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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

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.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the lower court err in finding June Wells did not have express or implied authority to bind Respondent Free Kindergarten Association of Charleston ("FKAC") to the agreement between Appellant Michael D. Royal ("Royal") and FKAC to purchase and sell real estate ("Agreement" or "PSA")?

2. Did the lower court err in granting the motion for non-suit dismissal of Royal's claims?

3. Did the lower court err in finding FKAC was governed by the South Carolina Nonprofit Corporation Act of 1994, S.C. Code Ann. §§ 33-31-101, *et seq.* ("1994 Act")?

4. Did the lower court err in finding the PSA is contrary to public policy and therefore void?

5. Did the lower court err in considering the issue of, and in finding, unconscionability of the Agreement without consent of the parties when that issue was not presented in the pleadings?

6. Did the lower court err in failing to order specific performance of the Agreement?

7. Did the lower court err in finding Intervenor/Respondent The Attorney General of the State of South Carolina's ("AG") has authority to disapprove of or seek nullification of the Agreement?

8. Did the lower court err in granting Intervenor/Respondent Charleston County School District's ("CCSD") motion for intervention and in determining substantive issues in its ruling?

9. Did the lower court err in allowing CCSD to file claims seeking affirmative relief and in granting CCSD's requested relief when its claim was not presented for consideration?

10. Did the lower court err in excluding the transcript of the deposition of CCSD's Rule

30(b)(6) designated witness from evidence in this case?

STATEMENT OF THE CASE

Royal filed the underlying action on December 4, 2018, asserting claims for breach of contract and specific performance of the PSA, involving real estate identified as 34 Pitt Street, Charleston, South Carolina 29401 ("Property"), owned by FKAC. Until the early to mid-2000s, FKAC provided free kindergarten education in the building on the Property. Royal and FKAC signed the PSA on April 23, 2013, which gave FKAC the right to set the closing date on any date from April 23, 2013 through April 9, 2018. FKAC waited until the very end of that period, and on April 4, 2018, gave the AG advance notice of the closing. The AG demanded FKAC halt the sale, claiming power to nullify the PSA due to purchase price. After twice extending the closing date, FKAC would not close without AG approval, and Royal filed a Complaint as a *pro se* plaintiff.

On March 21, 2019, the case was referred by consent order to the Charleston County Master-In-Equity, the Honorable Mikell R. Scarborough. Prior to this reference, the AG and CCSD filed separate motions to intervene on January 28 and February 7, 2019, respectively. The AG asserted that statutory and common law governing charitable trusts granted him authority over the sale of FKAC's last known substantial asset, the Property. CCSD claimed an interest pursuant to a February 5, 1971 amendment to FKAC's charter, reflecting a resolution of the members that upon the corporation's dissolution, its residual assets would "be turned over to Charleston School District #20, part of the South Carolina State School System[.]" (R. p. 648) ("1971 Amendment").

Via June 7, 2019 form order, the AG intervened as a matter of right and CCSD permissively intervened. CCSD's June 24, 2019 Answer, Counterclaim and Crossclaim requested a declaratory judgment that: a) CCSD is the owner of FKAC's assets, and/or sale proceeds of such assets; b) the PSA is null and void; and c) FKAC's assets and/or sale proceeds, upon dissolution, would belong to CCSD. Formal orders were entered July 10 and August 22, 2019, as to intervention by the AG

and CCSD (collectively, "Intervenors"), respectively. On February 22, 2021, Joe Qualey was appointed as Receiver for FKAC and directed to take possession of the Property.[1]

The master conducted a non-jury trial of this matter on December 15, 2021. On March 31, 2022, the lower court entered an order with its findings and conclusions from trial ("Order"). In relevant part, the Order found that: FKAC's assets, upon dissolution, shall pass to CCSD; Wells did not have sufficient authority to execute the PSA on FKAC's behalf; and the AG had authority to approve or disapprove the PSA under certain statutory and common law sources. At trial, before Royal completed his case in chief, the master ordered non-suit dismissal of Royal's claims under Rule 41(b), SCRCP, pursuant to the following exchange with the AG's counsel:

> THE COURT: All right. Okay. Now, Ms. Jowers, back to you, do you have a motion?
>
> MS. JOWERS: I don't think I have a motion. I was going to have two comments. I don't think so. Oh, yes, I do. Your Honor, we would move for directed -- well, can I request two things?
>
> MR. TIBBALS: We hadn't rested.
>
> MS. JOWERS: Okay.
>
> THE COURT: Well, you can go ahead and make the motion because I'm going to grant it. Go ahead and make the motion.
>
> MS. JOWERS: Okay. Your Honor, I would make a motion for directed verdict at this time.
>
> THE COURT: It's a motion for nonsuit.
>
> MS. JOWERS: I'm sorry. Your Honor, I would make a motion for nonsuit, that the -- this action, that this contract and this potential sale was against public policy because it was less than fair market value.[2]

(R. p. 530, line 18-p. 531, line 14). No monetary judgment is on appeal, but the PSA purchase price is $315,200. The orders appealed include the Order; July 18, 2022 orders ruling on CCSD's

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[1] Charleston Chap. 4, United Daughters of the Confederacy and Confederate Museum intervened Aug. 10, 2021, and were dismissed Oct. 28, 2021, after removing their materials from the Property.
[2] While the lower court's effectively *sua sponte* motion for non-suit dismissal constitutes reversible error, additional, more substantive, issues warranting reversal are addressed herein.

motion to exclude and strike filed trial exhibits, and denying Royal's motion and amended motion to reconsider; and intervention orders attached to the Notice of Appeal, served August 17, 2022.

STATEMENT OF THE FACTS

I. INITIAL MEETINGS AND DISCUSSIONS REGARDING A SALE (2011-2013).

Although the heart of this dispute is the enforceability of a four-page, two-party agreement to purchase and sell real property, the other parties' defenses and allegations necessitate review of an extended timeframe of relevant facts. In 2011, planning a move home to Charleston, Royal was searching for a property downtown suitable for both residential and business uses. (R. p. 257, line 8-p. 258, line 7). On December 3, 2011, Royal drove by the Property and immediately identified it as the property he had been seeking. (R. p. 258, line 8-p. 259, line 12). Located in a residential neighborhood, it featured an approximately 2,800 square foot one-story abandoned building. *Id.*; (R. p. 577).[3]

Royal took photographs of the Property and began his search to find the owner. (R. p. 259, line 8-p. 260, line 18; R. pp. 586-588). Title and tax records at that time indicated the City of Charleston ("City") held an interest in the Property. (R. p. 261, lines 17-24; R. p. 286, line 2-p. 287, line 24). Royal met with City staff in December 2011, who advised that FKAC owned the Property and to contact June Murray Wells ("Wells") on its behalf. (R. p. 261, line 25-p. 262, line 11; R. p. 267, line 16-p. 268, line 8; R. p. 275, line 15-p. 277, line 2). Royal met Wells for the first time in 2012 and discussed FKAC and the Property. (R. p. 277, line 3-p. 280, line 13). During that and subsequent conversations, Wells advised she was the last remaining member of FKAC's board of directors, she had authority to sell the Property, and no other person had any authority with

[3] Royal's first two exhibits were marked and filed post-trial differently than shown in the transcript (*Compare* R. p. 210, lines 13-14, *with* R. pp. 559, *and* R. p. 573 (transcript's Plaintiff's Exhibits #1 and #1A were marked and filed as Plaintiff's Robinson Exhibit 1 and Plaintiff's Exhibit 1, respectively)).

respect to the Property. (*See, e.g.*, R. p. 283, line 16-p. 285, line 2; R. p. 288, line 1-p. 289, line 5; *see also* R. p. 281, line 2-p. 283, line 11). Royal expressed his desire to purchase the Property, and Wells indicated FKAC was open to selling since its kindergarten operations had ceased. (*See, e.g.*, R. p. 285, line 18-p. 286, line 10; R. p. 289, line 24-p. 290, line 3). Royal left that first meeting with the impression Wells "was very sharp, friendly. ... that she intended to sell [the Property]." (R. p. 280, lines 17-23).

In the fall of 2012, aware of Royal's significant interest in purchasing the Property, Wells invited him to see the Property, and she gave him a tour of the grounds and building on November 4, 2012. (R. p. 594). Wells was storing personal property inside the building and continuously told Royal she was busy moving items out and would soon have the building vacant. (R. p. 629; R. p. 352, line 9-p. 353, line 8; R. p. 354, line 11-p. 355, line 9; R. p. 426, line 11-p. 427, line 1). While Wells gave every indication that she wanted FKAC to sell the Property, Royal sensed her apprehension about being forced to move the personal property under a tight deadline. (*See, e.g.*, *id.*; R. p. 295, line 11-p. 296, line 4; R. p. 310, line 3-p. 312, line 3).

Royal asked Wells if an appraiser, Michael Robinson ("Robinson"), could inspect and appraise the Property to inform Royal's purchase offer. (R. p. 289, line 24-p. 290, line 24; R. p. 595). Royal and Robinson met Wells at the Property on November 28, 2012, and she unlocked the building and showed Robinson around. (R. p. 290, line 22-p. 292, line 4). Robinson, who is MAI-accredited, produced an appraisal January 11, 2013, estimating a fair market value of $315,200.00 effective December 19, 2012. (R. p. 292, lines 5-18; R. p. 574). Prior to making any offer, and multiple times thereafter, Royal encouraged Wells to engage an attorney on FKAC's behalf to review any offer or proposed contract, but she never did so. (R. p. 289, lines 6-23; R. p. 342, lines 1-9; R. p. 447, lines 18-25; R. p. 495, lines 1-7; R. p. 501, line 16-p. 503, line 2).

On January 14, 2013, Royal mailed Wells a proposed contract, offering to purchase the Property for $315,200, the fair market value reflected in Robinson's appraisal. (R. pp. 596-600; R. p. 293, lines 1-25). Aware of Wells' concern about removing all the materials from the Property, the proposal gave FKAC exclusive possession until June 30, 2013, over five (5) months from the offer date and three (3) months after the proposed March 30, 2013 closing date. (R. pp. 596-600; R. p. 295, line 11-p. 296, line 4; R. p. 299, lines 4-16). Said closing date reflected Royal's desire to quickly close, but the contract offer allowed FKAC to extend closing to December 31, 2013; however, FKAC did not countersign. (R. pp. 596-600; R. p. 299, line 4-p. 300, line 1). In subsequent conversations, Royal determined the hesitation was due to Wells' concern about creating a vacate date by which to remove personal property. (R. p. 300, line 2-p. 301, line 6).

II. ROYAL AND FKAC EXECUTE THE REAL ESTATE AGREEMENT (2013).

Royal decided to make one more attempt to purchase the Property, and on April 23, 2013 ("Effective Date"), visited Wells at the museum where she worked, her preferred meeting place, and presented a second contract offer. (R. p. 340, line 1-p. 341, line 25). This offer also contained the $315,200.00 purchase price, but Royal had drafted this version to include language intended to assuage Wells' trepidation about a move-out deadline. *Id.*; (R. pp. 601-604). Rather than fix a concrete closing deadline, this second offer gave FKAC extreme flexibility, allowing it to unilaterally set a date for closing on any day from the Effective Date until April 9, 2018 ("PSA Closing Deadline") (R. pp. 601-604; R. pp. 620-622; R. p. 309, line 25-p. 312, line 2; R. p. 340, line 24-p. 341, line 3). Royal only proposed a flexible closing date to accommodate and benefit FKAC and alleviate pressure on Wells to meet a closing/move-out deadline. (*Id.*; R. p. 491, lines 8-22; R. p. 1261, lines 11-20; *see also* R. p. 213, lines 9-14).

