the basis for its Motion to Strike and Exclude certain of Plaintiff's trial exhibits. Because Rule 61, SCRCP, and Rule 103, SCRE, both address errors in the admission or exclusion of evidence, it is assumed they apply. Under both,

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<sup>1</sup> See Transcript of the December 15, 2021 Trial ("Tr."), at 345:1-6. Copies of the transcript excerpts cited herein are attached hereto as **Exhibit A**.

<sup>2</sup> A copy of Plaintiff's exhibit list circulated to counsel is attached hereto as **Exhibit C**.

Court action is only warranted if “substantial justice” or a “substantial right of the party” is impacted by the error. Rule 61, SCRCP; Rule 103(a), SCRE. Additionally, no evidentiary error may be alleged unless “a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context[.]” Rule 103(a)(1), SCRE.

CCSD makes no effort and offers no argument to satisfy either prong of the analysis. *See State v. Patterson*, 625 S.E.2d 239, 245, 367 S.C. 219, 231 (Ct. App. 2006) (“[T]he duty is upon the defendant to prove prejudice[.]” of admitted evidence.) (internal citation omitted). The substantial rights of CCSD, to the extent any exist, are in no way affected by admission of the exhibits at issue, and no injustice results. And as demonstrated herein, no timely objection or motion was made by CCSD.

### **ARGUMENT AND CITATION OF AUTHORITY**

As an initial matter, Royal agrees to withdraw Plaintiff’s Exhibits 54A and 71 from the case’s record. All other evidence at issue in CCSD’s motion is a proper part of the record.

#### **I. CCSD WAIVED ITS RIGHT TO OBJECT TO ADMISSION OF THE EVIDENCE.**

##### **A. CCSD Failed to Make Contemporaneous Objections to the Evidence.**

It is a well-established principle of South Carolina law that the failure to object to the admission of evidence, contemporaneous with its submission, constitutes a waiver of that objection. *See State v. Hoffman*, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) (requiring contemporaneous objection); *White v. Wilbanks*, 298 S.C. 225, 229, 379 S.E.2d 298, 300 (Ct. App. 1989), *rev’d on other grounds*, 301 S.C. 560, 393 S.E.2d 182 (1990) (“Failure to make a contemporaneous objection makes the issue unavailable on appeal.”); *State v. Byers*, 392 S.C. 438, 444-46, 710 S.E.2d 55, 58 (2011).

A main issue in this case concerns whether June Wells had authority to act on behalf of FKAC, as she signed the subject contract as its “Authorized Agent.” *See* Pl.’s Ex. 11 (the “PSA”). A portion of the evidence CCSD objects to was submitted by Plaintiff to establish his reasonable basis for concluding June Wells was the authorized agent of FKAC.<sup>3</sup>

During the direct examination of Royal, Plaintiff’s Exhibits 12-15 were proffered but not admitted. After admission of Plaintiff’s Exhibit 16, the remaining Authority Exhibits were cumulatively proffered at the suggestion of the Court in an acknowledgement of the wealth of evidence that Plaintiff intended to introduce on the issue. *See* Tr. 109:3 – 110:5, 120:17 – 122:11. The Authority Exhibits were all later admitted during the redirect examination of Mr. Royal, as FKAC’s counsel had opened the door on cross-examination. *See id.* Tr. 282:25 – 283:24, 345:9-14. The majority of questioning by FKAC’s counsel concerned Royal’s impressions as to Ms. Wells’ authority, and documents relied upon in forming those impressions. Thus, Plaintiff’s Exhibits 12, 13, 14, and the others relating to June Wells’ authority, were admitted into evidence without objection. *See id.* Tr. 282:25 – 283:24 (“The Court: Do you want to put them into evidence? Mr. Tibbals: Yes. . . The Court: They’re just in the record.”).

As to the other evidence CCSD objects to, the record is clear that Plaintiff’s exhibits included discovery responses in the case, the transcript of the deposition of CCSD’s Rule 30(b)(6) witness, and various legal authorities. *See* Tr. 299:8-25, 345:9-15.<sup>4</sup> Because the Court granted the AG’s motion for non-suit prior to the close of Plaintiff’s evidence, some of the contested exhibits were not individually identified in the trial transcript. However, the Court granted Plaintiff’s

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<sup>3</sup> The June Wells authority exhibits include Plaintiff’s Exhibits 12-15, 17-27, 27A, and 30 (the “Authority Exhibits”).

<sup>4</sup> These documents were also identified in Plaintiff’s trial exhibit list provided to the Court and counsel on December 13, 2021.



request at trial to furnish the record with the rest of his evidence. *See id.* at 345:9-15. CCSD made no objection at that time or request for Plaintiff to make specific identifications on the record.

**B. CCSD Failed to Assert Timely Objections After Receipt of the Trial Transcript.**

In accordance with CCSD's request at trial, Royal's counsel, on December 23, 2021, sent an email to counsel for all parties with a list of Plaintiff's exhibits admitted into evidence and a copy of said exhibits. *See* Ex. B. CCSD's counsel replied on December 28, 2021, thanked Royal's counsel for transmitting the list and exhibits to all counsel for review, and stated "[o]nce we have received and had the opportunity to review the trial transcript we will file formal objections to the applicable documents as necessary." Ex. B.

Despite the parties' receipt of the trial transcript on February 25, 2022, CCSD asserted no objections to Plaintiff's trial exhibits until the instant motion was filed on April 8, 2022. CCSD was aware, and had copies of all, of Plaintiff's trial exhibits for over one hundred (100) days before filing this motion. And it was in receipt of the trial transcript for over forty (40) days before it filed any objection. Therefore, contrary to CCSD's motion and attached letter, it had every opportunity object to Plaintiff's trial exhibits, and instead waived any objections it may have had.

**II. CCSD'S OBJECTIONS ARE WITHOUT MERIT.**

Even assuming that CCSD's generic objections were timely, they are wholly unsupported.

**A. "Not included in plaintiff's trial notebook" is Not a Valid Objection.**

Plaintiff is unaware of any legal precedent supporting an evidentiary objection on the ground that an exhibit was "not included in plaintiff's trial notebook[.]" CCSD's Motion to Exclude and Strike Ex. 1, at Ex. A. Yet, CCSD advanced this objection to more than fifteen (15) exhibits. *See id.* The trial notebook was provided to the Court and counsel as a courtesy and is not required nor are there any parameters proscribed as to its content.

**B. CCSD's Objections Lack Specificity.**

Evidentiary objections must set forth specific grounds. *See* Rule 103(a)(1), SCRE. Ignoring its untimely nature, CCSD's Motion copied and pasted the same generic objections, in varying numeration, to every contested exhibit. *See* CCSD's Motion Ex. 1, at Ex. A.

**C. The Contested Authority Exhibits Are Not Hearsay.**

By definition, the Authority Exhibits, as well as Plaintiff's Exhibits 77, 79, and 83 which serve the same purpose, are not hearsay. *See* Rule 801(c), SCRE. In order to constitute hearsay, the evidence must be submitted for the truth of the matter asserted. *See id.*; *see also, e.g., Thomas v. Dootson*, 377 S.C. 293, 298, 659 S.E.2d 253, 256 (Ct. App. 2008). Here, the cumulative evidence of June Wells' actions and communications on behalf of FKAC were solely offered to establish an element of implied authority – that Plaintiff was reasonable in his conclusion that June Wells possessed the requisite authority to sell the subject property. These exhibits were evidence Plaintiff relied upon in reaching his conclusion as to her authority, and not offered to establish any statement or matter contained in any of the documents. Thus, there was no error in the admission of Plaintiff's Exhibits 12-15, 17-27, 27A, 30, 77, 79, and 83.

**D. The Submitted Discovery Responses Are Proper Evidence.**

Inexplicably, CCSD has objected to the introduction of party discovery responses served in the case (Pl.'s Exs. 78-94).<sup>5</sup> As noted herein, CCSD was provided a list of Plaintiff's proposed exhibits prior to trial. This list included these discovery responses and filings as items numbered 94-100. *See* Plaintiff's exhibit list circulated on December 13, 2021, attached hereto as **Exhibit**

**D.** All of the discovery responses CCSD objects to were signed by counsel certifying the veracity

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<sup>5</sup> Charleston Chapter No. 4, United Daughters of the Confederacy, and the Confederate Museum were previously parties to this action.

of the responses, as required by Rules 11 and 26(g), SCRCP. Additionally, party verifications of interrogatory answers were solicited and received from the AG and CCSD in accordance with Rule 33, SCRCP.<sup>6</sup> See Pl.'s Exs. 93, 94. It is puzzling then why CCSD would object to these exhibits as being unauthenticated, lacking in foundation, and hearsay. CCSD's Motion Ex. 1, at Ex. A.

CCSD also contends the discovery responses were not offered as exhibits at trial. The trial transcript contradicts this assertion, showing that Plaintiff sought to submit as evidence "discovery responses, interrogatory answers . . . request to admit answers" (Tr. 298:10-19), as well as a stipulation with FKAC's counsel as to June Wells' membership in FKAC (*id.* 321:5-14). No timely objection to this evidence was registered by CCSD at the trial.

**E. The Transcript of the Deposition of CCSD's Rule 30(b)(6) Deposition was Properly Admitted.**

The deposition transcript (Pl.'s Ex. 74) is permissible under Rule 32(a)(2), SCRCP, as the testimony of a party's Rule 30(b)(6) designee. CCSD's only contemporaneous objection to the same was that Plaintiff had failed to provide advance copies of the transcript excerpts it intended to use. See Tr. 299:16-18. Yet no advance notice under Rule 32(a)(5), SCRCP, was required because the entire transcript was entered into evidence.<sup>7</sup> And contrary to CCSD's assertions, Plaintiff was not required to show that CCSD's Rule 30(b)(6) designee was unavailable to testify at trial. See *Gibson v. Wright*, 403 S.C. 32, 48, 742 S.E.2d 49, 57 (Ct. App. 2013) (holding that deposition testimony of a Rule 30(b)(6) witness is admissible under Rule 32(a)(2) regardless of the availability of said witness).

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<sup>6</sup> Rule 33(d), SCRCP, explicitly allows for the use of interrogatory answers at trial to the extent permitted by the Rules of Evidence. Additionally, admissions pursuant to Requests for Admission under Rule 36 are proper evidence. "Any matter admitted under this rule [36] is conclusively established[.]" Rule 36(b), SCRCP.

<sup>7</sup> Plaintiff's pre-trial exhibit list did identify transcript excerpts as an exhibit, but at trial Plaintiff advised he would be entering the entire transcript. See Tr. 299:19-23.

### **CONCLUSION**

Because CCSD waived any evidentiary objections available, and its untimely objections are without basis, and based upon the grounds and reasons contained herein, Plaintiff respectfully requests that this Court deny CCSD's Motion to Exclude and Strike.

s/ Evan P. Williams

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*COUNSEL FOR PLAINTIFF*

*MICHAEL D. ROYAL*

April 21, 2022

Mt. Pleasant, South Carolina

## **Exhibit B**

### December 2021 Emails between Counsel Regarding Plaintiff's Trial Exhibits

Plaintiff's Memorandum in Opposition to  
Defendant Charleston County School District's  
Motion to Exclude and Strike

*Michael D. Royal*

v.

*Free Kindergarten Association of Charleston,  
The Attorney General of the State of South Carolina, and  
Charleston County School District*

Civil Action No. 2018-CP-10-05739  
Charleston County Court of Common Pleas

**From:** Warren Ariail <warren@ariaillaw.com>  
**Sent:** Wednesday, December 29, 2021 9:45 AM  
**To:** Evan Williams; mfjowers@scag.gov; ksimons@scag.gov; pfstringer@yahoo.com; Bright Ariail  
**Cc:** Jeff Tibbals; Karen Hucks; Lisa Caldwell; Gretchen Stringer-Robinson  
**Subject:** RE: Royal v. FKAC, et al. - 2018-CP-10-05739

Good morning Evan,

Thank you for your email and link to access the Plaintiff's spreadsheet entitled "Plaintiff's Trial Exhibits" ("Plaintiff's Spreadsheet") and documents attached thereto. Please be advised that Bright and I have reviewed and compared Plaintiff's Spreadsheet and attached documents with our trial notes in this case. Based on our review, we believe there are various ones of the attached documents which are objectionable as trial exhibits on one or more of the following grounds:

- (1): Failure to authenticate and lay evidentiary foundations for particular document(s);
- (2): Failure to proffer particular document(s) as evidence;
- (3): Failure to enter particular document(s) into evidence (including the lack of court ruling(s) holding the document(s) to be admissible);
- (4): Particular document(s) constitute inadmissible hearsay;
- (5): Particular document(s) are irrelevant.

Examples of these documents include, but are not limited to, Plaintiff's Exhibits 29A and 77 referenced in and attached to Plaintiff's Spreadsheet. Again, based on our trial notes we believe these two documents as well as other documents referenced in and attached to Plaintiff's Spreadsheet are objectionable and inadmissible as trial exhibits on behalf of Plaintiff.

Once we have received and had the opportunity to review the trial transcript we will file formal objections to the applicable documents as necessary.

In closing, thank you again for transmitting the Plaintiff's Spreadsheet and attached documents to all counsel for review in connection with this matter.

With best wishes for a happy and prosperous New Year, I am

Sincerely,

Warren

**Warren W. Ariail, Attorney**  
**Ariail Law Firm, LLC**

---

**From:** Evan Williams <ewilliams@bybeetibbals.com>  
**Sent:** Thursday, December 23, 2021 12:01 PM  
**To:** mfjowers@scag.gov; ksimons@scag.gov; pfstringer@yahoo.com; Bright Ariail <bright@brightariaillaw.com>; Warren Ariail <warren@ariaillaw.com>  
**Cc:** Jeff Tibbals <jst@bybeetibbals.com>; Karen Hucks <khucks@bybeetibbals.com>; Lisa Caldwell <lcaldwell@bybeetibbals.com>; Gretchen Stringer-Robinson <gretchen@stringerlaw.us>  
**Subject:** Royal v. FKAC, et al. - 2018-CP-10-05739

Counsel,

Below is a link to access Plaintiff's trial exhibits that will be submitted for the record. Also accessible via the link is an index of the exhibits. Please let us know if you have any questions or issues accessing.

<https://bybeeandtibbalsllc.sharefile.com/d-s28831ba475974db0be82002f0403495a>

Mary Frances and Kristin, we did not have a copy of Mr. Robinson's 2018 appraisal that was marked as an AG exhibit, so that is not included in this set.

Hope everyone has a safe and merry Christmas.

Evan

---

Evan P. Williams  
735 Johnnie Dodds Blvd. Suite 104, Mt. Pleasant, SC 29464  
O: 843.881.1623 D: 843.513.1036  
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[bybeetibbals.com](http://bybeetibbals.com)

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**BYBEE & TIBBALS**  
EMINENT DOMAIN & PROPERTY  
RIGHTS LITIGATION

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## **Exhibit C**

### Plaintiff's Trial Exhibit List Circulated December 23, 2021

#### Plaintiff's Memorandum in Opposition to Defendant Charleston County School District's Motion to Exclude and Strike

*Michael D. Royal*

v.

*Free Kindergarten Association of Charleston,  
The Attorney General of the State of South Carolina, and  
Charleston County School District*

Civil Action No. 2018-CP-10-05739  
Charleston County Court of Common Pleas



| <u>Exhibit Number</u>  | <u>Document Description</u>                                                                                                             | <u>Doc. Date</u> |
|------------------------|-----------------------------------------------------------------------------------------------------------------------------------------|------------------|
| Plaintiff's Robinson 1 | Appraisal of the Property, as of December 19, 2012, by Charleston Appraisal Services, Inc.                                              | 12/19/2012       |
| Plaintiff's Ex. 1      | December 3, 2011 Picture of Property                                                                                                    | 12/3/2011        |
| Plaintiff's Ex. 2      | December 3, 2011 Picture of Property                                                                                                    | 12/3/2011        |
| Plaintiff's Ex. 3      | December 3, 2011 Picture of Property                                                                                                    | 12/3/2011        |
| Plaintiff's Ex. 4      | Email from Michael Royal to Secretary of State's Office                                                                                 | 12/7/2011        |
| Plaintiff's Ex. 7      | News and Courier Article regarding June Wells                                                                                           | 10/8/1990        |
| Plaintiff's Ex. 8      | Royal's Calendar Reminder (Subject: Meet June Wells at 34 Pitt Street)                                                                  | 11/4/2012        |
| Plaintiff's Ex. 9      | Email to Michael Royal from Mike Robinson                                                                                               | 11/12/2012       |
| Plaintiff's Ex. 10     | January 14, 2013 letter from Royal to June Wells w/ enclosed proposed PSA (v6)                                                          | 01/14/2013       |
| Plaintiff's Ex. 11     | Real Estate Purchase and Sale Agreement                                                                                                 | 04/23/2013       |
| Plaintiff's Ex. 12     | Letter from Lawrence A. Dodds, Jr. to FKAC/June Wells with Draft Lease                                                                  | 11/22/1993       |
| Plaintiff's Ex. 13     | S.C. Department of Revenue Withholding Tax Change of Records/Reorder Form addressed to FKAC c/o June Wells                              | 1/1/1997         |
| Plaintiff's Ex. 14     | FKAC's Letter Replying to S.C. Tax Commission's Letter of 1/8/1997                                                                      | 3/4/1997         |
| Plaintiff's Ex. 15     | Letter from S.C. Department of Revenue to FKAC c/o June Wells                                                                           | 3/19/1997        |
| Plaintiff's Ex. 16     | FKAC's Resolution Designating Bank Depository                                                                                           | 06/25/1997       |
| Plaintiff's Ex. 17     | State of SC Notice of Failure to File Quarterly Tax Return                                                                              | 6/27/1997        |
| Plaintiff's Ex. 18     | FKAC's Employer's Quarterly Federal Tax Return                                                                                          | 6/26/1997        |
| Plaintiff's Ex. 19     | Fixed Rate Certificate from First Federal of Charleston                                                                                 | 7/3/1997         |
| Plaintiff's Ex. 20     | FKAC checks to S.C. Department of Revenue and S.C. Employment Security Commission                                                       | 9/11/1997        |
| Plaintiff's Ex. 21     | Letter from the S.C. Employment Security Commission to FKAC                                                                             | 9/22/1997        |
| Plaintiff's Ex. 22     | IRS Employer's Quarterly Federal Tax Return Form addressed to FKAC c/o June Wells                                                       | Rev. 01/2001     |
| Plaintiff's Ex. 23     | Bank Statement for FKAC/Marion Hanckel Kindergarten sent care of June Wells                                                             | 12/31/2001       |
| Plaintiff's Ex. 24     | Various Utility Bills addressed to FKAC c/o June Wells                                                                                  | 2003-2009        |
| Plaintiff's Ex. 25     | Various Bank Correspondence Addressed to FKAC c/o June Wells                                                                            | 2004-2011        |
| Plaintiff's Ex. 26     | Undated blank check from a Wachovia account in the name of FKAC/Marion Hanckel Kindergarten c/o June Wells                              | Undated          |
| Plaintiff's Ex. 27A    | Application to Board of Architectural Review from FKAC/June Wells seeking to repair roof; payment receipt; approved application; permit | 6/19/2009        |
| Plaintiff's Ex. 27     | Handwritten Letter from June Wells to Charleston County Dept of Revenue Collections and enclosed FKAC check                             | 3/25/2010        |
| Plaintiff's Ex. 28     | Letter from the AG's Office to June Wells/FKAC                                                                                          | 11/12/2010       |
| Plaintiff's Ex. 29     | Order of the Charleston County Probate Court                                                                                            | 11/23/2010       |
| Plaintiff's Ex. 29A    | Affidavit of June Murray Wells                                                                                                          | 11/23/2010       |
| Plaintiff's Ex. 30     | Check from FKAC to Charleston County Revenue Collections                                                                                | 12/22/2012       |
| Plaintiff's Ex. 31     | Memorandum of Purchase and Sale Agreement                                                                                               | 4/23/2013        |
| Plaintiff's Ex. 32     | Letter from Royal to Colleen Carducci (City of Charleston)                                                                              | 5/29/2013        |

| <u>Exhibit Number</u> | <u>Document Description</u>                                                                        | <u>Doc. Date</u>         |
|-----------------------|----------------------------------------------------------------------------------------------------|--------------------------|
| Plaintiff's Ex. 38    | Quitclaim Deed from the City of Charleston to FKAC                                                 | 10/3/2013                |
| Plaintiff's Ex. 46    | Letter from Michael Royal to FKAC/June Wells                                                       | 11/10/2014               |
| Plaintiff's Ex. 47    | Letter from Michael Royal to FKAC/June Wells                                                       | 1/26/2015                |
| Plaintiff's Ex. 54    | Email Correspondence between William Wells and Michael Royal                                       | 1/11/2018                |
| Plaintiff's Ex. 54A   | Email Correspondence between William Wells and Michael Royal                                       | 3/13/2013                |
| Plaintiff's Ex. 55    | Email Correspondence between Royal, FKAC, Tread Josey and Bill Wells                               | 3/29/2018                |
| Plaintiff's Ex. 56    | FKAC's Notice of Sale to AG and cover letter                                                       | 4/4/2018                 |
| Plaintiff's Ex. 57    | Executed 1st Addendum to the Real Estate Purchase and Sale Agreement                               | 4/11/2018                |
| Plaintiff's Ex. 58    | FKAC's 1901 Constitution and Charter                                                               | 1901                     |
| Plaintiff's Ex. 59    | FKAC's Certificate of Incorporation                                                                | 1/24/1901                |
| Plaintiff's Ex. 60    | FKAC Resolution to Amend Charter                                                                   | 1/14/1931                |
| Plaintiff's Ex. 61    | FKAC's Application for Amendment of Charter                                                        | 1/16/1971                |
| Plaintiff's Ex. 62    | Secretary of State's Certification of FKAC's Amendment to Charter                                  | 2/5/1971                 |
| Plaintiff's Ex. 63    | Certificate of Existence of FKAC executed by the S.C. Secretary of State                           | 8/23/2013                |
| Plaintiff's Ex. 65    | 2nd Addendum to the Purchase and Sale Agreement                                                    | 4/24/2018                |
| Plaintiff's Ex. 66    | Defendant FKAC's Answers to Plaintiff Michael Royal's First Requests for Admission                 | 10/11/2021               |
| Plaintiff's Ex. 67    | Emails between Tread Josey and the AG's Office                                                     | 4/17/2018 -<br>4/19/2018 |
| Plaintiff's Ex. 68    | Letter to AG's Office from Michael Royal                                                           | 4/20/2018                |
| Plaintiff's Ex. 69    | Various emails between Michael Royal, the AG's Office, FKAC, and Tread Josey                       | 4/25/2018 -<br>5/18/2018 |
| Plaintiff's Ex. 70    | Letter to Plaintiff Royal from FKAC                                                                | 5/11/2018                |
| Plaintiff's Ex. 71    | Email from Michael Royal to FKAC and Tread Josey                                                   | 5/14/2018                |
| Plaintiff's Ex. 74    | Transcript of Deposition of CCSD's Rule 30(b)(6), SCRCF, Designee Jeffrey Borowy                   | 11/22/2021               |
| Plaintiff's Ex. 75    | S.C. Secretary of State Online Business Entity Profile for FKAC                                    | 11/6/2018                |
| Plaintiff's Ex. 76    | South Carolina 1900 Act No. 219 (with cover email from S.C. State Library to Royal dated 12/9/021) | 2/19/1900                |
| Plaintiff's Ex. 77    | Affidavit of Jill Hunter Powell (filed in C/A No. 2018-CP-10-5739 on 6/17/2021)                    | 6/17/2021                |
| Plaintiff's Ex. 78    | Defendant CCSD's Answer to Plaintiff's First Set Interrogatories                                   | 10/1/2021                |
| Plaintiff's Ex. 79    | Plaintiff's and FKAC's Stipulation of Fact                                                         | 10/1/2021                |
| Plaintiff's Ex. 80    | AG's Responses to Plaintiff's First Requests for Admission                                         | 10/8/2021                |
| Plaintiff's Ex. 81    | FKAC's Answers to Plaintiff's First Set of Interrogatories                                         | 10/11/2021               |
| Plaintiff's Ex. 82    | The AG's Responses to Plaintiff's First Set of Interrogatories                                     | 10/20/2021               |
| Plaintiff's Ex. 83    | UDC and Museum's Answers to Royal's First Request for Admissions                                   | 10/21/2021               |
| Plaintiff's Ex. 84    | CCSD's Answers to Plaintiff's First Requests for Admission                                         | 10/22/2021               |

| <u>Exhibit Number</u> | <u>Document Description</u>                                                         | <u>Doc. Date</u> |
|-----------------------|-------------------------------------------------------------------------------------|------------------|
| Plaintiff's Ex. 85    | Defendant CCSD's Answers to Plaintiff's Second Set of Interrogatories               | 10/25/2021       |
| Plaintiff's Ex. 86    | Defendant CCSD's 1st Supplemental Answers to Plaintiff's 1st Set of Interrogatories | 11/19/2021       |
| Plaintiff's Ex. 87    | Defendant CCSD's 2nd Supplemental Answers to Plaintiff's 1st Set of Interrogatories | 11/19/2021       |
| Plaintiff's Ex. 88    | Defendant CCSD's 1st Supplemental Answers to Plaintiff's 2nd Set of Interrogatories | 11/19/2021       |
| Plaintiff's Ex. 89    | Defendant CCSD's 3rd Supplemental Answers to Plaintiff's 1st Set of Interrogatories | 11/22/2021       |
| Plaintiff's Ex. 90    | Defendant CCSD's 2nd Supplemental Answers to Plaintiff's 2nd Set of Interrogatories | 11/28/2021       |
| Plaintiff's Ex. 91    | Defendant CCSD's 4th Supplemental Answers to Plaintiff's 1st Set of Interrogatories | 12/8/2021        |
| Plaintiff's Ex. 92    | Defendant CCSD's Answers to Plaintiff's 3rd Interrogatories                         | 12/8/2021        |
| Plaintiff's Ex. 93    | CCSD's Verification of Answers to Plaintiff's Interrogatories                       | 12/13/2021       |
| Plaintiff's Ex. 94    | The AG's Verification of AG's Responses to Plaintiff's Interrogatories              | 12/14/2021       |

|                                     |   |                                               |
|-------------------------------------|---|-----------------------------------------------|
| STATE OF SOUTH CAROLINA             | ) | IN THE COURT OF COMMON PLEAS                  |
|                                     | ) | NINTH JUDICIAL CIRCUIT                        |
| COUNTY OF CHARLESTON                | ) | CASE NO.: 2018-CP-10-05739                    |
|                                     | ) |                                               |
| Michael D. Royal                    | ) |                                               |
|                                     | ) |                                               |
| Plaintiff,                          | ) | <b><u>CHARLESTON COUNTY SCHOOL</u></b>        |
|                                     | ) | <b><u>DISTRICT'S REPLY TO PLAINTIFF'S</u></b> |
| vs.                                 | ) | <b><u>MEMORANDUM IN OPPOSITION TO</u></b>     |
|                                     | ) | <b><u>TO DEFENDANT CHARLESTON COUNTY</u></b>  |
|                                     | ) | <b><u>SCHOOL DISTRICT'S MOTION TO</u></b>     |
| Free Kindergarten Association of    | ) | <b><u>EXCLUDE AND STRIKE</u></b>              |
| Charleston, The Attorney General    | ) |                                               |
| of the State of South Carolina, and | ) |                                               |
| Charleston County School District,  | ) |                                               |
|                                     | ) |                                               |
| Defendants.                         | ) |                                               |

Defendant, Charleston County School District ("CCSD"), by and through its undersigned counsel, hereby submits this Memorandum in Reply to Plaintiff's Memorandum in Opposition to Defendant Charleston County School District's Motion to Exclude and Strike.

## **I. INTRODUCTION**

This matter came before the Master in Equity (the "Court") for trial on December 15, 2022, and concerns real property located at 34 Pitt Street in Charleston, South Carolina (the "Property"). Following the testimony of Michael D. Royal, as Plaintiff's final witness in Plaintiff's case in chief, and the Court's exchange with Plaintiff's counsel set forth in the official trial transcript at pgs 298: 8 – 300:17, the Court entertained motions and heard oral arguments on the parties' motions and various legal issues. After considering oral arguments, the testimony received and the documentary exhibits admitted into evidence, the Court issued its ruling from the bench, to be followed by a formal order, dismissing the case pursuant to Rule 41(b), SCRCP.

The Plaintiff complains the Court's granting of a nonsuit was improper because he had not

closed his case. *Plaintiff's Memorandum in Opposition to Defendant Charleston County School District's Motion to Exclude and Strike; Plaintiff's Amended Motion to Reconsider*. On the other hand, however, Plaintiff asserts that all of his exhibits were admitted at the trial of this action. *Id.*; **Exhibit A.** Plaintiff's procedural complaint as to the timing of the Court's nonsuit is incongruent with his assertion that all of his exhibits were admitted at the trial of this action.

Furthermore, South Carolina jurisprudence holds that although the usual time for a nonsuit is after the plaintiff closes his evidence in chief, a motion for nonsuit may be made at any time during the trial of a case. *Ahrens v. McDaniel*, 287 S.C. 63, 336 S.E.2d 505 (1985); Rule 41(b), SCRPC. A judge may grant a nonsuit on his own motion as well as on motion of counsel, including a motion of counsel for nonsuit solicited by the court. *Id.* The *Ahrens* decision was issued after the passage of the South Carolina Rules of Civil Procedure and remains viable precedent on the issue of nonsuit in South Carolina.