Royal perceived that the idea of a date certain for moveout created Wells' earlier unease about contract execution, but he did not perceive anything difficult about the moveout itself. (R.

p. 426, line 11-p. 428, line 16). Wells desired ample flexibility in the timeline to ensure each item reached its proper recipient. (R. pp. 623-624) ("I [Royal] have committed to helping Ms. Wells transition the items in the school building to their future homes ... Ms. Wells exercises great caution with the items in her care."). Notwithstanding the PSA's potentially expansive closing provision, Royal, based on Wells' representations, expected to close soon after the Effective Date. (R. p. 353, line 1-p. 355, line 21; R. p. 491, lines 3-22). Royal and Wells, on FKAC's behalf, executed the PSA in the presence of a notary and two witnesses. (R. p. 302, line 24-p. 304, line 23; R. p. 340, line 1-p. 341, line 25; R. p. 344, line 1-p. 345, line 3; R. pp. 601-604; R. pp. 620-622).[4]

III. ROYAL'S REPEATED ATTEMPTS TO CLOSE EXPEDIENTLY (2013-2018).

Royal was and has been ready, willing, and able to close on the Property since the Effective Date. (R. p. 382, lines 5-15). From contract execution until mid-2018, Royal politely but persistently contacted FKAC seeking to close, many times offering assistance in relocating personal property. (*See, e.g.*, R. p. 109 ¶13; R. p. 138; R. p. 144; R. p. 352, line 9-p. 353, line 12) ("I called her somewhat regularly to see if I could be helpful."). On numerous occasions, Royal took actions or made proposals to assist FKAC and facilitate closing. (R. p. 345, line 4-p. 352, line 8; R. p. 354, line 22-p. 358, line 5). For example, via January 25, 2015 letter, Royal proposed to close immediately and preserve FKAC's right of possession until April 9, 2018. (R. pp. 631-632). Royal offered to make a $30,0000 down payment and pay taxes and insurance while FKAC occupied the building rent-free. *Id.*; (R. p. 359, line 13-p. 360, line 18). Additionally, Royal repaired the Property at his expense (R. p. 467, lines 14-19), and resolved a cloud on title (*see infra* p. 19).

[4] Pl.Ex. 31 (R. pp. 620-622), Mem. of Real Estate Purchase and Sale Agreement ("PSA Memo"), was recorded with the Charleston County Register of Deeds to give record notice of the PSA. (R. p. 343, line 6-p. 344, line 25).

Despite all of Royal's efforts, and even though the Property was no longer in use for FKAC's corporate mission, Wells continued to store her personal property in the building at 34 Pitt Street, forcing Royal to wait the full five years for a closing date. (R. p. 354, line 8-p. 355, line 21; R. p. 362, lines 4-20). On March 29, 2018, FKAC's attorney assured Royal that FKAC would close by April 9, 2018, stating a deed had been prepared and a bank account opened for FKAC to receive the sale proceeds. (R. pp. 634-635). A week later, on April 4, 2018, FKAC gave the AG notice of the sale, believing it was required under S.C. Code Ann. § 33-31-1202(f). (R. pp. 636-637); *see infra* Argument Secs. I, V.A.-B.

IV. THE AG HALTS THE SALE (2018).

Thereafter, FKAC's counsel requested the closing date be extended until April 26, 2018, as the AG's twenty-day notice period expired April 25, and a PSA addendum to this effect was executed. (R. p. 371, line 11-p. 374, line 6; R. p. 110 ¶14; R. p. 136). FKAC then requested a second extension, to which Royal agreed, but FKAC had not provided its executed second addendum by April 26, 2018, the amended closing date (R. p. 110 ¶15; R. p. 138; R. p.140). Consequently, Royal sent FKAC's counsel an e-mail on April 26, tendering performance. *See id.* He requested FKAC provide the signed second addendum or advise of the location for closing and wiring instructions. *See id.* On April 27, FKAC provided its executed copy of the second addendum (signed April 24, 2018), and the parties extended the closing to May 25, 2018 ("Final Closing Deadline") (R. p. 110 ¶16; R. p. 140).

Also on April 26, 2018, Royal participated in a conference call with Sonny Jones, Senior Assistant Deputy Attorney General ("Jones"), and Mary Frances Jowers, Assistant Deputy Attorney General, during which Jones insisted that the AG had independent power to nullify the PSA. (R. p. 387, line 13-p. 388, line 5; R. p. 667). Jones further stated that the AG was voiding the contract unless Royal agreed to pay more than the contract purchase price. (R. p. 388, lines 5-10).

Royal asked Jones to identify the source of the AG's authority to nullify or renegotiate the terms of the PSA, and Jones cited S.C. Code Ann. § 33-31-1202.[5] (R. p. 388, lines 11-19). When Royal questioned the AG's interpretation of that statute, Jones responded, "That's the way we do it." *Id*.

On May 11, 2018, FKAC sent Royal a letter refusing to close "without approval of the Attorney General." (R. p. 390, line 10-p. 391, line 6). When he received FKAC's letter on May 14, Royal sent FKAC's counsel, Rick Stringer, an email advising the letter amounted to anticipatory breach of the PSA. (R. pp. 110-111 ¶18; R. p. 144). Unbeknownst to Royal, the AG separately corresponded with Stringer after the sale notice, exhorting FKAC to resist the sale. (R. pp. 1276-1284; R. p. 162).

V. FKAC REFUSES TO CLOSE (2018).

The Final Closing Deadline passed, but Royal still hoped to avoid litigation. On June 1, 2018, Stringer notified CCSD of FKAC's agreement to sell the Property to Royal (R. p. 711 no. 32). On June 28, 2018, more than a month after the Final Closing Deadline, FKAC's counsel emailed Royal, stating FKAC refused to consummate the sale. (R. p. 162). FKAC was unwilling to close because the AG would not approve the sale, based on an appraisal he had commissioned valuing the Property as of June 7, 2018. *Id.*; (R. p. 33). Royal was unaware of this appraisal as the AG had not provided him a copy. *Id.*; (R. pp. 1286-1300). With Intervenors' counsel copied, Royal replied, giving notice of default and demanding the parties close the transaction. (R. p. 162).

In its first communication with Royal, CCSD responded, falsely claiming FKAC was in the dissolution process, the Property was to be conveyed directly to CCSD, and it was the sole beneficiary of residual assets.[6] (R. p. 400, line 19-p. 401, line 20). Due to FKAC's continued

[5] The AG has admitted, and the lower court found, that FKAC's April 4 notice (R. pp. 636-637) satisfied the requirements of the statute (assuming FKAC is subject thereto). (R. p. 40).
[6] It is not in dispute that FKAC was and still is in good standing and authorized to do business in South Carolina. Nor has any dissolution proceeding been initiated with regard to FKAC.

refusals to close, and Intervenors' continued interference, Royal was forced to initiate this action on December 4, 2018.

STANDARD OF REVIEW

The appellate court "'reviews all questions of law de novo[,]'" which it can resolve "'with no particular deference to the trial court.'" *Lollis v. Dutton*, 421 S.C. 467, 477, 807 S.E.2d 723, 728. (Ct. App. 2017).[7] The standard as to the lower court's "factual findings, however, depends on . . . whether the underlying action is an action at law or an action in equity." *Fesmire v. Digh*, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009). For actions at law, "findings of fact will not be disturbed unless found to be without evidence which reasonably supports the [lower] court's findings." *Stanley v. Atlantic Title Ins. Co.*, 377 S.C. 405, 409, 661 S.E.2d 62, 64 (2008). In actions at equity, "this court can find facts in accordance with its view of the preponderance of the evidence." *West v. Newberry Elec. Coop., Inc.*, 357 S.C. 537, 593 S.E.2d 500, 542 (Ct. App. 2004).

This appeal involves Royal's claim for specific performance and breach of contract. (R. pp. 112-113 ¶¶26-35). If both equitable and legal claims are involved, determination of the case's "main purpose" dictates the applicable standard of review. *See Fesmire*, 385 S.C. at 303, 683 S.E.2d at 807. This determination is primarily made by reviewing the body of the complaint, but, if necessary, the court may also consider "'the prayer for relief and any other facts and circumstances which throw light upon the main purpose of the action.'" *Lowcountry Open Land Trust v. Charleston S. Univ.*, 376 S.C. 399, 406-407, 656 S.E.2d 775, 779 (Ct. App. 2008) ("*LOLT*"); *see Fesmire*, 385 S.C. at 303, 683 S.E.2d at 807 ("this Court must look to the action's main purpose as reflected by the nature of the pleadings, evidence, and character of the relief sought[]").

[7] All emphases are added and all internal citations are omitted, unless otherwise noted.

The *LOLT* opinion is relevant here as it provides guidance as to the applicable standard for cases involving both specific performance and breach of contract claims. There, the respondent alleged that "the master was interpreting the contract, so the action [wa]s one at law and this court's scope of review should extend only to the correction of errors of law." *LOLT*, 376 S.C. at 406 n.4, 656 S.E.2d at 779 n.4. Although the respondent's pleading alleged a breach of contract claim, it "primarily asserted a claim for specific performance" and "the relief sought is specific performance. This is an action in equity." *Id.* at 406, 406 n.4, 656 S.E.2d at 779, 779 n.4.

Because this action's main purpose is specific performance of the PSA, it lies in equity. *See, e.g.*, *Ingram v. Kasey's Assocs*., 340 S.C. 98, 105, 531 S.E.2d 287, 290 (2000). Therefore, this Court may find facts based upon its own view of the preponderance of the evidence. In the instant appeal, the lower court's rulings must be overturned. The lower court erred in its conclusions of law and made factual findings not supported by the preponderance of the evidence. Indeed, the record does not contain reasonable support for many of the lower court's findings.

ARGUMENT

At its core, this action is simple: Royal seeks to enforce a valid and binding Agreement for the purchase and sale of real estate. Royal proved at trial, with overwhelming and uncontroverted evidence, all elements of contract, breach, and specific performance, negating CCSD's assertion that June Wells did not have authority to execute the PSA. No party has questioned Wells' thoughtfulness or intention, nor her mental acuity or capacity, and FKAC itself admits that Wells had full agency and authority to take binding acts on its behalf. Likewise, no party has challenged Royal's good faith in all of his dealings with FKAC.

The Intervenors have bitterly fought the consummation of the PSA, cloaking their contract interference as "public interest" concerns. But CCSD's clear motivation is to secure a windfall profit by ignoring the sanctity of contract. The AG seeks an extraordinary expansion of power –

unfettered discretion to nullify a private contract involving a defunct educational corporation. The simple four-page PSA was negotiated and signed by a private citizen and a privately funded entity, which acquired the property not by donation, but for monetary consideration. Long before the PSA execution, FKAC, with the AG's knowledge, ceased all operations and therefore provided no public benefit, charitable or otherwise.

I. FKAC IS NOT GOVERNED BY THE 1994 NONPROFIT ACT.

The Order contains frequent references to the 1994 Act. (R. pp. 32, 37-39, 42, 49). Yet, the Order fails to address Royal's argument at trial that the 1994 Act does not govern FKAC. The question of whether the 1994 Act applies touches on two primary issues on appeal – Wells' authority to act for FKAC and the powers asserted by the AG to invalidate the PSA.

FKAC was incorporated under and is governed by Act No. 219, 1900 S.C. Acts 390 ("1900 Act"). (R. p. 506, line 18-p. 511, line 16; R. pp. 638-642 (Jan. 24, 1901 Certificate of Incorporation, stating it is incorporated under and governed by the 1900 Act)).[8] By the plain language of the 1994 Act, FKAC is excluded from its purview. First, FKAC does not meet the 1994 Act's definition of a "corporation." *See* 1994 Act §§ 33-31-140(7), (12), (30) (referencing §§ 33-31-201 – -207, -1707). Under the 1994 Act, public benefit corporations are only those entities a) incorporated on or after March 2, 1994; or b) incorporated between the 1976 Act's effective date and March 1, 1994.[9] *Id.* Second, FKAC is not subject to the 1994 Act as specified under § 33-31-1701, "Application to Existing Domestic Corporations." FKAC was never governed by the 1976 Act, has not filed "with the Secretary of State an irrevocable election to be governed by the" 1994 Act, and is not the product of a merger. 1994 Act §§ 33-31-1701(a)-(c). FKAC's failure to satisfy

[8] The 1900 Act is referenced, as 1900 (23) 390, in the legislative history of various sections of the 1994 Act. *See, e.g.*, S.C. Code Ann. §§ 33-31-120, -140.
[9] "1976 Act" refers to Title 33, Chapter 31 of the 1976 Code of Laws of South Carolina.

any of the three criteria envisioned by the Legislature compels a finding that FKAC is not subject to the 1994 Act.

II. JUNE WELLS HAD AUTHORITY TO EXECUTE THE AGREEMENT ON BEHALF OF FKAC.

Devoting one paragraph to the issue, the Order held that "the extent of Wells [sic] limited authority does not constitute actual, implied or apparent authority to" execute the PSA for FKAC. (R. p. 35).[10] Although the AG never alleged Wells lacked authority, the finding on this issue was included as a basis for granting the AG's motion for non-suit. (R. pp. 34-35). The Order lacks any analysis or application of South Carolina apparent authority law and fails to satisfy the preponderance of evidence standard. The holding flies in the face of overwhelming evidence presented at trial proving Wells' express and apparent authority, and appears to contradict the master's own recognition that Wells did possess requisite authority to bind FKAC. (R. p. 545, lines 14-17 ("[An] issue[] in this case is whether or not Ms. June Wells had the authority to act. I'm going to find that she did have the authority to act, but that's not statutory."); *see also* R. p. 263, line 25-p. 265, line 25; R. p. 281, line 11-p. 283, line 11; R. p. 511, line 6-p. 514, line 6; R. p. 523, line 25-p. 524, line 9; R. p. 526, line 3-p. 527, line 14 (discussing evidence of Wells' agency)).

The only party to dispute June Wells' authority was CCSD, the author of the Order, a permissive intervenor seeking to nullify the PSA. Yet CCSD presented no evidence to refute Wells' authority. The weight of the evidence supports only one conclusion: June Wells possessed the requisite authority to execute the PSA and consummate the sale on FKAC's behalf.

[10] Additionally, the lower court found that Wells possessed "some authority but not absolute authority to act on behalf of the FKAC[,]" and "[w]hatever authority Wells had to sign the Agreement on behalf of FKAC . . . is subordinate to the public interest." (R. p. 35). The Order did not elucidate as to the circumstances in which the public interest would invalidate agency law.

A. <u>FKAC's Pleadings, Prior Rulings, and Sworn Statements Affirm Wells' Authority</u>.

The Order is directly contradicted by FKAC's own pleadings confirming Wells' authority to act. (R. p. 187 ¶2 ("Wells[] was and is the duly authorized director and last surviving member of the [FKAC] and that as such **she has authority and had authority since approximately 1990 to represent the [FKAC]**."); *see also* R. p. 187 ¶1).[11]

The Order also conflicts with a 2010 Charleston County Probate Court order recognizing Wells as the only person in the world with authority to act for FKAC. (R. pp. 613-616) ("Probate Order"). The Probate Order terminated the Marion Stuart Hanckel Trust ("Hanckel Trust"), previously FKAC's sole source of funding, and distributed its assets to the Coastal Community Foundation. *Id.* The probate court relied heavily on the fact that "**Wells expressed her consent on behalf of the Free Kindergarten Association** to the" requested termination of the Hanckel Trust. (R. p. 615). The AG himself championed Wells' authority and consent, preparing an affidavit which Mary Frances Jowers, the AG's counsel of record in this action, sent to Wells. (R. p. 612); (R. p. 331, line 3-p. 332, line 10; R. p. 338, line 3-p. 339, line 2). Based on this affidavit (R. pp. 617-619), the court found:

> June Murray Wells is the last living advisory board member of the Free Kindergarten Association with capacity to act on behalf of the Association. She is the **only known person with capacity to act on behalf of the Association**.

(R. p. 614). In finding this evidence has no relevance to Wells' authority to bind FKAC to the PSA, the Order portrays the affidavit and Probate Order as relating only to FKAC's operational status, funding, and equitable deviation of the Hanckel Trust. (R. pp. 30-31). The Order erred in failing to consider this evidence as establishing Wells' general authority to take corporate actions

[11] FKAC denied the paragraphs of CCSD's cross-claim alleging Wells lacked authority to exercise FKAC's corporate powers and execute the PSA. (*Compare* R. p. 187 ¶1, *with* R. pp. 179-180 ¶¶31, 33).

on FKAC's behalf. (R. pp. 613-616; R. pp. 617-619). It is inexplicable that Wells had requisite authority to authorize termination of FKAC's funding, but no power to convey an asset FKAC could no longer afford. (R. p. 618 ¶¶5-7; R. p. 614; *see also* R. p. 334, lines 1-15; R. p. 338, line 17-p. 339, line 20; R. p. 524, lines 1-9).

Indeed, FKAC itself filed the Probate Order to support its request that the Court determine "whether the sole surviving member of [FKAC] is June Murray Wells and is therefore authorized to sell the aforesaid property." (R. p. 166 ¶7; R. pp. 168-171).[12]

A 2013 quitclaim deed conveying the City's reversionary interest in the Property to FKAC also contains a sworn affidavit of Wells evidencing her authority. The City obtained a reversionary interest in 1963 via a Declaration of Trust by FKAC, which FKAC paid $15,000 to extinguish, but no confirming instrument was recorded. (R. p. 345, line 9-p. 350, line 21; R. p. 398, line 6-p. 399, line 5; R. pp. 623-624, R. pp. 625-628). Royal worked to clear this title defect on FKAC's behalf, and the quitclaim deed listed the $15,000 previously "paid at and before the sealing of these presents by June Wells, on behalf of the [FKAC]" as consideration. (R. p. 625). Indicating the transfer was for consideration, Wells signed an affidavit attached to the deed as the "Authorized agent of the purchaser ([FKAC])." (R. p. 627 ¶8). In addition to the wealth of evidence discussed below establishing her express and implied authority, the Probate Order, Wells' affidavits, and FKAC's pleadings provide conclusive proof of Wells' authority to execute the PSA and consummate the Property's sale.

B. <u>June Wells Possessed Express Authority to Execute the PSA on FKAC's Behalf.</u>

To bind the principal to the actions carried out, an agent may have express or apparent

[12] FKAC and Royal also executed a Stipulation of Fact that June Wells "was the sole member of FKAC from November 23, 2010 until the date of her death, November 29, 2020[.]" (R. pp. 679-680).

authority to act. *See, e.g.*, *Froneberger v. Smith*, 406 S.C. 37, 46-51, 748 S.E.2d 625, 630-31 (Ct. App. 2013). Wells' express authority to act for FKAC arose from her roles in the organization.

1. Wells Held a 100% Membership Interest in a Member-Controlled Entity.

Contrary to the Order, FKAC was not controlled by a board of directors; rather, by the terms of its Constitution and By-Laws, FKAC's members formed the governing body vested with authority to approve its business matters and transactions. (*See, e.g.*, R. pp. 658-659 (FKAC's Constitution and By-Laws, providing FKAC transacted business, and could amend its governing documents, via a vote of its members); R. pp. 643-646 (1931 resolution of FKAC's members changing its corporate name); R. p. 647 and R. p. 648 (1971 application to amend charter, and 1971 Amendment, incorporating the dissolution clause adopted "pursuant to law, at a meeting of the members")).[13]

June Wells was the sole surviving member of FKAC from at least November 23, 2010, until the date of her death in November 2020. (R. pp. 613-616; R. pp. 617-619; R. pp. 625-628; R. pp. 679-680; R. pp. 681-682; R. pp. 695-696 ¶¶1-2; R. p. 187 ¶2; R. p. 136; R. p. 140; R. p. 373, line 19-p. 374, line 13; R. p. 380, line 13-p. 381, line 4). Wells possessed 100% of the voting power of FKAC's governing body, its members, at all relevant times.

2. Wells' Other Various Roles Also Made Her the One and Only Agent of FKAC.

Although neither the 1900 Act nor FKAC's constitution require or even mention a "board of directors," it appears decades after FKAC's founding, certain members, including Wells, came to hold themselves out as directors on a board. This is likely because by the 1990s financial and government bodies expected nonprofit entities to have a board. (R. p. 403, line 9-p. 404, line 8; R.

[13] It is this 1971 resolution, passed by members and not any board of directors, upon which CCSD relies for its alleged interest in this case. Yet if the membership is not FKAC's governing authority, as CCSD claims, then the 1971 Amendment and CCSD's alleged interest are invalidated.

p. 436, line 1-p. 439, line 22). To the extent there was a group calling itself FKAC's board of directors, Wells was its sole remaining member, and she therefore held 100% of that group's voting power during the relevant time. (R. pp. 610-611 (FKAC's 1997 Resolution, Wells named as a Board member and signed as the Director); R. p. 682 no. 2; R. p. 696 nos. 3-4). Additionally, Wells held other roles proving agency, including her position as "Director" in the sense of the chief administrative officer. (R. pp. 610-611; R. p. 187 ¶2; R. p. 437, line 23-p. 438, line 25; R. pp. 1119-1120). Much of the record evidences her corporate actions performed for FKAC. (*See e.g.*, R. pp. 605-619, 625-628).

3. CCSD's Argument as to Strict Compliance with the 1994 Act is of No Import.

CSSD's only argument against Wells' authority was that the PSA was not executed in strict compliance with the 1994 Act, by a quorum of FKAC's board of directors. (R. p. 1457). Yet neither the lower court nor any party has offered any evidence or argument to show that FKAC is governed by the 1994 Act. FKAC is governed by the 1900 Act, not the 1994 Act, which does not mention or contemplate a "board of directors." *See supra* pp. 16-17, 20. The 1900 Act provides that corporations chartered thereunder have the same powers as individuals to "acquire and transfer property, both real and personal, under such regulations as may be fixed in the by-laws of the said corporation[.]" 1900 Act § 4; (*see also* R. p. 435, line 21-p. 439, line 18; R. pp. 654-661). FKAC's by-laws vested its members with authority to exercise its corporate powers. (R. pp. 654-661). Alternatively, if found that FKAC is subject to the 1994 Act, its members are vested with the powers otherwise exercised by a board, as permitted by S.C. Code Ann. § 33-31-801(c).

C. <u>June Wells Unquestionably Had Apparent Authority to Act on FKAC's Behalf</u>.

Apparent authority exists when "persons of ordinary prudence, reasonably knowledgeable with business usages and customs are led to believe the agent has certain authority and they in turn deal with the agent based on that assumption." *Fernander v. Thigpen*, 278 S.C. 140, 143, 293

S.E.2d 424, 426 (1982). The elements necessary to "establish apparent agency are: (1) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was a reliance upon the representation; and (3) that there was a change of position to the relying party's detriment." *Graves v. Serbin Farms, Inc.*, 306 S.C. 60, 63, 409 S.E.2d 769, 771 (1991).

Under South Carolina law, "[a]gency is a question of fact. The relationship of agency . . . may be, and frequently is, implied from the words and conduct of the parties and the circumstances of the particular case." *Gathers v. Harris Teeter Supermarket, Inc.*, 282 S.C. 220, 226, 317 S.E.2d 748, 752 (Ct. App. 1984); *see also Beasley v. Kerr-McGee Chem. Corp., Inc.*, 273 S.C. 523, 526, 257 S.E.2d 726,727 (1979) (extrinsic evidence outside a contract may establish agency relationship).

The record contains an astounding amount of testimony and documentary evidence establishing Wells' authority, as the issue was a focal point of Royal's case at trial. (*See, e.g.*, R. p. 526, line 3-p. 527, line 14). Wells herself handed these documents to Royal around the period the two negotiated the PSA's terms, during which she repeatedly told Royal she had authority to sell the Property. (R. p. 285, lines 7-10; R. p. 298, line 2-p. 299, line 19; R. p. 308, line 1-p. 309, line 4; R. p. 336, lines 9-13). The manifestations of agency by both principal and agent are countless, and an exercise of "ordinary prudence" in the evaluation of Wells' agency leads to only one conclusion, a finding of authority. *See, e.g.*, *supra* pp. 8-11; (*see also* R. p. 275, line 15-p.277, line 2; R. p. 280, line 17-p. 285, line 2; R. p. 526, line 2-p. 527, line 14). Royal was deliberate in his efforts to determine and confirm the person with authority to convey the Property. *Id.*; *see infra* Argument Sec. IV.A.; (*see also, e.g.*, R. p. 259, lines 8-12; R. p. 260, line 22-p. 263, line 8; R. p. 267, line 3-p. 271, line 4; R. p. 273, line 1-p. 274, line 12; R. p. 275, line 7-p. 278, line 20; R. p. 297, line 2-p. 298, line 19; R. p. 589).