Under the circumstances of the present case, it was not error for the Court to grant a nonsuit after its consideration of the parties' motions, oral arguments, the testimony received and the documentary exhibits admitted into evidence. *See Id.*

The Plaintiff received a full and fair opportunity to present his case in chief before the Court. The material facts presented by Plaintiff in his case in chief on the salient issues of the Purchase and Sale Agreement ("PSA"), June Wells' alleged authority to execute the PSA on behalf of FKAC, the PSA's violation of public policy, the Attorney General of South Carolina's ("SCAG's") role and responsibilities in connection with the PSA and CCSD's rights to the residual proceeds of sale of the Property were before the Court at the time the Court granted the nonsuit. These material facts established the Defendants' right to judgment as a matter of law at this juncture of the trial, even before the Defendants had an opportunity to present their cases in chief

to the Court. Thus, the Court's nonsuit was proper.

On March 30, 2022, the Court signed its formal order granting the Attorney General's motion for nonsuit ("Nonsuit Order"). Also, on March 30, 2022, the Plaintiff filed a letter with the Charleston County Clerk of Court ("Clerk of Court") "filing" what he mischaracterizes as "his exhibits admitted at the trial of this action." **Exhibit A.** The Court filed its Nonsuit Order on March 31, 2022.

On April 8, 2022, CCSD filed its Motion to Exclude and Strike contesting the admission of certain of the "exhibits" contained in Plaintiff's March 30, 2022 letter to the Clerk of Court ("contested exhibits"). Plaintiff filed his Memorandum in Opposition to CCSD's Motion to Exclude and Strike on April 21, 2022 ("opposing memorandum").

CCSD hereby replies to Plaintiff's Opposing Memorandum as set forth below.

## **II. CCSD DID NOT WAIVE ITS RIGHT TO OBJECT TO THE CONTESTED DOCUMENTS WHICH PLAINTIFF MISCHARACTERIZES AS EXHIBITS ADMITTED AT THE TRIAL OF THIS ACTION.**

In his opposing memorandum, Plaintiff cites the following distinguishable legal precedent and flawed arguments in support of his claim that CCSD waived its objections to the contested documents:

- (1) Plaintiff cites the cases of *State v. Hoffman*, 312 S.C. 386, 440 S.E.2d 869 (1994); *White v. Wilbanks*, 298 S.C. 225, 379 S.E.2d 298 (Ct. App. 1989); and *State v. Byers*, 391 S.C. 438, 710 S.E.2d 55 (2011) as legal support for its argument of waiver ("Plaintiff's legal authorities").
- (2) Plaintiff's documents labeled as Exhibits 12-15 were initially proffered, but not admitted into evidence during the direct examination of Plaintiff.
- (3) Plaintiff's documents labeled as Exhibits 17-27, 27A, and 30 were cumulatively proffered at the suggestion of the Court in an acknowledgement of the wealth of evidence that Plaintiff intended to introduce on the contested issue of June Well's authority to execute the Purchase and Sale Agreement on behalf of FKAC.

- (4) Plaintiff's documents labeled as Exhibits 12-15, 17-27, 27A, and 30, which Plaintiff identifies as his alleged "Authority Documents", were all later admitted during the redirect examination of Plaintiff, as FKAC's counsel cross-examination of Plaintiff had opened the door allowing for the admission of these documents upon redirect.
- (5) Plaintiff's alleged Authority Documents were admitted into evidence without objection.
- (6) Plaintiff's other documents labeled as Plaintiff's exhibits, and contested by CCSD, include "discovery responses in the case, the transcript of the deposition of CCSD's Rule 30(b)(6) witness, and various legal authorities." Because the Court granted the SCAG's motion for non-suit prior to the close of Plaintiff's evidence, these exhibits were not individually identified in the trial transcript. However, the Court granted Plaintiff's request at trial to furnish the record with the rest of his evidence. CCSD made no objection at that time or request for Plaintiff to make specific identifications of these documents on the record.
- (7) CCSD failed to assert timely objections after receipt of the trial transcript.

### **Legal Analysis**

Under South Carolina law, [w]aiver is a voluntary and intentional abandonment or relinquishment of a known right." *Parker v. Parker*, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994). "Stated differently, waiver requires a party to have known of a right and known he was abandoning that right." *Id.*

Plaintiff's arguments are without merit under South Carolina law and fail to constitute sufficient grounds to constitute waiver of CCSD's right to object to these contested documents.

#### **A. Plaintiff's Legal Authorities Are Distinguishable And Inapposite To This Case.**

Plaintiff's legal authorities are both legally and factually distinguishable from the instant case inasmuch as: (b) the Plaintiff never moved to have the contested documents admitted into evidence at trial and, therefore, the legal principal requiring an objection contemporaneous with the submission of the evidence at trial does not apply to these contested documents and (b) all

three (3) cases cited by Plaintiff relate to objections and motions to strike live witness testimony (testimonial evidence) given and admitted into evidence at trial as opposed to a generic, non-specific “stack of documents” and other materials which: (a) Plaintiff did not include in Plaintiff’s Trial Exhibit Notebook and/or which Plaintiff never marked, identified, authenticated, supported with a properly laid foundation, or moved to be admitted into evidence and (b) the Court never admitted into evidence at trial.

## **B. Trial**

During the morning portion of trial, Plaintiff’s counsel stated that he “[had] a stack of documents that Mr. Royal received, and these are all documents that [Plaintiff’s counsel stated Mr. Royal] relied upon in believing that June Wells was the authorized agent for FKAC.” Tr. 106:4 – 122:11. Prior to the lunch break at trial, the Court allowed Plaintiff, via Plaintiff’s counsel, to proffer Plaintiff’s Exhibits 12-15 from this “stack of documents.” *Id.* The Court did not admit Plaintiff’s Exhibits 12-15 into evidence, and instead limited Plaintiff’s submission of these exhibits as proffers in the record. *Id.*

Following Plaintiff’s proffer of Plaintiff’s Exhibits 12-15, the Court admitted Plaintiff’s Exhibit 16 into evidence. *Id.* After the Court’s admission of Plaintiff’s Exhibit 16 into evidence, Plaintiff’s counsel stated he could proffer the “rest of” the earlier referenced generic, non-specific “stack of documents”. *Id.* Plaintiff’s counsel did not identify nor otherwise specify the individual documents or exhibits or corresponding exhibit numbers of such documents/exhibits from the “stack of documents” which Plaintiff intended to proffer. *Id.* In response, the Court advised Plaintiff’s counsel that he could do “[w]hatever [he] want[ed] to do” but that the proffer was to be “clean[ed] up later, not [then]”, and instructed Plaintiff and his legal team to “work on that over lunch” indicating that the Plaintiff’s alleged “authority documents” could be proffered later. *Id.*



Following the lunch break recess and during the redirect examination of Plaintiff, Plaintiff's counsel stated he "would renew [his] proffer then with all of the documents [Plaintiff's counsel stated Royal] relied upon." (i.e., the earlier referenced generic, non-specific "stack of documents"). Tr. 282:16 – 283:25. Plaintiff's counsel argued that FKAC's counsel's cross-examination of Plaintiff had opened the door for a proffer of these documents since he had "asked a number of questions about the documentation that [Plaintiff] relied upon..."<sup>1</sup> (Emphasis added). *Id.*

Once again, Plaintiff's counsel did not identify or specify any particular documents, exhibits or exhibit numbers from this generic, non-specific "stack of documents" for proffer. Furthermore, despite Plaintiff's counsel's statements at this juncture of the trial, Plaintiff ultimately did not proceed at that point or at any other time to make a proffer of any additional documents or exhibits at trial. Finally, the Court made it clear in its exchange with Plaintiff's counsel that any such proffer by Plaintiff would be just that, a proffer and not the admission of such documents or exhibits into evidence at trial. Tr. 283:2-24.

Plaintiff's counsel, upon concluding his redirect examination of Plaintiff and indicating Plaintiff to be his last witness, informed the Court that he had "a lot of stuff to do before [he closed his] case. Tr. 298:4 – 299:25. Specifically, he stated "I've got discovery responses, interrogatory answers. I have got request to admit answers. I've got deposition, 30(b)(6) deposition transcript [of CCSD] that comes in and –We've got a couple of statutes that we've got. We actually have a 1967 and a 1976 code book." *Id.* Plaintiff's counsel's references to these materials were generic

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<sup>1</sup> Contrary to Plaintiff's contention that Mr. Stringer "opened the door" on certain unspecified documents during his cross-examination of Mr. Royal, Mr. Stringer's questioning only addressed 1) Exhibit 11 – Purchase and Sales Agreement, 2) a county tax record which was not admitted, and 3) that there were "... no bylaws that you were aware of pointing Ms. Wells as a director, board member, or anything else ..." and "... no resolution allowing her to sign the contract ...". See Tr. 201:5-14 and Exhibit 1 to CCSD's Motion to Exclude and Strike.

and did not identify specific exhibits or corresponding exhibit numbers. Also, none of these materials were contained in Plaintiff's Trial Exhibit Notebook.

In addition to the above comments, Plaintiff's counsel advised the Court at this time that inasmuch as excerpts of the 30(b)(6) deposition of CCSD had not been provided to its counsel per SCRCF, that Plaintiff would put the entire transcript of the CCSD 30(b)(6) deposition in..." whereupon the Court informed counsel that "[t]hat ain't the way it works." TR. 298:17 – 299:25. The CCSD 30(b)(6) deposition transcript was likewise not contained in Plaintiff's Trial Exhibit Notebook.

Following this exchange with Plaintiff's counsel, the Court entertained motions, heard oral arguments of the parties' motions and various legal issues and issued its ruling on the bench, to be followed by a formal order, dismissing the case by nonsuit. The Court issued its ruling dismissing the case prior to presentation of any of the Defendant's cases in chief in this action.

Upon the Court's ruling, the following colloquy occurred between Plaintiff's counsel and the Court regarding the court record:

"MR. TIBBALS: [M]ay I complete the record as we were discussing –

THE COURT: Sure, absolutely.

MR. TIBBALS: --and put in the documents and evidence that I need to do?

THE COURT: Yep.

Tr. 345:9-15.

Plaintiff's counsel's statements are ambiguous as to whether he was requesting to make a proffer of the generically referenced "documents and evidence" or to move for the admission of said materials into evidence. Plaintiff's Opposing Memorandum continues this ambiguity by arguing that the Court, in the colloquy cited above, "granted Plaintiff's request at trial to *furnish*

the record with the rest of his evidence.” (emphasis added).

Regardless of this ambiguity, the Court, in its exchange with Plaintiff’s counsel, did not dispense with the South Carolina Rules of Evidence (“SCRE”) in regard to Plaintiff’s request to complete the record in this matter. No Court has authority to disregard the application of these evidentiary rules.

As a result, the Plaintiff was required either to make a proffer of specifically marked and identified exhibits or move for and obtain the admission of said exhibits into evidence in accordance with the SCRE. At trial, the Plaintiff failed on both counts with respect to the contested exhibits.

The record establishes that the Plaintiff failed to make a proffer of any specifically marked and identified exhibits at trial other than Plaintiff’s Exhibits 12-15. *See Transcript of Hearing (including Index of Exhibits), Pgs. 1-352.* Plaintiff made no proffer of the specific contested exhibits at trial. *Id.*

The record further establishes that: (a): Plaintiff failed to satisfy the evidentiary requirements for admission of the contested exhibits into evidence at trial (including, the requirements to mark, identify, authenticate, lay a proper foundation for, and move to admit each particular exhibit into evidence) and (b) the Court never admitted the contested exhibits into evidence at trial.

Finally, as the Court’s official, certified post-trial confirmation of the above, CCSD craves reference to the official Index of Exhibits to the trial transcript prepared and certified by the Court’s court reporter at the trial of this action. **Exhibit B.** The court reporter’s Index of Exhibits establishes that: (1) Plaintiff’s Exhibits 12 – 15 were the only documents proffered by Plaintiff at trial; (2) While proffered at trial, Plaintiff’s Exhibits 12 -15 were never admitted into evidence at

trial; and (3) The contested exhibits were neither proffered nor admitted into evidence at trial (i.e., Plaintiff's exhibits 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27A, 27, 30, 54A, 71, 74, 75, 76, 77, 78, 79, 80, 81, 82, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, and 94). *Id.*

### C. Post-Trial

Having failed to make a proffer or obtain the admission of the contested documents into evidence at trial, the Plaintiff seeks through his post-trial letter to the Clerk of Court to deem the contested documents as exhibits of the Plaintiff admitted into evidence at trial.

However, Plaintiff has failed to satisfy the evidentiary requirements for the admission of the contested exhibits into evidence at trial and his post-trial letter to the Clerk of Court fails to cure these defects.

On December 23, 2021, eight days after trial, Plaintiff's counsel emailed all counsel of record a link to access "Plaintiff's trial exhibits that *will be submitted* for the record" (emphasis added) and an "index of the exhibits." **Exhibit C.** The index of exhibits consisted of a spreadsheet titled "**PLAINTIFF'S TRIAL EXHIBITS**" and listed **94 exhibits** in total. The **94 exhibits** contained in Plaintiff's link constituted an increase of **21 exhibits** over and above the **73 exhibits** contained in Plaintiff's Trial Exhibit Notebook from which Plaintiff drew his exhibits at trial.

On December 29, 2021, via reply email and as a matter of professional courtesy, CCSD's counsel thanked Plaintiff's counsel for his December 23, 2001 email. However, CCSD's reply email expressly informed Plaintiff's counsel of concerns held by CCSD regarding multiple objections to various documents mischaracterized by Plaintiff as "Plaintiff's trial exhibits." **Exhibit D.** CCSD's counsels' reply email further informed Plaintiff's counsel that they would review the trial transcript and "file formal objections to the applicable documents **as necessary**." (emphasis added). *Id.*

Following CCSD's reply email, ninety one (91) days passed without: (a) any further response from Plaintiff's counsel, (b) the filing of a Rule 52(b), SCRCP motion by Plaintiff, or (c) satisfaction of evidentiary requirements of SCRE or admission of the contested documents into evidence.

Therefore, during this period, CCSD deemed that formal objections were premature and unnecessary following its December 29, 2021 reply email.

However, on March 30, 2022, the day the Court signed the Order dismissing Plaintiff's case, the Plaintiff filed a letter with the Clerk of Court "filing" what he mischaracterizes as his "exhibits admitted at the trial of this action." **Exhibit A.** At the time of Plaintiff's letter to the Clerk of Court, Plaintiff had not satisfied the above-referenced specific evidentiary requirements of the SCRE for the admission of the contested exhibits into evidence.

In addition, the Court had not admitted the contested exhibits into evidence at the time of Plaintiff's letter to the Clerk of Court. Therefore, the contested documents filed with the Clerk of Court did not constitute nor qualify as "exhibits admitted at the trial of this action."

Finally, Plaintiff's letter to the Clerk of Court cannot substitute for nor satisfy the evidentiary requirements for the admission of evidence under the SCRE for the admission nor does it constitute a court order admitting the contested exhibits into evidence.

Under these circumstances, and after review of the trial transcript and receipt of Plaintiff's letter to the Clerk of Court, CCSD deemed it **necessary** to file formal objections to the contested documents. Accordingly, CCSD filed its formal Motion to Exclude and Strike on April 8, 2022.

In conclusion, CCSD did not voluntarily and intentionally abandon or relinquish its right to object to admission of the contested exhibits into evidence. Therefore, CCSD has not waived its right to object to the contested exhibits which Plaintiff mischaracterizes as exhibits admitted at

the trial of this action.

### **III. CCSD'S OBJECTIONS TO THE CONTESTED EXHIBITS ARE MERITORIOUS.**

#### **A. Trial Notebook Objection is Valid**

On December 8, 2021, Plaintiff filed Plaintiff Michael D. Royal's Pre-Trial Brief, containing a "list of exhibits that Plaintiff may introduce at trial." **Exhibit E.** Plaintiff listed **13 potential exhibits** and reserved the right to identify additional exhibits on or before the Court's stated deadline of December 13, 2021. On December 13, 2021, Plaintiff submitted Plaintiff Michael D. Royal's List of Potential Trial Exhibits to the Court and counsel of record. **Exhibit F.** Plaintiff's List of Potential Trial Exhibits listed **105 potential exhibits**.

At trial on December 15, 2021, Plaintiff provided the Court and all counsel of record with his notebook entitled **TRIAL EXHIBITS – Hearing before the Honorable Mikell R. Scarborough – Wednesday, December 15, 2021 at 10:00 am** ("Plaintiff's Trial Exhibit Notebook"). Plaintiff's Trial Exhibit Notebook contained **73 tabbed exhibits**. Plaintiff's Trial Exhibit Notebook: (a) eliminated thirty-two (32) exhibits from Plaintiff's List of Potential Trial Exhibits, dated December 13, 2021; (b) renumbered and assigned new trial exhibit numbers to the remaining 73 tabbed exhibits; and (c) failed to include Plaintiff's now proposed Plaintiff's Exhibits 74-94 contained in its post-trial letter to the Clerk of Court . Plaintiff pulled his trial exhibits directly from Plaintiff's Trial Exhibit Notebook during trial.

The last Plaintiff's exhibit drawn from Plaintiff's Trial Exhibit Notebook and admitted into evidence at trial was Plaintiff's Exhibit 70. Tr. 185:18-186:1. The remaining Plaintiff's Exhibits 71 and 73 contained in Plaintiff's Trial Exhibit Notebook were not admitted into evidence at trial. **See Exhibit B.**

On December 23, 2021, eight days after trial, Plaintiff's counsel emailed all counsel of

record a link to access **“Plaintiff’s trial exhibits that will be submitted for the record”** (emphasis added) and an “index of the exhibits.” **Exhibit C.** The index of exhibits consisted of a spreadsheet titled **“PLAINTIFF’S TRIAL EXHIBITS”** and listed **94 exhibits** in total. The 94 exhibits contained in Plaintiff’s link constituted an increase of 21 exhibits over and above the 73 exhibits contained in Plaintiff’s Trial Exhibit Notebook.

On March 30, 2022, the day the Court signed the Order dismissing Plaintiff’s case, the Plaintiff filed a letter with the Charleston County Clerk of Court filing what he mischaracterizes as “his exhibits admitted at the trial of this action.” **EXHIBIT A.** Plaintiff’s letter included the same spreadsheet index of exhibits titled **“PLAINTIFF’S TRIAL EXHIBITS”** and the same **94 exhibits** contained in the December 23, 2021 email link.

Despite the above, Plaintiff now attempts by his December 23, 2001 email and March 30, 2022 letter to the Clerk of Court to improperly file certain exhibits that were neither contained in Plaintiff’s Trial Exhibit Notebook nor proffered, moved to be admitted or admitted into evidence at trial. Specifically, Plaintiff seeks to file into the record Plaintiff’s Exhibit’s 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27A, 27, 30, 54A, 71, and 74 – 94 as referenced in his post-trial administrative filing with the Clerk of Court, which exhibits were not contained in Plaintiff’s Trial Notebook and were neither proffered nor admitted into evidence at the trial of this matter.

Plaintiff’s post-trial attempt in this manner to in essence supplement Plaintiff’s Trial Exhibit Notebook with **21 new exhibits and to move these new exhibits into evidence** is improper. These specific exhibits were not marked and identified by Plaintiff as exhibits at trial, were not provided to CCSD as exhibits at trial and were never moved from Plaintiff’s Trial Exhibit Notebook and entered into evidence at trial. Thus, CCSD was prejudiced and deprived of its substantial right and opportunity to be informed of, to consider and to lodge objections to these

particular exhibits at trial.

Based on the above grounds, as well as the objections contained in Exhibit 1 to CCSD's Motion to Exclude and Strike, the contested Exhibits 74-94 should be excluded and stricken from the record.

**B. CCSD's Objections Are Specific and Satisfy The South Carolina Rules of Evidence.**

CCSD's objections to the contested exhibits are made on specific grounds as fully stated in Exhibit 1 (and Exhibits A and B thereto) to CCSD's Motion to Exclude and Strike. CCSD's specific objections and its attendant Motion to Exclude and Strike are in full compliance with the South Carolina Rules of Civil Procedure. *See* Rule 103, SCRE.

Based on the above grounds, as well as the objections contained in Exhibit 1 to CCSD's Motion to Exclude and Strike, the contested Exhibits 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27A, 27, 30, 54A, 71, 74 - 94 should be excluded and stricken from the record.

**C. The Contested Exhibits Labeled By Plaintiff as Authority Exhibits Or Exhibits Serving the Same Purpose Are Inadmissible Hearsay and Irrelevant to the Issue of Apparent Authority.**

Plaintiff labels his proposed Exhibits 12-15, 17-27, 27A, and 30 as "Authority Exhibits". Plaintiff labels his proposed Exhibits 77, 79, and 83 as exhibits which serve the same purpose ("Same Purpose Exhibits") as his "Authority Exhibits." Plaintiff asserts that these documents are not hearsay and there was no error in the admission of these documents into evidence. Plaintiff argues these documents were not offered for the truth of the matter asserted, but rather to show that he relied and acted upon the statements therein. However, to be admissible for this purpose, such statements must be limited solely to explaining Plaintiff's subsequent conduct or showing the effect of the statements upon the Plaintiff.



Plaintiff exceeds this strictly limited scope of admissibility by claiming these documents establish June Well's apparent authority to execute the PSA and sell 34 Pitt Street, the last remaining asset of FKAC.

As an initial matter, the record establishes that: (1) Exhibits 12 -15 were marked, identified and proffered, but not admitted into evidence at trial or post trial under Rule 52(b), SCRPC; (2) Exhibits 17-27, 27A, and 30 were neither marked, identified, authenticated, supported by a properly laid foundation, proffered, moved to be admitted into evidence by Plaintiff or admitted into evidence by the Court at trial or post trial under Rule 52(b), SCRPC and (3) Exhibits 77, 79, and 83 were never even mentioned at trial nor contained in Plaintiff's Trial Exhibit Notebook, much less marked, identified, authenticated, supported by a properly laid foundation, proffered, moved to be admitted into evidence by Plaintiff or admitted into evidence by the Court at trial or post trial under Rule 52(b), SCRPC. *See*, SECTION II. Above.

Furthermore, the Court's limitation of the Plaintiff to a proffer of the "Authority Exhibits" (Plaintiff's Exhibits 12-15) and the potential for a proffer of the "Authority Exhibits" (Plaintiff's Exhibits 17 – 27, 27A, and 30) which proffer Plaintiff failed to make at trial was due, *inter alia*, to the inadmissibility of these documents as inadmissible hearsay. The Court rejected Plaintiff's reliance argument as grounds for admitting the "Authority Documents" into evidence and limited Plaintiff to a proffer or potential for proffer as stated above.

The same analysis and result necessarily applies to the "same purpose" documents cited in Plaintiff's Opposing Memorandum (Plaintiff's proposed Exhibits 77, 79, and 83), documents which Plaintiff argues he relied upon for Ms. Well's authority to execute the Purchase and Sale Agreement ("PSA"), but notably did not even exist at the time of Ms. Well's execution of the PSA. *Plaintiff's Amended Motion to Reconsider; Plaintiff's Memorandum in Opposition to Defendant*

*Charleston County School District's Motion to Exclude and Strike.*

Plaintiff argues that his “Authority Exhibits” and “Same Purpose Exhibits” establish that June Wells’ words and conduct established her apparent authority to execute the PSA and sell the 34 Pitt Street property. Plaintiff’s argument lacks merit.

Apparent authority is ascertained from the interaction between the principal and a third party, rather than the interaction between the principal and the agent. Apparent authority is demonstrated by words or conduct of the principal that such words or conduct convey to the third party that such agent possesses the authority to enter into a transaction for the principal. The agent cannot by his or her own acts, obtain or prove that he/she has this authority. Rather, apparent authority depends on and must be proven by conduct or words of the principal. Apparent authority depends on a factual showing that the principal, through its actions or words, leads the third party to reasonably believe that the agent had apparent authority to enter into the transaction on behalf of the principal.

Plaintiff failed to make this showing in his case in chief at trial. Here, FKAC is the principal and Wells is the agent. Accordingly, Plaintiff’s “Authority Exhibits” and “Same Purpose Exhibits”, and June Wells’ words and conduct in connection therewith are not even relevant to the determination of apparent authority since it is the words and conduct of the principal that are controlling.

Finally, the Plaintiff, by his own admissions, acknowledges the inadmissibility of these contested documents. Plaintiff argues that FKAC’s counsel opened the door for the admission of these documents during his cross examination of Plaintiff.<sup>2</sup> *Assuming arguendo* the validity of

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<sup>2</sup> See Footnote 1 herein.

Plaintiff's argument, the "open door doctrine" would only allow for the admission of otherwise inadmissible evidence. Therefore, Plaintiff's reliance upon the "open door doctrine" as his grounds for admission of the contested documents into evidence is an absolute admission of the inadmissibility of these contested documents by the Plaintiff.

Based on the above grounds, as well as the objections contained in Exhibit 1 to CCSD's Motion to Exclude and Strike, the contested Exhibits 12-15, 17-27, 27A, 30, 77, 79, and 83 should be excluded and stricken from the record.

**D. Plaintiff's Submission of Discovery Responses As Trial Exhibits Is Improper.**

Plaintiff seeks through his letter to the Clerk of Court to submit Plaintiff's proposed Exhibits 78-94 labeled by Plaintiff as "Discovery Responses" as part of his "exhibits admitted at the trial of this action." Plaintiff's submission is improper.

Plaintiff's counsel made generic, non-specific references to discovery responses/answers in his ambiguous colloquy with the Court at trial. *See* SECTION II., *supra*. Plaintiff's counsel's generic references did not identify any particular parties' discovery responses nor corresponding exhibit numbers. Exhibits 78-94 were not contained in Plaintiff's Trial Exhibit Notebook, and were never marked, identified, authenticated, supported by a properly laid foundation, moved to be admitted into evidence by Plaintiff or admitted into evidence by the Court at trial or post trial under Rule 52(b), SCRCP. *See*, SECTION II., *supra*.

Based on the above grounds, as well as the objections contained in Exhibit 1 to CCSD's Motion to Exclude and Strike, the contested Exhibits 78-94 should be excluded and stricken from the record.

**E. Plaintiff's Submission of the Transcript of the Rule 30(b)(6) Deposition of CCSD through its designated representative Jeffrey Thomas Borowy is improper.**

Plaintiff seeks through his letter to the Clerk of Court to submit Plaintiff's proposed Exhibit 74 labeled by Plaintiff as "Transcript of Deposition of CCSD's Rule 30(b)(6), SCRCPP, Designee Jeffrey Borowy" as part of "his exhibits admitted at the trial of this action." Plaintiff's submission is improper.

Plaintiff's Pre-Trial Brief, dated December 8, 2021, listed "CCSD, via excerpts of the transcript of its Rule 30(b)(6), SCRCPP, deposition" as a potential witness at trial. See *Exhibit E - Plaintiff Michael D. Royal's Pre-Trial Brief*, Pgs. 20-21. Plaintiff reserved the right to amend or supplement his witness list prior to trial. *Id.* at pg. 21. Plaintiff did not amend or supplement his witness list prior to trial.

Plaintiff's List of Potential Trial Exhibits, dated December 13, 2021, listed "Excerpts of the Rule 30(b)(6), SCRCPP, Deposition of CCSD, via written transcript (designee Jeffrey Borowy)" as a potential exhibit at trial. See *Exhibit F - Plaintiff Michael D. Royal's List of Potential Trial Exhibits*, Exhibit 102.

At trial on December 15, 2021, Plaintiff provided the Court and all counsel of record with his notebook entitled **TRIAL EXHIBITS – Hearing before the Honorable Mikell R. Scarborough – Wednesday, December 15, 2021 at 10:00 am** ("Plaintiff's Trial Exhibit Notebook"). Plaintiff's Trial Exhibit Notebook contained **73 tabbed exhibits**. Plaintiff's Trial Exhibit Notebook: (a) eliminated Exhibit 102 - Excerpts of the Rule 30(b)(6), SCRCPP, Deposition of CCSD, via written transcript (designee Jeffrey Borowy) as a trial exhibit; and (b) failed to include Plaintiff's now proposed Plaintiff's Exhibit 74 – Transcript of Deposition of CCSD's Rule 30(b)(6), SCRCPP, Designee Jeffrey Bowery as a trial exhibit.

Despite the above, Plaintiff's counsel advised the Court after the conclusion of Plaintiff's re-direct examination that [Plaintiff] would put the entire [CCSD] 30(b)(6) deposition transcript in..." as part of closing his case. **Tr. 298:15-23.** Prior to trial, Plaintiff had informed all Defendants of only the potential use of excerpts from CCSD's Rule 30(b)(6) deposition transcript as a witness/exhibit at trial. And even this notice and Plaintiff's listing of these excerpts as a witness/exhibit had been withdrawn by their removal from Plaintiff's Trial Exhibit Notebook at trial.

In light of Plaintiff's pretrial exhibit/witness disclosures, CCSD objected to the use of excerpts of CCSD's Rule 30(b)(6) deposition transcript on the grounds of Plaintiff's failure to provide counsel for CCSD with the excerpts that he intended to enter into evidence in violation of SCRCP 32(a)(5). Tr. 299:14-18. Plaintiff continued, however, over CCSD's above objection to state that he had the Rule 30(b)(6) deposition of CCSD that comes in..." whereupon the Court informed Plaintiff's counsel that "[t]hat ain't the way it works." (emphasis added). **Tr. 299: 24-25.**

The Court's exclusion of CCSD's Rule 30(b)(6) deposition transcript was proper. Plaintiff's proposed Exhibit 74 was never listed on **any trial exhibit list of Plaintiff**, was not contained in Plaintiff's Trial Exhibit Notebook at trial, and was never marked, identified, authenticated, supported by a properly laid foundation, moved to be admitted into evidence by Plaintiff or admitted into evidence by the Court at trial or post trial under Rule 52(b), SCRCP.

Nonetheless, Plaintiff continues to attempt to admit CCSD's Rule 30(b)(6) deposition transcript as a trial exhibit in his post trial letter to the Clerk of Court. By doing so, Plaintiff seeks to circumvent the Court's trial ruling, as well as the Court's earlier pre-trial ruling on CCSD's Motion to Modify Plaintiff's Notice of Rule 30(b)(6), SCRCP, Deposition of Defendant

Charleston County School District and to Quash Portions Thereof and Motion for Protective Order, filed November 11, 2021. (“CCSD’s Rule 30(b)(6) Deposition Motion”).

CCSD’s Deposition Motion set forth specific matters of examination that CCSD requested be quashed and requested a protective order in favor of CCSD related to those matters. Despite filing CCSD’s Deposition Motion, and in an effort to advance the case prior to trial, CCSD agreed, subject to CCSD’s Deposition Motion and as expressly indicated therein, to provide a representative to testify on the other matters listed in Plaintiff’s Notice of Rule 30(b)(6); specifically, those matters not objected to in CCSD’s Motion. As confirmed, CCSD provided Jeffrey Bowery, Chief Operating Officer, as CCSD’s representative to be deposed on November 22, 2021.

Despite CCSD’s Deposition Motion filed November 11, 2021, and despite that this Court had not yet heard CCSD’s Deposition Motion, counsel for Plaintiff asked many objectionable questions related to the specific Matters of Examination that CCSD’s Deposition Motion sought to quash (“objectionable matters”) during the 30(b)(6) deposition of CCSD held on November 22, 2021. Accordingly, during the deposition, CCSD’s counsel made objections to various questions of Plaintiff’s counsel related to these objectionable matters. The objectionable Matters of Examination to which CCSD objected in CCSD’s Deposition Motion and at the deposition included Items 3(a), (b), and (d), 9, 12, 13, 16, 17, 18, 19, 21, 22, 23, and 24 listed in Plaintiff’s Notice of Rule 30(b)(6) SCRCF, Deposition of Charleston County School District.

Following the deposition, the Court heard oral arguments on CCSD’s Deposition Motion on November 29, 2021. The Court granted CCSD’s Rule 30(b)(6) Deposition Motion with one exception. The Court’s ruling allowed Plaintiff to reconvene the deposition “. . . solely on the basis of . . . cases, similar to this one, in which [CCSD] have been the recipient of a gift of property

that they've got.” See **Exhibit G** – *Excerpts of 11/29/21 hearing transcript at 32:19 – 33-1*.

Thus, the admission of CCSD’s Rule 30(b)(6) deposition transcript as a trial exhibit would substantially prejudice CCSD in the following particulars: Such admission would (a): reverse this Court’s rulings in its earlier pretrial order on CCSD’s Rule 30(b)(6) Motion (b): allow the admission of information concerning Matters of Examination found objectionable and protected from inquiry and disclosure by the Court; and (c) allow for the admission of Exhibit 74 which was not contained in any exhibit list of Plaintiff, not contained in Plaintiff’s Trial Exhibit Notebook, and was never marked, identified, authenticated, supported by a properly laid foundation, moved to be admitted into evidence by Plaintiff or admitted into evidence by the Court at trial or post trial under Rule 52(b), SCRCF. See, SECTION II., *supra*.

Based on the above grounds, as well as the objections contained in Exhibit 1 to CCSD’s Motion to Exclude and Strike, the contested Exhibit 74 should be excluded and stricken from the record.

### **Conclusion**

Based on the foregoing, the Defendant Charleston County School District is entitled to an Order:

(1): Excluding and striking the documents designated and attached as “Exhibits 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27A, 27, 30, 54A, 71, 74, 75, 76, 77, 78, 79, 80, 81, 82, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, and 94” in Plaintiff, Michael Royal’s counsel’s letter to The Honorable Julie J. Armstrong, Charleston County Clerk of Court, dated March 30, 2022, wherein Plaintiff seeks to file these documents as plaintiff’s “exhibits admitted at the trial of this action”.

For these reasons, the Defendant Charleston County School District hereby respectfully

requests that its Motion to Exclude and Strike be granted.

LAW OFFICE OF A. BRIGHT ARIAIL, LLC

/s/ A. Bright Ariail

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*Attorneys for Charleston County School District*

May 20, 2022  
Charleston, South Carolina



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March 30, 2022

**VIA E-FILING**

The Honorable Julie J. Armstrong  
Charleston County Clerk of Court  
100 Broad Street  
Charleston, SC 29401

**Re: *Michael D. Royal v. Free Kindergarten Association of Charleston, et al.***  
**Civil Action No. 2018-CP-10-05739**

Dear Ms. Armstrong:

This firm represents Plaintiff Michael D. Royal ("Plaintiff") in the above-captioned matter. As requested by the Court, Plaintiff is filing his exhibits admitted at the trial of this action. Below is an index or list of the same for reference, which was circulated to counsel of record on December 23, 2021, as evidenced by the email correspondence that is enclosed and filed herewith.

| <b><u>Exhibit Number</u></b> | <b><u>Document Description</u></b>                                                         | <b><u>Doc. Date</u></b> |
|------------------------------|--------------------------------------------------------------------------------------------|-------------------------|
| Plaintiff's Robinson 1       | Appraisal of the Property, as of December 19, 2012, by Charleston Appraisal Services, Inc. | 12/19/2012              |
| Plaintiff's Ex. 1            | December 3, 2011 Picture of Property                                                       | 12/3/2011               |
| Plaintiff's Ex. 2            | December 3, 2011 Picture of Property                                                       | 12/3/2011               |
| Plaintiff's Ex. 3            | December 3, 2011 Picture of Property                                                       | 12/3/2011               |
| Plaintiff's Ex. 4            | Email from Michael Royal to Secretary of State's Office                                    | 12/7/2011               |
| Plaintiff's Ex. 7            | News and Courier Article regarding June Wells                                              | 10/8/1990               |
| Plaintiff's Ex. 8            | Royal's Calendar Reminder (Subject: Meet June Wells at 34 Pitt Street)                     | 11/4/2012               |
| Plaintiff's Ex. 9            | Email to Michael Royal from Mike Robinson                                                  | 11/12/2012              |

EXHIBIT A

|                     |                                                                                                                                         |              |
|---------------------|-----------------------------------------------------------------------------------------------------------------------------------------|--------------|
| Plaintiff's Ex. 10  | January 14, 2013 letter from Royal to June Wells w/ enclosed proposed PSA (v6)                                                          | 01/14/2013   |
| Plaintiff's Ex. 11  | Real Estate Purchase and Sale Agreement                                                                                                 | 04/23/2013   |
| Plaintiff's Ex. 12  | Letter from Lawrence A. Dodds, Jr. to FKAC/June Wells with Draft Lease                                                                  | 11/22/1993   |
| Plaintiff's Ex. 13  | S.C. Department of Revenue Withholding Tax Change of Records/Reorder Form addressed to FKAC c/o June Wells                              | 1/1/1997     |
| Plaintiff's Ex. 14  | FKAC's Letter Replying to S.C. Tax Commission's Letter of 1/8/1997                                                                      | 3/4/1997     |
| Plaintiff's Ex. 15  | Letter from S.C. Department of Revenue to FKAC c/o June Wells                                                                           | 3/19/1997    |
| Plaintiff's Ex. 16  | FKAC's Resolution Designating Bank Depository                                                                                           | 06/25/1997   |
| Plaintiff's Ex. 17  | State of SC Notice of Failure to File Quarterly Tax Return                                                                              | 6/27/1997    |
| Plaintiff's Ex. 18  | FKAC's Employer's Quarterly Federal Tax Return                                                                                          | 6/26/1997    |
| Plaintiff's Ex. 19  | Fixed Rate Certificate from First Federal of Charleston                                                                                 | 7/3/1997     |
| Plaintiff's Ex. 20  | FKAC checks to S.C. Department of Revenue and S.C. Employment Security Commission                                                       | 9/11/1997    |
| Plaintiff's Ex. 21  | Letter from the S.C. Employment Security Commission to FKAC                                                                             | 9/22/1997    |
| Plaintiff's Ex. 22  | IRS Employer's Quarterly Federal Tax Return Form addressed to FKAC c/o June Wells                                                       | Rev. 01/2001 |
| Plaintiff's Ex. 23  | Bank Statement for FKAC/Marion Hanckel Kindergarten sent care of June Wells                                                             | 12/31/2001   |
| Plaintiff's Ex. 24  | Various Utility Bills addressed to FKAC c/o June Wells                                                                                  | 2003-2009    |
| Plaintiff's Ex. 25  | Various Bank Correspondence Addressed to FKAC c/o June Wells                                                                            | 2004-2011    |
| Plaintiff's Ex. 26  | Undated blank check from a Wachovia account in the name of FKAC/Marion Hanckel Kindergarten c/o June Wells                              | Undated      |
| Plaintiff's Ex. 27A | Application to Board of Architectural Review from FKAC/June Wells seeking to repair roof; payment receipt; approved application; permit | 6/19/2009    |

|                     |                                                                                                             |            |
|---------------------|-------------------------------------------------------------------------------------------------------------|------------|
| Plaintiff's Ex. 27  | Handwritten Letter from June Wells to Charleston County Dept of Revenue Collections and enclosed FKAC check | 3/25/2010  |
| Plaintiff's Ex. 28  | Letter from the AG's Office to June Wells/FKAC                                                              | 11/12/2010 |
| Plaintiff's Ex. 29  | Order of the Charleston County Probate Court                                                                | 11/23/2010 |
| Plaintiff's Ex. 29A | Affidavit of June Murray Wells                                                                              | 11/23/2010 |
| Plaintiff's Ex. 30  | Check from FKAC to Charleston County Revenue Collections                                                    | 12/22/2012 |
| Plaintiff's Ex. 31  | Memorandum of Purchase and Sale Agreement                                                                   | 4/23/2013  |
| Plaintiff's Ex. 32  | Letter from Royal to Colleen Carducci (City of Charleston)                                                  | 5/29/2013  |
| Plaintiff's Ex. 38  | Quitclaim Deed from the City of Charleston to FKAC                                                          | 10/3/2013  |
| Plaintiff's Ex. 46  | Letter from Michael Royal to FKAC/June Wells                                                                | 11/10/2014 |
| Plaintiff's Ex. 47  | Letter from Michael Royal to FKAC/June Wells                                                                | 1/26/2015  |
| Plaintiff's Ex. 54  | Email Correspondence between William Wells and Michael Royal                                                | 1/11/2018  |
| Plaintiff's Ex. 54A | Email Correspondence between William Wells and Michael Royal                                                | 3/13/2013  |
| Plaintiff's Ex. 55  | Email Correspondence between Royal, FKAC, Tread Josey and Bill Wells                                        | 3/29/2018  |
| Plaintiff's Ex. 56  | FKAC's Notice of Sale to AG and cover letter                                                                | 4/4/2018   |
| Plaintiff's Ex. 57  | Executed 1st Addendum to the Real Estate Purchase and Sale Agreement                                        | 4/11/2018  |
| Plaintiff's Ex. 58  | FKAC's 1901 Constitution and Charter                                                                        | 1901       |
| Plaintiff's Ex. 59  | FKAC's Certificate of Incorporation                                                                         | 1/24/1901  |
| Plaintiff's Ex. 60  | FKAC Resolution to Amend Charter                                                                            | 1/14/1931  |
| Plaintiff's Ex. 61  | FKAC's Application for Amendment of Charter                                                                 | 1/16/1971  |
| Plaintiff's Ex. 62  | Secretary of State's Certification of FKAC's Amendment to Charter                                           | 2/5/1971   |
| Plaintiff's Ex. 63  | Certificate of Existence of FKAC executed by the S.C. Secretary of State                                    | 8/23/2013  |
| Plaintiff's Ex. 65  | 2nd Addendum to the Purchase and Sale Agreement                                                             | 4/24/2018  |

|                    |                                                                                                    |                       |
|--------------------|----------------------------------------------------------------------------------------------------|-----------------------|
| Plaintiff's Ex. 66 | Defendant FKAC's Answers to Plaintiff Michael Royal's First Requests for Admission                 | 10/11/2021            |
| Plaintiff's Ex. 67 | Emails between Tread Josey and the AG's Office                                                     | 4/17/2018 - 4/19/2018 |
| Plaintiff's Ex. 68 | Letter to AG's Office from Michael Royal                                                           | 4/20/2018             |
| Plaintiff's Ex. 69 | Various emails between Michael Royal, the AG's Office, FKAC, and Tread Josey                       | 4/25/2018 - 5/18/2018 |
| Plaintiff's Ex. 70 | Letter to Plaintiff Royal from FKAC                                                                | 5/11/2018             |
| Plaintiff's Ex. 71 | Email from Michael Royal to FKAC and Tread Josey                                                   | 5/14/2018             |
| Plaintiff's Ex. 74 | Transcript of Deposition of CCSD's Rule 30(b)(6), SCRCF, Designee Jeffrey Borowy                   | 11/22/2021            |
| Plaintiff's Ex. 75 | S.C. Secretary of State Online Business Entity Profile for FKAC                                    | 11/6/2018             |
| Plaintiff's Ex. 76 | South Carolina 1900 Act No. 219 (with cover email from S.C. State Library to Royal dated 12/9/021) | 2/19/1900             |
| Plaintiff's Ex. 77 | Affidavit of Jill Hunter Powell (filed in C/A No. 2018-CP-10-5739 on 6/17/2021)                    | 6/17/2021             |
| Plaintiff's Ex. 78 | Defendant CCSD's Answer to Plaintiff's First Set of Interrogatories                                | 10/1/2021             |
| Plaintiff's Ex. 79 | Plaintiff's and FKAC's Stipulation of Fact                                                         | 10/1/2021             |
| Plaintiff's Ex. 80 | AG's Responses to Plaintiff's First Requests for Admission                                         | 10/8/2021             |
| Plaintiff's Ex. 81 | FKAC's Answers to Plaintiff's First Set of Interrogatories                                         | 10/11/2021            |
| Plaintiff's Ex. 82 | The AG's Responses to Plaintiff's First Set of Interrogatories                                     | 10/20/2021            |
| Plaintiff's Ex. 83 | UDC and Museum's Answers to Royal's First Request for Admissions                                   | 10/21/2021            |
| Plaintiff's Ex. 84 | CCSD's Answers to Plaintiff's First Requests for Admission                                         | 10/22/2021            |
| Plaintiff's Ex. 85 | Defendant CCSD's Answers to Plaintiff's Second Set of Interrogatories                              | 10/25/2021            |
| Plaintiff's Ex. 86 | Defendant CCSD's 1st Supplemental Answers to Plaintiff's 1st Set of Interrogatories                | 11/19/2021            |

|                    |                                                                                     |            |
|--------------------|-------------------------------------------------------------------------------------|------------|
| Plaintiff's Ex. 87 | Defendant CCSD's 2nd Supplemental Answers to Plaintiff's 1st Set of Interrogatories | 11/19/2021 |
| Plaintiff's Ex. 88 | Defendant CCSD's 1st Supplemental Answers to Plaintiff's 2nd Set Interrogatories    | 11/19/2021 |
| Plaintiff's Ex. 89 | Defendant CCSD's 3rd Supplemental Answers to Plaintiff's 1st Set of Interrogatories | 11/22/2021 |
| Plaintiff's Ex. 90 | Defendant CCSD's 2nd Supplemental Answers to Plaintiff's 2nd Set of Interrogatories | 11/28/2021 |
| Plaintiff's Ex. 91 | Defendant CCSD's 4th Supplemental Answers to Plaintiff's 1st Set of Interrogatories | 12/8/2021  |
| Plaintiff's Ex. 92 | Defendant CCSD's Answers to Plaintiff's 3rd Interrogatories                         | 12/8/2021  |
| Plaintiff's Ex. 93 | CCSD's Verification of Answers to Plaintiff's Interrogatories                       | 12/13/2021 |
| Plaintiff's Ex. 94 | The AG's Verification of AG's Responses to Plaintiff's Interrogatories              | 12/14/2021 |

Please let us know if we can provide any further information.

Yours Sincerely,



Evan P. Williams

cc via NEF service and e-filing:

A. Bright Ariail, Esq.  
Warren W. Ariail, Esq.  
Mary Frances Jowers, Esq.  
Kristin Simons, Esq.  
Patrick F. Stringer, Esq.  
Joseph K. Qualey, Esq.  
Zac Smith, Esq.

Enclosure(s)

1

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**From:** [Evan Williams](#)  
**To:** [mfjowers@scag.gov](#); [ksimons@scag.gov](#); [pfstringer@yahoo.com](#); [Bright Ariail](#); [Warren W. Ariail](#)  
 ([warren@ariaillaw.com](#))  
**Cc:** [Jeff Tibbals](#); [Karen Hucks](#); [Lisa Caldwell](#); [Gretchen Stringer-Robinson](#)  
**Subject:** Royal v. FKAC, et al. - 2018-CP-10-05739  
**Date:** Thursday, December 23, 2021 12:00:43 PM  
**Attachments:** [image001.png](#)

---

Counsel,

Below is a link to access Plaintiff's trial exhibits that will be submitted for the record. Also accessible via the link is an index of the exhibits. Please let us know if you have any questions or issues accessing.

<https://bybeeandtibbalsllc.sharefile.com/d-s28831ba475974db0be82002f0403495a>

Mary Frances and Kristin, we did not have a copy of Mr. Robinson's 2018 appraisal that was marked as an AG exhibit, so that is not included in this set.

Hope everyone has a safe and merry Christmas.

Evan

---

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 735 Johnnie Dodds Blvd. Suite 104, Mt. Pleasant, SC 29464  
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---

**BYBEE & TIBBALS**  
**EMINENT DOMAIN & PROPERTY**  
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| <u>Exhibit Number</u>  | <u>Document Description</u>                                                                                                             | <u>Doc. Date</u> |
|------------------------|-----------------------------------------------------------------------------------------------------------------------------------------|------------------|
| Plaintiff's Robinson 1 | Appraisal of the Property, as of December 19, 2012, by Charleston Appraisal Services, Inc.                                              | 12/19/2012       |
| Plaintiff's Ex. 1      | December 3, 2011 Picture of Property                                                                                                    | 12/3/2011        |
| Plaintiff's Ex. 2      | December 3, 2011 Picture of Property                                                                                                    | 12/3/2011        |
| Plaintiff's Ex. 3      | December 3, 2011 Picture of Property                                                                                                    | 12/3/2011        |
| Plaintiff's Ex. 4      | Email from Michael Royal to Secretary of State's Office                                                                                 | 12/7/2011        |
| Plaintiff's Ex. 7      | News and Courier Article regarding June Wells                                                                                           | 10/8/1990        |
| Plaintiff's Ex. 8      | Royal's Calendar Reminder (Subject: Meet June Wells at 34 Pitt Street)                                                                  | 11/4/2012        |
| Plaintiff's Ex. 9      | Email to Michasel Royal from Mike Robinson                                                                                              | 11/12/2012       |
| Plaintiff's Ex. 10     | January 14, 2013 letter from Royal to June Wells w/ enclosed proposed PSA (v6)                                                          | 01/14/2013       |
| Plaintiff's Ex. 11     | Real Estate Purchase and Sale Agreement                                                                                                 | 04/23/2013       |
| Plaintiff's Ex. 12     | Letter from Lawrence A. Dodds, Jr. to FKAC/June Wells with Draft Lease                                                                  | 11/22/1993       |
| Plaintiff's Ex. 13     | S.C. Department of Revenue Withholding Tax Change of Records/Reorder Form addressed to FKAC c/o June Wells                              | 1/1/1997         |
| Plaintiff's Ex. 14     | FKAC's Letter Replying to S.C. Tax Commission's Letter of 1/8/1997                                                                      | 3/4/1997         |
| Plaintiff's Ex. 15     | Letter from S.C. Department of Revenue to FKAC c/o June Wells                                                                           | 3/19/1997        |
| Plaintiff's Ex. 16     | FKAC's Resolution Designating Bank Depository                                                                                           | 06/25/1997       |
| Plaintiff's Ex. 17     | State of SC Notice of Failure to File Quarterly Tax Return                                                                              | 6/27/1997        |
| Plaintiff's Ex. 18     | FKAC's Employer's Quarterly Federal Tax Return                                                                                          | 6/26/1997        |
| Plaintiff's Ex. 19     | Fixed Rate Certificate from First Federal of Charleston                                                                                 | 7/3/1997         |
| Plaintiff's Ex. 20     | FKAC checks to S.C. Department of Revenue and S.C. Employment Security Commission                                                       | 9/11/1997        |
| Plaintiff's Ex. 21     | Letter from the S.C. Employment Security Commission to FKAC                                                                             | 9/22/1997        |
| Plaintiff's Ex. 22     | IRS Employer's Quarterly Federal Tax Return Form addressed to FKAC c/o June Wells                                                       | Rev. 01/2001     |
| Plaintiff's Ex. 23     | Bank Statement for FKAC/Marion Hanckel Kindergarten sent care of June Weills                                                            | 12/31/2001       |
| Plaintiff's Ex. 24     | Various Utility Bills addressed to FKAC c/o June Wells                                                                                  | 2003-2009        |
| Plaintiff's Ex. 25     | Various Bank Correspondence Addressed to FKAC c/o June Wells                                                                            | 2004-2011        |
| Plaintiff's Ex. 26     | Undated blank check from a Wachovia account in the name of FKAC/Marion Hanckel Kindergarten c/o June Wells                              | Undated          |
| Plaintiff's Ex. 27A    | Application to Board of Architectural Review from FKAC/June Wells seeking to repair roof; payment receipt; approved application; permit | 6/19/2009        |
| Plaintiff's Ex. 27     | Handwritten Letter from June Wells to Charleston County Dept of Revenue Collections and enclosed FKAC check                             | 3/25/2010        |
| Plaintiff's Ex. 28     | Letter from the AG's Office to June Wells/FKAC                                                                                          | 11/12/2010       |
| Plaintiff's Ex. 29     | Order of the Charleston County Probate Court                                                                                            | 11/23/2010       |
| Plaintiff's Ex. 29A    | Affidavit of June Murray Wells                                                                                                          | 11/23/2010       |
| Plaintiff's Ex. 30     | Check from FKAC to Charleston County Revenue Collections                                                                                | 12/22/2012       |
| Plaintiff's Ex. 31     | Memorandum of Purchase and Sale Agreement                                                                                               | 4/23/2013        |
| Plaintiff's Ex. 32     | Letter from Royal to Colleen Carducci (City of Charleston)                                                                              | 5/29/2013        |

| <u>Exhibit Number</u> | <u>Document Description</u>                                                                        | <u>Doc. Date</u>         |
|-----------------------|----------------------------------------------------------------------------------------------------|--------------------------|
| Plaintiff's Ex. 38    | Quitclaim Deed from the City of Charleston to FKAC                                                 | 10/3/2013                |
| Plaintiff's Ex. 46    | Letter from Michael Royal to FKAC/June Wells                                                       | 11/10/2014               |
| Plaintiff's Ex. 47    | Letter from Michael Royal to FKAC/June Wells                                                       | 1/26/2015                |
| Plaintiff's Ex. 54    | Email Correspondence between William Wells and Michael Royal                                       | 1/11/2018                |
| Plaintiff's Ex. 54A   | Email Correspondence between William Wells and Michael Royal                                       | 3/13/2013                |
| Plaintiff's Ex. 55    | Email Correspondence between Royal, FKAC, Tread Josey and Bill Wells                               | 3/29/2018                |
| Plaintiff's Ex. 56    | FKAC's Notice of Sale to AG and cover letter                                                       | 4/4/2018                 |
| Plaintiff's Ex. 57    | Executed 1st Addendum to the Real Estate Purchase and Sale Agreement                               | 4/11/2018                |
| Plaintiff's Ex. 58    | FKAC's 1901 Constitution and Charter                                                               | 1901                     |
| Plaintiff's Ex. 59    | FKAC's Certificate of Incorporation                                                                | 1/24/1901                |
| Plaintiff's Ex. 60    | FKAC Resolution to Amend Charter                                                                   | 1/14/1931                |
| Plaintiff's Ex. 61    | FKAC's Application for Amendment of Charter                                                        | 1/16/1971                |
| Plaintiff's Ex. 62    | Secretary of State's Certification of FKAC's Amendment to Charter                                  | 2/5/1971                 |
| Plaintiff's Ex. 63    | Certificate of Existence of FKAC executed by the S.C. Secretary of State                           | 8/23/2013                |
| Plaintiff's Ex. 65    | 2nd Addendum to the Purchase and Sale Agreement                                                    | 4/24/2018                |
| Plaintiff's Ex. 66    | Defendant FKAC's Answers to Plaintiff Michael Royal's First Requests for Admission                 | 10/11/2021               |
| Plaintiff's Ex. 67    | Emails between Tread Josey and the AG's Office                                                     | 4/17/2018 -<br>4/19/2018 |
| Plaintiff's Ex. 68    | Letter to AG's Office from Michael Royal                                                           | 4/20/2018                |
| Plaintiff's Ex. 69    | Various emails between Michael Royal, the AG's Office, FKAC, and Tread Josey                       | 4/25/2018 -<br>5/18/2018 |
| Plaintiff's Ex. 70    | Letter to Plaintiff Royal from FKAC                                                                | 5/11/2018                |
| Plaintiff's Ex. 71    | Email from Michael Royal to FKAC and Tread Josey                                                   | 5/14/2018                |
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| Plaintiff's Ex. 94    | The AG's Verification of AG's Responses to Plaintiff's Interrogatories              | 12/14/2021       |

**From:** [Warren Ariail](#)  
**To:** [Evan Williams](#); [mfjowers@scag.gov](mailto:mfjowers@scag.gov); [ksimons@scag.gov](mailto:ksimons@scag.gov); [pfstringer@yahoo.com](mailto:pfstringer@yahoo.com); [Bright Ariail](#)  
**Cc:** [Jeff Tibbals](#); [Karen Hucks](#); [Lisa Caldwell](#); [Gretchen Stringer-Robinson](#)  
**Subject:** RE: Royal v. FKAC, et al. - 2018-CP-10-05739  
**Date:** Wednesday, December 29, 2021 9:44:59 AM  
**Attachments:** [image001.png](#)

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Good morning Evan,

Thank you for your email and link to access the Plaintiff's spreadsheet entitled "Plaintiff's Trial Exhibits" ("Plaintiff's Spreadsheet") and documents attached thereto. Please be advised that Bright and I have reviewed and compared Plaintiff's Spreadsheet and attached documents with our trial notes in this case. Based on our review, we believe there are various ones of the attached documents which are objectionable as trial exhibits on one or more of the following grounds:

- (1): Failure to authenticate and lay evidentiary foundations for particular document(s);
- (2): Failure to proffer particular document(s) as evidence;
- (3): Failure to enter particular document(s) into evidence (including the lack of court ruling(s) holding the document(s) to be admissible);
- (4): Particular document(s) constitute inadmissible hearsay;
- (5): Particular document(s) are irrelevant.

Examples of these documents include, but are not limited to, Plaintiff's Exhibits 29A and 77 referenced in and attached to Plaintiff's Spreadsheet. Again, based on our trial notes we believe these two documents as well as other documents referenced in and attached to Plaintiff's Spreadsheet are objectionable and inadmissible as trial exhibits on behalf of Plaintiff.

Once we have received and had the opportunity to review the trial transcript we will file formal objections to the applicable documents as necessary.

In closing, thank you again for transmitting the Plaintiff's Spreadsheet and attached documents to all counsel for review in connection with this matter.

With best wishes for a happy and prosperous New Year, I am

Sincerely,

Warren

**Warren W. Ariail, Attorney**  
**Ariail Law Firm, LLC**

---

**From:** Evan Williams <[ewilliams@bybeetibbals.com](mailto:ewilliams@bybeetibbals.com)>  
**Sent:** Thursday, December 23, 2021 12:01 PM  
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**Cc:** Jeff Tibbals <jst@bybeetibbals.com>; Karen Hucks <khucks@bybeetibbals.com>; Lisa Caldwell <lcaldwell@bybeetibbals.com>; Gretchen Stringer-Robinson <gretchen@stringerlaw.us>

**Subject:** Royal v. FKAC, et al. - 2018-CP-10-05739

Counsel,

Below is a link to access Plaintiff's trial exhibits that will be submitted for the record. Also accessible via the link is an index of the exhibits. Please let us know if you have any questions or issues accessing.

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Mary Frances and Kristin, we did not have a copy of Mr. Robinson's 2018 appraisal that was marked as an AG exhibit, so that is not included in this set.

Hope everyone has a safe and merry Christmas.

Evan

---

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---

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STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

Michael D. Royal,

Civil Action No. 2018-CP-10-05739

Plaintiff,

**PLAINTIFF MICHAEL D. ROYAL'S  
PRE-TRIAL BRIEF**

vs.

Free Kindergarten Association of Charleston,  
The Attorney General of the State of South  
Carolina, and Charleston County School  
District,

Defendants.

Plaintiff Michael D. Royal ("Plaintiff" or "Royal"), by and through his undersigned counsel, respectfully submits this brief in accordance with Rule 16 of the South Carolina Rules of Civil Procedure.

**INTRODUCTION AND PROCEDURAL HISTORY**

Plaintiff's Complaint was filed December 4, 2018, which alleged claims for specific performance and breach of a contract to purchase and sell real property located in Charleston County, South Carolina, brought on behalf of Plaintiff, the buyer under the contract, against Defendant Free Kindergarten Association of Charleston ("FKAC" or the "Association"), the seller under the contract. Complaint ¶¶ 26-35. FKAC filed its Answer on January 7, 2019, and therein also alleged claims for damages due to Plaintiff's filing of the Complaint and Lis Pendens on the Property, and reimbursement of its attorneys' fees and expenses incurred. FKAC's Answer ¶¶ 9-12.