Wells held herself out to third parties as being an agent authorized to act on FKAC's behalf. *See id.*; *see supra* pp. 8-12, 17-21; (R. pp. 601-628; R. pp. 634-637; R. pp. 695-697 nos. 1-7; R. p. 136; R. p. 140). Wells retained legal counsel on FKAC's behalf in anticipation of the closing and for this litigation, and upon her death FKAC's counsel requested a Receiver be appointed. (R. pp. 1119-1120; R. pp. 74-77). All parties to this action accepted Wells' designation as FKAC's corporate witness to testify on its behalf pursuant to Rule 30(b)(6), SCRCP. Wells was the only person with access to the gated Property and a key to the building. (R. p. 30; R. p. 284, line 17-p. 285, line 10). Wells handled FKAC's finances, including tax and utility payments, was an authorized signatory on its bank account, and was issued a refund from the South Carolina Department of Revenue on FKAC's behalf. (R. pp. 606-611; R. p. 625; R. p. 345, line 4-p. 346, line 7).

At trial, Royal presented and testified extensively as to the substantial amount of evidence he relied upon as proof of Wells' authority. *See id.*; (*see also* R. p. 308, line 1-p. 309, line 24; R. p. 331, lines 3-18; R. p. 333, line 22-p. 334, line 21; R. p. 335, line 11-p. 339, line 25; R. p. 412, line 17-p. 413, line 13; R. p. 456, line 6-p. 457, line 8; R. p. 474, line 1-p. 476, line 1; R. p. 479, line 1-p. 482, line 4; R. p. 491, line 25-p. 495, line 2); *supra* Argument Secs. II.A., B.1.-2. (pp. 17-21). This evidence consisted, *inter alia*, of tax notices, utility bills, bank statements, bank resolutions, legal documents and correspondence with various banks and local and state governmental entities. (*See, e.g.*, R. p. 316, line 7-p. 317, line 21; R. p. 320, line 9-p. 326, line 18; R. pp. 605-619; R. pp. 625-628). Indeed, the lower court indicated the issue of her apparent authority had been thoroughly established when it cut off Royal's presentation of evidence on the subject at trial, deeming the remaining evidence "cumulative."

> THE COURT: Why don't you just put that [Probate Court order] in? I'll let you proffer all the other ones, but you can put that one in.

> MR. TIBBALS: Because it's the accumulation of the documents and the evidence.
>
> THE COURT: Well, he [Royal] can -- he can testify to that. He can testify to what he did and what he saw. Okay? Just proffer them. . . . that's just cumulative evidence. He's already saying, he thinks she had the authority. . . . But I'm telling you, you've got a court order that says something. You've got multiple documents, you know. Go ahead and ask the question. But I don't see the need to go through 100 documents if you've got -- he's already testified to what he believes. He can state the basis for his belief. I don't have a problem with that.

(R. p. 314, line 22-p. 316, line 5; *see also* R. p. 283, line 24-p. 284, line 13 ("You've already established, and it's been admitted; so it's in. All right? You got it. She claims to be the sole authority for it. … I don't need cumulative evidence[.]"); R. p. 312, line 4-p. 314, line 6; R. p. 326, line 19-p. 328, line 8 ("I'm not going to let you go anymore.…I had enough.")).

After Royal's cross-examination, his counsel renewed his proffer and request to admit the "cumulative" authority evidence. (R. p. 488, line 23-p. 489, line 13). Although the lower court indicated the items were admitted ("I'm going to allow you to, provided we don't go into them. . . . They're just in the record." (R. p. 489, lines 7-24)), it later granted, in error, CCSD's motion to exclude and strike the same (R. pp 18-25).[14] The Order plainly erred in finding Royal only relied upon three documents and one fact as proof of Wells' authority. (R. pp. 30-31).[15] The Order also erred in citing the PSA's paragraph 6 to refute Royal's belief of Wells' authority. (R. p. 43). The Order simply ignored Royal's clear testimony explaining his rationale for including paragraph 6 in his drafting of the PSA and his clear testimony that he had no question about Wells' authority. *See infra* p. 33 n.24.

In addition to direct affirmations of Wells' authority at trial, the lower court's statements

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[14] In this regard, the lower court chose to prohibit Royal's presentation of his full case in chief, which prejudiced his ability to seek relief, and his abilities on this appeal. The evidence of Wells' authority that was proffered but not admitted included Royal's exhibits numbered 17-27, 27A, 30.

[15] Notably, the finding that Royal did not rely upon FKAC's 1997 Resolution (R. pp. 610-611) is clear error, directly contradicted by the record. (*Compare* R. p. 31, *with* R. p. 325, line 1-p. 326, line 25).

that the PSA would be enforceable except for the purported AG approval requirement shows her authority had been proven. (R. p. 541, lines 16-20; R. p. 543, lines 5-17 ("Given, if this were a private contract between two parties, I would uphold [Royal's] argument[]" to enforce the PSA.); R. p. 547, line 22-p. 548, line 10; R. p. 549, lines 7-18 ("the contract is not to be enforced between the parties because they did not get [AG] approval")). Apparent authority was established by far more than a preponderance of the evidence. All the relevant evidence proves Royal, to his clear detriment, reasonably relied on Wells' many representations that she possessed requisite authority to execute the PSA. *Supra* pp. 8-12, 17-21.

D. <u>Wells' Agency by Estoppel</u>.

Additionally, all parties are estopped from denying Wells' agency because they placed or permitted Wells to be "in a position impliedly manifesting h[er] authority[.]" *Eadie v. H.A. Sack Co.*, 322 S.C. 164, 171, 470 S.E.2d 397, 401 (Ct. App. 1996) ("there is no true difference between apparent authority and agency by estoppel"). Although only FKAC is the principal, the AG and CCSD attempted to step into FKAC's shoes by alleging powers or ownership over FKAC's assets.

The AG is estopped due to its previous promotion of Wells via affidavit, adopted in the Probate Order. *See supra* pp.18-19. FKAC is estopped due to its affirmative statements of authority in its pleadings and other evidence in the record. *See supra* pp. 18-23. CCSD, based on FKAC's 1971 Amendment, claims ownership of FKAC's assets and the right to protect against waste and misapplication. (R. pp. 182-184 ¶¶40-49). Yet from 1971 through June 2018, it made no effort to monitor FKAC's activities or assets, including the Property. (R. p. 1309, line 24-p.1310, line 21; R. pp. 675-676 nos. 10-11; R. pp. 721-722 nos. 10-11). Having permitted Wells to manage FKAC's affairs for decades, CCSD is estopped from denying her authority, especially when the 2010 Probate Order and 2013 PSA Memo were filed as public record and its office is less than a

mile from the Property.

All parties knew or should have known that FKAC stopped operating in the 2000s, lost funding in 2010, and only one living person was associated with FKAC. Even if Wells' authority "arose because of her sole remaining position as somebody with knowledge about [] FKAC[]" (R. p. 35), the AG and CCSD's allowance of and failure to oversee FKAC's continued existence placed her in this position that impliedly manifested her authority.

III. THE ORDER ERRED IN FINDING THE PSA VIOLATES PUBLIC POLICY.

The Order fashions a gossamer wisp of a public policy argument, employing circular logic in its attempts to define the public policy allegedly violated. (*See, e.g.*, R. pp. 44-45) ("In the present case, the contract is void because it is against public policy. . . . the parties cannot make a contract in violation of law.").[16] The scant reasoning was hurriedly employed, because public policy arguments first emerged only one week before trial, via the AG's Pre-Trial Brief (R. pp. 1169-1172) and Memorandum of Law ("Mem. Law") (R. pp. 1389-1398). In three years of vigorous litigation, no party had raised a "public policy" argument. The AG had steadfastly relied upon a theory of statutory omnipotence to terminate contracts with unbridled discretion – a theory the lower court also endorsed at trial, indicating that Royal's role was not to defend his contract rights, but to ask the AG "how high" he should jump (R. p. 554, lines 13-24).

The Order mistakenly found the PSA violative of South Carolina public policy because: a) the fair market value of the Property increased between the dates of execution and closing; and b) the PSA contained "several unusual provisions[.]" (R. pp. 41-43). These are not recognized public policies sufficient to invalidate the contract. More specifically, the lower court erred: in

[16] (*See also* R. p. 536, lines 20-24) (in support of non-suit dismissal, the AG stated, "freedom of contract is subordinate to public policy. Agreements that are contrary to public policy are legal [sic]. This agreement is contrary to public policy, whether or not Ms. Wells had authority.").

misapplying established law regarding date of valuation; in failing to establish a foundation to accept a June 7, 2018 appraisal as controlling evidence of fairness; in refusing to recognize FKAC as a willing seller at all times prior to AG interference; and in finding unequal bargaining power when the issue was not presented for review and the record contains no support.

A. <u>The Date of Valuation Is the Date of Contract Under South Carolina Law</u>.

The lower court erroneously adopted a public policy argument to allow future market conditions to not only trump a contract purchase price, but to void the entire contract. South Carolina law is well established that the proper fair market valuation date is the date of contract.

> [I]t is well settled that a mere change in the value of land will not justify a refusal to grant [specific performance]. . . . "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**." . . . The same rule applies if the value of the property should go down instead of up.

Adams v. Willis, 225 S.C. 518, 526-27, 83 S.E.2d 171, 175-76 (1954) (quoting *Holly Hill Lumber Co., Inc. v. McCoy*, 201 S.C. 427, 23 S.E.2d 372, 380 (1942) (citing *Shannon v. Freeman*, 117 S.C. 140, 109 S.E. 406 (1921))); *see Campbell v. Carr*, 361 S.C. 258, 261-62, 603 S.E.2d 625, 628 (Ct. App. 2004) (evaluating fair market value on the date "the contract was executed" to determine specific performance claim); *Bannon v. Knaus*, 282 S.C. 589, 593, 320 S.E.2d 470, 471 (Ct. App. 1984) ("Interpretation of the contract is governed by the objective manifestation of the parties' assent at the time the contract was made."). The Order, in discussing the AG's role over asset sales, relies on opinions that considered fair market value at the time of contract. (R. pp. 36-40).

Accordingly, the lower court erred in "find[ing] that the sales price is less than fair market value[.]" (R. p. 41). The only evidence in the record of fair market value at the date of contract is the appraisal produced January 11, 2013 by Mike Robinson,[17] MAI certified, commissioned to

[17] Robinson was found to be a "very competent appraiser" and "well qualified" expert. (R. p. 216,

establish the purchase price under the PSA. (*Compare* R. p. 574, *with* R. p. 601 ¶2).

1. There Is No Public Policy Requiring that a Buyer Agree to Adjust the Purchase Price Based on Market Fluctuations.

Misapplying Black's Law Dictionary, the master summarily concluded that FKAC and Royal did not agree to a fair market value sales price. (R. p. 41).[18] The Order contains no analysis as to why the binding, essential term of purchase price should not be upheld, and implies that the price may not be fixed until the closing date, in contravention of basic contract and free market principles. Indeed, the purchase price is an essential term of a contract to buy or sell real estate. The absence or uncertainty of an essential term renders a contract indefinite and unenforceable.

The record is devoid of evidence that Royal expected or encouraged a five (5) year delay, and he could not have possibly divined that the real estate market would appreciate, or to what extent, during that time. (R. pp. 629-632; R. pp. 634-635; R. p. 136; R. p. 663; R. pp. 665-669; R. p. 144; R. p. 247, line 19-p. 248, line 4; R. p. 427, line 3-p. 428, line 16).[19] Delay on the seller's part does not prejudice a buyer's right to enforce the contract, and the mere fact that a property's value increases after contract execution does not support a finding of invalidity. "One who has himself prevented performance or tender of performance at the time set cannot take advantage of the delay." *Freeman*, 117 S.C. at 487, 109 S.E. at 409. The market could have declined instead, leading the Intervenors to strictly enforce the contract sales price. (R. p. 540, line 4-p. 543, line 14). The lower court failed to recognize that hindsight always provides perfect clarity.

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line 19; R. p. 226, line 9). Robinson conducted the AG's 2018 appraisal and was called as an expert at trial by the AG.