Thereafter, The Attorney General of the State of South Carolina (the "AG") moved to intervene on January 28, 2019, and Charleston County School District's (CCSD") motion to intervene was filed on February 7, 2019. A Form 4 Order was entered June 7, 2019 granting both

motions to intervene, which was followed by formal Orders entered July 10, 2019, granting the AG's motion, and August 22, 2019 as to CCSD's. On June 24, 2019, CCSD filed its Answer, Counterclaim, Crossclaim and Request for Declaratory Judgment ("Counterclaim"), seeking therein a declaratory judgment that: a) CCSD is the legal, beneficial and/or equitable owner of all of FKAC's assets, and/or the proceeds of the sale of such assets; b) the PSA is null and void; and c) all of FKAC's assets and/or the proceeds of the sale of the same will transfer to CCSD upon FKAC's dissolution. *See* CCSD's Counterclaim, Prayer for Relief. CCSD also seeks an award of its costs and fees incurred in defending against Plaintiff's Complaint. *See id.* The AG filed its Answer to the Complaint, and Answer/Reply to CCSD's Request for Declaratory Judgment, on July 25, 2019, and Plaintiff filed his Reply to CCSD's Counterclaim on August 16, 2019.

### **UNDISPUTED FACTS AND LEGAL ISSUES INVOLVED**

#### **I. UNDISPUTED FACTS.**

##### **A. Contract Execution and Terms.**

On April 23, 2013 (the "Effective Date"), Royal and FKAC entered into a real estate purchase and sale agreement for certain real property FKAC owned bearing the address of 34 Pitt Street, Charleston, Charleston County, South Carolina 29401, identified as TMS No. 457-04-01-129 (the "Property"). Complaint ¶ 5, Ex. A. A copy of this agreement is attached as Exhibit A to the Complaint (the "PSA" or "Agreement"). The purchase price for the Property pursuant to the PSA is three hundred fifteen thousand two hundred and 0/100 dollars (\$315,200.00) (the "Purchase Price"). Complaint Ex. A. The Purchase Price was based on and matched the fair market value of the Property determined in an appraisal by an MAI-designated appraiser that valued the Property as of December 19, 2012. Complaint ¶ 6, Ex. B. This date of value was proximate to the time



Royal and FKAC began negotiating the purchase and sale terms. *See* Transcript of Deposition of Michael D. Royal, Volume I,<sup>1</sup> at 37:21 – 38:3; 40:18 – 41:8.

Section 4 of the Agreement requires the Association to convey marketable title to the Property to Royal. Complaint Ex. A. Pursuant to the requirements of section 2 of the Agreement, Royal paid to the Association a down payment in the amount of five thousand and 0/100 dollars (\$5,000.00), which was only refundable if FKAC could not convey marketable title or defaulted under the PSA. *Id.* at ¶ 8, Ex. A. The Association expressed to Royal a need for flexibility around the timing of its vacating of the Property. *Id.* at ¶ 9; *see also* Transcript of the Deposition of FKAC’s Rule 30(b)(6), SCRCF, Designee, June Wells (“FKAC Dep.”), attached hereto as **Exhibit 4**, at 93:11-20; Transcript of the May 25, 2021 Deposition of William Wells (“Bill Wells Dep.”), attached hereto as **Exhibit 5**, at 40:24-25, 41:1-4, 42:22-25, 43:1-8.

As a result, section 7 of the Agreement allowed for the Association to choose its own closing date within the period from the Effective Date until April 9, 2018 (the “PSA Closing Date”), a period of almost five years. Complaint ¶ 9. The structuring of a flexible closing timeframe was created solely to suit and benefit the Association. *Id.* at ¶ 11; *see supra* cites to FKAC and Bill Wells Deps. Royal did not desire to wait for a closing and was ready, willing, and able to close on the Property by May 31, 2013. Complaint ¶ 11, Ex. D. Royal agreed to the possibility of an extended closing only to accommodate the Association’s stated needs. *See supra* cites to FKAC and Bill Wells Deps.

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<sup>1</sup> There are three (3) volumes of transcripts of Royal’s deposition, one for each day of testimony. They are cited herein as “Royal Vol. I,” “Royal Vol. II,” and “Royal Vol. III,” respectively, and the excerpts of and exhibits to those transcripts cited herein are attached hereto as **Exhibits 1, 2, and 3**, in order of volume number.

**B. Attempts to Close on the PSA.**

Throughout the period from the Effective Date until the beginning of 2018, Royal politely but persistently sought a closing. Complaint ¶ 13, Exs. D and H; Royal Vol I at 111:1-9. Royal offered on multiple occasions to provide assistance to the Association to facilitate the closing, but the Association would not commit to a closing date. *Id.* As an example, on January 26, 2015, having waited over a year and a half to close, Royal sent a letter to FKAC proposing an arrangement that would enable him to close but still preserve FKAC's right to use the property up until April 9, 2018. *See Exhibit 6* attached hereto (copy of the January 26, 2015 letter). Effectively, this proposal amounted to seller financing, requiring Royal to make a \$30,000 down payment and assume responsibility for taxes and insurance while allowing FKAC to occupy the building rent-free. *See id.*; Bill Wells Dep., at 76:10-16, 85:1-24, 86:1-9. FKAC advised Royal that it did not wish to pursue this arrangement. *See* Royal Vol. III, at 374:1-3.

Thereafter, Royal met and began communicating with June Wells' son, William "Bill" Wells ("Mr. Wells"), regarding Royal's plans for the Property and potential closing dates. *See* Royal Vol. I, at 109:8-12; Bill Wells Dep., at 76:10-16. It was easier for Royal to communicate with Mr. Wells, because he, unlike his mother, corresponded via email, and Mr. Wells relayed these conversations to June Wells. *See id.*; *see also* January 11, 2018 Email from Royal to William Wells, attached hereto as **Exhibit 7**.

On March 29, 2018, eleven (11) days before the PSA Closing Date, FKAC's counsel assured Royal that FKAC was prepared to close on April 9, and that a deed for the closing had been prepared and a bank account opened for FKAC to receive the closing proceeds. *See* Plaintiff's Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment, filed November 24, 2021 ("Plaintiff's MSJ Memo"), at Ex. 2 (copy of March 29, 2018 email). Yet

FKAC's counsel waited until April 4, 2018, five (5) days before closing, to give notice to the AG of the upcoming sale under S.C. Code Ann. § 33-31-1202. *See* Plaintiff's MSJ Memo Ex. 3 (FKAC's April 4, 2018 Notice of Sale to the AG). This statute requires a public benefit corporation to give notice to the AG twenty (20) days prior to any sale "of all, or substantially all, of its property if the transaction is not in the usual and regular course of its activities[.]" S.C. Code Ann. § 33-31-1202(f).

The delayed notice likely explains FKAC's counsel's request, on or around April 5, 2018, that Royal agree to extend the closing to April 26, 2018. Complaint ¶ 14. Royal assented, and the parties executed an addendum to this effect on April 11, 2018. *See* Complaint Ex. C (first addendum to the PSA). Even though the twenty (20) day notice period to the AG expired on April 25, 2018, FKAC was not willing to close by April 26. Royal agreed to FKAC's request for a second closing extension, but FKAC had not provided its executed second addendum by April 26, 2018, the amended closing date. Complaint ¶ 15, Exs. D and E.

Consequently, Royal sent the Association's counsel an e-mail that day, April 26, tendering performance, and stating that he had the necessary funds available to close. *See id.* Royal further requested that the Association either provide the signed second addendum, which extended the closing date to May 25, 2018 (the "Extended Closing Date"), or advise Royal of the location for closing and to provide wiring instructions. *See id.* No response was received that day. On April 27, 2018, FKAC provided Royal with its executed copy of the PSA's second addendum, which it had signed April 24, 2018. *See* Complaint Ex. E (copy of the second addendum). May 25, 2018 was the latest possible closing date under the contract and its addenda.

Thereafter, FKAC sent a letter to Royal, dated May 11, 2018, refusing to close on the Property "without approval of the Attorney General." Complaint Ex. F. Approval by the AG was

not an express or implied condition to closing under the PSA (*see* Complaint Ex. A), and not required by the text of S.C. Code Ann. § 33-31-1202 (*see infra*).

Royal received FKAC's letter on May 14, 2018, and in response sent an e-mail to FKAC's counsel that day, stating that his May 11 letter amounted to an anticipatory breach of the Agreement. Complaint ¶ 18, Ex. G. Unbeknownst to Royal, the AG was in communication with FKAC's counsel in April and May of 2018 regarding the sale and prior litigation the AG was involved in relating to nonprofit entities. *See* **Exhibit 8** attached hereto (April 11 and May 23, 2018 emails from the AG's Office to FKAC's counsel).

Subsequently, on May 18, 2018, Jowers sent an e-mail to Royal, wherein she stated, in part, "The position of the Attorney General in this sale, as in all sales under section 33-31-1202, is that the sale cannot be completed until the Attorney General completes our review." Complaint Ex. H. Apparently, such review is not limited by § 33-31-1202's 20-day notice period. Additionally, it seems the AG only desired to include FKAC and CCSD in this review. *See* **Exhibit 9** attached hereto (emails exchanged between May 22 and June 28, 2018).

On May 18, 2018, Royal gave notice to the AG and the Association that the statute it cited did not provide a basis to require that a property sale must be approved by the AG. *See* Complaint Ex. I. S.C. Code Ann. § 33-31-1202(f), part of the South Carolina Nonprofit Corporation Act of 1994,<sup>2</sup> states:

A public benefit or religious corporation must give written notice to the Attorney General twenty days before it sells, leases, exchanges, or otherwise disposes of all, or substantially all, of its property if the transaction is not in the usual and regular course of its activities unless the Attorney General has given the corporation a written waiver of this subsection.

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<sup>2</sup> Hereinafter the South Carolina Nonprofit Corporation Act of 1994, S.C. Code Ann. § 33-31-101, *et seq.*, is referred to as the "Nonprofit Corporation Act."

S.C. Code Ann. § 33-31-1202(f). Additionally, the text of the statute does not require any materials or an appraisal to be provided to the AG, other than a notice. *See id.*

**C. FKAC Does Not Perform by the Extended Closing Date.**

Although FKAC failed to close by the Extended Closing Date, Royal awaited word from FKAC, as well as the AG as to its position, in an effort to resolve the matter prior to incurring the costs of litigation. A week after the Extended Closing Date, on June 1, 2021, FKAC sent a letter to CCSD giving it notice of the PSA. *See* December 1, 2021 letter from Plaintiff's counsel to the Court, filed December 2, 2021 ("Dec. 1 Letter"),<sup>3</sup> attachment 1.

On June 28, 2018, more than a month after the Extended Closing Date, FKAC's counsel notified Royal via e-mail that FKAC refused to close on the Property under the terms of the Agreement. Complaint Ex. K. Therein, FKAC's counsel cited to an appraisal of the Property which the AG had provided to FKAC and CCSD a week prior. *See id.* Royal was not copied on the AG's email circulating the appraisal and was thus unaware of the same. *See* **Exhibit 10** attached hereto.

Royal replied to FKAC's counsel's email the same day, and put FKAC on notice that it was in default of the PSA and demanded that the parties close on the transaction. Complaint Ex. L (copy of Royal's June 28, 2018 email). CCSD's attorney responded to this email, claiming that CCSD was the beneficiary of FKAC's residual assets. *See* Transcript of November 22, 2021 Rule 30(b)(6), SCRCF, Deposition of CCSD ("CCSD Dep."), Ex. 12.<sup>4</sup> Therein, CCSD falsely claimed that FKAC was in the process of dissolving and that the Property was to be conveyed to CCSD.

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<sup>3</sup> The Court's docket labels this filing event as "Letter in Re Documents Not Included with Pltff Memo," dated December 2, 2021, and attributed to Plaintiff Michael D. Royal.

<sup>4</sup> The excerpts of and exhibits to the transcript of the deposition of CCSD's Rule 30(b)(6) designee which are cited herein are attached hereto collectively as **Exhibit 11**.

*See id.* CCSD's attorney advised Royal that she would be in touch following the July 2018 meeting of CCSD's board of trustees, at which it would discuss how to proceed. *See id.* CCSD's Board of Trustees never made a decision as to how to proceed with respect to the Property or the PSA, nor approved of CCSD's intervention in this lawsuit. *See* CCSD Dep., at 73:7-18. Due to FKAC's continued refusal to close, Royal filed his Complaint on December 4, 2018.

## II. LEGAL ISSUES.

### A. Plaintiff's Causes of Action.

Although Plaintiff's Complaint was styled as pleading one claim, it alleges two causes of action against Defendants, which are analyzed more fully below.

#### 1. Breach of Agreement.

"The necessary elements of a contract are an offer, acceptance, and valuable consideration. A valid offer 'identifies the bargained for exchange and creates a power of acceptance in the offeree.'" *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 406 (2003) (internal citation omitted). Royal and the Association entered into a valid and enforceable agreement, the PSA. Royal presented two offers to FKAC containing the transaction's terms for FKAC's review and potential acceptance, one on January 14, 2013 and one on April 23, 2013. *See* Royal Vol. II, at 270:15-24; 277:1-4; 278:11 – 279:19; 284:25 – 285:10. FKAC rejected the first and accepted the second offer by executing the PSA under its own free will in the presence of witnesses and a notary, and a mutual meeting of the minds on all terms contained in the Agreement. *See* Complaint Ex. A, p. 4; Plaintiff's MSJ Memo Ex. 4; Royal Vol. II, at 284:25 – 285:10; 292:2-17. The parties contracted to exchange valuable consideration – Royal via the purchase price and FKAC via title to the Property, and Royal's payment of the downpayment constituted partial consideration.

CCSD alleges that June Wells, FKAC's signatory to the PSA, did not have authority to execute the instrument. Counterclaim ¶ 47; *see, e.g.*, CCSD Dep., at 50:3-10. This argument fails as a matter of law, as ample evidence exists to show her authority. *See* Plaintiff's MSJ Memo, at pp. 3-10 and exhibits cited therein; *see also* Dec. 1 Letter (cited *supra*); Royal Vol. I, at 71:11 – 74:2, 75:14-24, 92:14-95:6, 141:6-20, 146:6 – 147:6; Royal Vol. II, at 175:15-22, 184:24 – 188:15, 225:8 – 23, 226:12 – 227:15, 264:24 – 265:10, 266:13 – 267:12, 284:21-24, 288:8 – 289:9, 301:12; Royal Vol. III, at 350:17 – 356:14, 366:15-22, 409:17 – 411:4; FKAC Dep., at 50:12-15, 73:7-12, 83:23 – 84:1 (“Yes” in reply to the question, “Do you think you have a document that says you have the authority on behalf of Free Kindergarten to sell its real property), 126:6 – 127:5 (stating that she had been both a member of the FKAC and a director (on the board of directors), 129:23 – 130:4 (agreeing that “it was ordinary in your roles to act on behalf of the association and make important decisions”).

As set forth in more detail in Plaintiff's MSJ Memo, Wells' position as a member is the essential inquiry as to the authority issue as it provides a basis for operating with actual or apparent authority. *See* Plaintiff's MSJ Brief, pp. 4-5, 6-8, and exhibits cited therein. Consistent with S.C. Code Ann. § 33-31-803(c), FKAC's governing documents, its Constitution and Bylaws, vests all of the powers which would otherwise be exercised by a board in the Association's members. *See* Plaintiff's MSJ Brief, Ex. 7.

FKAC's failure and refusal to convey marketable title to Royal constitutes a material breach of the PSA. Complaint Ex. A, at ¶ 4. As alleged in the Complaint, FKAC's actions evidence an intention to breach the PSA and constitute breaches of the covenant of good faith and fair dealing inherent in all contracts. Complaint ¶¶ 14-23, 30. Royal has suffered consequential and incidental damages as a result of the FKAC's breach of the PSA. Such damages include, but

are not limited to, lost rental income from parking spaces at the Property from the Extended Closing Date, May 25, 2018, through the date of judgment, plus interest. Additionally, South Carolina common law provides for a standard measure of general damages. *See Bannon v. Knauss*, 282 S.C. 589, 593, 320 S.E.2d 470, 472-73 (Ct. App. 1984) (“In an action for breach of a contract to purchase real estate, general damages may be measured by the difference between the contract price and the fair market value of the property at the time of the breach.” (internal citation omitted)).

2. Specific Performance.

Royal’s claim for specific performance sounds in equity, whereby the Court is to consider whether an adequate remedy at law exists. *Ingram v. Kasey’s Assocs.*, 340 S.C. 98, 105, 531 S.E.2d 287, 291 (2000) (internal citations omitted). To succeed on his claim, the Court must find the following:

(1) there is clear evidence of a valid agreement; (2) the agreement had been partly carried into execution on one side with the approbation of the other; and (3) the party who comes to compel performance has performed his or her part, or has been and remains able and willing to perform his or her part of the contract.

*Ingram*, 340 S.C. at 106, 531 S.E.2d at 291 (internal citations omitted). In deciding whether to enter a decree of specific performance, the Court is granted discretion which is “to be exercised in accordance with special rules of equity and with regard to the facts and circumstances of each case.” *Miller v. Dillon*, 851 S.E.2d 462, 471, 432 S.C. 197, 213-14 (Ct. App. 2020) (internal quotation omitted).

a. *All Elements are Satisfied in the Instant Matter.*

Because of the unique nature of real property, Royal cannot be fully compensated monetarily for the Association’s material breaches of the Agreement. *See Shirey v. Bishop*, 431 S.C. 412, 422, 848 S.E.2d 325, 330 (Ct. App. 2020) (“[w]hen land is the subject matter of an



agreement[,] the jurisdiction of equity to enforce specific performance is undisputed[] and does not depend on the inadequacy of the legal remedy in the particular case.” (alterations in original)).

As set forth above, there is clear evidence of a valid agreement. *See supra*, Sec. II.A.1. The Agreement has been partly carried into execution by Royal with the approbation of the Association as Royal took steps required to close on the Property pursuant to the Agreement. Such actions include Royal’s issuance of the downpayment owed under the contract, which, prior to FKAC’s breach, was nonrefundable. He also facilitated the issuance of a quitclaim deed for the Property from the City of Charleston to FKAC (*see Exhibits 12 and 13* attached hereto),<sup>5</sup> and engaged in a monthslong process to remove of the Property from the County’s delinquent tax sale list due to a records error (*see Exhibit 15* attached hereto). Moreover, on March 29, 2018, FKAC confirmed its intentions to close on the PSA Closing Date. *See supra*, p. 4; Plaintiff’s MSJ Memo Ex. 2.

Additionally, Royal has demonstrated his ability to satisfy the PSA’s requirements and close, as he alleged in the Complaint (¶¶ 24-25, 28, 35) both “past and present ability and willingness to perform his obligations under the Contract. South Carolina does not require Plaintiff to have made actual tender of the funds necessary to close in order to obtain the remedy of specific performance. Plaintiff only need state in his pleading that he is ready, willing, and able to perform his obligations under the Contract.” *Shay v. Austin*, 466 F. Supp. 2d 664, 669 (D.S.C. 2006) (citing

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<sup>5</sup> On July 19, 1963, FKAC executed a Declaration of Trust which conveyed to the City of Charleston a reversionary one-half interest in the Property if it ceased to be used for kindergarten purposes. *See Exhibit 14* attached hereto. At some point FKAC extinguished this reversionary interest through payment of \$15,000 to the City, but tax records showed the City as the Property owner prior to this quitclaim deed. *See Royal Dec. Tr.*, at 238:6-19, 239:16 – 240:10, 255:13-25. June Wells signed the Affidavit for Taxable or Exempt Transfers as the “Authorized agent of the purchaser (Free Kindergarten Association of Charleston).” *See Ex. 13*, at p. 3 ¶ 8.

*Speed v. Speed*, 213 S.C. 401, 49 S.E.2d 588, 593 (1948); *Maccaro v. Andrick Dev. Corp.*, 280 S.C. 96, 101, 311 S.E.2d 91, 94 (Ct. App. 1984)).

b. *Enforcement of the PSA is Equitable.*

Finally, the underlying circumstances of the case and the rules of equity support a decree of specific performance. The Association was and is a nonprofit corporation registered and in good standing with the South Carolina Secretary of State to conduct business. Plaintiff, in August of 2013, requested a Certificate of Existence for FKAC from the South Carolina Secretary of State, which provided conclusive evidence that FKAC could transact business in the State. See **Exhibit 16** attached hereto, August 23, 2013 Certificate of Existence; see also S.C. Code Ann. § 33-31-128(c) (“Subject to any qualification stated in the certificate, a certificate of existence or authorization issued by the Secretary of State *may be relied upon as conclusive evidence that the domestic or foreign corporation is in existence or is authorized to transact business in this State.*”).<sup>6</sup>

June Wells, FKAC’s signatory, was intelligent and mentally sharp during the time relevant to the PSA’s formation. Moreover, Royal, at every turn, made certain that Wells was fully informed of and understood all pertinent information and that she was comfortable with all contract terms. On multiple occasions Royal recommended to Wells that she retain legal counsel to review the PSA prior to execution. See, e.g., Transcript of June 4, 2019 Hearing, at 32:18 – 33:6; Royal Vol. II, at 213:6-21; Royal Vol. III, 399:9 – 400:9. And although Royal drafted the PSA, a key term allowing a flexible closing date was added to alleviate Wells’ concern as to adequate time to

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<sup>6</sup> Every party to this litigation has admitted the fact that FKAC has not dissolved, denoting FKAC’s ability to transact business at the date of closing. See **Exhibits 17, 18, and 19** attached hereto, CCSD’s (at no. 6), FKAC’s (at no. 7), and the AG’s (at no. 6) respective Answers to Royal’s First Requests for Admission.

vacate the premises. Complaint ¶ 11; *see, e.g.*, Royal Vol. II, at 278:11 – 279:19. Under the terms of the first offer which FKAC rejected, the transaction would have closed in 2013. Wells indicated to Royal continuously that although FKAC desired to enter a sale agreement, she was afraid there would not be adequate time to remove all of the contents stored in the building. Royal believed, and he felt that Wells believed, that the Agreement would close soon after the Effective Date.

Allowing for FKAC's option period to close was a significant sacrifice for Royal – he was seeking a property for immediate use and discovered the Property during his search for the same. From the Effective Date through early 2018, Royal politely but persistently contacted the Association with requests to close the Agreement so that he could begin occupying and using the Property. Complaint ¶ 13; *see, e.g.*, Royal Vol. III, Ex. 26 (November 10, 2014 letter from Royal to FKAC). Wells consistent reply was that she was making progress transitioning contents out of the building and that she was close to being able to close the Agreement.

Additionally, the purchase price was a product of an appraisal by a local MAI-certified appraiser, Michael Robinson, a copy of which was presented to Wells prior to the PSA's execution. Complaint ¶ 6; *see* **Exhibit 20** attached hereto, January 14, 2013 letter from Royal to Wells enclosing said appraisal and an earlier draft of the Agreement (advising that the “proposed real estate contract . . . us[es] Mr. Robinson's appraised value as the purchase price”). In this January 14, 2013 letter, Royal asked Wells what date she would feel comfortable moving out of the Property, and explained that “while I greatly look forward to moving in at 34 Pitt Street, I want to accommodate your timeline[.]” *Id.* Royal, to avoid any surprise, made clear in his letter that the appraised value used for the purchase price was strictly a “land value” price based upon removal of the existing building on the Property. *See id.*

Moreover, the PSA's terms were largely construed in the seller's, FKAC, favor: contrary to the custom of a seller paying a brokerage commission, no brokerage fees applied to the transaction; Royal was to pay all closing costs; Royal agreed to reimburse FKAC for its legal expenses up to \$1,000; and Royal was not entitled to any "initial look" or "'due diligence' period" but rather was immediately obligated to purchase the Property, as it existed, upon signing the PSA. Complaint ¶ 12.a.-d.

In short, the Agreement was entered into at arm's length by a motivated seller and purchaser, the former of which was a corporation fully entitled to transact business and enter into contracts for the same. Its terms were fair and equitable to both parties, and in reality were skewed in favor of FKAC's interests. It was executed by a duly authorized agent of FKAC in the presence of a notary public and multiple witnesses. *See supra* Sec. II.A.1.; FKAC's Reply to CCSD's cross-claim, ¶ 2; Complaint Ex. A, p. 4; Plaintiff's MSJ Memo Ex. 4. Therefore, Plaintiff must prevail on this claim. "[S]pecific performance of a contract to sell real property will be ordered whe[n] the contract 'is fair and was entered into openly and aboveboard.'" *Shirey*, 431 S.C. at 422, 848 S.E.2d at 330 (internal citations omitted) (latter alteration in original).

**B. CCSD's Counterclaim.**

1. Declaratory Judgment.

CCSD has requested that the Court enter a declaratory judgment that: a) CCSD is the legal, beneficial, and/or equitable owner of FKAC's assets and/or the proceeds from the sale of the same; b) the PSA is null and void; and c) CCSD is entitled to FKAC's assets, and/or the proceeds from the sale of the same, upon FKAC's dissolution. *See* CCSD's Counterclaim, Prayer for Relief. CCSD's conflicting assertions in the first and third subparts — claiming both present ownership

of FKAC's assets and entitlement to the same upon FKAC's dissolution — was cleared up during its deposition, such that only parts b) and c) of its claim remain. *See infra*.

Claims for declaratory judgment may be brought under the Uniform Declaratory Judgments Act, S.C. Code Ann. § 15-53-10, *et seq.* (the "D.J. Act"), only if a justiciable controversy exists. *See, e.g., Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 423-24, 593 S.E.2d 462, 465-66 (2004); *S.C. Lottery Comm'n v. Glassmeyer*, 428 S.C. 423, 431-33, 835 S.E.2d 524, 528 (Ct. App. 2019). The South Carolina Supreme Court has set forth the following elements required to establish a justiciable controversy: "Where a concrete issue is present, and there is a definite assertion of legal rights and a positive legal duty with respect thereto, which are denied by the adverse party, there is a justiciable controversy calling for the invocation of a declaratory judgment action." *Power v. McNair*, 255 S.C. 150, 153-54 (1970) (internal quotations and citations omitted). To maintain a declaratory judgment claim as to a contract, the party must have a cognizable interest in, or demonstrate its rights or legal relations are affected by, the contract at issue. *See* S.C. Code Ann. § 15-53-30.

Royal asserts that no justiciable controversy exists involving CCSD, as it is not a party to the valid PSA and it is not the named beneficiary of the residual assets of FKAC following its dissolution. Evidence exists which casts doubt upon CCSD's claim to FKAC's residual assets as, essentially, the "successor" to Charleston School District #20. *See* Plaintiff's MSJ Memo, Ex. 8; CCSD Dep, 114:4 – 115:23, Ex. 22. Moreover, the AG has not formed a final opinion as to the entity entitled to receive FKAC's residual assets upon dissolution. *See* AG's Responses to Royal's First Set of Interrogatories, attached hereto as **Exhibit 21**, no. 17.

Regardless, CCSD's allegation that the PSA is null and void is patently false, and its claim to FKAC's residual assets, the proceeds of the sale to Royal, has not matured, prior to FKAC's

dissolution. CCSD's attempt to nullify the PSA is based on two arguments: 1) June Wells lacked authority to execute the PSA; and 2) the PSA's purchase price did not represent the Property's fair market value, which is allegedly to be determined by the AG. *See* CCSD Dep., at 76:20 – 78:6.

a. *June Wells Had Authority to Execute the PSA.*

As to CCSD's first argument, the evidence shows that June Wells without a doubt had authority to execute the Agreement on behalf of FKAC. *See supra* Sec. II.A.1. Moreover, CCSD has offered no evidence of its own to refute June Wells' authority. *See* CCSD's memoranda opposing Plaintiff's Motion for Partial Summary Judgment.<sup>7</sup> In these memoranda, CCSD merely attempts to attack evidence proffered by Royal or makes assertions that are refuted by the existing evidence – absent are any citations to documents showing that June Wells did not have authority. It attempts to proffer a May 2018 letter from FKAC's counsel as support, but this letter actually cuts against CCSD's position. *See* Nov. Memo, p. 10, Ex. C. In the letter, FKAC's counsel states that June Wells was FKAC's sole surviving member (*see id.*), a fact that was recently stipulated to,<sup>8</sup> and FKAC's July 1, 2019 Reply to CCSD's cross-claim states that Wells was “the duly authorized director and last surviving member of [FKAC] and that as such **she has authority and had authority since approximately 1990 to represent [FKAC]**” (*see* ¶ 2). CCSD's fixation on PSA terms regarding Wells' authority (Nov. Memo p. 9) ignores deposition testimony on the topic. *See, e.g.*, Royal Vol. II, at 264:17 – 265:10, 266:4-16.

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<sup>7</sup> CCSD's Motion [sic] in Opposition to Plaintiff's Motion for Partial Summary Judgment, filed November 29, 2021 (“Nov. Memo”), and CCSD's Supplemental Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment, filed December 3, 2021 (“Dec. Memo”).

<sup>8</sup> *See* Plaintiff's MSJ Memo Ex. 10, and Plaintiff's Dec. 1 Letter. As set forth in Plaintiff's MSJ Memo and *supra*, Wells' position as a member is the essential inquiry as to the authority issue.

And apparently, CCSD does not intend to offer any evidence disproving June Wells' authority. *See* CCSD Dep., at 79:20 – 80:5, 97:6-10 (“We’re not going to prove that Ms. Wells didn’t have the authority. We believe that somebody has to prove that Ms. Wells has the authority[.]”).

b. *Fair Market Value Assertions.*

Regarding CCSD’s second argument as to PSA validity, CCSD has no ability or standing to assert any challenge to, interfere with, or alter the terms of, a private contract to which it is not a party or has any current interest in. CCSD’s testimony fully acknowledges this fact:

a. **CCSD testified that it has no authority or control over FKAC’s assets.** (CCSD Dep. at 67:14-23);

b. **CCSD testified that it does not have authority to determine a fair purchase price for the Property under the PSA** (*Id.* at 67:24 – 68:13); and

c. CCSD has no such authority or control because **CCSD does not own FKAC’s assets**, including the Property, and is **not claiming any interest in FKAC’s assets until FKAC is dissolved** (*Id.* at 63:10-25, 64:19-22, 73:19 – 74:4).<sup>9</sup>

Even if CCSD had some form of authority over FKAC or the PSA, CCSD testified its consent to the PSA was not necessary because it (falsely) believes the PSA is null and void due to its execution by June Wells. *Id.* at 68:25 – 69:10. Additionally, the facts that the provision of FKAC’s charter designating its residual beneficiary was subject to change, and that CCSD had no financial oversight over FKAC, or any means to know if FKAC’s assets were being jeopardized, misapplied, devalued, or wasted, shows that CCSD has no authority to affirmatively seek revision, or in essence rescission, of the PSA. *Id.* at 70:7 – 71:16.

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<sup>9</sup> This testimony eliminates CCSD’s request for a declaratory judgment that it is the legal, beneficial, and/or equitable owner of FKAC’s assets. *See* CCSD’s Counterclaim, Prayer for Relief subpart a. CCSD has admitted that FKAC is not dissolved. *See* Ex. 17, at no. 6.

Perhaps the conclusive fact that defeats CCSD's quest to invalidate the PSA, though, is that it believes the AG, not itself, is the party to determine fair market value. CCSD Dep., at 77:5-10. Therefore, CCSD admits it has no standing to object to or present evidence regarding the PSA's purchase price.

2. Request for Costs and Attorneys' Fees.

In its Counterclaim, CCSD requests "that the Court award Charleston County School District their [sic] costs, including reasonable attorneys' fees, incurred in defending Plaintiff's Complaint in this action[.]" Its pleading does not allege any basis for this request.<sup>10</sup> Its Rule 30(b)(6) deposition designee was likewise flummoxed and made vague assertions that paragraph 3 of the PSA supported its request. *See* CCSD Dep., at 84:7 – 85:12.

The PSA provides no ground for CCSD's request. Paragraph 3 states that Royal "agrees to reimburse Seller for any of Seller's attorney fees up to One Thousand and 00/100 Dollars (\$1,000.00)." Complaint Ex. A. FKAC was the Seller under the PSA, and more importantly, CCSD testified that it is not a party to the PSA. *See* CCSD Dep., at 85:17-24. Finally, there is no statute which could be construed to provide for CCSD's fees incurred in defending against Royal's breach of contract and specific performance claims (both of which are directed against FKAC).

Clearly, there is no basis for CCSD's request for costs and fees.

C. The AG's Interference with the PSA.

The Attorney General has made sweeping claims that his *parens patriae* authority allows him to invalidate a binding real estate contract freely entered into by FKAC and Royal. *See* AG's

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<sup>10</sup> On December 8, 2021, a week overdue, CCSD provided an answer to Royal's interrogatory on this topic. *See* **Exhibit 22** attached hereto. Therein, it asserts that the PSA is null and void and unenforceable. As such, it alleges that it's only entitled to fees if Plaintiff prevails on his claim – which makes no logical sense. *See id.*



Motion to Intervene and Memorandum in Support, p. 3; Ex. 21, at no. 12. Such a claim, in actuality, is detrimental to the public benefit. Should the AG succeed in his efforts, the public will never be able to rely upon or attempt to enforce any real estate contract entered into with a nonprofit corporation. Additionally, the authority cited by the AG as providing it control over the PSA is either unsupportive or not applicable to the facts and circumstances of this case. *See* Ex. 21, at no. 9.

**D. FKAC's Counterclaims.**

It is not entirely clear from its pleading the nature of FKAC's counterclaims as they are not ascribed a title therein. It appears that FKAC is seeking consequential and other damages because it is allegedly unable to sell the Property due to the Complaint and Lis Pendens. This claim is perplexing as FKAC refused to sell the Property even though it was contractually obligated to do so. Additionally, FKAC has proffered no evidence to support any such claim, such as evidence of any offers or interested buyers since this litigation was commenced.

Additionally, FKAC, citing paragraph 6 of the PSA, seeks to recover its attorneys' fees and expenses incurred "as a result of this litigation and as a result of the lack of Attorney General's approval of sale of substantially all of the assets." It thus appears that FKAC's claim for fees should be directed toward the AG. Regardless, paragraph 6 of the PSA only contemplates the payment of FKAC's expenses incurred in taking "any actions and execut[ing] and deliver[ing] such further documents as may be reasonably required in good faith to consummate the transaction contemplated by this Agreement[.]" Complaint Ex. A, ¶ 6. As such, the PSA does not provide a basis for FKAC to recover its expenses incurred in this litigation. It specifically advised Royal that it refused to close on the PSA, and in this litigation it seeks to prevent closing on the transaction

contracted for. *See, e.g.*, FKAC's Answer ¶ 2 (denying therein Plaintiff's claim for specific performance).

### **FACTS IN CONTROVERSY**

The parties are not in complete agreement on the following facts:

1. The parties, at least Royal and CCSD, disagree as to whether June Wells had authority to execute the PSA on behalf of FKAC.
2. The parties disagree as to whether the PSA contained a fair purchase price for the Property.
3. The parties disagree as to whether the AG has authority to review and disapprove of the PSA and the sale contemplated therein.
4. The parties disagree as to whether CCSD has standing to assert its counterclaim.

### **LISTING OF EXHIBITS AND WITNESSES**

#### **Royal's Exhibits.**

A list of exhibits that Plaintiff may introduce at trial are set forth below. Pursuant to the Court's email of December 6, 2021, Plaintiff reserves the right to identify additional exhibits on or before the stated deadline of December 13, 2021.

1. FKAC's 1901 Constitution and Charter;
2. FKAC Resolution Adopted January 14, 1931;
3. FKAC's January 16, 1971 Application for Amendment of Charter;
4. Secretary of State's Certification of Amendment of FKAC's Charter, Executed February 5, 1971;
5. November 12, 2010 Letter from the AG's Office to June Wells;
6. November 23, 2010 Affidavit of June Wells;
7. December 7, 2010 Order of the Charleston County Probate Court in Case No. 2010-GC-10-90;
8. Appraisal of the Property, as of December 19, 2012, by Charleston Appraisal Services, Inc.;
9. The PSA, executed April 23, 2013;
10. Memorandum of PSA executed and recorded on April 23, 2013;
11. Certificate of Existence of FKAC, signed by the South Carolina Secretary of State on August 23, 2013;
12. Addenda to the PSA, executed on or about April 11 and 24, 2018;
13. Plaintiff's and FKAC's Stipulation of Fact, dated on or about October 1, 2021;

Royal's Witnesses.

A list of persons Plaintiff may call as witnesses at trial are set forth below. Pursuant to the Court's email of December 6, 2021, Plaintiff reserves the right to amend or supplement this list prior to trial.

1. Michael D. Royal, care of undersigned counsel;
2. FKAC, via excerpts of the video and/or written transcript of its Rule 30(b)(6), SCRCF, deposition;
3. CCSD, via excerpts of the transcript of its Rule 30(b)(6), SCRCF, deposition;
4. Pledger M. "Jody" Bishop, III, MAI, SRA, AI-GRS, CRE, Valbridge Property Advisors, 1250 Fairmont Avenue, Mount Pleasant, SC 29464, (843) 884-1266; and
5. Michael Robinson, MAI, SRA, Charleston Appraisal Services, Inc., 304 Meeting Street, Suite 201, Charleston, SC 29401, (843) 723-6256.

**UNUSUAL PROBLEMS RELATING TO EVIDENCE**

As the Court is aware, there is no living person, to the parties' knowledge, who is a member, board member, officer, employee, or agent of the Association. Testimony of the Association will be introduced via the transcript of its Rule 30(b)(6), SCRCF, deposition. The unavailability of a witness will presumptively lead to many objections to evidence on hearsay grounds. On a related note, the case necessarily involves older documents relating to FKAC's formation, charter, and corporate resolutions.

Another issue is CCSD's December 3, 2021 motion to strike Royal's December 1, 2021 designation, via supplemental interrogatory answers, of himself as an expert to testify on the damages sustained due to FKAC's breach of the PSA. Similar to CCSD's designation of its expert,<sup>11</sup> Royal produced his designation one (1) business day before his deposition. This designation is consistent with the Court's June 21, 2021 Order encompassing Royal's damages

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<sup>11</sup> Although CCSD retained its expert in April 2021, it refused to answer Royal's valid interrogatory requesting identification of any non-testifying consulting expert, and waited until November 19, 2021 to identify its testifying expert appraiser.

claims, as said Order does not limit the persons Royal may call to testify at trial as an expert. Additionally, and as distinguished from CCSD's hide-the-ball tactics, Royal produced his damages formula and statement on August 26, 2021, 99 days before CCSD's motion to strike, and this formula has not changed. Yet CCSD's counsel refused to depose Royal about his claimed damages or in his expert capacity during the second and third days of his deposition that took place on December 2 and 3, 2021.

### **UNUSUAL MATTER TO BE BROUGHT TO THE ATTENTION OF THE COURT**

The trial of this case is currently scheduled for one day, December 15, 2021. Due to multiple motions filed by CCSD since the pre-trial hearing, and the number of witnesses likely to be called at trial, it seems that additional time will be required to conclude the trial. One suggestion to ensure all of the evidence and arguments are fully heard is to bifurcate the trial. In that scenario, Plaintiff would propose the following:

- i. Day 1, or first part, of trial: evidence is heard relating to the issues of: a) June Wells' authority; and b) validity and enforceability of the PSA.
- ii. Day 2, or second part, of trial: evidence is heard relating to the issues of: a) any objections to the PSA or the sale contemplated therein; and b) the parties' claimed damages and remedies (including CCSD's requested declaratory judgment pertaining to FKAC's assets).

### **SETTLEMENT NEGOTIATIONS**

After Plaintiff's counsel appeared of record, it wrote a letter to all counsel on October 21, 2021 attempting to schedule mediation of the case. Following responses from counsel for the AG and FKAC, it contacted four (4) potential mediators and obtained their availability. After relaying this availability to the parties, CCSD's counsel advised that it would not participate in mediation

until after the deposition of Plaintiff (on December 2 and 3, 2021). Plaintiff's counsel replied, stating that one of the potential mediators had already provided four (4) available dates after Plaintiff's deposition, and asked that CCSD advise as to its availability and willingness to participate in mediation. No response was received to that communication.

s/ Evan P. Williams

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*ATTORNEYS FOR PLAINTIFF*

*MICHAEL D. ROYAL*

December 8, 2021  
Mt. Pleasant, South Carolina

December 13, 2021

***Michael D. Royal v. Free Kindergarten Association of Charleston, et al.***  
**Civil Action No. 2018-CP-10-05739**

Plaintiff Michael D. Royal's List of Potential Trial Exhibits:

1. FKAC's 1901 Constitution and Charter
2. FKAC's 1901 Certificate of Incorporation
3. FKAC Resolution to Amend Charter Adopted January 14, 1931
4. July 19, 1963 Declaration of Trust by FKAC
5. 1966 News Article
6. FKAC's January 16, 1971 Application for Amendment of Charter
7. Secretary of State's Certification of Amendment of FKAC's Charter, Executed February 5, 1971
8. October 18, 1990 News & Courier Article
9. November 22, 1993 Letter from Lawrence A. Dodds, Jr. to June Wells
10. FKAC's 1997 Withholding Tax Change of Records/Reorder Form to the S.C. Department of Revenue
11. January 8, 1997 Letter from S.C. Tax Commission and March 4, 1997 reply letter from FKAC
12. March 19, 1997 Letter from S.C. Department of Revenue with Refund Check
13. FKAC's June 25, 1997 Resolution Designating Bank Depository
14. June 30, 1997 IRS Return, Form 2848, POA
15. Fixed Rate Certificate from First Federal of Charleston to FKAC on July 3, 1997 with accompanying Corporate Resolutions
16. September 11, 1997 FKAC Checks to S.C. Department of Revenue signed by June Wells
17. September 22, 1997 Letter from S.C. Employment Security Commission to FKAC c/o June Wells
18. 2001 Former 941 Employer's Quarterly Tax Return Form to FKAC c/o June Wells
19. December 31, 2001 Bank Statement for FKAC & Hanckel Kindergarten to June Wells
20. 2003-2012 FKAC Utility Bills sent to June Wells
21. October 25, 2004 - 2011, Various Bank Correspondence to FKAC c/o June Wells
22. Undated Wachovia Check Showing FKAC Bank Account in c/o June Wells
23. June 19, 2009 FKAC Application to City BAR to Repair Roof Executed/ Submitted by June Wells
24. March 25, 2010 Letter from June Wells for FKAC to Charleston County Revenue Collections
25. November 12, 2010 Letter from the AG's Office to June Wells enclosing affidavit
26. November 23, 2010 Affidavit of June Wells filed in Probate Court Case No. 2010-GC-10-90 on even date
27. December 7, 2010 Order of the Charleston County Probate Court in Case No. 2010-GC-10-90
28. December 3, 2011 Picture of Property
29. December 9, 2011 Note Seeking Owner of 34 Pitt Street
30. December 7, 2011 Royal Email to SOS Office

EXHIBIT F

31. December 7, 2011 Email from SOS Office to Royal
32. November 4, 2012 MR Calendar Appt. for Meet w/ June Wells at the property
33. November 21, 2012 Email from Michael Robinson to Michael Royal
34. Appraisal of the Property, as of December 19, 2012, by Charleston Appraisal Services, Inc.
35. December 22, 2012 Check from June Wells to Charleston County for 34 Pitt St.
36. January 14, 2013 letter from Royal to June Wells with enclosed draft PSA (v6)
37. PSA, executed April 23, 2013
38. Memorandum of PSA executed and recorded on April 23, 2013
39. May 29, 2013 Letter from Royal to Colleen Carducci, City of Charleston Real Estate Management Director
40. August 15, 2013 Email from Royal to Carducci providing the 2010 Probate Court Order from Wells Fargo v. McMaster
41. August 20, 2013 Royal letter to Secretary of State's Office requesting FKAC Certificate of Existence
42. Certificate of Existence of FKAC, signed by the South Carolina Secretary of State on August 23, 2013
43. August 30, 2013 Email from Royal to Colleen Carducci
44. November 18, 2013 Email from Royal to Janie Borden regarding Quitclaim Deed
45. Quitclaim Deed from City to FKAC, signed October 31, 2013, recorded Dec. 12, 2013
46. December 4, 2013 As Built Survey of the Property
47. November 10, 2014 Letter from Royal to FKAC
48. January 26, 2015 Letter from Royal to FKAC, c/o June Wells
49. June 19, 2015 Email from Royal to Toy Glennon, Charleston County Assessor
50. August 24, 2015 Email from Royal to Janie Borden (cc Toy Glennon)
51. November 4, 2015 Email from Royal to Toy Glennon
52. November 23, 2015 Email Royal to Toy Glennon
53. November 15, 2015 Email from Bill Wells to Royal
54. November 29, 2015 Email from Royal to Bill Wells
55. December 4, 2015 Royal Email to contractor, Rod Stoll (cc Bill Wells)
56. March 7, 2016 Email from Royal to Bill Wells
57. May 11, 2017 Email from Colleen Carducci to Royal
58. September 21, 2017 Email from Royal to Lee Batchelder
59. November 3, 2017 Email from contractor, Chris Brace, to Royal with attached invoice
60. October 27, 2017 Emails between Royal and Bill Wells
61. January 4, 2018 Photo of Property taken by Royal
62. January 11, 2018 Emails between Bill Wells and Royal
63. March 13, 2018 Email from Patrick F. Stringer to Royal
64. March 29, 2018 Email from Stringer to Royal
65. April 2, 2018 Zoning Verification Letter from City of Charleston
66. FKAC's April 4, 2018 Notice of Sale to AG and Cover Letter of even date
67. 1st Addendum to PSA, executed on or about April 11, 2018
68. April 11, 2018 Emails from Mary Frances Jowers to Patrick F. Stringer
69. April 13, 2018 Letter from Stringer to Tread Josey
70. April 20, 2018 Letter from Royal to the AG's Office
71. 2nd Addendum to PSA, executed on or about April 24, 2018

72. April 26, 2018 Email from Royal to Stringer
73. May 11, 2018 Letter from Patrick F. Stringer to Royal
74. May 14, 2018 Email from Royal to Patrick F. Stringer
75. Email string ending in May 18, 2018 Emails between Royal and Jowers
76. May 22, 2018 Emails between Jowers and Patrick F. Stringer
77. May 23, 2018 Email from Jowers to Stringer (forwarded on June 28, 2018 by Stringer to Royal)
78. June 1, 2018 letter from Stringer to Natalie Ham, former CCSD counsel
79. Appraisal of the Property, as of June 7, 2018, by Charleston Appraisal Services, Inc.
80. June 28, 2018 Email from Stringer to Royal, forwarding Jowers' June 22, 2018 Email with appraisal
81. June 28, 2018 Emails between Jowers, Royal, Crooks, Stringer, Ham, et al.
82. June 28, 2018 Email from Mary Frances Jowers to Lynn Crooks, cc to Patrick F. Stringer, Natalie Ham, et al.
83. July 13, 2018 Email from Crooks to Jowers re CCSD Meeting
84. July 30, 2018 Email from Stringer to Royal, forwarding Crooks' July 27, 2018 Letter
85. November 6, 2018 Screenshot of S.C. Secretary of State's Website with FKAC information
86. December 19, 2018 Emails between the AG's Office and CCSD
87. January 25, 2019 Emails between the AG's Office, CCSD counsel, and FKAC counsel
88. June 17, 2021 Jill Powell Affidavit filed in Support of Charleston Chapter No. 4, UDC and the Confederate Museum's Motion to Intervene
89. Plaintiff's and FKAC's Stipulation of Fact, dated on or about October 1, 2021
90. Royal's Damages Calculations Produced in Discovery
91. PPSF Linear Regression Model Produced by Royal in Discovery
92. Comparable Pricing Website Screenshots Produced in Discovery
93. Report of Pledger M. "Jody" Bishop, III, and exhibits used at his deposition
94. The AG's Answers to Royal's Requests for Admission
95. FKAC's Answers to Royal's Requests for Admission
96. CCSD's Answers to Royal's Requests for Admission
97. UDC & Confederate Museum's Answers to Royal's Requests for Admission
98. CCSD's Answers to Royal's Interrogatories
99. The AG's Answers to Royal's Interrogatories
100. FKAC's Answers to Royal's Interrogatories
101. Excerpts of the Rule 30(b)(6), SCRCP, Deposition of FKAC, via written transcript and/or video recording (designee June Wells)
102. Excerpts of the Rule 30(b)(6), SCRCP, Deposition of CCSD, via written transcript (designee Jeffrey Borowy)
103. Exhibits used for impeachment
104. Demonstrative exhibits
105. Rebuttal exhibits



1 THE COURT: Well, is the school  
2 district subject to that? The breach of contract  
3 and specific performance?

4 MR. WILLIAMS: The claim is not  
5 filed against them, but they are in essence  
6 seeking to prevent specific performance of the  
7 contract.

8 THE COURT: Okay.

9 MR. WILLIAMS: They're claiming to  
10 own the property in essence.

11 THE COURT: All right. So what did  
12 you not get from the witness when you did take  
13 his deposition?

14 MR. WILLIAMS: We would like to go  
15 into more detail as to the school district's  
16 policies and customs relating to real property,  
17 asset management, policies related to  
18 acquisition, sale of the real property.

19 THE COURT: All right. I tell you  
20 what I'm going to do. I will allow you to  
21 continue that deposition solely on the basis of  
22 those cases, similar to this one, in which they  
23 have been the recipient of a gift of property  
24 that they've got. If you can find another case  
25 like this one, ask them all the questions you

1 want.

2 But as to whether or not they go and  
3 purchase property in Lincoln (sic) or  
4 McClellanville or Awendaw and they create a  
5 school district, that has no relevance to this  
6 case, whatsoever, and would not be permitted.  
7 Okay?

8 MR. WILLIAMS: I understand, Your  
9 Honor. If I may ask for clarification?

10 THE COURT: Sure.

11 MR. WILLIAMS: May I ask questions  
12 relating to how they intend to use this property?

13 THE COURT: Nope. Nope.

14 MR. WILLIAMS: And one last point,  
15 the motion also covered those topics relating to  
16 document retention and production.

17 THE COURT: Of similar properties  
18 or in general?

19 MR. WILLIAMS: No. In this case as  
20 to their internal policies related to how they  
21 store, retain, search and produce documents,  
22 which are relevant to the discovery in this case.

23 THE COURT: Anything since June of  
24 '18, it sounds like, would be a relevant time  
25 period, sure.

|                                     |   |                                     |
|-------------------------------------|---|-------------------------------------|
| STATE OF SOUTH CAROLINA             | ) | IN THE COURT OF COMMON PLEAS        |
|                                     | ) | NINTH JUDICIAL CIRCUIT              |
| COUNTY OF CHARLESTON                | ) | CASE NO.: 2018-CP-10-05739          |
|                                     | ) |                                     |
| Michael D. Royal,                   | ) |                                     |
|                                     | ) |                                     |
| Plaintiff,                          | ) | <b>CHARLESTON COUNTY SCHOOL</b>     |
|                                     | ) | <b>DISTRICT’S MEMORANDUM</b>        |
| vs.                                 | ) | <b>IN OPPOSITION TO PLAINTIFF’S</b> |
|                                     | ) | <b>MOTION TO RECONSIDER</b>         |
|                                     | ) |                                     |
| Free Kindergarten Association of    | ) |                                     |
| of Charleston, The Attorney General | ) |                                     |
| of South Carolina, and Charleston   | ) |                                     |
| County School District,             | ) |                                     |
|                                     | ) |                                     |
| <u>Defendants.</u>                  | ) |                                     |

Defendant, Charleston County School District (“CCSD”), by and through its undersigned counsel, hereby submits this Memorandum in Opposition to Plaintiff’s Amended Motion to Reconsider.

### **INTRODUCTION**

This is an action for breach of contract, damages and specific performance of a contract for the purchase of real property and improvements located at 34 Pitt Street in Charleston, SC owned by the Defendant Free Kindergarten Association of Charleston (“FKAC”). FKAC is a South Carolina non- profit corporation established in South Carolina on January 20, 1901.

This matter came before the Master in Equity (the “Court”) for trial on December 15, 2022, and concerns real property located at 34 Pitt Street in Charleston, South Carolina (the “Property”). Following the testimony of Michael D. Royal, as Plaintiff’s final witness in Plaintiff’s case in chief, and the Court’s exchange with Plaintiff’s counsel set forth in the official trial transcript at pgs. 298:8 – 300:17, the Court entertained motions and heard oral arguments on the parties’ motions and various legal issues. After considering oral arguments, the testimony received and the documentary exhibits admitted into evidence, the Court issued its ruling from the bench, to be followed by a formal order, dismissing the case pursuant to Rule 41(b), SCRCp.

Plaintiff complains the Court's granting of a nonsuit was improper because he had not closed his case. *Plaintiff's Memorandum in Opposition to Defendant Charleston County School District's Motion to Exclude and Strike; Plaintiff's Amended Motion to Reconsider*. On the other hand, however, Plaintiff asserts that all of his exhibits were admitted at the trial of this action. *Id*; **Exhibit A**. Plaintiff's procedural complaint as to the timing of the Court's nonsuit is incongruent with his assertion that all of his exhibits were admitted at the trial of this action.

Furthermore, South Carolina jurisprudence holds that although the usual time for a nonsuit is after the plaintiff closes his evidence in chief, a motion for nonsuit may be made at any time during the trial of a case. *Ahrens v. McDaniel*, 287 S.C. 63, 336 S.E.2d 505 (1985); Rule 41(b), SCRPC. A judge may grant a nonsuit on his own motion as well as on motion of counsel, including a motion of counsel for nonsuit solicited by the court. *Id*. The *Ahrens* decision was issued after the passage of the South Carolina Rules of Civil Procedure and remains viable precedent on the issue of nonsuit in South Carolina.

Under the circumstances of the present case, it was not error for the Court to grant a nonsuit after its consideration of the parties' motions, oral arguments, the testimony received and the documentary exhibits admitted into evidence. *See id*.

The Plaintiff received a full and fair opportunity to present his case in chief before the Court. The material facts presented by Plaintiff in his case in chief on the salient issues of the Purchase and Sale Agreement ("PSA"), June Wells' alleged authority to execute the PSA on behalf of FKAC, the PSA's violation of public policy, the Attorney General of South Carolina's ("SCAG") role and responsibilities in connection with the PSA and CCSD's rights to the residual proceeds of sale of the Property were before the Court at the time the Court granted the nonsuit. Those material facts established the Defendants' right to judgment as a matter of law at this juncture of the trial, even before the Defendants had the opportunity to present their cases in chief to the Court. Thus, the Court's nonsuit was proper.

On March 30, 2022, the Court signed its formal order granting the nonsuit ("Nonsuit Order"). The Court filed its Nonsuit Order on March 31, 2022.

On April 10, 2022, Plaintiff filed his Amended Motion to Reconsider the Court's Nonsuit Order.

CCSD hereby opposes Plaintiff's Amended Motion to Reconsider as set forth below.

### **GENERAL OBJECTIONS**

- (1): The Court's findings of fact and conclusions of law under applicable South Carolina law and other legal authorities relating to all issues ruled on at trial are properly made, and apply the proper and applicable legal standards to the facts before the Court.
- (2): CCSD joins The Attorney General of the State of South Carolina in any responsive pleading he files and/or any oral argument made related to his objection to the proposed sale and that the Agreement violates public policy and is contrary to law.

### **SPECIFIC OBJECTIONS**

#### **A. PLAINTIFF'S CASE IN CHIEF/RULE 41(b), SCRCP**

- (1): **PLAINTIFF'S ALLEGATION:** Plaintiff asserts the Court's Order erred as a matter of law in considering and granting the AG's motion for non-suit prior to Plaintiff finishing the presentation of his case in chief.

**CCSD'S RESPONSE:** The Court's grant of nonsuit was proper in this case. *See* Charleston County School District's Memorandum in Opposition to Plaintiff's Amended Motion to Reconsider, Section I. (Introduction); Charleston County School District's Reply to Plaintiff's Memorandum in Opposition to Defendant Charleston County School District's Motion to Exclude and Strike.

- (2): **PLAINTIFF'S ALLEGATION:** Plaintiff asserts the Court's Order finding that Royal was the final witness in Plaintiff's case in chief (Order Pg. 9) is not supported by the record. *Plaintiff's Motion – 18.*

**CCSD'S RESPONSE:** The official certified trial transcript directly contradicts Plaintiff's allegation. Specifically, upon completion of Mr. Royal's testimony and his stepping down from the witness stand the Court asked Plaintiff's counsel if he had "any further witnesses?" Tr. 298: 4-12. Plaintiff's counsel responded to the Court's question as follows: "**I don't think I have witnesses**, but I have got

a lot of stuff to do before I close my case.” (emphasis added) *Id.*

**RULE 41(b), SCRPC STANDARD/PLAINTIFF ALLEGED RIGHT TO RELIEF**

(1): **PLAINTIFF’S ALLEGATIONS:** Plaintiff asserts the Court’s Order erred in granting the AG’s motion for non-suit on the following grounds:

(a): To present a right to relief in his case in chief under Rule 41(b), Plaintiff was only required to establish the elements of his two claims for breach of contract and specific performance, but there is no requirement that he defeat opposing parties’ defenses, such as the AG’s claimed ability to invalidate contracts purportedly contrary to public policy.

(b): The record shows that Plaintiff demonstrated a right to relief on his claims (including evidence of a valid contract, a breach of the contract by FKAC, partial execution of the contract by Royal, and Royal’s readiness, willingness, and ability to close on the transaction).

*Plaintiff’s Motion – 6. a. & b.*

**CCSD’S RESPONSE:** The Court’s grant of nonsuit was proper in this case. *See* Charleston County School District’s Memorandum in Opposition to Plaintiff’s Amended Motion to Reconsider, Section I. (Introduction); Charleston County School District’s Reply to Plaintiff’s Memorandum in Opposition to Defendant Charleston County School District’s Motion to Exclude and Strike.

**RESOLUTION TO AMEND FKAC CHARTER**

(1): **PLAINTIFF’S ALLEGATION:** Plaintiff asserts the record does not show that the 1971 resolution to amend FKAC’s charter was authorized by a majority of the Board of Directors of FKAC.

*Plaintiff’s Motion – 2.c.*

(2): **PLAINTIFF’S ALLEGATION:** Plaintiff asserts FKAC’s charter was amended in 1971 pursuant to a resolution voted upon and authorized by the members of the FKAC, not its Board of Directors. *Plaintiff’s Motion – 3.a.*

**CCSD RESPONSE:**

Plaintiff's assertions are incorrect. The record shows that the resolution in question was adopted by a majority vote at a meeting of the members of FKAC on November 3, 1970. Plaintiff's Trial Ex. 61. The Directors or Authorized Managing Board of FKAC represented the majority of the duly elected and qualified members present at the meeting held on November 3, 1970. *Id.* The Directors or Authorized Managing Board consisted of: (1) Mrs. Harry H. Lindstedt – President; (2) Mrs. Fred N. Them – Vice President; (3) Mrs. Vince Moseley – Secretary; (4) Miss Ann E. Morse – Treasurer and (5) Mrs. Wade Murray – Director. *Id.* Thereafter, on January 16, 1971, the same individuals, constituting a majority of the Directors or Board of Directors of FKAC, certified the resolution. *Id.* On February 5, 1971, the South Carolina Secretary of State recognized the certification of the resolution by a majority of the Board of Directors of FKAC and certified that the requirements of the law for said amendment to the FKAC charter had been complied with and certified that the FKAC charter had been amended in accordance with the resolution. Plaintiff's Trial Ex. 62.