[18] The Order's cited authority actually supports the PSA's price as fair market value. *Id.* ("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[.]" (citing Black's Law Dictionary (11th ed. 2019))).

[19] In his appraisal produced in January 2013, Robinson noted that "[t]he real estate market has been flat for several years." (R. p. 578).

2. The Order Errantly Relied on a June 2018 Appraisal as Evidence of Fair Market Value.

The trial court accepted the AG's flawed argument that an appraisal with an arbitrary date of valuation in June 2018, rendered the PSA void as against public policy. (R. p. 530, line 18-p. 532, line 11; R. p. 1397 (contending FKAC "selling property for significantly less than fair market value is a sufficient reason to find that the contract cannot be enforced[]")).[20] The June 2018 appraisal also was unreliable because it assumed the existing structure on the Property, Royal sought to preserve, could be demolished, in violation of the City of Charleston's zoning ordinance. (R. p. 238, line 1-p. 239, line 22).

B. <u>In Finding the PSA Unconscionable, the Master Ruled on an Issue Not Presented in the Pleadings Without Consent of the Parties</u>.

The lower court improperly considered and ruled upon the issue of contract unconscionability, in the form of unequal bargaining power, as it was not contained in the pleadings, not presented for review, and not tried by implied consent. *See Shirey v. Bishop*, 431 S.C. 412, 423-25, 848 S.E.2d 325, 331 (Ct. App. 2020). No party presented any evidence on the matter, and the issue was barely touched upon at trial. *See Fraternal Order of Police v. S.C. Dep't of Revenue,* 352 S.C. 420, 435, 574 S.E.2d 717, 725 (2002). The extent of its "discussion," during this entire case, was a brief mention by the AG in moving for non-suit, to which Royal's counsel objected on the ground that nothing on the issue "came into evidence." (R. p. 535, line 24-p. 536, line 7).

The lower court, in the absence of a pleading raising the issue or any testimony or other

[20] The AG's Memorandum of Law (R. pp. 1389-1398) ("AG Mem.") was submitted with his pre-trial brief and referenced by the master multiple times during trial. (R. p. 532, lines 10-17; R. p. 543, lines 5-9; R. p. 546, lines 9-10).

direct evidence in the record,[21] made findings as to bargaining power and unconscionability, which served as a basis for dismissing Royal's claims. The findings on these issues, and conclusions drawn therefrom to nullify the PSA, constitute reversible error.

C. <u>The Record Contains No Support for a Finding that the PSA Is Unconscionable</u>.

Even if this Court finds that unconscionability was properly before the lower court, its rulings are without merit or support. This Court has held, even where contract price is inadequate, that alone "is not a ground for refusing the remedy of specific performance . . . the inadequacy must" be accompanied by foul play, fraud, or undue influence for the contract to be invalidated. *Campbell v. Carr*, 361 S.C. at 264, 603 S.E.2d at 627. As with valuation, proof of fraud or undue influence must be as of the date of contract. *See id.* at 265, 603 S.E.2d at 628 (concurring opinion questioning whether there was sufficient proof of seller's mental illness <u>at the time of contract</u>).

1. No Fraud or Foul Play was Alleged.

No party raised any issue as to the propriety of Royal's interactions with FKAC via its agent, Wells, nor alleged Royal fraudulently induced FKAC into executing the contract, concealed any terms, or made any other allegations of manipulation, mental illness, or foul play. Indeed, even though CCSD sought to nullify the PSA, the only supporting grounds alleged were adequacy of consideration, and Wells' alleged lack of authority. (R. pp. 181-184 ¶¶39-50). Simply put, all the evidence shows Royal's good faith, and none shows either subterfuge or bad faith from Royal.

2. No Evidence Exists as to Parties' Relative Bargaining Power or Real Estate Acumen.

Unconscionability exists if the evidence shows "absence of meaningful choice on the part of [FKAC] due to one-sided contract provisions, together with terms that are so oppressive that no

[21] Even if the record contains evidence relevant to unconscionability, implied consent to try the issue cannot be found because "*all of the parties did not recognize it as an issue during trial*," and such evidence was necessarily "*introduced as relevant to some other issue*[.]" *Shirey*, 431 S.C. at 424, 425, 848 S.E.2d at 332 (emphasis in original).

reasonable person would make them and no fair and honest person would accept them." *Carolina Care Plan, Inc. v. United Healthcare Servs., Inc*. 361 S.C. 544, 554, 606 S.E. 2d 752, 757 (2004). Often found in adhesion contracts, factors such as relative disparity in bargaining power and parties' relative sophistication should be considered as to the meaningful choice element. *See Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 668 (2007). "Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process[.]" *Gladden v. Boykin*, 402 S.C. 140, 148, 739 S.E.2d 882, 886 (2013).

None of the parties' pleadings raised any allegations, and no evidence exists, regarding respective bargaining power or undue influence. But the lower court found "there was a huge disparity in bargaining power between these two parties[]" because (disparaging Royal's hours on the witness stand) "Mr. Royal has regaled us today with his knowledge and expertise in negotiating contracts." (R. p. 544, lines 7-11). Royal's testimony on contract negotiations consisted of his interactions with and efforts to accommodate FKAC via the PSA terms, including the closing timeline. And while Royal testified as to his intent in drafting the PSA provisions, none of his testimony indicates expertise, nor was he qualified as an expert in any area.[22] Moreover, Royal gave no testimony, on direct or cross-examination, on any secondary or higher-level education or work experience.

Just as, if not more, important is the record's complete void of any evidence indicating Wells' real estate acumen, sophistication, or bargaining power. Without any sustaining testimony or evidence, the Order makes unfounded representations as to Royal's education history and minimizes Wells' scholarly and career achievements. (*Compare* R. p. 43, *with, e.g.*, R. p. 187 ¶2;

[22] Indeed, in response to Royal's counsel's request to call Royal as an expert on lost profit damages, the master's three-sentence ruling was: "All right. Denied. He's the plaintiff." (R. p. 213, line 23-p. 214, line 7).

R. pp. 607-608). It is difficult to conceive why the Order found a disparity in bargaining power without a shred of evidence or any allegation on the issue. This finding constitutes reversible error.

3. The PSA's Provisions Are Not Oppressive to FKAC; Rather, Many Are Favorable.

In addition to retrospective application of market value appreciation, the Order deemed the PSA violated public policy based on "unusual provisions" in paragraphs 4 through 8. (R. pp. 43-44 (errantly identifying ¶ 8 as number 7 on R. p. 43)). To begin, there is no legal basis to support a finding that "unusual provisions" in a contract make it contrary to public policy.[23]

The Order erred in finding that paragraph 8 of the PSA, providing the purchaser with a termination right under certain circumstances, violated public policy. (R. pp. 43-44). Executory contracts are not uncommon, and the parties are free to negotiate and agree to specific terms. Furthermore, the lower court failed to consider evidence about why the provision was included, and ignored the fact that paragraph 8 was entirely moot because all the evidence showed that Royal always was able to and desired to close as quickly as possible. (*See, e.g.*, R. p. 353, line 19-p. 354, line 14; R. p. 416, line 23-p. 418, line 11; R. p. 453, line 17-p. 454, line 4). The lower court erred both in construing this section as an option (ignoring evidence presented to the contrary) and in utterly failing to make any analysis or finding as to why, if it were an option, made such an Agreement contrary to public policy, considering the cash downpayment and all other facts surrounding the Agreement. (R. p. 451, line 4-p. 455, line 4).

The Order misapprehended the provisions in paragraphs 4 and 5, which actually favored the buyer and supported enforcement. (R. pp. 43-44; R. pp. 602-603 ¶¶4-5 (requiring seller only furnish a lower quality limited warranty deed and providing that seller would not be in default if a

[23] Indeed, South Carolina's public policy, expressed in the 1900 Act governing FKAC, is that such entities "have the [] powers: To make contracts, . . . to acquire and transfer property, . . . **possessing the same powers in such respects as individuals** now enjoy." 1900 Act § 4.

title defect existed)). The Order also failed to consider the trial testimony regarding the benefit of these provisions to FKAC. (R. p. 410, line 6-p.412, line 16).[24] Finally, the Order's "unusual provision" analysis failed to consider that many standard terms in form real estate contracts were eliminated to favor FKAC. No brokerage or commission fees were assessed to FKAC, Royal paid all closing costs, agreed to reimburse a fixed amount of attorneys' fees, was not entitled to a due diligence period, and there were no contingencies as to inspection or financing. (R. pp. 601-602 ¶¶2-3; R. p. 109 ¶¶12.a.-d.)

The PSA was not unfair, nor did it favor the buyer. In fact, it was skewed in FKAC's favor. Its terms were fair and equitable and resulted from good faith negotiations. Meanwhile, Royal himself operated under good faith and fair dealing, resolved tax and title issues, and attempted on multiple occasions to assist Wells with moving her property out of the building so that the parties could close. (R. pp. 623-624, 625-628; R. p. 347, line 17-p. 355, line 9). Finally, there was no discussion as to why allowing FKAC to delay the closing makes that provision oppressive to FKAC, and why Royal, who desired an immediate closing, should bear the burden of FKAC's continuous choice to delay.

IV. AS ROYAL IS ENTITLED TO SPECIFIC PERFORMANCE, THE ORDER ERRED IN DISMISSING HIS CLAIMS.

A. <u>All Elements of Specific Performance Are Established and the PSA Must be Enforced</u>.

To compel specific performance, the following elements must be established:

> "(1) clear evidence of an agreement; (2) that the agreement has been partly carried into execution on one side with the approbation of the other; and (3) that the party who comes to compel performance has performed on his part, or has been and

[24] As established herein, the PSA's paragraph 6 was not at issue. The evidence proves Royal had no question about Wells' authority before and after signing the PSA and establishes the rationale for the PSA's inclusion of the language in question. (*See, e.g.*, R. p. 296, line 22-p. 298, line 19; R. p. 406, line 13-p. 407, line 4 (stating third parties, such as title companies, may require specific documentation); R. p. 408, line 16-p. 409, line 4 ("I had every reason to believe that [Wells] did have authority when she signed [the PSA].")).

remains able and willing to perform his part of the contract."

Shirey v. Bishop, 431 S.C. at 422, 848 S.E.2d at 339. "[S]pecific performance of a contract to sell real property will be ordered where the contract 'is fair and was entered into openly and aboveboard.'" *Amick v. Hagler*, 286 S.C. 481, 485, 334 S.E.2d 525, 527 (Ct. App. 1985). The record conclusively establishes the existence of a valid contract freely entered into by a willing buyer and willing seller for fair market value consideration at the time of execution. (*See, e.g.*, R. p. 234, line 20-p. 237, line 17; R. p. 285, line 18-p. 286, line 1; R. p. 288, line 1-p. 290, line 11; R. p. 359, line 13-p. 360, line 22; R. p. 369, line 10-p. 371, line 10; R. p. 427, line 3-p. 428, line 16; R. pp. 573-585; R. pp. 596-604; R. pp. 620-622; R. pp. 629-632; R. pp. 634-635); *see also supra* pp. 8-12, 26-33; *infra* pp. 35-36.

The record is also replete with evidence that Royal and FKAC partly carried the contract into execution with the approbation of the other. (*See, e.g.*, R. pp. 623-624; R. pp. 625-628;[25] R. pp. 629-630; R. pp. 631-632; R. pp. 634-635; R. pp. 636-637; R. p. 345, line 4-p. 353, line 12; R. p. 467, lines 14-20). The lower court expressly acknowledged Royal's efforts to close:

> I don't think there's any question about that. Is that an issue? We wouldn't be here if he wasn't trying to act in furtherance of the contract. This thing has been going on for about nine years now. . . . All right. I don't think there's any doubt that Mr. Royal is pursuing this thing. . . . Extremely diligently, I might add.

(R. p. 347, lines 1-13). At all times since the Effective Date through present, Royal has been and remains ready, willing, and able to close, and has repeatedly advised FKAC of the same. (R. pp. 629-635; R. pp. 135-140; R. p. 353, line 19-p. 354, line 10; R. p. 356, line 23-p. 360, line 15 (during presentation of Pl.Exs. 46-47 (R. pp. 629-632), the lower court stated, "These all go to say

[25] Royal's efforts to remove the cloud placed on title by the City's reversionary interest, with FKAC's knowledge, is further proof that he acted in good faith, relied upon Wells' representations of authority, and that he was trying to close the sale as quickly as he could. (R. pp. 623-624, 625-628).

he's [Royal] trying to move forward with the sale, right?" (R. p. 358, lines 9-10)); R. p. 382, lines 5-15); *see also supra* pp. 10-14.

Royal and FKAC are entitled to freedom of contract without interference. *Supra* Argument Sec. III.; *infra* Argument Sec. V. By more than a preponderance, the evidence establishes that the PSA is fair, just, and expresses the parties' true intent. "Interpretation of the contract is **governed by the objective manifestation of the parties' assent <u>at the time the contract was made</u>**. It does not depend on the subjective, after the fact meaning one party assigns to it." *Bannon v. Knaus*, 282 S.C. at 593, 320 S.E.2d at 472. Because it is unambiguous and explicit, the PSA must be construed and enforced in accordance with the terms agreed to by FKAC and Royal, "to be taken and used in their plain, ordinary sense." *U.S. v. Metric Constructors, Inc.*, 325 S.C. 129, 136, 480 S.E.2d 447, 450 (1997) ("A party to a written contract, where there is no ambiguity or indefiniteness in the essentials, cannot say their minds did not meet." (*id.*)).

South Carolina common law is clear that the lower court did not have authority to alter or rewrite the contract, or "impose unwanted obligations and terms under the guise of specific performance or judicial construction." *LOLT*, 376 S.C. at 410-11, 656 S.E.2d at 781. Nor can the AG arbitrarily choose the valuation date in contradiction of the parties' negotiated terms. (R. p. 543, lines 5-6). If the real estate market had declined, the AG would have approved the sale as the contract price would have exceeded fair market value on the closing date. In accordance with South Carolina law, the dismissal of Royal's claims should be reversed, and specific performance ordered.

B. <u>The Order's Finding that FKAC was Not a Willing Seller is Contrary to the Evidence</u>.

The lower court's finding that FKAC was not a willing seller is wholly without support and contradicted by the record. FKAC was willing to close and never indicated otherwise until May 11, 2018. (R. pp. 631-632; R. p. 144; R. p. 353, line 19-p. 355, line 9; R. p. 359, line 13-p.

360, line 22; R. p. 369, line 10-p. 371, line 10). There is an abundance of evidence detailing the actions of both Royal and FKAC to complete the transaction by the original closing date, April 9, 2018. (*See, e.g.*, R. pp. 633; R. pp. 634-635; R. pp. 636-637; R. p. 650 no. 3).

V. THE AG DOES NOT HAVE AUTHORITY TO INVALIDATE THE AGREEMENT.

In concluding the AG has veto power over the PSA, the Order relies upon inapplicable law and ignores the facts of this case. (R. pp. 36-40, 42). And although it attempts to make the public policy attack on the PSA a more prominent part of the analysis, the lower court defended the AG's claim to independent powers, both in the Order and via statements at trial, advising Royal to ask "how high?" when the AG commands Royal to jump. (R. p. 554, lines 13-24).

While the lower court defends its Order with notions of the public good, the effect of the Order is a policy granting the AG unfettered power to arbitrarily pick and choose which real estate sales should proceed. If contract provisions deviate from the "norm," or if the AG disagrees with the agreed upon date of valuation, he can withhold approval and seek to nullify the agreement. Essentially, the Order gives the AG unfettered authority to determine public policy on a whim to fit the contours of a specific case.

No recognized legal authority, nor any of the sources cited by the lower court, support the AG's participation under the facts and circumstances of the case at hand, which does not involve a charitable trust, a statewide public interest, or an entity operating on donated property or public funds. Perhaps more importantly, no authority cited by the lower court or the AG demonstrates that an otherwise enforceable contract may be voided solely on the basis of a change in market conditions.[26] The jurisprudence offered by the AG, and relied on by the Court, can only be read to

[26] Much of the AG's Memorandum of Law was adopted, verbatim, in the Order. (*Compare* R. pp. 35-36, 37-38, 39-40, 42, 44, *with* R. pp. 1390-1391, 1392-1393, 1395-1396, 1394, 1397-1398). The authorities proffered in both are also found in the AG's motion to intervene and errantly adopted in the order granting said motion. (R. pp. 744-747, R. pp. 97-101).

require a purchase price that is reasonable at the time of the contract's execution.

A. <u>As FKAC Is Not Subject to the 1994 Nonprofit Act, the Lower Court Erred in Finding Section 33-31-1202(f) Provides the AG with Authority and Standing</u>.

First, because the lower court's conclusion rested on S.C. Code Ann. § 33-31-1202(f), part of the 1994 Act, a determination as to whether FKAC is subject to the 1994 Act is a necessary building block for finding that the AG has authority to prevent performance of a sale contract. However, the Order failed to make an examination or determination on this issue, even though Royal raised it at trial. (R. p. 506, line 18-p. 509, line 8). Instead, without any supporting evidence or analysis, the Order operates on an unstated assumption that the 1994 Act governs. (*See, e.g.*, R. pp. 35-39 (stating "the statute at issue in the present case" is S.C. Code Ann. § 33-31-1202(f)), R. p. 42).

This faulty assumption led to an erroneous result. The lower court held that FKAC was required to give the AG notice of the sale pursuant to Section 33-31-1202(f) (R. pp. 35-36), for which the legislature's intended purpose "was to notify the Attorney General and provide him with an opportunity to be heard." (R. p. 37). But because FKAC is not subject to the 1994 Act (*see supra* Argument Sec. I.), it is not subject to the notice provisions of § 33-31-1202(f). As a result, pursuant to the lower court's interpretation of the statute, the AG was not entitled to object to or be heard regarding the PSA and sale thereunder. In turn, no evidence or argument was properly presented to support the conclusion that consummation of the PSA violates "public policy."

B. <u>The AG's Involvement Under Section 33-31-1202(f) is Limited to Receipt of Notice</u>.

Should the Court find that FKAC is subject to the 1994 Act, Royal asserts that the lower court erred in its reading and application of S.C. Code Ann. § 33-31-1202(f). This statute, the Order's main source cited in support of AG authority, provides 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.

S.C. Code Ann. § 33-31-1202(f). Subsection (f), the only sentence of § 33-31-1202 that mentions the AG, contains no requirement to provide, and grants no authority to request, any materials or an appraisal, except for the sale notice. *Compare* S.C. Code Ann. § 33-31-1202 ("Notice Statute"), *with* (R. p. 666). Although the AG and lower court designate the Notice Statute as "the statute at issue in the present case," (R. p. 1395; R. p. 39), no language can be found providing the AG any review or approval authority. In fact, the provisions of § 33-31-1202 expressly provide that such sales may proceed *without* AG approval. *See infra* pp. 39-40.

On its face, the Notice Statute confers no authority whatsoever except the ability to provide a written waiver of the statutory notice. Indeed, it is void of any text that contemplates any response by the AG to the notice. But despite receipt of the requisite notice (R. p. 35), the AG continued to affirmatively represent to Royal and FKAC that the sale could not proceed without the AG's approval and continued to demand a new appraisal be performed. (R. pp. 662-664, 665-669). The lower court erred by accepting the AG's argument that the Notice Statute provided him authority to approve or disapprove of the sale. (R. p. 548, line 2-p. 549, lines 8-11) ("I'm going to find that the contract is not to be enforced between the parties because they did not get approval from the [AG][.]").

In addition, the lower court erred in finding the Notice Statute granted the AG authority to determine the date of valuation, and amount, of the asset's purchase price. (R. pp. 40-42; R. p. 549, lines 8-11). The lower court, without support, found the AG's approval of the sale was a legal requirement, endorsing the AG's ability to nullify the PSA based on his belief as to adequacy of the purchase price. (*Id.*; R. pp. 1389-1390; R. pp. 665-669). The lower court reversibly erred in its approval of the AG's conduct and conclusions as to powers granted under the Notice Statute.

1. The Lower Court's Interpretation of the Notice Statute's Purpose is Unsupported and Contrary to Proper Statutory Construction.

The Order went even further, finding that the statute conferred standing upon the AG to "be heard and object to the sale of the nonprofit's assets at issue in this action" (R. p. 40), because "the only logical conclusion is that this purpose [of § 33-31-1202(f)] is to notify the Attorney General and provide him with an opportunity to be heard." (R. p. 37).

The Order erred in this regard, as the statute does not confer any legal standing for the AG to intervene in litigation, brought by the purchaser to enforce the contract or otherwise, and affirmatively act to nullify the underlying contract. Not only is this purpose absent from the statute or surrounding sections,[27] it runs contrary to subsections (a) and (b) of the statute, which specifically permit a nonprofit to sell all of its property outside its usual and regular course of activities without the AG's approval. S.C. Code Ann. §§ 33-31-1202(a)-(b). Therefore, the AG's actions to void the PSA and prevent the sale run contrary to South Carolina statutory law and public policy thereunder as to the ability of nonprofit entities to carry out such transactions.

The lower court's interpretation also conflicts with §§ 33-31-128(c) and 33-31-302 of the 1994 Act. Pursuant thereto, FKAC's certificate of existence which Royal obtained from the Secretary of State (R. p. 649), could "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). Additionally, corporations subject to the 1994 Act have "**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).

These statutory provisions, in combination with §§ 33-31-1202(a)-(b), leave no doubt that

[27] Section 33-31-1403 contemplates notice to the AG but is inapplicable because FKAC was not in the process of dissolving (and still is not dissolved). S.C. Code Ann. § 33-31-1403; (R. p. 49).

FKAC had the ability and authority to sell the Property to Royal on terms agreeable to FKAC alone, without the AG's approval. The Order failed to consider that these provisions of South Carolina statutory law are themselves expressions of public policy which contradict its holdings.

Finally, the Order erred in failing to consider more logical purposes of § 33-31-1202(f) provided for within the 1994 Act. One clear purpose of requiring notice of a sale of all assets is to allow the AG to evaluate whether to initiate a judicial dissolution proceeding under the 1994 Act. *See* S.C. Code Ann. § 33-31-1430(a)(1)(iii)-(iv).[28] Another likely purpose would be to allow the AG time to initiate a proceeding to challenge a corporation's power to act under S.C. Code Ann. § 33-31-304. It also seems logical that this notice may aid the AG in determining whether to make investigations into a nonprofit corporation under S.C. Code Ann. § 33-31-171.[29] Regardless, the Order cites no support, and none is found in the record, for its ruling as to the Notice Statute's "only logical" purpose, which is refuted and contradicted by provisions of the 1994 Act.

2. The Lower Court Erred in Ruling that the Notice Statute Placed Any Obligation or Burden on the Purchaser, Royal.

The lower court erred in finding merit in and adopting the AG's argument that Royal, instead of the seller FKAC, was somehow obligated to provide the AG with notice of the sale and to satisfy the AG's demands, whatever they might be. (R. pp. 666-669). Analogizing the situation to a parent attempting to extricate a child from DSS, the lower court stated:

> [M]y advice to them was, do what they said. And if they say, jump, ask them how high. It makes things go a lot smoother when they hold all the cards. In this instance, the Attorney General's Office, the way I read the law, they hold the trump card. So when they ask for information, when they ask for a current appraisal, I would say,

[28] The AG has not commenced a dissolution proceeding, but such a determination should have been made in 2010, when his office provided Wells an affidavit stating that she consented to terminating FKAC's sole source of funding, and that the kindergarten "is not currently operating . . . and does not have plans to begin operating again." (R. pp. 618-619 ¶¶ 5, 7, 8; *see also* R. p. 612).

[29] The AG himself proffered this authority as a relevant consideration. (R. p. 1390).

it was probably in [Royal's] best interest to get that and work with them[.]

(R. p. 554, lines 9-22). The implication is clear: the AG's authority knows no limits.