(3): **PLAINTIFF'S ALLEGATION:** Plaintiff asserts the sole testimony with regard to FKAC came from the Plaintiff as to his reliance on the 1971 resolution and FKAC's charter to establish June Wells' authority to act on behalf of FKAC.

*Plaintiff's Motion – 2.c.*

**CCSD'S RESPONSE:** The 1971 resolution and FKAC's charter do not contain the name of June Wells ("Ms. Wells"), do not identify Ms. Wells as a member, officer, director, member of the authorized managing board of FKAC, person authorized to act on behalf of FKAC, or person authorized to sell the last remaining asset of FKAC. In short, these documents do not refer to Ms. Wells or grant authority to Ms. Wells on behalf of FKAC in any manner whatsoever. Plaintiff's reliance on these documents to establish Ms. Wells' authority to act on behalf of FKAC is unreasonable and such documents do not establish or confer such authority on Ms. Wells. *See also, FKAC MEMBERSHIP, CCSD RESPONSE* above.

**CCSD AND CONSTITUENT DISTRICT 20**

(1): **PLAINTIFF'S ALLEGATIONS:** Plaintiff asserts the below Findings of Fact contained in

the Court's Order are not supported by evidence in the record:

(a): No entities exist by the name of Charleston County School District #20 or Charleston County School Constituent District #20 (Order Pgs. 3-4, 21, 22).

(b): The Court's Order's summary of and conclusions as to 1967 S.C. Act 340 and the effect thereof (Order 3-4, 20-22).

(2): **PLAINTIFF'S ALLEGATIONS:** Plaintiff asserts the Court's Order erred in concluding that CCSD is entitled to the sale proceeds of FKAC's asset, the Property, as neither CCSD, nor any other party, presented any evidence or argument at trial to support the finding.

(a): Evidence exists which contradicts, or casts doubt upon this finding, including:

(1): the deposition testimony of the CCSD's Rule 30(b)(6), SCRCF, designee;

(2): the AG's statement that it has no opinion as to the entity entitled to receive

those sale proceeds.

*Plaintiff's Motion 14.1.*

**CCSD'S RESPONSE:** The Court's findings of fact and conclusions of law and supporting legal authorities relating to the issues of the relationship between CCSD and Constituent District 20, the effect of the 1971 resolution upon the sale of the Property and CCSD's rights to the residual proceeds of the sale of the Property are supported by the evidence, are properly made, apply the proper and applicable legal standards to the facts before the Court, and constitute the law of the case in this matter. *See* the Court's Nonsuit Order; the Court's Order Granting Motion of Charleston County School District to Intervene; CCSD's Motion in Limine with Respect to Plaintiff's Pre-Trial Brief Claims of a Lack of Standing and the Non-Existence of a Justiciable Controversy Involving Charleston County School District.

### **FKAC MEMBERSHIP**

(1): **PLAINTIFF ALLEGATION:** Plaintiff asserts FKAC, via counsel, stipulated that June Wells was the sole member of FKAC from November 23, 2010 until the date of her death, November 29, 2020.



*Plaintiff's Motion – 3.b.*

**CCSD'S RESPONSE:**

The record is devoid of evidence of June Wells' satisfaction of the requirements of membership in FKAC (i.e., no evidence of June Wells' nomination and election by two-thirds of the members present, that her name was proposed at one meeting and voted on at the next, or of her payment of annual dues). Also, FKAC's charter does not address or prescribe particular voting rights of its members nor does it grant its members or any one member the authority to sell all, or substantially all, of FKAC's property. *Assuming arguendo*, that June Wells was ever a member of FKAC, the record fails to establish her right to sell all, or substantially all, of FKAC's property, including the 34 Pitt Street property at issue in this case.

**FKAC BOARD OF DIRECTORS**

(1): **PLAINTIFF ALLEGATION:** Plaintiff asserts no evidence was given by any party of any election of a board of directors for FKAC.

*Plaintiff's Motion – 2.c.*

**CCSD'S RESPONSE:** The record contains abundant evidence of the existence and operation of a board of directors for FKAC. *See, inter alia*, Constitution and Charter of the South Carolina Kindergarten Association (Plaintiff's Trial Ex. 58); Application for Amendment of Eleemosynary Charter of the Free Kindergarten Association (Plaintiff's Trial Ex. 61); SC Secretary of State Certification of Amendment to Charter of Free Kindergarten Association of Charleston (Plaintiff's Trial Ex. 62).

(2): **PLAINTIFF ALLEGATION:** Plaintiff asserts the corporate charter was introduced into evidence, and Royal testified that it made no reference to a board of directors.

*Plaintiff's Motion – 2c.*

**CCSD'S RESPONSE:**

Plaintiff's testimony is incorrect. Specifically, Article VII of the Constitution and Charter of the South Carolina Kindergarten Association (Plaintiff's Trial Ex. 61) does reference and establish a board of directors in the form of the Executive Committee. *See also, FKAC BOARD OF DIRECTORS (1), CCSD'S RESPONSE* above.

**JUNE WELLS' ALLEGED AUTHORITY TO ACT ON BEHALF OF FKAC**

(1): **PLAINTIFF'S ALLEGATION:** Plaintiff asserts the sole testimony with regard to FKAC came from the Plaintiff as to his reliance on the 1971 resolution and FKAC's charter to establish June Wells' authority to act on behalf of FKAC.

*Plaintiff's Motion – 2.c.*

**CCSD'S RESPONSE:** The 1971 resolution and FKAC's charter do not contain the name of June Wells ("Ms. Wells"), do not identify Ms. Wells as a member, officer, director, member of the authorized managing board of FKAC, person authorized to act on behalf of FKAC, or person authorized to sell the last remaining asset of FKAC. Likewise, Ms. Wells was not a signatory to these documents nor does the record establish her authority. In short, these documents do not refer to Ms. Wells or grant authority to Ms. Wells on behalf of FKAC in any manner whatsoever. Plaintiff's reliance on these documents to establish Ms. Wells' authority to act on behalf of FKAC is unreasonable and such documents do not establish or confer such authority on Ms. Wells. *See also, FKAC MEMBERSHIP, CCSD RESPONSE* above.

(2): **PLAINTIFF'S ALLEGATION:** Plaintiff asserts the record shows that Plaintiff relied on many additional documents than the three (3) listed on pages 5-6 of the Court's Order and many facts in addition to the fact that she was the only person with access to the Property as proof of June Wells' authority to conduct business on behalf of FKAC. The Court's Order directly contradicts the abundance of uncontroverted evidence submitted and testified to by Plaintiff which established June Wells' authority.

*Plaintiff's Motion – 2.g*

**CCSD'S RESPONSE:**

The Court's findings of fact and conclusions of law under South Carolina law and other and legal authorities relating to the issue of June Wells' alleged authority to act on behalf of FKAC and, more specifically to sell all, or substantially all, of FKAC's property, including the 34 Pitt Street property at issue in this case are supported by the evidence, are properly made, and apply the proper and applicable legal standards to the facts before the Court. Furthermore, Plaintiff's reliance on "many" documents which he labels as his "authority documents" and "similar purpose documents" and other facts for the proposition that June Wells' had authority to sell the 34 Pitt Street property on behalf of FKAC: (a) is not supported by the evidence, (b) is unreasonable, (c) misapplies the elements of apparent authority (i.e., Plaintiff's argument of reliance is based on the alleged words and actions of the purported agent, June Wells, as opposed to the words and actions of the principal, FKAC) and is based on documents that were never admitted into evidence in this case (*see, CCSD's Motion to Exclude and Strike*).

(3): **PLAINTIFF'S ALLEGATION:** Plaintiff asserts the Court's Order finding that Royal did not rely upon FKAC's Resolution Designating Bank Depository dated June 25, 1997 (Plaintiff's Trial Ex. 16) "1997 Resolution") as evidence of June Wells' authority (Order Pg. 6) is directly contradicted by the record. Plaintiff specifically testified that he relied upon the 1997 Resolution as evidence of Ms. Well's authority. Tr. 119:3-24 and 120:1-25.  
*Plaintiff's Motion – 2.h.*

**CCSD'S RESPONSE:** The portions of the transcript cited by Plaintiff DO NOT contain any testimony whatsoever by Mr. Royal testifying that he relied upon the 1997 Resolution in any way, including as evidence of Ms. Well's authority or otherwise. The transcript pages simply show Mr. Royal identifying the 1997 Resolution and then describing certain aspects of the Resolution.

(4): **PLAINTIFF'S ALLEGATION:** Plaintiff asserts the Court's Order finding that there is no indication that Ms. Wells signed FKAC's Resolution Designating Bank Depository dated June 25, 1997 (Plaintiff's Trial Ex. 16) as a member of FKAC's Board of Directors is unsupported by the record.

*Plaintiff's Motion – 2.h.*

**CCSD'S RESPONSE:** The Court's finding is proper. *See, Charleston County School District's Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgement, Item 32.*

(5): **PLAINTIFF'S ALLEGATION:** Affidavit of June Wells, dated November 23, 2010 ("Wells Affidavit") (Plaintiff's Trial Ex. 29A). Plaintiff asserts the following with respect to the Wells Affidavit:

(a): The record does not support the Court's Order's summary of and conclusions as to the Wells Affidavit, namely as it relates to the authority of June Wells to act on behalf of FKAC.

(b): The Court's Order found that Royal relied upon the Wells Affidavit as establishing Ms. Wells' authority.

(c): The Court's Order (Order Pgs. 5-6) unnecessarily and prejudicially editorialized the content of the Wells Affidavit by inserting the phrase "[not authority]" within the document's text to equate capacity with lack of authority (finding that Ex. 29A stated that Ms. Wells had "capacity [not authority] to act on behalf of [FKAC]").

(d): CCSD's counsel argued that the instant litigation is related to the Charleston County Probate Court case in which the Wells Affidavit was filed and relied upon in a final order.

(e): The Wells Affidavit clearly supports Ms. Wells' authority to sell the Property.

*Plaintiff's Motion – 2.i. and 7.*

**CCSD'S RESPONSE:**

(a): The Court's findings of fact and conclusions of law under applicable South Carolina law and other legal authorities relating to the issue of June Wells' alleged authority to act on behalf of FKAC and, more specifically to sell all, or substantially all, of FKAC's property, including the 34 Pitt Street property at issue in this case are supported by the evidence, are properly made, and apply the proper and applicable legal standards to the facts before the Court. Furthermore, Plaintiff's reliance on the Wells Affidavit (which exhibit CCSD acknowledges was admitted into evidence over CCSD's objection) for the proposition that June Wells' had authority to sell the 34 Pitt Street property on behalf of FKAC: (a) is not supported by the evidence, (b) is unreasonable, and (c) misapplies the

elements of apparent authority (i.e., Plaintiff's argument of reliance is based on the alleged words and actions of the purported agent, June Wells, as opposed to the words and actions of the principal, FKAC).

(b): The Court did not find that the Wells Affidavit established June Wells' authority to sell the 34 Pitt Street property.

(b): Plaintiff's assertion (d) above mischaracterizes, distorts and misapplies CCSD's counsel's reference to collateral estoppel and/or res judicata principles the argument of CCSD's counsel relating to the Wells' affidavit and the Probate Court case. A proper statement of CCSD's argument is set forth in *Charleston County School District's Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment, Item 16*.

(6): **PLAINTIFF'S ALLEGATION:** Charleston County Probate Court Order, dated December 7, 2010 ("Probate Court Order") (Plaintiff's Trial Exhibit 29). Plaintiff asserts the following with respect to the Probate Court Order:

(a): The Court's Order found that Royal relied upon the Probate Court Order as establishing Ms. Wells' authority.

(b): The Court's Order (Order Pgs. 5-6) unnecessarily and prejudicially editorialized the content of the Probate Court Order by inserting the phrase "[not authority]" within the documents' text to equate capacity with lack of authority (finding that Ex. 29 stated that Ms. Wells had "capacity [not authority] to act on behalf of [FKAC]").

*Plaintiff's Motion 7.*

### **CCSD'S RESPONSE:**

(a): The Court's findings of fact and conclusions of law under South Carolina law and other legal authorities relating to the issue of June Wells' alleged authority to act on behalf of FKAC and, more specifically to sell all, or substantially all, of FKAC's property, including the 34 Pitt Street property at issue in this case are supported by the evidence, are properly made, and apply the proper and applicable legal standards to the facts before the Court. Furthermore, Plaintiff's reliance on the Probate Court Order (which document CCSD acknowledges was admitted into evidence over CCSD's objection) for the proposition that June Wells' had authority to sell the 34 Pitt Street

property on behalf of FKAC: (a) is not supported by the evidence, (b) is unreasonable, and (c) misapplies the elements of apparent authority (i.e., Plaintiff's argument of reliance is based on the alleged words and actions of the purported agent, June Wells in connection with the Probate Court Order, as opposed to the words and actions of the principal, FKAC).

(b): The Court did not find that Probate Court Order established June Wells' authority to sell the 34 Pitt Street property.

(c): *See, Charleston County School District's Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment, Item 16..*

(7): **PLAINTIFF'S ALLEGATION:** Plaintiff asserts the Court's Order failed to consider the overwhelming amount of evidence submitted by Plaintiff establishing June Wells' authority. The Court acknowledged Plaintiff's abundance of support on the issue and allowed a cumulative proffer and admission of all of the documents relied upon as establishing June Wells authority.

*Plaintiff's Motion – 3.c.*

### **CCSD'S RESPONSE:**

The Court's findings of fact and conclusions of law under applicable South Carolina law and other legal authorities relating to the issue of June Wells' alleged authority to act on behalf of FKAC and, more specifically to sell all, or substantially all, of FKAC's property, including the 34 Pitt Street property at issue in this case are supported by the evidence, are properly made, and apply the proper and applicable legal standards to the facts before the Court. Furthermore, Plaintiff's reliance on "many" documents which he labels as his "authority documents" and "similar purpose documents" and other facts for the proposition that June Wells' had authority to sell the 34 Pitt Street property on behalf of FKAC: (a) is not supported by the evidence, (b) is unreasonable, (c) misapplies the elements of apparent authority (i.e., Plaintiff's argument of reliance is based on the alleged words and actions of the purported agent, June Wells, as opposed to the words and actions of the principal, FKAC) and is based on documents that were never admitted into evidence in this case (*see, CCSD's Motion to Exclude and Strike*).

(7): **PLAINTIFF'S ALLEGATION:** Plaintiff asserts FKAC'S pleadings cited below admit that

June Wells was authorized to sell the Property on behalf of FKAC.

(a): FKAC's Answer to Complaint at ¶7 (stating that if June Wells is the sole surviving member of FKAC, then she is "authorized to sell the aforesaid [P]roperty").

(b): FKAC's Reply to Crossclaim at ¶2 (stating that "Ms. June Murray Wells ('Ms. Wells') was and is the duly authorized director and last surviving member of the Free Kindergarten Association of Charleston and that as such she had authority since approximately 1990 to represent the Free Kindergarten Association of Charleston.").

*Plaintiff's Motion 3.d.*

**CCSD'S RESPONSE:**

(a): Plaintiff's assertion mischaracterizes, distorts and misapplies FKAC's Answer to Complaint at ¶7 inasmuch as that paragraph does not make an affirmative statement as to June Wells being authorized to sell the 34 Pitt Street property, but instead, requests that the Court make a declaration as to the rights of the parties with regard to the sale of the 34 Pitt Street property under the PSA.

(b): FKAC's Reply to Crossclaim at ¶2 does not state that June Wells had authority to sell the 34 Pitt Street property.

(8): **PLAINTIFF'S ALLEGATION:** Plaintiff asserts the Court's Order (Order Pg. 6) erred in its determination of the evidentiary value of the Wells Affidavit and FKAC's 1997 Resolution. These documents were not submitted as proof that the sale of the Property was authorized or that June Wells was given specific authority to execute such a sale. They were submitted as part of a group of cumulative evidence relied upon by Plaintiff in evaluating June Wells' authority to act on behalf of FKAC.

*Plaintiff's Motion 14.g.*

**CCSD'S RESPONSE:** The Court's determination of the evidentiary value of the Wells Affidavit and 1997 Resolution is proper.

(9): **PLAINTIFF'S ALLEGATION:** Plaintiff asserts the Court's Order (Order Pg. 18) erred in finding that paragraph 6 of the PSA, regarding seller providing documentation of June Wells'

authority, is proof that Royal had any question that Ms. Wells had authority to bind FKAC to the contract. All of the evidence proves that Royal had no question about Ms. Wells' authority and establishes the rationale for the PSA's inclusion of the language in question (i.e., to satisfy third parties, such as title companies). Royal testified "I had every reason to believe that [Wells] did have authority when she signed [the PSA]."

*Plaintiff's Motion – 14.j.*

**CCSD'S RESPONSE:**

(a): The Court's findings of fact and conclusions of law under applicable South Carolina law and other legal authorities relating to the issue of June Wells' alleged authority to act on behalf of FKAC and, more specifically to sell all, or substantially all, of FKAC's property, including the 34 Pitt Street property at issue in this case are supported by the evidence, are properly made, and apply the proper and applicable legal standards to the facts before the Court.

(b): Mr. Royal's assertion/testimony that Paragraph 6 of the PSA is not evidence that he had any question that Ms. Wells had authority to bind FKAC to the contract is not credible.

(c): Paragraph 6 of the PSA says nothing about seeking documentation of June Wells' authority, and proceeding to court if necessary to prove such authority as being for the purpose of satisfying third parties, such as title companies.

(10): **PLAINTIFF'S ALLEGATION:** Plaintiff asserts the Court's Order erred in ignoring or failing to consider, analyze, or apply the legal standards for determining a person's authority to act on behalf of a corporation or entity, including the doctrines of actual and apparent authority.

*Plaintiff's Motion – 17.*

**CCSD'S RESPONSE:**

(a): The Court's findings of fact and conclusions of law under applicable South Carolina law and other legal authorities relating to the issue of June Wells' alleged authority to act on behalf of FKAC and, more specifically to sell all, or substantially all, of FKAC's property, including the 34 Pitt Street property at issue in this case are supported by the evidence, are properly made, and apply the proper and applicable legal standards to the facts before the Court.



(11): **PLAINTIFF'S ALLEGATION:** Plaintiff asserts the Court's Order's finding that June Wells did not have any type of authority to execute the PSA on behalf of FKAC for the sale of the Property (Order Pg. 10) is inconsistent with and contradicted by the evidence and the Court's findings and rulings made at trial. After consideration of the substantial amount of evidence relating to Ms. Wells' authority, the Court decided at trial that it was "going to find that she did have the authority to act[.]"

*Plaintiff's Motion 19.*

**CCSD'S RESPONSE:**

(a): The Court's findings of fact and conclusions of law under applicable South Carolina law and other legal authorities relating to the issue of June Wells' alleged authority to act on behalf of FKAC and, more specifically to sell all, or substantially all, of FKAC's property, including the 34 Pitt Street property at issue in this case are supported by the evidence, are properly made, and apply the proper and applicable legal standards to the facts before the Court.

(b): The Court specifically stated the limitations on any authority to act by June Wells on behalf of FKAC and did not find that she had authority to sell all, or substantially all, of FKAC's property, including the 34 Pitt Street property.

(12): **PLAINTIFF'S ALLEGATIONS:**

(a): Plaintiff asserts that further supporting a finding that June Wells had authority, the Court, at trial, held that the contract would be valid and enforceable except for the fact that it involved a nonprofit entity, which made the contract and transaction subject to the AG's review and approval. Tr. 335:16 – 337:20, 341:22 – 342:10, 343: 7-18 (the Court found "that the contract is not to be enforced between the parties because they did not get approval from the Attorney General's office...if [Royal] were a private contract with the other opposing party, they wouldn't have to do that.").

*Plaintiff's Motion 19.a.*

(b): Plaintiff asserts the Court found in favor of Plaintiff on the primary issue of June Wells' authority to execute the PSA and sell the Property on behalf of FKAC. Tr. 339:14-20. Plaintiff

further asserts the Court even stated that “if this were a private contract between two parties, I would uphold [Plaintiff’s] argument]” to enforce the PSA. Tr.337:15-25.

*Plaintiff’s Motion - 6.b.*

**CCSD’S RESPONSE:**

(a): The Court’s findings of fact and conclusions of law under applicable South Carolina law and other legal authorities relating to the issue of June Wells’ alleged authority to act on behalf of FKAC and, more specifically to sell all, or substantially all, of FKAC’s property, including the 34 Pitt Street property at issue in this case are supported by the evidence, are properly made, and apply the proper and applicable legal standards to the facts before the Court.

(b): The Court did not find in favor of Plaintiff on one of the primary issues in the case; namely, the question of whether June Wells’ had authority to execute the PSA and sell the Property on behalf of FKAC.

(c): The above quotes by Plaintiff reference discussions between the Court and Plaintiff’s counsel regarding the impact of the SCAG’s obligations to protect the public in connection with the sale of FKAC’s last remaining asset under the PSA and how that distinguishes this transaction from one between private parties. The Court did not find in these discussions that June Wells had authority to sell the 34 Pitt Street property under the circumstances of this case.

(13): **PLAINTIFF’S ALLEGATION:** Plaintiff asserts the Court’s Order (Order Pg. 9-10) erred in considering and ruling upon the issue of June Well’s authority as part of the AG’s motion for non-suit. The issue of June Wells’ authority was not encompassed within the AG’s motion for nonsuit – the AG only moved for non-suit as to whether “this contract and this potential sale was against public policy because it was less than fair market value.” Tr. 324:18 – 325:14. In fact, the AG stated at trial that it was “not taking a position on authority[.]” Tr. 326:20-24; *see also* Tr. 308:24-25.

*Plaintiff’s Motion 20.*

**CCSD’S RESPONSE:**

(a): The SCAG stated at trial and in connection with the Probate Court Order that although the AG was “not taking a position on authority, [it would] note, as [CCSD’s counsel] pointed out, you know,

authority to sell a building and do the final steps is different from authority to comment on an equitable deviation action, just to tell the Court, hey, here's what's going on in our operating. That's a different standard..." Tr. 326: 23- 327:5.

(b): The SCAG engaged the Court further on this issue in the colloquy below stating at trial in follow up to the above statement that:

SCAG'S COUNSEL - "...Ms. Wells' authority, to comment on it, to tell the Court what was happening in...with the Free Kindergarten because she was the only person left maybe at that time is different from her authority to sell a building. So in terms of that...

THE COURT: The last remaining asset...

SCAG'S COUNSEL: Correct.

THE COURT: ...of the entity?

SCAG'S COUNSEL: Correct, correct.

Tr. 327:14 – 328: 1.

(c): CCSD's counsel argued the issue of June Wells' alleged authority, and the lack thereof, at trial at the request of the Court during oral arguments on the parties' motions, including the SCAG's motion for nonsuit.

(d): *See Charleston County School District's Motion to Exclude and Strike.*

(15): **PLAINTIFF'S ALLEGATION:** Plaintiff asserts the Court failed to consider or apply S.C. Code Ann. § 33-31-304, which provides that "the validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act[.]" except "in a proceeding brought against the corporation to enjoin an act where a third party has not acquired rights." Plaintiff further asserts that such proceedings must be brought in a permissible action (i.e., by the AG, a director, or by a member or members in a derivative proceeding per S.C. Code Ann. § 33-31-304) and, therefore, any challenge to FKAC's execution of the PSA on the basis of June Wells purportedly lacked authority was improper, as no permissible action was brought in accordance with § 33-31-304). *Plaintiff's Motion - 13. b.*

**CCSD'S RESPONSE:** S.C. Code Ann. § 33-31-304 is inapplicable to the present action because it does not address actions that, *inter alia*:

(a): do not deal with the authority or power of a corporation to sell, transfer or otherwise convey assets held in charitable trust or subject to a reversionary or other interest.

(b): (i) violate other provisions of the Model Act, (ii) violate federal or state laws; (iii) have not been approved or authorized as required by the Model Act or (iv) breach duties owed by the corporation.

See OFFICIAL COMMENT to S.C. Code Ann. § 33-31-304.

### **THIRD PARTY LETTER OF INTENT/PURCHASE OFFERS ON PROPERTY**

(1): **PLAINTIFF’S ALLEGATIONS:** Plaintiff asserts there was no evidence in the record of a letter of intent or viable purchase offers for 34 Pitt Street by third parties.

*Plaintiff’s Motion – 2.k.*

**CCSD’S RESPONSE:** Plaintiff’s assertion that there was no evidence in the record of a letter of intent is in error. See Tr. 222:25 – 229:20.

### **MICHAEL ROYAL’S INITIAL DRAFT PURCHASE AND SALE AGREEMENT/OFFER ON THE PROPERTY**

(1): **PLAINTIFF’S ALLEGATIONS:** Plaintiff asserts that the Court’s Order failed to consider the evidence that FKAC rejected Plaintiff’s “initial offer” because it contained a firm and near closing date, which thereby led Plaintiff to revise his offer to provide an extremely flexible closing date so as to alleviate Wells’ concerns about removing the contents from the Property.

*Plaintiff’s Motion – 3.i.*

### **CCSD’S RESPONSE:**

The record is devoid of evidence that FKAC “rejected Plaintiff’s initial offer because it contained a firm and near closing date.” In fact, Mr. Royal’s testimony at trial shows that neither FKAC nor June Wells responded to Plaintiff’s “initial offer”.

## **PURCHASE AND SALE AGREEMENT**

(1): **PLAINTIFF'S ALLEGATION:** Plaintiff asserts the Court's Order failed to consider the unrefuted evidence that he relied upon the PSA to his detriment by solving title and tax problems for FKAC, developing a strategy for consolidation of storage units to save FKAC money, and physically assisting FKAC with moving the contents out of the building on the Property.

*Plaintiff's Motion 3.h.*

**CCSD'S RESPONSE:** Plaintiff's alleged actions above were gratuitous, not a part of the requirements or terms of the PSA.

(2): **PLAINTIFF'S ALLEGATION:** Plaintiff asserts there is not legal or factual basis for the Court's finding that Plaintiff was required to give notice of the PSA to the AG or CCSD.

*Plaintiff's Motion – 12.b.*

**CCSD's RESPONSE:** The Plaintiff moved and the Court admitted the Memorandum of Purchase and Sale Agreement into evidence as Plaintiff's Trial Ex. 31. Plaintiff's counsel argued at the trial that the PSA Memorandum gave the AG and CCSD notice that Ms. Wells was disposing of 34 Pitt Street and a basis for contesting the sale at that time. Tr. 321-323. Accordingly, the Court's findings/conclusions regarding the PSA Memorandum, including its content and effect on Plaintiff's assertion of notice, are relevant, properly made and do not constitute error.

(3): **PLAINTIFF'S ALLEGATION:** Plaintiff asserts there is no requirement that the Memorandum of PSA recorded in the Register of Deeds Office (Plaintiff's Trial Ex. 31) include the purchase price or be enrolled with the R.O.D. in the AG's or CCSD's name. Plaintiff asserts the Court's findings/conclusions on this issue (Order Pgs. 7, 11, 16) constitute errors of law.

*Plaintiff's Motion – 12.b.*

**CCSD's RESPONSE:** The Plaintiff moved and the Court admitted the Memorandum of Purchase and Sale Agreement into evidence as Plaintiff's Trial Ex. 31. Plaintiff's counsel argued at the trial

that the PSA Memorandum gave the AG and CCSD notice that Ms. Wells was disposing of 34 Pitt Street and a basis for contesting the sale at that time. Tr. 321-323. Accordingly, the Court's findings/conclusions regarding the PSA Memorandum, including its content and effect on Plaintiff's assertion of notice, are relevant, properly made and do not constitute error.

(4): **PLAINTIFF'S ALLEGATION:** Plaintiff asserts the Court's Order indicates that Royal's position in the PSA was akin to an option (Order Pg. 18) but does not consider whether Royal gave adequate consideration for such an "option..." Also, in its comparison of the PSA to an option, the Court's Order fails to note that Royal paid a \$5,000 deposit which would not have been returned to Royal if he had not been able to close because of financial impossibility on the closing date chosen by FKAC.

*Plaintiff's Motion – 14.i.*

**CCSD'S RESPONSE:** Plaintiff admitted that he, as the author of the PSA, drafted it in a manner such that it was "almost like an option" but "not exactly the same." Order Pg. 18. Plaintiff asserts in his Amended Motion to Reconsider that satisfactory option fee like provisions were contained in the PSA, specifically the payment of a \$5000 deposit that was non-refundable in certain situations. Plaintiff's assertions fail for the following reasons: (1) The PSA does not identify or contain any reference to an "option fee"; (2) The \$5000 was expressly stated/identified as a down payment on the purchase price, not as an option fee; (3) The \$5000 down payment was not fully non-refundable in all situations. In short, there was no option fee provided for or paid to FKAC under the PSA.

### **CONCLUSION**

Based on the foregoing, Plaintiff is not entitled to an Order altering or amending the Court's Nonsuit Order and Defendant Charleston County School District respectfully requests that Plaintiff's Amended Motion to Reconsider be denied.

SIGNATURE PAGE FOLLOWS

LAW OFFICE OF A. BRIGHT ARIAIL, LLC

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*Attorneys for Charleston County School District*

May 20, 2022  
Charleston, South Carolina

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March 30, 2022

**VIA E-FILING**

The Honorable Julie J. Armstrong  
Charleston County Clerk of Court  
100 Broad Street  
Charleston, SC 29401

**Re: *Michael D. Royal v. Free Kindergarten Association of Charleston, et al.***  
**Civil Action No. 2018-CP-10-05739**

Dear Ms. Armstrong:

This firm represents Plaintiff Michael D. Royal ("Plaintiff") in the above-captioned matter. As requested by the Court, Plaintiff is filing his exhibits admitted at the trial of this action. Below is an index or list of the same for reference, which was circulated to counsel of record on December 23, 2021, as evidenced by the email correspondence that is enclosed and filed herewith.

| <b><u>Exhibit Number</u></b> | <b><u>Document Description</u></b>                                                         | <b><u>Doc. Date</u></b> |
|------------------------------|--------------------------------------------------------------------------------------------|-------------------------|
| Plaintiff's Robinson 1       | Appraisal of the Property, as of December 19, 2012, by Charleston Appraisal Services, Inc. | 12/19/2012              |
| Plaintiff's Ex. 1            | December 3, 2011 Picture of Property                                                       | 12/3/2011               |
| Plaintiff's Ex. 2            | December 3, 2011 Picture of Property                                                       | 12/3/2011               |
| Plaintiff's Ex. 3            | December 3, 2011 Picture of Property                                                       | 12/3/2011               |
| Plaintiff's Ex. 4            | Email from Michael Royal to Secretary of State's Office                                    | 12/7/2011               |
| Plaintiff's Ex. 7            | News and Courier Article regarding June Wells                                              | 10/8/1990               |
| Plaintiff's Ex. 8            | Royal's Calendar Reminder (Subject: Meet June Wells at 34 Pitt Street)                     | 11/4/2012               |
| Plaintiff's Ex. 9            | Email to Michael Royal from Mike Robinson                                                  | 11/12/2012              |

EXHIBIT A



|                     |                                                                                                                                         |              |
|---------------------|-----------------------------------------------------------------------------------------------------------------------------------------|--------------|
| Plaintiff's Ex. 10  | January 14, 2013 letter from Royal to June Wells w/ enclosed proposed PSA (v6)                                                          | 01/14/2013   |
| Plaintiff's Ex. 11  | Real Estate Purchase and Sale Agreement                                                                                                 | 04/23/2013   |
| Plaintiff's Ex. 12  | Letter from Lawrence A. Dodds, Jr. to FKAC/June Wells with Draft Lease                                                                  | 11/22/1993   |
| Plaintiff's Ex. 13  | S.C. Department of Revenue Withholding Tax Change of Records/Reorder Form addressed to FKAC c/o June Wells                              | 1/1/1997     |
| Plaintiff's Ex. 14  | FKAC's Letter Replying to S.C. Tax Commission's Letter of 1/8/1997                                                                      | 3/4/1997     |
| Plaintiff's Ex. 15  | Letter from S.C. Department of Revenue to FKAC c/o June Wells                                                                           | 3/19/1997    |
| Plaintiff's Ex. 16  | FKAC's Resolution Designating Bank Depository                                                                                           | 06/25/1997   |
| Plaintiff's Ex. 17  | State of SC Notice of Failure to File Quarterly Tax Return                                                                              | 6/27/1997    |
| Plaintiff's Ex. 18  | FKAC's Employer's Quarterly Federal Tax Return                                                                                          | 6/26/1997    |
| Plaintiff's Ex. 19  | Fixed Rate Certificate from First Federal of Charleston                                                                                 | 7/3/1997     |
| Plaintiff's Ex. 20  | FKAC checks to S.C. Department of Revenue and S.C. Employment Security Commission                                                       | 9/11/1997    |
| Plaintiff's Ex. 21  | Letter from the S.C. Employment Security Commission to FKAC                                                                             | 9/22/1997    |
| Plaintiff's Ex. 22  | IRS Employer's Quarterly Federal Tax Return Form addressed to FKAC c/o June Wells                                                       | Rev. 01/2001 |
| Plaintiff's Ex. 23  | Bank Statement for FKAC/Marion Hanckel Kindergarten sent care of June Wells                                                             | 12/31/2001   |
| Plaintiff's Ex. 24  | Various Utility Bills addressed to FKAC c/o June Wells                                                                                  | 2003-2009    |
| Plaintiff's Ex. 25  | Various Bank Correspondence Addressed to FKAC c/o June Wells                                                                            | 2004-2011    |
| Plaintiff's Ex. 26  | Undated blank check from a Wachovia account in the name of FKAC/Marion Hanckel Kindergarten c/o June Wells                              | Undated      |
| Plaintiff's Ex. 27A | Application to Board of Architectural Review from FKAC/June Wells seeking to repair roof; payment receipt; approved application; permit | 6/19/2009    |

|                     |                                                                                                             |            |
|---------------------|-------------------------------------------------------------------------------------------------------------|------------|
| Plaintiff's Ex. 27  | Handwritten Letter from June Wells to Charleston County Dept of Revenue Collections and enclosed FKAC check | 3/25/2010  |
| Plaintiff's Ex. 28  | Letter from the AG's Office to June Wells/FKAC                                                              | 11/12/2010 |
| Plaintiff's Ex. 29  | Order of the Charleston County Probate Court                                                                | 11/23/2010 |
| Plaintiff's Ex. 29A | Affidavit of June Murray Wells                                                                              | 11/23/2010 |
| Plaintiff's Ex. 30  | Check from FKAC to Charleston County Revenue Collections                                                    | 12/22/2012 |
| Plaintiff's Ex. 31  | Memorandum of Purchase and Sale Agreement                                                                   | 4/23/2013  |
| Plaintiff's Ex. 32  | Letter from Royal to Colleen Carducci (City of Charleston)                                                  | 5/29/2013  |
| Plaintiff's Ex. 38  | Quitclaim Deed from the City of Charleston to FKAC                                                          | 10/3/2013  |
| Plaintiff's Ex. 46  | Letter from Michael Royal to FKAC/June Wells                                                                | 11/10/2014 |
| Plaintiff's Ex. 47  | Letter from Michael Royal to FKAC/June Wells                                                                | 1/26/2015  |
| Plaintiff's Ex. 54  | Email Correspondence between William Wells and Michael Royal                                                | 1/11/2018  |
| Plaintiff's Ex. 54A | Email Correspondence between William Wells and Michael Royal                                                | 3/13/2013  |
| Plaintiff's Ex. 55  | Email Correspondence between Royal, FKAC, Tread Josey and Bill Wells                                        | 3/29/2018  |
| Plaintiff's Ex. 56  | FKAC's Notice of Sale to AG and cover letter                                                                | 4/4/2018   |
| Plaintiff's Ex. 57  | Executed 1st Addendum to the Real Estate Purchase and Sale Agreement                                        | 4/11/2018  |
| Plaintiff's Ex. 58  | FKAC's 1901 Constitution and Charter                                                                        | 1901       |
| Plaintiff's Ex. 59  | FKAC's Certificate of Incorporation                                                                         | 1/24/1901  |
| Plaintiff's Ex. 60  | FKAC Resolution to Amend Charter                                                                            | 1/14/1931  |
| Plaintiff's Ex. 61  | FKAC's Application for Amendment of Charter                                                                 | 1/16/1971  |
| Plaintiff's Ex. 62  | Secretary of State's Certification of FKAC's Amendment to Charter                                           | 2/5/1971   |
| Plaintiff's Ex. 63  | Certificate of Existence of FKAC executed by the S.C. Secretary of State                                    | 8/23/2013  |
| Plaintiff's Ex. 65  | 2nd Addendum to the Purchase and Sale Agreement                                                             | 4/24/2018  |

|                    |                                                                                                    |                       |
|--------------------|----------------------------------------------------------------------------------------------------|-----------------------|
| Plaintiff's Ex. 66 | Defendant FKAC's Answers to Plaintiff Michael Royal's First Requests for Admission                 | 10/11/2021            |
| Plaintiff's Ex. 67 | Emails between Tread Josey and the AG's Office                                                     | 4/17/2018 - 4/19/2018 |
| Plaintiff's Ex. 68 | Letter to AG's Office from Michael Royal                                                           | 4/20/2018             |
| Plaintiff's Ex. 69 | Various emails between Michael Royal, the AG's Office, FKAC, and Tread Josey                       | 4/25/2018 - 5/18/2018 |
| Plaintiff's Ex. 70 | Letter to Plaintiff Royal from FKAC                                                                | 5/11/2018             |
| Plaintiff's Ex. 71 | Email from Michael Royal to FKAC and Tread Josey                                                   | 5/14/2018             |
| Plaintiff's Ex. 74 | Transcript of Deposition of CCSD's Rule 30(b)(6), SCRCF, Designee Jeffrey Borowy                   | 11/22/2021            |
| Plaintiff's Ex. 75 | S.C. Secretary of State Online Business Entity Profile for FKAC                                    | 11/6/2018             |
| Plaintiff's Ex. 76 | South Carolina 1900 Act No. 219 (with cover email from S.C. State Library to Royal dated 12/9/021) | 2/19/1900             |
| Plaintiff's Ex. 77 | Affidavit of Jill Hunter Powell (filed in C/A No. 2018-CP-10-5739 on 6/17/2021)                    | 6/17/2021             |
| Plaintiff's Ex. 78 | Defendant CCSD's Answer to Plaintiff's First Set of Interrogatories                                | 10/1/2021             |
| Plaintiff's Ex. 79 | Plaintiff's and FKAC's Stipulation of Fact                                                         | 10/1/2021             |
| Plaintiff's Ex. 80 | AG's Responses to Plaintiff's First Requests for Admission                                         | 10/8/2021             |
| Plaintiff's Ex. 81 | FKAC's Answers to Plaintiff's First Set of Interrogatories                                         | 10/11/2021            |
| Plaintiff's Ex. 82 | The AG's Responses to Plaintiff's First Set of Interrogatories                                     | 10/20/2021            |
| Plaintiff's Ex. 83 | UDC and Museum's Answers to Royal's First Request for Admissions                                   | 10/21/2021            |
| Plaintiff's Ex. 84 | CCSD's Answers to Plaintiff's First Requests for Admission                                         | 10/22/2021            |
| Plaintiff's Ex. 85 | Defendant CCSD's Answers to Plaintiff's Second Set of Interrogatories                              | 10/25/2021            |
| Plaintiff's Ex. 86 | Defendant CCSD's 1st Supplemental Answers to Plaintiff's 1st Set of Interrogatories                | 11/19/2021            |

|                    |                                                                                     |            |
|--------------------|-------------------------------------------------------------------------------------|------------|
| Plaintiff's Ex. 87 | Defendant CCSD's 2nd Supplemental Answers to Plaintiff's 1st Set of Interrogatories | 11/19/2021 |
| Plaintiff's Ex. 88 | Defendant CCSD's 1st Supplemental Answers to Plaintiff's 2nd Set Interrogatories    | 11/19/2021 |
| Plaintiff's Ex. 89 | Defendant CCSD's 3rd Supplemental Answers to Plaintiff's 1st Set of Interrogatories | 11/22/2021 |
| Plaintiff's Ex. 90 | Defendant CCSD's 2nd Supplemental Answers to Plaintiff's 2nd Set of Interrogatories | 11/28/2021 |
| Plaintiff's Ex. 91 | Defendant CCSD's 4th Supplemental Answers to Plaintiff's 1st Set of Interrogatories | 12/8/2021  |
| Plaintiff's Ex. 92 | Defendant CCSD's Answers to Plaintiff's 3rd Interrogatories                         | 12/8/2021  |
| Plaintiff's Ex. 93 | CCSD's Verification of Answers to Plaintiff's Interrogatories                       | 12/13/2021 |
| Plaintiff's Ex. 94 | The AG's Verification of AG's Responses to Plaintiff's Interrogatories              | 12/14/2021 |

Please let us know if we can provide any further information.

Yours Sincerely,

Evan P. Williams

cc via NEF service and e-filing:

A. Bright Ariail, Esq.  
 Warren W. Ariail, Esq.  
 Mary Frances Jowers, Esq.  
 Kristin Simons, Esq.  
 Patrick F. Stringer, Esq.  
 Joseph K. Qualey, Esq.  
 Zac Smith, Esq.

Enclosure(s)

FILED ELECTRONICALLY FILED - 2022 May 30 17:23 AM - CHAIRLUSTON - COMMON PLEAS - CASE#2018CP10057399

1 STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS  
2 COUNTY OF CHARLESTON FOR THE NINTH JUDICIAL CIRCUIT  
3

4 Michael D. Royal, )  
5 Plaintiff, )  
6 )  
7 vs. )  
8 Free Kindergarten Association of )  
9 Charleston, ) Case No.:  
10 Defendant, ) 2018-CP-10-  
11 ) 5739  
12 The Attorney General of the State of )  
13 South Carolina and The Charleston County )  
14 School District, )  
15 Intervenors. )  
16  
17

18 Motion before the Honorable Mikell R.  
19 Scarborough, reported by Josie Allen Boehm, Registered  
20 Professional Reporter and Notary Public, at 100 Broad  
21 Street, Courtroom 2A, Charleston, South Carolina, May  
22 20th, 2022, commencing at 11:07 a.m.  
23  
24  
25

## APPEARANCES

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ALSO PRESENT:

Joe Qualey; Zach Smith

## INDEX TO EXAMINATION

Court Reporter's Certificate

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## INDEX TO EXHIBITS

No exhibits were marked.

1           THE COURT: Y'all may have a seat. Usual  
2 suspects before the Court. All right. We're here on  
3 the case of Michael Royal versus the Free Kindergarten  
4 Association of Charleston and Attorney General of the  
5 State of South Carolina and the Charleston County  
6 School District on the Plaintiff's Rule 59(e) motion  
7 to reconsider.

8           Plaintiff is represented by Mr. Jeff Tibbals.  
9 Good morning, Mr. Tibbals.

10          MR. TIBBALS: Good morning, Your Honor. I  
11 hope that you will appreciate your white board is now  
12 white again.

13          THE COURT: Very nice, yeah. He marked it up  
14 with permanent marker yesterday.

15          All right. So then we have for the Free  
16 Kindergarten Association is Mr. Rick Stringer.

17          MR. STRINGER: Yes, Your Honor.

18          THE COURT: For the Charleston County School  
19 District, Ms. Bright Ariail.

20          MS. ARIAIL: Yes, sir.

21          THE COURT: For the State Attorney General,  
22 Ms. Amy Jowers.

23          MS. JOWERS: Good morning.

24          THE COURT: And the receiver, Mr. Joe Qualey,  
25 is present.



1 MR. QUALEY: And Zach Smith.

2 THE COURT: Very good. All right. Okay. So  
3 this Court issued its order in this case on I  
4 believe -- it was March 31st of this year. Granted  
5 judgement not in favor of the plaintiff. Let's just  
6 say that.

7 The motion to reconsider was filed on April  
8 the 8th. An amended motion was thereafter filed on  
9 April the 10th I believe it was.

10 I only found one additional ground, and that  
11 was -- I believe it was a new paragraph, number 4,  
12 which had to do with Mr. Michael Robinson's appraisal.  
13 Does that sound correct?

14 MR. TIBBALS: That sounds about right, Your  
15 Honor. I know we filed a motion to reconsider and we  
16 had --

17 THE COURT: With voluminous objections.

18 MR. TIBBALS: -- engaged with significant  
19 discussions with our client prior to filing that  
20 motion. And then after further discussions with the  
21 client, filed.

22 THE COURT: Okay. So that's the matter  
23 before us today pursuant to Rule 59(e) of the South  
24 Carolina Rules of Civil Procedure, which states a  
25 motion to alter the amended judgement shall be served

1 not later than ten days after receipt of the written  
2 notice.

3 I don't believe that's at all in question.  
4 As to timeliness of the motion, I have received from  
5 Ms. Ariail on behalf of the school district memorandum  
6 in opposition to the plaintiff's motion to reconsider,  
7 which apparently was just filed this morning; is that  
8 correct?

9 MS. ARIAIL: Yes, Your Honor.

10 THE COURT: But I also received from you on  
11 about April the 8th a letter, and I wanted to address  
12 that. That raises some of the same issues.

13 You had filed a motion to exclude and strike  
14 certain documents, and we'll get into those documents  
15 in a bit, because we do have to make a record.

16 So I also received on March the 30th, which  
17 was I think the date I signed the order, which was  
18 filed the following day, a letter from Mr. Tibbals  
19 sort of outlining what his position was relative to  
20 June Wells' authority.

21 "No evidence to support the school district's  
22 claim to sale proceeds and disputes as to exhibits  
23 admitted into evidence." We'll get to that.

24 So let me tell you what I've done today in  
25 order to short-circuit this process substantially, and

1 that is I've gone through Mr. Tibbals' motion in some  
2 great detail as well as reviewed the transcript of  
3 record. And I want to give you my rulings rather than  
4 hearing from y'all.

5 I do need to ask you a couple of questions.  
6 Mr. Tibbals, your first matter in the motion, and I  
7 think they were 20 or something, 20 or 21.

8 Ultimately, there were 20 with multiple  
9 subparts in some of these. It had to do with motion  
10 to reconsider filed in December of 2021. Having to do  
11 with lack of standing. Those were not raised at the  
12 trial of trial?

13 MR. TIBBALS: Well, Your Honor, there were a  
14 couple of what -- and let me just back up and give you  
15 the overall view that we had of it is that we wanted  
16 to make sure that we did a little housekeeping and  
17 make sure all of the issues and all the pending  
18 motions had been resolved and ruled upon before  
19 anything else happened.

20 So when we -- when our staff went through and  
21 reviewed, you know, the voluminous record of motions  
22 in this case, they found a couple of them that they  
23 didn't think had been ruled on, and those are  
24 identified in the motion to reconsider.

25 One is the 12/10, December 10th, 2021 CCSD

1 motion to reconsider. The decision is to rule on  
2 privileged documents, and the other one was CCSD's  
3 motion in limine with regard to plaintiff's claims in  
4 the pretrial brief that CCSD lacked standing.

5 So for the record, we just wanted a ruling on  
6 those motions and just so we have a complete record.

7 THE COURT: Okay. Ms. Ariail, you have a  
8 position as to your standing?

9 MS. ARIAIL: Well, Your Honor, I think that  
10 both have pretty much been overcome by events. The  
11 fact that we've tried this case --

12 THE COURT: I think so, too. I think the  
13 standing issue was resolved. And then I can't  
14 remember what the other one was. It was pretrial and  
15 issues about discovery if I remember.

16 MS. ARIAIL: Yes, sir.

17 THE COURT: And discovery abuse possibly?

18 MS. ARIAIL: Yes, sir.

19 MR. TIBBALS: And I hate to suggest --

20 THE COURT: I got to tell you, I got one  
21 going on right now with Tommy Goldstein, and y'all all  
22 got to know Goldstein. He's a piece of work.

23 So he filed -- I denied sanctions in a case,  
24 and he's filed a motion for me to reconsider my  
25 failure to sanction these attorneys in the case.

1           And if that's not the use of discretion, I  
2     don't know what is. I can't wait to argue that one,  
3     but I'm going to argue that one along with the fact  
4     I've tossed his entire case out on summary judgement.  
5     So I'm just going to wait until then.

6           The issues of sanctions is clearly  
7     discretionary with the Court. Failure to do that is,  
8     I think, the use of discretion and not the abuse of  
9     discretion.

10          MR. TIBBALS: Yes, Your Honor.

11          THE COURT: So let's cover that one.

12          MR. TIBBALS: I would agree. And I also -- I  
13     mean, not to suggest to you how to do this. But, I  
14     mean, the motion in limine was a trial motion. I  
15     mean, it's sort of moot.

16          THE COURT: Yeah, yeah. Well, let's creep  
17     through your motion to reconsider. All right?  
18     Because I'm going to do that for you. I'm doing that  
19     for you.

20          MR. TIBBALS: Yes, please. Thank you.

21          THE COURT: So let me see if I remember. So  
22     Rule 59(e) is for the purpose of -- it's not for the  
23     purpose of relitigating cases. It's for the purpose  
24     of bringing before the Court its opportunities to  
25     correct any errors of law or findings of fact that may

1 be in error.

2 Okay. So that's really the purpose of it.  
3 And I was doing some research on that. I'll read that  
4 to you in the record.

5 So I went through this exhaustively last  
6 night. There will be a couple of points to make.  
7 Have y'all got the motion to reconsider in front of  
8 you?

9 MR. TIBBALS: Yes, Your Honor.

10 THE COURT: All right. That's how we're  
11 going to do this.

12 Item number 2: Order contains findings of  
13 fact not supported or proven by evidence in the  
14 record.

15 I went through that, and I don't know what  
16 you mean by order 4, order 6, order 7, order 8. Are  
17 these paragraphs? I don't know what y'all mean by  
18 that.

19 MR. TIBBALS: Oh, those are references to the  
20 page numbers of the order.

21 THE COURT: Okay. Order page 4, order page  
22 6?

23 MR. TIBBALS: Yes, Your Honor.

24 THE COURT: I was looking for something --

25 MR. TIBBALS: I apologize for that.

1 THE COURT: No. Okay. Got you. Okay. All  
2 right. Well, so that's 2A through N.

3 So I didn't find any basis on which to alter  
4 or amend my orders in any of those factual issues.

5 3 was the order of omitted material facts  
6 demonstrated by the evidence in the record, and that's  
7 3A through M.

8 And, again, I didn't find any basis to alter  
9 or amend the order on those.

10 4, prior to the close of the plaintiff's  
11 presentation of evidence of the trial. Attorney  
12 General moved for nonsuit as to whether contract was  
13 void against public policy. The issue came up as to  
14 whether or not the plaintiff had completed the  
15 presentation of its evidence.

16 And I think that was covered in Ms. Ariail's  
17 reply. The Court clearly asked Mr. Tibbals if they  
18 were done.

19 And the answer was: We're done with  
20 witnesses. I believe so. We had some -- maybe  
21 something you're going to read into the record, some  
22 other exhibits, that type of thing.

23 I'm looking for the specific page, hold on.  
24 Pace 298 of the transcript, line 8. "Mr. Tibbals, do  
25 you have any further witnesses?" Answer on 10. "I

1 don't think I have witnesses, but I've got a lot of  
2 stuff to do."

3 "All right. Tell me what you've got to do."

4 "I've got discovery responses, interrogatory  
5 answers, request to admit, deposition, 30(b)(6),  
6 transcripts."

7 My question, "Particularly of?"

8 And he said, "The school district. Got a  
9 couple of statutes we want to put on the record. That  
10 has to do with everything having to do with the school  
11 district."

12 It goes on to 301. We talk about authority  
13 of the board, that kind of stuff. Okay. And no  
14 additional testimony was presented.

15 One of things -- I'm just going to jump in  
16 here -- that I found strikingly amazing to me was when  
17 Mr. Royal testified. It was on page 183 of the  
18 transcript. "I just wanted to tell the truth and the  
19 whole truth. A week ago today, I learned for the  
20 first time the phrase public policy."

21 The man is a lawyer. The man went to law  
22 school. Went to Yale. He went to UVA Law School, and  
23 he's hearing about public policy for the first time.  
24 That really struck me. I couldn't quite figure that  
25 one out. Clearly that was one of the basis for the



1 AG's motion and the Court's ruling.

2 So on page 283, there were a proffer of  
3 evidence. I think this is going to take up some of  
4 these.

5 On the proffer, I'm going to allow you to --  
6 provided we don't go into them. They're in the  
7 record. So whatever documents you were asking to  
8 proffer, I was going to allow you to proffer.

9 May or may not be into evidence. We're going  
10 to go into those line by line to some degree. I just  
11 want to make sure y'all know where I'm coming from.  
12 So I'm going to deny number 4.

13 As to number 5, this is where we talk about  
14 public policy. This has two sections, A and B. This  
15 is the rule. 41(b) motions for non-suit are only  
16 permitted on the basis Plaintiff did not to  
17 demonstrate a right to relief on the claims. I deny  
18 that. Ms. Ariail did a good job with responding to  
19 that in her responsive brief today.

20 6, as to Ms. Wells' 2010 affidavit, the order  
21 unnecessarily and prejudicially editorialized the  
22 content of these documents. I'm going to deny that.  
23 Y'all can argue that on appeal.

24 Number 7, the plaintiff's contention is that  
25 code section 33-31-1202(f) does not provide the

1 Attorney General authority to review and invalidate a  
2 binding contract. But they do have to submit the  
3 contract so that they can make a decision. It is this  
4 Court's finding ultimately the Court makes that  
5 decision.

6 But in this case, I never saw where they ever  
7 really submitted it to them, nor did they give the AG  
8 an opportunity to respond to it. So the notice was a  
9 problem.

10 Paragraph 8 says we take issue. We think we  
11 did provide notice to the Attorney General. That's  
12 not my recollection.

13 Paragraph 9 is another multiple paragraph, A  
14 through E. Here, we're citing the law as to the  
15 ability of the Attorney General's office to make  
16 decisions pertaining to eleemosynary corporations, and  
17 I deny that one as well.

18 10, case law relied upon the order to  
19 invalidate the sales agreement due to the AG's  
20 purported authority over nonprofit contracts is  
21 sustained. I deny that.

22 11 is another multi paragraph intention that  
23 the Court heard in interpreting and applying the law,  
24 11A through I in this instance.

25 Paragraph B, Mr. Tibbals, you might have to

1 help me out. "Plaintiff, the buyer under the PSA, was  
2 not required to give notice to the Attorney General".

3 Was that y'all's position? I think that's  
4 your client's position. Is that your position?

5 MR. TIBBALS: Let me look at this if you  
6 could indulge me.

7 THE COURT: Sure. It says 7, 11, 16, so I'm  
8 assuming that is the order of pages 7, 11, and 16.

9 MR. TIBBALS: I think Mr. Royal consistently  
10 took the position during the entirety of this case  
11 that the plaintiff was not required to give notice to  
12 the AG of the purchase and sale agreement for the sale  
13 of the property. I do believe that's been his consist  
14 position.

15 I believe you've consistently ruled that he  
16 did have such duty, and I think that the issue, as we  
17 discussed, to file, if I remember correctly, that is  
18 issue was initially raised by Mr. Royal's attorney,  
19 Mr. Josey, who said we need to give notice to the AG.  
20 And I think Mr. Stringer had some testimony on that  
21 issue.

22 So I think that Mr. Royal contends that he  
23 was not required to give that notice, but you found  
24 that he was.

25 THE COURT: I think that's the gist of the

1 whole case, isn't it? To my way of thinking, that's  
2 sort of where we are.

3 I just think he's fundamentally wrong, so  
4 he'll get to correct me on appeal if he can. Okay?  
5 So that really gets to the heart of the matter  
6 personally. But I'll go through this for you, because  
7 I think you're entitled to that.

8 I've denied paragraph 11 and those 11  
9 subparts to it, A through I.

10 MR. TIBBALS: And I think to get a little bit  
11 more specific on that issue, I think what he's saying  
12 is that the statute would require perhaps the seller  
13 to give notice under certain circumstances, but maybe  
14 not the buyer.

15 THE COURT: Okay. All right. As to who's  
16 going to give the notice, right?

17 MR. TIBBALS: Yes, sir.

18 THE COURT: Okay. All right. Well, in this  
19 case, we've got a 80-plus-year-old woman who's running  
20 around doing whatever she's doing, Ms. Wells. Gets  
21 under authority question.

22 She goes to Mr. Stringer, and Mr. Stringer  
23 says, hey, we got to get the permission of the AG. He  
24 demands to close. He doesn't care what the AG says or  
25 does. I think that the State does, and I think public

1 policy requires it pursuant to that statute.

2 So 12, again, I think it's a multi paragraph,  
3 seven subparagraphs. "The order ignored or failed to  
4 consider controlling precedent." Goes into some case  
5 law.

6 Argument here, sales price must be determined  
7 as to the date of the contract. We talked about that.  
8 I think the AG is certainly entitled to, one, review  
9 the contract and, two, opine on whether they think  
10 it's in the best interest of the State, the public  
11 policy argument again.

12 13, again, multi-syllabic. Has to do with  
13 legal conclusions of law. 13A through H, that's  
14 eight. I deny that.

15 14, no evidence in the record to support the  
16 parties were unequal in bargaining power. Denied.

17 15, order contains contradictory findings or  
18 conclusions. I think I'm in the original one. I  
19 might be off.

20 MR. TIBBALS: That's fine. I'm following  
21 along.

22 THE COURT: I might be on the wrong numbers.  
23 Court must render approval or disapproval. I think  
24 ultimately, it's the Court's decision to make, but I  
25 do think the AG has the right to review the contract

1 and enter into the discussion as to whether or not  
2 they think it's in the best interest of the State to  
3 move forward.

4 That's been my experience, and I think that's  
5 what needs to happen. It did not happen here. All  
6 right.

7 16 has to do with a persons authority to act.  
8 The order's finding June Wells did not have the type  
9 of authority to execute the PSA on the contract.

10 I think I did find that she had authority.  
11 That was hotly contested by the school district.

12 MR. TIBBALS: Yes, Your Honor. And I think  
13 that's one of the areas where the order may be  
14 inconsistent with the rule.

15 THE COURT: All right. You want to point out  
16 specifically where we're talking?

17 MS. ARIAIL: Your Honor, I believe what you  
18 said was that she had some sort of authority, but  
19 there was not anything specific to the purchase and  
20 sale agreement.

21 THE COURT: Okay. I think that sounds right.  
22 You got the prior probate code, the probate case,  
23 where the probate judge found that she had authority  
24 to do whatever was going on over there? I can't  
25 remember what that was. That had to do with the

1 Hankle Trust (ph) if I remember right.

2 MS. ARIAIL: Yes, sir.

3 THE COURT: And this would be -- and I had  
4 this come up the other day as well. This case falls  
5 into the category of winding up and dissolving of all  
6 assets, which I think is a fairly substantial  
7 difference of -- or much more significant prospects.

8 So it's the end of the -- in this case, the  
9 Free Kindergarten, the eleemosynary corporation, which  
10 I think transfers into a stricter authority review at  
11 least. And that's why I say it gets back to the  
12 Attorney General's office to review that.

13 I think they have to take the time to review  
14 that, and we come in here and we decide if it's valid  
15 or not.

16 Okay. You stated -- paragraph 18, AG stated  
17 they were not taking the position on authority. The  
18 school district clearly did, and the Court made that  
19 finding as just indicated.