C. <u>Authority Granted by Charitable Trust and Public Charity Statutes Does Not Apply</u>.

As additional statutory authority supporting AG authority to override a real estate contract, the Order relied on S.C. Code Ann. §§ 1-7-130 and 62-7-405, finding that the AG had a duty thereunder to protect the public interest in public charities and charitable trusts, respectively, to the detriment of all others. (R. pp. 36-40). The lower court erred in both its reliance and ruling. The statutes and their overall schemes have no bearing on FKAC or the PSA because FKAC is not a public charity and no express trust or judicially created trust is at issue. But even if they were relevant, the limited powers conferred do not support the actions condoned in the Order.

1. The AG's Statutory Powers Over Public Charities Are Inapplicable.

If the AG's power arises from a statutory duty to protect the public or charitable interest, it must first be found that FKAC is a public benefit corporation or public charitable organization. (*See* R. pp. 35-40). First, as established *supra* (Argument Sec. I, pp. 16-17), FKAC is not a public benefit corporation subject to the 1994 Act. Second, it is not a public charitable organization, meaning any authority provided under S.C. Code Ann. § 1-7-130 has no bearing.

FKAC is not a 501(c)(3) organization, as the Order admits in a footnote to its application of U.S. Tax Court opinions. (R. p. 42 n.4).[30] Moreover, there is no evidence that FKAC received public funding, and it is uncontroverted that the Property was purchased for monetary consideration by FKAC, not gifted to FKAC. (R. pp. 623-624; R. pp. 625-628; R. p. 398, line 6-p. 399, line 5); *supra* Argument Sec. II.A. As further examined *infra* (p. 48), this is a key distinction

[30] Thus, the lower court erred in: a) its application of federal tax law opinions, which have no precedential value or relevance; b) comparing the PSA's sale to an "illegal 'private inurement' under federal tax laws[;]" and c) relying on a law school journal article by the Texas Assistant Attorney General regarding charity authority of the Texas Attorney General. (R. pp. 40, 42).

because the South Carolina Supreme Court has construed the donation of property to a publicly funded entity as giving rise to the AG's public charity or charitable trust authority. *See S.C. Dep't of Mental Health v. McMaster*, 372 S.C. 175, 179 n.3, 182-83, 642 S.E.2d 552, 554 n.3, 555-56 (2007) ("*DMH*").

Thus, the Property was not a charitable gift necessitating that money be kept in the "charity stream," as argued by the AG and adopted by the lower court. (R. p. 39; R. p. 534, line 21-p. 535, line 3). Because there is no "charitable money" (R. p. 535, lines 1-3) or appropriated public funds involved here, there is no public interest inviting the AG's protection. Accordingly, the PSA must be enforced.

There is also no evidence that FKAC operated for charitable or nonprofit purposes during the relevant time. To the contrary, per Wells' affidavit and the Probate Order it supported, FKAC ceased operating around 2005 and lost funding in 2010. *See supra* pp. 18-19. At all times relevant to this action, FKAC was not funded, privately or publicly, and was no longer engaged in any endeavors beneficial to the public. (R. p. 29; R. pp. 613-616; R. pp. 617-619; R. p. 1171 ("This action is unusual in that the **FKAC was a nonprofit that is not currently operating**.")). FKAC is simply not a public charity which falls under the purview of S.C. Code Ann. § 1-7-130 and the oft-cited statute does not give rise to any power over FKAC or the PSA.

2. The South Carolina Trust Code, by Its Own Terms, Cannot be Considered.

Section 62-7-405, part of the South Carolina Trust Code (S.C. Code Ann. §§ 62-7-101, *et seq.*), has no application to the matter at hand. Under its own plain language, the Trust Code only "applies to express trusts, charitable or noncharitable, and trusts created pursuant to a statute, judgment, or decree that requires the trust to be administered in the manner of an express trust." *See* S.C. Code Ann. § 62-7-102; *see also* S.C. Code Ann. § 62-7-401. As a result, § 62-7-405 is inapplicable. There is no express trust involved, and no trust, charitable or otherwise, for FKAC

or its assets has been created pursuant to any statute, judgment, or decree. Indeed, no party requested a finding that a charitable trust existed, and no such decree is found in the Order.

The lower court's reliance on statutory law and findings as to public charity and charitable trust authority are clearly in error and should be reversed.

3. Even if the AG's Statutory Powers Over Trusts or Public Charities Apply, the Order Impermissibly Expanded the Limits of Any Authority Granted.

Even if the cited statutes could apply, they simply do not provide the AG with the unfettered power approved by the lower court. The law does not confer authority on the AG to choose an asset's date of valuation, or require a significantly higher purchase price based on his own appraisal valuation (conducted after the PSA's closing date). While the AG is vested with protective powers, deference must be given to well-established legal principles and rights.

Section 1-7-130 only gives the AG the power to "enforce the due application of funds given or appropriated to public charities" and "prevent breaches of trust in the administration thereof[.]" S.C. Code Ann. § 1-7-130. This provision only ascribes ministerial duties of enforcement and administration. Similarly, in the context of charitable trusts, § 62-7-405(c) of the Trust Code only gives the AG the authority to "maintain a proceeding to enforce the trust." This is not a proceeding maintained by the AG. And it is not a proceeding to enforce a trust, or prevent administrative malfeasance, because no trust exists. But even if one did, the AG's actions and powers conferred in the Order go far beyond ensuring the proceeds from the PSA's negotiated purchase and sale are distributed with "charitable purpose." (R. p. 40).

On this point, the Order failed to support its conclusion that the AG is concerned with whether nonprofit assets are "maintained in the 'charity stream[,]'" and failed to define the quoted term, "charity stream." (R. p. 40). The Order also failed to consider the AG's statement that he has no opinion as to the entity entitled to receive FKAC's residual assets upon dissolution. (R. p. 691

#17). It is unclear, then, how the AG will satisfy the purported statutory duty to maintain FKAC's residual assets in the nebulous charity stream. The Order's reliance on S.C. Code Ann. §§ 1-7-130 and 62-7-405(c) only served as cover for the AG's improper interference. The lower court erred in its application of the two statutes and in finding they conferred any power in this case.[31]

D. <u>The Order Errantly Applied South Carolina Common Law Regarding the AG's General Powers for Charitable Trusts and the Public Benefit</u>.

The Order lacks any analysis as to the circumstances in which a trust may have been created, and does not itself establish one, but agreed with the AG that general common law powers over charitable trusts allow him to prevent the sale to Royal. (R. p. 37; R. pp. 40-41; R. p. 549, lines 8-11).

1. The Order Contravenes the South Carolina Supreme Court's *Wilson v. Dallas* Opinion.

One such charitable trust power is the *parens patriae* doctrine, to which the Order contains a single isolated reference and fails to provide analysis. (R. p. 38) (quoting unpublished Court of Common Pleas order from *Sisters of Charity v. Wilson*, Case No. 2016-CP-40-00087 (Jan. 27, 2016)).[32] The doctrine's application is restricted to cases that sufficiently implicate a statewide public interest.[33] Here, no sufficient interest warranting AG involvement exists, as there is no statewide interest in, or potential statewide harm related to, distribution of FKAC's residual assets for the benefit of students on the City of Charleston's peninsula.[34] (R. p. 691 at no. 17). As a result, the AG's *parens patriae* powers to protect the welfare of all the State's citizens have no bearing

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[31] It also erred in finding they provided the AG with a statutory right to intervene. (R. pp. 94, 101).
[32] The Circuit Court's order in *Sisters of Charity* is available in the record (R. pp. 1399-1402).
[33] *Furman Univ. v. McLeod*, 238 S.C. 475, 483, 120 S.E.2d 865, 867 (1961) ("**[T]he Attorney General is the proper party to protect the interest of the members of the public at large, as distinct from those having 'immediate or peculiar interests.'**").
[34] If found that a sufficient quasi-sovereign interest is implicated, the AG cannot invoke his *parens patriae* powers because CCSD, the "charitable beneficiary" identified in the Order, albeit in error, needs no protecting. Based on its number of filings below, CCSD has been actively represented.

on the case at hand and certainly do not warrant the AG's contractual interference.

Moreover, the Order's reliance on *parens patriae*, and applications of general charitable trust authority, run contrary to the South Carolina Supreme Court's opinion in *Wilson v. Dallas*, 403 S.C. 411, 743 S.E.2d 746 (2013). While the doctrine's body of common law is mostly limited to family court or juvenile criminal matters, and neither the lower court nor the AG offered any published opinion applying the doctrine, the *Dallas* opinion is persuasive for the matter at hand.

One key consideration is that *Dallas* undoubtedly involved a matter impacting the general public interest of South Carolina. The testamentary trust at issue specified that its assets were to be applied to assist the poor and financially needy seeking "education at educational entities and/or institutions in the States of South Carolina and Georgia." *Dallas*, 403 S.C. at 417, 743 S.E.2d at 750. Additionally, as with every other charitable trust opinion discussed herein, *Dallas* involved disputes over an express trust, further cementing the limited circumstances of the authority's application. In the case, the AG sought to discard an existing charitable trust and replace it with one of his own creation, which the court held was an abuse of the AG's limited charitable trust powers. *Id.* at 420-422, 444-47, 743 S.E.2d at 751-52, 764-66. In relevant part, the court found:

> [T]he AG has no authority to become completely entrenched in an action that began here as one to set aside a will and for statutory shares, direct the settlement negotiations, and then fashion a settlement that discards Brown's will and his 2000 Irrevocable Trust and replaces them with new trusts, only to give himself sole authority to select the managing trustee. By so doing, the AG has effectively obtained control over the bulk of Brown's assets and has given his office unprecedented authority to oversee the affairs of the parties that has not heretofore been recognized in our jurisprudence.

Id. at 445-46, 743 S.E.2d at 765. Many similarities exist in the present action.

Similarly, in this case, the AG "completely entrenched" himself as a super negotiator. After actively preventing the sale, which FKAC intended to close prior to the AG's interference, he turned to active participation in this litigation to combat Royal's action for specific

performance, even going so far as moving for non-suit dismissal at trial. In no uncertain terms, the AG has taken control of FKAC's assets, directing the manner in which the Property may be sold, and giving himself authority to act as "trustee" to override agreed upon contractual terms.[35]

The AG's "'duty is to remedy abuses in trust management.' However, **the AG is <u>not</u> 'in the position of a super administrator of charities with <u>control over, or right to participate in, the contractual undertakings</u> of the charities**.'" *Id.* at 446, 743 S.E.2d at 765. The lower court's conclusions that the AG has authority to alter, direct, and control FKAC's contractual undertakings violate every aspect of legal precedent establishing his permissible powers. The Order and the PSA's nullification are "fundamentally flawed because the entire proposal is based on an unprecedented misdirection of the AG's authority[.]" *Id.* at 444, 743 S.E.2d at 764. The dismissal of Royal's claims must be reversed and the PSA enforced to consummate the sale specified therein.

2. The Order Heavily Relied on Unpublished Trial Court Orders and Pleadings.

In adopting the AG's proffered sources, the Order's legal conclusions are supported mainly by unpublished opinions or filings from previous cases involving the AG. Ms. Jowers appeared for the AG in these actions, and thus had opportunity to pick more favorable orders to present in this matter, while Royal was entirely unaware of their existence until he was provided copies of the same. The cited opinions and pleadings have no precedential value, and reliance on them is not only erroneous but inequitable. Any rebuttal research is necessarily limited to published opinions of South Carolina appellate courts, due to constraints of research databases and Rule 268, SCACR.

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[35] "Although the AG certainly has duties in regards to charitable trusts, if he believed [Wells or her attorney], as trustees, were not good stewards, the remedy would be to seek their removal and replacement. … 'The remedy for bona fide problems with the trustee is not rewriting a will or trust but replacing the trustee with a new trustee.[]'" *Id.* at 446-47, 743 S.E.2d at 766. This excerpt from *Dallas* not only invalidates the AG's ability to alter the purchase price, but also supports June Wells' agency authority by estoppel. *See supra* Argument Sec. II.D.

Moreover, none of the Order's cited "authorities" support its conclusions because they each involved an undisputed express trust. The Order's only citation for *parens patriae* powers (R. p. 38), *Sisters of Charity* (R. pp. 1399-1402), does not provide a basis for voiding the PSA. The referenced orders in the *Baptist Found. of S.C.* cases (R. pp. 39-40; R. pp. 1427-1453), where the Horry County Probate Court modified an express trust's terms to give the trustee authority to sell its real property assets due to changed circumstances, support enforcement of the PSA.

In *Calhoun County Museum and Cultural Center*, a Probate Court again allowed beneficiaries to sell interests in the trust's real property assets under equitable deviation, but did not contemplate any input or approval by the court or AG for a future sale, and per the AG's request only required that the AG be provided notice "[u]pon the sale," not prior notice and approval authority. (R. p. 39; R. pp. 1421-1426). Finally, the lower court's reliance on the mortgage foreclosure complaint filed in *Sloan Brothers, LLC* is perplexing, if not troubling, as it contains allegations, nothing more, and a pleading in an unrelated matter has no place in a dispositive order. (R. p. 39; R. pp. 1412-1420).

3. Published Case Law Cited in the Order is Irrelevant to the Facts of this Case.

The limited published opinions relied upon in the Order similarly fail to support the master's conclusions of permissible AG interference via charitable trust powers. The Order first quotes an opinion's footnote outlining the AG's statutory duties to protect the public at large in administering charitable trusts. (R. p. 36) (citing *Epworth Children's Home v. Beasley*, 365 S.C. 157, 163 n.3, 616 S.E.2d 710, 713 n.3 (2005)). As established *supra* (Argument Sec. V.C.), these statutory powers play no role in this case. Thus, *Epworth*, regarding trustee misdealings and applying express trust language to prohibit termination, has zero application. The AG's response did not factor in the court's analysis, and the opinion indicates no active participation by the AG

in the trust's affairs despite evidence of mismanagement. *Id.* at 165-72, 616 S.E.2d at 714-18.

Similarly, the reliance on *S.C. Dep't of Mental Health v. McMaster* to support the AG's domineering presence is misplaced. (R. p. 37). There, the Supreme Court was asked to determine if the state hospital property was subject to a charitable trust, and the conditions in which a sale was permissible. *DMH*, 372 S.C. at 180, 642 S.E.2d at 554. The court found that a charitable trust existed over the property, based entirely on language in the conveyances to the Department of Mental Health ("Department") as a gift "for the charitable purposes of the State Hospital[,]" and the fact that the hospital received continued funding from the General Assembly. *DMH*, 372 S.C. at 182-83, 642 S.E.2d at 556 ("[T]he deeds and the legislative acts giving rise to the State Hospital clearly evidence the creation of a charitable trust.").[36] Conversely, FKAC was not publicly funded, purchased the Property for monetary consideration with no evidence its was conditioned on charitable use, and it ceased using the Property for any public purpose in the early 2000s. (R. p. 286, line 15-p. 287, line 24; R. p. 398, lines 2-25; R. pp. 617-619). Moreover, the court, not the AG, determined the existence of a trust in *DMH*. Here, no such determination or even a request for the same is in the record.

In combination with *DMH*, the Order relied on an unpublished Circuit Court order entered in the Department's subsequent action filed to obtain approval of the property's sale. (R. pp. 37-38) (discussing *S.C. Dep't of Mental Health v. Wilson*, 2011-CP-40-00875 (June 10, 2011) ("*DMH 2*")). Setting aside the errant reliance on an additional unpublished opinion, *DMH 2* actually contradicts the lower court's voiding the PSA. The contract approved was for a sale of the property in "as is" condition for $15 million. (R. p. 1405). In evaluating the contract, the court considered

[36] Supporting exclusive application to publicly appropriated property, the *DMH* Court further stated that "[p]roperty subject to a charitable trust may not be terminated or altered by the General Assembly, but rather, must be approved by the court." *Id.* at 183, 642 S.E.2d at 556.

an appraised value that included development cost deductions, but the subject appraisal's "as is" valuation was $2.3-2.9 million more than the contract price. (R. pp. 1405-1406). And contrary to the Order's finding that "unusual provisions" violate public policy (R. pp. 43-44), the *DMH 2* contract was a complex arrangement. The Department was to receive piecemeal installment payments (based on future valuations) paid after sale of parcels to be subdivided, or the developer itself could pay unspecified release prices in lieu of third-party sale, and the "purchase" contract had a 7-year term after which the buyer could opt-out. (R. p. 1405).

E. There is No Authority to Support the AG's Control Over or Nullification of the PSA.

No justification exists for the AG's railroading of the sale or attempting to nullify the PSA. The AG's authority is limited to administering or enforcing the terms of a trust (R. p. 28), but his efforts here far exceed that authority. The only permissible role the AG could potentially play is overseeing distribution of sale proceeds after PSA consummation. Even if the Order did not direct the distribution, such oversight is not needed. Royal voiced no objection to educational use of the proceeds (R. p. 397, lines 10-15), nor does he have any power to direct distribution. There is no evidence to suggest FKAC would not follow the provisions of the 1971 Amendment.

Regardless, even if there is a scenario in which a trust exists, the AG has in no way shown this would bar the PSA's enforcement. In such event, the only requirements are that the Property be sold for a reasonable price at the time of contract, and any residual assets pass to Charleston School District #20. All of the evidence supports a finding that FKAC intended to carry out the purported trust's directive of distribution, and there is no evidence to the contrary.

In summary, the AG's presence is entirely unwarranted and goes well beyond the claimed statutory and common law authority. The PSA and sale thereunder are consistent with all common law "authority" the AG cited and the lower court adopted. The sales price is for fair market value at the time of contract, and the South Carolina Supreme Court has specifically held that **the AG**

has no "<u>control over, or right to participate in, the contractual undertakings</u> of the charities." *Dallas*, 403 S.C. at 446, 743 S.E.2d at 765. Invalidating a contract based on market fluctuations has no support under South Carolina law. The Order must be reversed and the PSA enforced.

VI. THE LOWER COURT ERRED IN ALLOWING CCSD TO INTERVENE AND FILE AFFIRMATIVE CLAIMS.

Plainly stated, CCSD, a permissive intervenor, has hijacked this litigation from the start, and the lower court's approving CCSD's claimed entitlement to FKAC's assets, without the presentation of any facts or evidence, is in error.

A. <u>Ruling on Substantive Issues in Granting CCSD Permissive Intervention Was in Error</u>.

CCSD's permissive intervention is based upon FKAC's 1971 Amendment, specifically directing that its residual assets pass to "Charleston School District # 20" ("District 20"). (R. p. 648) During the hearing on CCSD's and the AG's motions to intervene, the master specifically advised Royal, *pro se* at the time, "that they only seek to intervene at this point in time, so it's really more of a procedural motion." (R. p. 1103, lines 12-14). Following argument, the lower court advised CCSD's counsel that Royal raised "an interesting dilemma, and that is the distinction between [CCSD] and Charleston County [sic] School District No. 20." (R. p. 1113, lines 15-19).

The lower court noted "previous litigation here between School District 20 and the school board. It clearly indicates that the beneficiary is School District No. 20, … I have to figure out who the proper party is." (R. p. 1114, lines 1-18). CCSD confirmed District 20 is a separate entity and was directed to consult with District 20's legal counsel about the litigation. (R. p. 1113, lines 15-21; R. p. 1114, lines 1-18; R. p. 1105, line 7-p. 1106, line 1). The master granted CCSD permissive intervention and directed Intervenors to prepare formal orders stating "exactly what we've talked about here today." (R. p. 1115, lines 13-16).

Yet thereafter, no proof or evidence of the proper party, or that CCSD satisfied the Court's

directive to consult District 20, was submitted. (R. pp. 1469-1473). Despite this, and the fact that CCSD only permissively intervened, the interlocutory order granting intervention made definitive findings and conclusions as to CCSD's rights that altered FKAC's dissolution clause, and essentially granted the relief requested in CCSD's counterclaim (filed 2 months prior). (R. pp. 78-92 ("Intervention Order")) (R. pp. 90-91).[37] Thus, the lower court's assurances that it viewed the motion to intervene as only procedural, which was consistent with South Carolina law, were undermined. After giving Royal the impression he would have opportunity to refute any substantial claims, the Intervention Order's findings were inequitable, prejudicial, and violated the scope of authority allowed in adjudicating a motion under Rule 24, SCRCP. (*See* R. pp. 1467-1471).

B. <u>The Record Shows No Justiciable Controversy Involving CCSD</u>.

Even CCSD left the hearing on its requested intervention believing its burden of proof as to beneficiary rights remained. It filed its requested declaration on the issue June 24, 2019 – after the hearing but prior to the Intervention Order entered August 2019. CCSD requested a declaratory judgment that: a) it 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. (R. pp. 184-185). This claim was not necessary if the right to the requested relief had already been proven.

More importantly, the claim fails on the merits. The requested relief, claiming both present ownership of FKAC's assets and entitlement to the same upon FKAC's dissolution, is conflicting. 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

[37] The only support proffered for CCSD's purported entitlement is S.C. Act 340, enacted in 1967. (R. pp. 87-91; R. pp. 727-731 nos. 19-29; R. pp. 44-47). Importantly, **FKAC approved the resolution underlying its 1971 Amendment *<u>after</u>* 1967 Act No. 340**, evidencing FKAC's clear intent that the beneficiary is specifically District 20.

Ann. § 15-53-30. Based upon its own pleading and the available evidence, there is no justiciable controversy involving CCSD – it is not a party to the PSA and it is not the named beneficiary of the residual assets of FKAC following its dissolution. (R. p. 1471 n.1; R. pp. 1472-1473). Moreover, the AG, who alleges authority to maintain assets in the "charity stream" (R. p. 40), has not formed an opinion as to the beneficiary of FKAC's residual assets upon dissolution. *See supra* pp. 43-44.

Even if ultimately found to be the beneficiary upon FKAC's dissolution, CCSD's claim to residual assets, proceeds of the sale to Royal, has not matured because FKAC has neither dissolved nor begun the process. As such, CCSD has no active interest giving it a basis to affirmatively seek to nullify the PSA. It is a passive participant who, according to the Order, does not have a role in opining on or determining a fair purchase price thereunder. (R. p. 49) (directing the Property's sale price "be approved by the Court after notice to the [AG]," without contemplating CCSD involvement). Therefore, CCSD has no cognizable interest in or rights to the PSA or Property, but may be entitled to accept whatever proceeds remain after a consummated sale of the Property (following FKAC's dissolution). (R. p. 1102, lines 9-12 ("[CCSD] is more concerned with the financial – its financial well-being as well as the well-being of the educational programs it has.")).

Yet the Order held that CCSD is entitled to FKAC's residual assets upon dissolution, even though CCSD's claim for such relief was not before the court, no evidence or argument was presented on the issue, and the lower court previously assured Royal that such claims could be disputed. (R. pp. 45-47). Accordingly, these rulings were made in error.

VII. THE LOWER COURT ERRED IN EXCLUDING THE TRANSCRIPT OF CCSD'S RULE 30(b)(6) DEPOSITION.

The lower court erred in ruling that the transcript CCSD's Rule 30(b)(6), SCRCP, deposition (Pl.Ex. 74) was not admitted as evidence or received as a proffer in this case. (R. pp.

21-25). CCSD's only contemporaneous objection, with which the lower court agreed, was that Royal was required to furnish advance copies of the excerpts he intended to use. (R. p. 504, line 10-p. 505, line 25; R. p. 21). This ruling conflicts with Rule 32(a), which allows use of "part or all of a deposition," and allows an adverse party to use a Rule 30(b)(6) deposition "for any purpose." Rules 32(a), 32(a)(2), SCRCP. At trial, Royal's counsel never sought to admit transcript excerpts, only offering the entire transcript as evidence. (R. pp. 504, line 10-p. 505, line 25). Additionally, Royal was not required to show that the Rule 30(b)(6) deponent was unavailable to testify at trial. *See Gibson v. Wright*, 403 S.C. 32, 48, 742 S.E.2d 49, 57 (Ct. App. 2013) (finding if a deposition is admissible under Rule 32(a)(2), such as Rule 30(b)(6) depositions, the adverse party need not demonstrate that the deponent was unavailable pursuant to Rule 32(a)(3), SCRCP).

CONCLUSION

The lower court's rulings should be reversed, and specific performance of the PSA granted.

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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

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.

RULE 211(b) CERTIFICATION

The undersigned certifies that the Final Brief of Appellant complies with Rule 211(b) of the South Carolina Appellate Court Rules.

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