20 All right. And then 19. Notice was given.  
21 I did not find it was sufficient under the facts of  
22 this case. And, again, we get back to the interesting  
23 question of public policy.

24 MR. TIBBALS: And to be fair, Your Honor, I  
25 just want to state on the record and defend Mr. Royal

1 a bit.

2 I think the context of the -- when he said  
3 the first time that I've heard public policy, I don't  
4 think he meant in his life. I think he meant in the  
5 context of the case.

6 In other words, what he was saying was we  
7 were -- we've been going through this case, and we've  
8 been going through this, you know, contract and then,  
9 you know, preclosing activities towards closing and  
10 then the AG raised objections.

11 And then it was not until recently he was  
12 trying to say that he had heard that the contract  
13 itself was against public policy. He had heard that  
14 he thought -- that the AG believed that there was  
15 inadequacy of consideration, but not necessarily that  
16 the contract was somehow against public policy. He  
17 was saying that came later in the game.

18 THE COURT: All right. That would be his  
19 interpretation of that? Okay. All right.

20 What other purpose would that statute  
21 provide?

22 MR. TIBBALS: You know, I think --

23 THE COURT: Send it to a bureaucrat in  
24 Columbia and have him check a box? Got to be more to  
25 it than that.



1           Ms. Jowers, you would agree with that,  
2 wouldn't you?

3           MS. JOWERS: Yes, sir.

4           THE COURT: All right. I want to make sure.  
5 I've got some box checking over here with the County I  
6 got to put up with sometimes. But there's some basis  
7 upon which to do some of that.

8           All right. So I'm reading from Elin vs.  
9 SCDOT, which is a motion to reconsider case. The  
10 Rules contemplate the motion to reconsider. Party had  
11 wished to file when they believe the Court is  
12 misunderstood and failed to fully consider or failed  
13 to rule on an argument, and the party must file one  
14 when an argument has been raised but not ruled on. So  
15 I want to make sure we get to that.

16           So that's my purpose in making short shrift  
17 of this motion to reconsider. I think from that  
18 standpoint, I think we're done.

19           What I do want to make sure is that we have  
20 the proper record on appeal, so let me turn to that.

21           There was an issue with a number of the  
22 exhibits, and I think that's in the front of the  
23 transcripts. I did find that it was an issue with  
24 Plaintiff's 12 through 15.

25           12, 13, 14, 15 were raised in both

1 Ms. Ariail's letter of April 8 and I believe in the  
2 memorandum she cited. Again, I did find on page 117  
3 of the transcript where I granted those. I allowed  
4 those to come into evidence. So 12 through 15.

5 MS. ARIAIL: Your Honor, those were  
6 proffered, correct?

7 THE COURT: Hold on a second. "It will be a  
8 proffer. I'm going to sustain the objection. You can  
9 proffer." 13 was proffered.

10 Sustain the objection, and you can proffer  
11 it. That was 13. Plaintiff's 14 was marked and  
12 proffered. So that's correct.

13 Okay. And we get into 16 and 17, all of that  
14 is going on. Yes, those were proffers.

15 MS. ARIAIL: Yes, sir. Thank you.

16 THE COURT: And then we go -- I'm reading  
17 strictly from the transcript. You may have some other  
18 ones, Ms. Ariail, I want to get straight. But, yes,  
19 those were proffers.

20 16 says it comes in at 120. Hold on.  
21 Corporate document comes into evidence. Yes. So  
22 actually, it's 120, 121. So 16, yeah. 16 is in.

23 And then I've got -- I'm looking at the  
24 exhibits list of the transcript. 28, 29, 29A, 31, 32,  
25 38. These are all in evidence.

1                   46, 47, 54, 54A. Don't have a page number on  
2 it. But is that one in question?

3                   MS. ARIAIL: That was identified, but it was  
4 not admitted into evidence.

5                   THE COURT: Okay. All right. So for ID  
6 purposes?

7                   MS. ARIAIL: Yes, sir.

8                   THE COURT: Okay. I think the Court found  
9 Ms. Huggins, that's probably what her system reflects.

10                  55 and 56 were in evidence. 57 must also be  
11 an ID?

12                  MS. ARIAIL: That's correct.

13                  THE COURT: Got it. 58 through 62 all come  
14 in on page 171, and then 63 comes in on 174.

15                  65, 66, 67 are in. 68 must be an ID. And on  
16 page 180, 69 and 70 are in. 71 must be for ID as  
17 well. That sound correct?

18                  MS. ARIAIL: Yes, sir.

19                  THE COURT: Okay. All right. Any other  
20 objections?

21                  MS. ARIAIL: Just the other ones are all  
22 addressed in the letter, my April 8th letter.

23                  THE COURT: Did we just cover those or are  
24 those additional?

25                  MS. ARIAIL: I'm sorry. What's the question?

1 THE COURT: Did we just cover those?

2 MS. ARIAIL: You covered -- our position was  
3 that the index of exhibits in the transcript is  
4 correct.

5 THE COURT: Is correct?

6 MS. ARIAIL: Yes, sir. There are a couple of  
7 pages that -- I think Plaintiff Exhibit Number 38 was  
8 actually received on 144. It's just a different page,  
9 but the list is accurate.

10 THE COURT: Okay. All right. Very good. So  
11 back to you, Mr. Tibbals.

12 MR. TIBBALS: So if I understand what you're  
13 saying, 12, 13, 14 and 15 were proffered, but then,  
14 you know, if you recall the context of that, that was  
15 when I was going through historical FKC documents with  
16 Michael that we contended that he relied upon in  
17 connection with apparent authority.

18 And you, you know, justifiably probably were  
19 a little bit impatient with it and sort of said this  
20 is -- is this more of these documents relating to FKC?  
21 Look, just proffer them and we'll decide later.

22 And then later when you said, okay, I find --  
23 that you had authority -- and let me see the  
24 transcript.

25 You know, I said -- this is when Mr. Stringer

1 testified. So I said: So I would renew my proffer  
2 that with all these documents that he relied upon,  
3 i.e, 12, 13, 14, 15, because the door has been opened  
4 by Mr. Stringer.

5 The Court: Of all the documents he relied  
6 upon, do you want to put them into evidence?

7 And I said yes.

8 THE COURT: What page are we on?

9 MR. TIBBALS: I'm on page 283 of the  
10 transcript. And the Court said: On the proffer, I'm  
11 going to allow you to, provided we don't go into them.

12 And I said okay.

13 And the Court says: They're just in the  
14 record.

15 I say: Fair enough.

16 So they should be part of the record pursuant  
17 to your ruling.

18 THE COURT: Okay. Got it. That would be as  
19 to the proffered exhibits?

20 MR. TIBBALS: Those are the ones that I was  
21 proffering that you said, you know, I don't know. You  
22 just got a whole stack of stuff here, and I don't want  
23 to go through all this stuff.

24 And then when I pointed out that Mr. Stringer  
25 opened the door on the authority issue, I said, okay,

1 now all the stuff comes in evidence, and you agreed.

2 THE COURT: Okay. I'm with you. I think I  
3 do recall that.

4 MS. ARIAIL: Your Honor, and this is covered  
5 in my letter also. We disagree that Mr. Stringer's  
6 cross examination opened the door on any of these  
7 other documents.

8 The only documents he specifically addressed  
9 was the purchase and sale agreement, which was Exhibit  
10 11, a county tax record, which was not admitted, and  
11 then he mentioned bylaws that -- he asked if there  
12 were any bylaws that he was aware of appointing  
13 Ms. Wells as a director, board member, anything, or  
14 any resolution allowing her to sign the contract.

15 Those are the only things that Mr. Stringer  
16 cross-examined him about. He didn't cross-examine him  
17 about the other documents.

18 THE COURT: Take me to his pages so I'm  
19 clear.

20 MS. ARIAIL: 201.

21 THE COURT: All right.

22 MS. ARIAIL: His cross examination starts at  
23 200.

24 THE COURT: Starts on page 200? Okay.  
25 Plaintiff's 11?

1 MS. ARIAIL: Yes, sir.

2 THE COURT: Which was in evidence at that  
3 time, right?

4 MS. ARIAIL: Yes, it was.

5 MR. TIBBALS: Your Honor, there was no  
6 contemporaneous objection when we re-proffered them.  
7 And the Rules note you've got to object at the time.  
8 The time for the objection was at the re-proffering  
9 when you said I'm going to admit them and they're  
10 going to be part of the record.

11 THE COURT: I'm with you. We're going to  
12 make sure we know what we're talking about.

13 So we're talking about 11. And multiple  
14 paragraphs in number 11, correct? That one was in  
15 evidence. That looks to be the only document that he  
16 did ask about; is that right?

17 Is Number 11 and whatever -- that tax  
18 document we don't think was ever produced was the only  
19 thing he asked about?

20 MS. ARIAIL: Yes, sir.

21 THE COURT: Okay. So let me go back. 283?

22 MR. TIBBALS: Yes, sir.

23 THE COURT: And we are specifically referring  
24 to 12 through 15?

25 MR. TIBBALS: Yes, sir.

1 THE COURT: All right.

2 MR. TIBBALS: And I think also 17 through 30,  
3 which were the ones that we -- you know, that was when  
4 you stopped me and you said you got a whole pile of  
5 stuff. You said if you want to proffer those, proffer  
6 them. And I said okay, we're going to proffer them.

7 And I think the issue for me at the time was  
8 more than just Mr. Stringer referencing that specific  
9 document, Your Honor. But it was the issue that  
10 whether or not Ms. Wells had authority to do anything  
11 with respect to FKC, including Mr. Stringer acting as  
12 the attorney for FKC.

13 He was raising and testifying about the issue  
14 of June Wells' authority. And so once that's in play  
15 and once that's being testified about by Mr. Stringer,  
16 then it was my argument, my position at the time, that  
17 that opens the door for all the evidence that I  
18 proffered relating to Mr. Royal's reliance upon her  
19 authority.

20 And at the time, you agreed with me. And at  
21 the time, there was no objection raised.

22 THE COURT: Okay. All right. And that would  
23 be -- what did you say, 17 through 30?

24 MR. TIBBALS: 12 through 15 and 17 through  
25 30.



1 THE COURT: And those are what documents?

2 MR. TIBBALS: They're records of -- I've got  
3 the list right here. SCDOR notice, FKC quarterly  
4 federal tax return, First Federal fixed rate  
5 certificate, various checks signed by June Wells,  
6 letter from the South Carolina Employment Commission.

7 THE COURT: Stuff she would have done as an  
8 employee?

9 MR. TIBBALS: Right.

10 MS. ARIAIL: Ms. Ariail, how are you  
11 prejudiced by that if I allow this to come in? It  
12 becomes a blanket proffer.

13 Clearly Mr. Stringer only went into the one  
14 document.

15 MS. ARIAIL: Right, Your Honor.

16 THE COURT: But he said I want all of them  
17 in, and I said okay, I'm going to let it.

18 MS. ARIAIL: Yeah. My recollection is that  
19 at the end of a trial, you instructed -- and this is  
20 after the record was closed.

21 But that you instructed the attorneys to get  
22 together and look at those documents and get with the  
23 court reporter to make sure they were on the record.

24 I am -- sorry.

25 (Discussion off the record.)

1 MS. ARIAIL: Back to where I was. My  
2 recollection is the other counsel, Mr. Williams, had a  
3 folder with about five documents in it. He walked up.  
4 I said: Please show those to my co-counsel.

5 Walked up with the court reporter. And  
6 apparently, you know, that was the opportunity to get  
7 them in the record. That wasn't done.

8 The other problem is that under the Rules,  
9 under Rule 52(b), he had another opportunity to do it.  
10 He hasn't done it then, either.

11 MR. TIBBALS: I think what happened, to be  
12 fair, was we did communicate with counsel for the  
13 school district immediately after trial.

14 And there was -- because not only were there  
15 these documents that were proffered that consisted of  
16 basically records of Free Kindergarten Association of  
17 Charleston, but there were also discovery responses  
18 that were certified. There were responses to requests  
19 for admission.

20 And those are the documents that Ms. Ariail  
21 remembers Evan having in his hands when he was sort of  
22 coming to the court reporter.

23 And so what we did is exactly I think what we  
24 would be expected to do, which is we sent a letter to  
25 the school district with the entire index.

1           And we said here it is. Here is every  
2 document. That way, we didn't have to stay here until  
3 10 at night after your courtroom is closed going  
4 through each and every document. And that's the way  
5 we agreed to handle it.

6           Now, we got a letter from Mr. Ariaail at the  
7 time. Okay. And Mr. Ariaail wrote a letter and said  
8 we're going to wait until the transcript comes to see  
9 what our objections were. Okay. We're not agreeing  
10 with you on this list. We're going to let you know  
11 once the transcript comes in what our objections were.

12           The transcript came in in March, and we never  
13 got any objections from them. And so we then  
14 submitted our exhibits. We then filed them after  
15 waiting for objections to come from the school  
16 district as they had promised.

17           THE COURT: Okay. I'm with you on that one.  
18 I can see -- and I, frankly -- originally, I had  
19 checked off 12, 13, 14 and 15. I must have found what  
20 we were talking about.

21           But now I'm looking at 17 through whatever,  
22 27. I don't remember talking about that stuff at all.

23           MR. TIBBALS: We didn't talk about it other  
24 than we had them, and you stopped me. You stopped me  
25 from asking further questions about these authority

1 documents that I had.

2 THE COURT: Is that on re-direct?

3 MR. TIBBALS: That was on my direct. That  
4 was on my examination of Mr. Royal.

5 Let me see if I can find the transcript.

6 THE COURT: I'm going to allow 12, 13, 14, 15  
7 in evidence based upon the language of 283.

8 MS. ARIAIL: Is that a proffer, Your Honor?

9 THE COURT: I'll allow those into evidence.  
10 I'm going to allow those into evidence. But the  
11 others are going to have to be a proffer only because  
12 they would be cumulative. Okay? I just object to  
13 that.

14 MS. ARIAIL: And that's 17 through 30?

15 THE COURT: Yeah, I think 17 through 27,  
16 wasn't it?

17 MR. TIBBALS: 30, I think, Your Honor.

18 THE COURT: Through 30. Well, looks like 28,  
19 29, 29A all came in according to this one.

20 MR. TIBBALS: Okay.

21 THE COURT: So 17 through 27?

22 MR. TIBBALS: 17 through 27.

23 THE COURT: Would be proffered. And then 30,  
24 I guess. Okay?

25 MR. TIBBALS: And I think there was also --

1 part of those discovery -- so I guess that's still the  
2 issue to decide is the discovery responses and  
3 stipulation of fact that we have.

4 THE COURT: Y'all had a stipulation of fact?

5 MR. TIBBALS: We did.

6 THE COURT: All right.

7 MS. ARIAIL: Your Honor, those were never  
8 mentioned.

9 MR. TIBBALS: Yes, they were.

10 THE COURT: He never moved to put those into  
11 evidence. It's nowhere in the record.

12 THE COURT: If y'all had a stipulation, I'm  
13 going to allow it. Okay?

14 MS. ARIAIL: He's trying to get documents in  
15 that weren't even in his trial notebook. He didn't  
16 even bring them. They weren't on the list. His list  
17 was a moving target.

18 THE COURT: Okay. Where is the stipulation?

19 MR. TIBBALS: There is a stipulation. But  
20 please allow me to say that if we look back at the  
21 transcript, which you read before, where I said I had  
22 not completed presenting my evidence, this is exactly  
23 the evidence that I was talking about.

24 And so if Your Honor at this point in time  
25 wants to deny the admission of those documents on the

1 basis that I was not permitted to finish my case, you  
2 know, that will be your decision. But that's what  
3 happened.

4 THE COURT: To what --

5 MR. TIBBALS: And they were on the pretrial  
6 exhibit list, which were delivered to CCSD.

7 THE COURT: To what issue do these documents  
8 apply?

9 MR. TIBBALS: I can't -- I don't know that I  
10 can go through and identify each and every issue that  
11 these documents related to.

12 But one of them, I can tell you right off the  
13 top of my head, I know what the stipulation of fact  
14 related to.

15 The stipulation of fact related to the fact  
16 that FKC was ready, willing, and able to close and  
17 moving towards the closing before the AG issue arose.

18 And that is something different from what I  
19 think the order found, which was that FKC was never  
20 ready to close. We have that stipulation.

21 THE COURT: Let me hear from Mr. Stringer.

22 MR. STRINGER: I don't believe that's  
23 correct. Look at the stipulation. It stipulates that  
24 she was a member of the Free Kindergarten Association.

25 Y'all had an earlier stipulation that had a

1 whole bunch of stuff in there like what you just said,  
2 but we did not agree to that.

3 MR. TIBBALS: Okay. We'll find it.

4 MR. STRINGER: Okay.

5 THE COURT: Did you find it?

6 MR. TIBBALS: We'll have to get a copy it.

7 THE COURT: I would be inclined -- if y'all  
8 have a stipulation, I would be inclined to do it, but  
9 I would like to look at that.

10 MR. TIBBALS: And then I know there were  
11 responses to requests to admit that related to the --  
12 well, there was the AG. There was the confederate  
13 museum. I mean, these were documents that were on our  
14 pretrial list that was served to all parties.

15 They were documents that I intended to  
16 include in the record prior to closing my case that I  
17 was not granted an opportunity to present.

18 MS. ARIAIL: And that's my whole point. They  
19 were never presented as evidence. And, Your Honor, I  
20 know it's in my memo, but I wanted to call your  
21 attention to South Carolina case Ahrens vs. McDaniel,  
22 which allows the Court to rule on nonsuit prior to the  
23 completion of --

24 THE COURT: Yeah. I've had it happen to me,  
25 Mr. Tibbals. It's happened to better people than you.

1 MS. ARIAIL: I assumed you were aware of that  
2 case.

3 THE COURT: Sometimes you can only take so  
4 much.

5 It seems to me that the issues in the case  
6 boil down to -- largely boil down to authority of  
7 Ms. Wells to enter into the contract, and then the  
8 right of the attorney general's office to at least  
9 review the contract, if not opine upon the contract.

10 And those, the Court's already addressed.  
11 Okay? So on that basis, I think that's what we've got  
12 to do. I'm happy to hear from anyone else along those  
13 lines.

14 Ms. Jowers, anything you wish to put in the  
15 record today?

16 MS. JOWERS: No, sir. Nothing further.  
17 Thank you.

18 THE COURT: Mr. Stringer?

19 MR. STRINGER: Nothing further, Your Honor.

20 THE COURT: And Ms. Ariail?

21 MS. ARIAIL: I'm done. Thank you, sir.

22 THE COURT: All right. So here's what I'm  
23 going to say. If y'all can locate the stipulation, I  
24 am inclined to grant that. I would like to see it. I  
25 don't remember seeing it.



1           But it's a stipulation that usually helps  
2 move cases along, which I would be very favorable to  
3 anybody in this particular case if we could move it  
4 along.

5           As to the other documents, I don't know that  
6 they were ever tendered, per se. I was looking for  
7 the language. There was a point in there where we  
8 were talking about what was going on.

9           I thought that was at 283 -- excuse me, 183.  
10 No, 283, when we sort of got to the point --

11          MR. TIBBALS: Those were with the -- if I  
12 remember correctly, the transcripts, 283, that was  
13 referring to the authority documents that had been  
14 proffered and were, you know, in sort of a  
15 compilation.

16          THE COURT: Right.

17          MR. TIBBALS: The discovery responses and  
18 whatnot at the end, those are the -- let's see if we  
19 can find them. The transcript page --

20          THE COURT: Page 298.

21          MR. TIBBALS: Okay. 298.

22          THE COURT: That's what I read earlier.

23 "Mr. Tibbals, do you have any further witnesses" --

24          MR. TIBBALS: Oh, that's right. And I said  
25 I've got discovery responses, interrogatory answers,

1 request to admit answers, depositions, 30(b)(6)  
2 depositions.

3 Yeah, that's where I was tendering,  
4 proffering those documents.

5 Then what happened next?

6 THE COURT: Well, I asked you: Particularly  
7 of the school district, right?

8 Y'all's position is the school district  
9 shouldn't even be part of this case. Why you want to  
10 load up the record with stuff about the school  
11 district if they shouldn't be part of?

12 MS. ARIAIL: Your Honor, I don't know if you  
13 got that far in the record, but I did object to the  
14 30(b)(6) transcript at that point.

15 THE COURT: Weren't we trying to narrow it  
16 down?

17 MS. ARIAIL: I think a lot of this goes to  
18 the whole whether or not the district has brought the  
19 party in this case.

20 THE COURT: Sure, which I allowed y'all to  
21 intervene.

22 So then how would you be prejudice by letting  
23 it in, other than evidentiary rulings? How does it  
24 hurt you?

25 MS. ARIAIL: Well, specific to that

1 transcript, you know, we have named Mr. Borowy as a  
2 witness in this case.

3 And, of course, we would then have the  
4 opportunity to put our case forward because it was  
5 nonsuited. So there's some things that, you know, in  
6 his transcript that they -- first of all, the  
7 transcript is full of objections.

8 Okay. They wanted to -- they said during the  
9 hearing that they were going to put in the excerpts.  
10 They have not provided us the excerpts prior to the  
11 trial.

12 So we didn't have the authority to look at  
13 what they were planning on putting in. So then he  
14 changed his tune and said he wanted to put the whole  
15 transcript in when he sent this letter in to the clerk  
16 of court. He wanted to put the whole transcript in.

17 There was actually a motion to quash and  
18 modify the 30(b)(6) notice because there was all kinds  
19 of stuff about whether or not school district is --  
20 you know, District 20 is part of Charleston County  
21 School District. That whole issue, the whole District  
22 20 issues that Mr. Royal continues to assert.

23 THE COURT: Don't they still exist as a  
24 constituent district?

25 MS. ARIAIL: Yes, sir, they do. But that's

1 the problem with the transcript. I'm just talking to  
2 one specific issue. But there's all kinds of  
3 testimony in there. There were lots and lots of  
4 objections.

5 And you found that they -- they wanted to  
6 reconvene his deposition, even though they had already  
7 asked a slew of questions related to that issue.

8 And your ruling on that particular motion, I  
9 believe it was on November 29th when we had the  
10 pretrial hearing, was that the only thing that you  
11 would allow them to reconvene the deposition related  
12 to was if they could find another case similar to this  
13 one where the school district had been given the  
14 property.

15 That was the only thing they were allowed to  
16 reconvene on. So that's -- there's a lot of problems  
17 with that transcript.

18 THE COURT: I'm with you. All right. So  
19 here's my ruling on that.

20 Mr. Tibbals, you're going to get your  
21 discovery responses. You're going to get your  
22 interrogatory answers. You're going to get your  
23 request to admit.

24 But I'm not going to allow the 30(b)(6)  
25 deposition. That should have been done in excerpts,

1 and we would have had a chance to review it at that  
2 time. And there's going to be too much to add at this  
3 point. Okay?

4 MR. TIBBALS: Yes, Your Honor.

5 THE COURT: All right. Very good. Y'all go  
6 forth and sin no more.

7 (Discussion off the record.)

8 MS. ARIAIL: I just wanted to make sure for  
9 the record the documents that were filed by  
10 plaintiff's counsel that are requests to admit and  
11 interrogatories and discovery responses were Exhibits  
12 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93  
13 and 94.

14 So it's 80 through 94. I'm trying to find  
15 the 30(b)(6). So that -- it's 74. So that's 80  
16 through 94.

17 THE COURT: Except for 74?

18 MR. TIBBALS: Well, 74 is outside of 80, Your  
19 Honor.

20 THE COURT: Thank you.

21 MR. TIBBALS: And I just want to address one  
22 issue before we close. And that is if I misstated the  
23 content of the stipulation, I apologize. I know, you  
24 know, what -- I know it went through a couple of draft  
25 iterations. I certainly don't mean to misstate what

1       it says. It says what it says.

2               MR. STRINGER: No offense. It just required  
3 a phone call on my part with Evan. So you might have  
4 been out of the loop, but we fixed it.

5               MR. TIBBALS: Okay.

6               THE COURT: Very good. Thank you. All  
7 right, folks.

8               So y'all need a formal order. We need to be  
9 clear on the exhibits is what we need to be clear on.

10              Why don't y'all circulate that? Otherwise, I  
11 pretty much denied what you requested. Okay?

12              Ms. Ariail, that would be wonderful if you  
13 could pull that together for me and run it by  
14 everybody.

15              (Off the record at 12:04 p.m. on May 20th,  
16 2022.)

## 1 COURT REPORTER'S CERTIFICATE

2  
3 I DO HEREBY CERTIFY THAT THE TESTIMONY  
4 CONTAINED IN SAID HEARING WAS, BY ME, REDUCED TO  
5 WRITING IN THE PRESENCE OF SAID WITNESS BY MEANS OF A  
6 COMPUTERIZED TRANSCRIPTION. THE SAID HEARING IS A  
7 TRUE AND ACCURATE TRANSCRIPT OF THE WHOLE OF THE  
8 TESTIMONY GIVEN BY SAID WITNESS, AS AFORESAID.

9 I DO FURTHER CERTIFY THAT I AM NOT CONNECTED  
10 BY BLOOD OR MARRIAGE WITH ANY OF THE PARTIES OR THEIR  
11 ATTORNEYS OR AGENTS, AND THAT I AM NOT AN EMPLOYEE OF  
12 EITHER OF THEM, NOR INTERESTED DIRECTLY OR INDIRECTLY  
13 IN THE MATTER OF CONTROVERSY EITHER AS COUNSEL,  
14 ATTORNEY, AGENT, OR OTHERWISE.

15 SIGNED THIS THE 1st DAY OF JUNE 2022.

16 \_\_\_\_\_  
17 JOSIE ALLEN BOEHM

18 My Commission Expires 9/24/22  
19  
20  
21  
22  
23  
24  
25

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas  
Mikell R. Scarborough, Master-In-Equity

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Circuit Court Case No. 2018-CP-10-05739

Michael D. Royal .....Appellant,

v.

Free Kindergarten Association of Charleston,  
The Attorney General of the State of  
South Carolina, and the Charleston County  
School District ..... Respondents.

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NOTICE OF APPEAL

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Appellant Michael D. Royal (“Appellant”) appeals the Order of the Honorable Mikell R. Scarborough, filed March 31, 2022, containing the lower court’s findings of fact and conclusions of law following the case’s trial, which, in part, granted a motion for non-suit dismissal of Plaintiff’s claims (“Trial Order”). On July 18, 2022, Appellant received notice, via the South Carolina Judicial Department’s E-Filing System’s NEF transmission, of the Order Denying Appellant’s Motion to Reconsider and Amended Motion to Reconsider the Trial Order (“Final Order”). This Notice of Appeal is being filed and served within thirty (30) days of receipt of the Final Order.

Appellant also appeals the decisions contained in separate orders of the lower court entered July 18, 2022, August 10, 2021, July 23, 2021, June 21, 2021, June 7, 2021, February 22, 2021,



August 22, 2019, July 10, 2019, and June 7, 2019, said orders having been made appealable following entry of the Final Order. Appendix "A" attached hereto contains a complete list of the orders being challenged on appeal and copies of each are attached as exhibits to this Notice.

Respectfully submitted,

s/Evan P. Williams

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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

Mikell R. Scarborough, Master-In-Equity

Circuit Court Case No. 2018-CP-10-05739

Michael D. Royal .....Appellant,

v.

Free Kindergarten Association of Charleston,

The Attorney General of the State of

South Carolina, and the Charleston County

School District ..... Respondents.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal in this matter on the above-named Respondents by e-mailing a .pdf copy of the same to their respective counsel of record, on this 17<sup>th</sup> day of August, 2022, addressed to the recipient attorney's primary e-mail address listed in the South Carolina Attorney Information System as shown below:

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**APPENDIX A**

**Plaintiff/Appellant Michael D. Royal's Notice of Appeal**  
*Michael D. Royal v. Free Kindergarten Association of Charleston, et al.*  
 Circuit Court Case No. 2018-CP-10-05739  
 Appellate Case No. 2022-\_\_\_\_\_

| <b>Order Challenged on Appeal</b>                                                                                                                    | <b>Attached as Exhibit No.</b> |
|------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------|
| March 31, 2022 Order                                                                                                                                 | 1                              |
| July 18, 2022 Order Denying Plaintiff's Motion to Reconsider                                                                                         | 2                              |
| July 18, 2022 Order Regarding Motion to Exclude and Strike                                                                                           | 3                              |
| August 10, 2021 Form 4 Order                                                                                                                         | 4                              |
| July 23, 2021 Order Denying Plaintiff's Motions for Clarification and Reconsideration and Setting Hearing on Motion to Intervene                     | 5                              |
| June 21, 2021 Order Concerning Various Discovery Motions Made by Charleston County School District and Plaintiff Royal's Motion for Protective Order | 6                              |
| June 7, 2021 Form 4 Order                                                                                                                            | 7                              |
| February 22, 2021 Order Appointing Receiver for Defendant Free Kindergarten Association of Charleston                                                | 8                              |
| August 22, 2019 Order Granting Motion of Charleston County School District to Intervene                                                              | 9                              |
| July 10, 2019 Order Granting Motion of the Attorney General of the State of South Carolina to Intervene                                              | 10                             |
| June 7, 2019 Form 4 Order                                                                                                                            | 11                             |

**RECEIVED**

**Sep 27 2023**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

Mikell R. Scarborough, Master-In-Equity

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Appellate Case No. 2022-001165

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Michael D. Royal, Appellant,

v.

Free Kindergarten Association of Charleston, Respondent,

The Attorney General of the State of South Carolina and  
The Charleston County School District, Intervenors/Respondents.

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**RULE 210(g) CERTIFICATE AND PROOF OF SERVICE**

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I certify that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material. I certify that I have served the Record on Appeal on the above-named Respondent and Intervenors/Respondents via email to their respective counsel of record, on September 27, 2023, containing the above-referenced document as attachments in .pdf, sent to the addresses shown below.

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