THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Daniel D. Hall, Circuit Court Judge

Case No. 2019-CP-46-02090
Appellate Case No. 2023-001398

RECEIVED
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SC Court of Appeals

Sherry Killian Duncan, ... Appellant,

v.

Gurdip S. Gill a/k/a Gary Gurdip
a/k/a Gary Gurdip Gill, ...Respondent.

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES i

STATEMENT OF CASE 1

STATEMENT OF ISSUES ON APPEAL 4

STANDARD OF REVIEW 4

LEGAL ARGUMENT 4

I. THE COURT ERRED IN DIRECTING VERDICT FOR THE RESPONDENT 6

II. THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE RULE 408 EVIDENCE 16

III. THE TRIAL COURT ERRED IN EXCLUDING WITNESS TESTIMONY IT DEEMED HEARSAY 19

CONCLUSION 21

TABLE OF AUTHORITIES

Cases

Ball v. Canadian Am. Express Co.,
314 S.C. 272, 442 S.E.2d 620 (1994) 14

Beck v. Clarkson, 300 S.C. 293, 298, 387 S.E.2d
681, 684 (Ct. App. 1989) 12

Beck v. Clarkson,
300 S.C. 293, 387 S.E.2d 681 (1989) 8, 13

Bradbury v. Phillips Petrol. Co.,
815 F.2d 1356 (10th Cir. 1987) 25

Branche Builders, Inc. v. Coggins,
386 S.C. 43, 686 S.E.2d 200 (2009) 7

Breuer Elec. Mfg. Co. v. Toronado Sys. of Am., Inc.,
687 F.2d 182 (7th Cir. 1982) 25

Buffkin v. Strickland,
280 S.C. 343, 312 S.E.2d 579 (1984) 8

Conner v. City of Forest Acres,
348 S.C. 454, 560 S.E.2d 606 (2002) 14, 14

Corley v. Coastal States Life Ins. Co.,
244 S.C. 1, 135 S.E.2d 316 (1964) 14

Corley v. Ott,
326 S.C. 89, 485 S.E.2d 97 (1997) 8, 16

Dallis v. Aetna Life Ins. Co.,
768 F.2d 1303 (11th Cir. 1985) 24

Drews Co. v. Ledwith-Wolfe Assocs., Inc.,
296 S.C. 207, 371 S.E.2d 532 (1988) 11, 12

Edwards v. Scapa Waycross, Inc.,
437 S.C. 396, 878 S.E.2d 696 (Ct. App. 2022) 18, 24

Fesmire v. Digh,
385 S.C. 296, 683 S.E.2d 803 (2009) 24

Fletcher v. Med. Univ. of S.C., 390 S.C. 458, 462, 702 S.E.2d 372, 374 (Ct. App. 2010) 11

Floyd v. Country Squire Mobile Homes, Inc.,
287 S.C. 51, 336 S.E.2d 502 (1985) 14, 14

Fowler v. Nationwide Mut. Fire Ins. Co.,
410 S.C. 403, 764 S.E.2d 249 (2014) 26

Halbersberg v. Berry,
302 S.C. 97, 394 S.E.2d 7 (1990) 8, 9

Hunter v. Hyder,
236 S.C. 378, 114 S.E.2d 493 (1960) 24

John D. Hollingsworth on Wheels, Inc. v. Arkon Corp.,
279 S.C. 183, 305 S.E.2d 71 (1983) 12

Jones v. General Elec. Co.,
331 S.C. 351, 503 S.E.2d 173 (1998) 11, 14

Jones v. Ridgely Commc'ns,
304 S.C. 452, 405 S.E.2d 402 (1991) 5

Lawson v. Rogers,
312 S.C. 492, 435 S.E.2d 853 (1993) 16

Lollis v.
Lollis, 291 S.C. 525, 354 S.E.2d 559 (1987) 16

Mali v. Odom,
295 S.C. 78, 367 S.E.2d 166 (1988) 11-12

Minter v. GOCT, Inc.,
322 S.C. 525, 473 S.E.2d 67 (1996) 13

Price v. Middleton,
75 S.C. 105, 55 S.E. 156 (1906) 9

Prudential Ins. Co. v. Curt Bullock Builders, Inc.,
626 F. Supp. 159 (N.D. Ill. 1985) 25

QHG of Lake City, Inc. v. McCutcheon,
360 S.C. 196, 600 S.E.2d 105 (2004) 18, 24

S.C. Fed. Sav. Bank v. Thornton-Crosby Dev. Co.,
303 S.C. 74, 399 S.E.2d 8 (1990) 11

S.C. Fin. Corp. v. W. Side Fin. Co.,
236 S.C. 109, 113 S.E.2d 329 (1960) 12

Spradley v. Houser,
247 S.C. 208, 146 S.E.2d 621 (1966) 10

State v. Beck,
342 S.C. 129, 536 S.E.2d 679 (2000) 26

State v. Saltz,
346 S.C. 114, 551 S.E.2d 240 (2001) 26, 27

Stephens v.
Stephens, 213 S.C. 525, 50 S.E.2d 577 (1948) 8, 9

Strategic Res. Co. v. BCS Life Ins. Co.,
367 S.C. 540, 627 S.E.2d 687 (2006) 16

Weaver v. Lentz,
348 S.C. 672, 561 S.E.2d 360 (2002) 5

Weems v. Tyson Foods, Inc.,
665 F.3d 958 (8th Cir. 2011) 24

Welch v. Epstein,
342 S.C. 279, 536 S.E.2d 408 (2000) 5

Whisenant v. James Island Corp.,
277 S.C. 10, 281 S.E.2d 794 (1981) 11

Whitmire v. Adams,
273 S.C. 453, 257 S.E.2d 160 (1979) 16

Wyman v. Davis,
223 S.C. 172, 74 S.E.2d 694 (1953) 8, 9

Yadkin Brick Co. v. Materials Recovery Co., L.P.,
339 S.C. 640, 529 S.E.2d 764 (2000) 13

Statutes

S.C. Code Ann. § 27-27-10 (Supp. 2003) 17

S.C. Code Ann. § 33-41-210 (Supp. 2003) 8, 22

Other

Rule 401, SCRE 27

Rule 402, SCRE 26

Rule 408 .... 23, 24, 25

Rule 408, SCRE 19

Rule 801(d)(2)(A), SCRE 26, 27

Rule 802, SCRE 26

APPELLANT'S STATEMENT OF THE CASE

This appeal arises out of a directed verdict granted by the trial court in favor of the Respondent after the Appellant's case in chief. Appellant filed her summons and Complaint with the Court of Common Pleas for the 16th Judicial Circuit in York County, South Carolina, on June 18, 2019. (Complaint). After failing to respond, a default was entered on August 9, 2019 and Judgment in favor of the Plaintiff was entered February 10, 2020. (Entry of Default and Default Judgment). The parties entered a consent order setting aside the judgment on August 31, 2020. Appellant then filed her Amended Summons and Complaint on September 14, 2020. (Amended Complaint). Respondent filed his Answer on October 2, 2020. (Answer). Respondent later filed his Amended Answer on November 12, 2021. Appellant then filed her second Amended Complaint on December 9, 2021. The Appellant's Second Amended Complaint sought civil redress in the form of compensatory damages, punitive damages, and a constructive trust based upon breach of contract, breach of contract accompanied by fraudulent acts by the Respondent, and recovery under the betterments statute. Respondent filed his Answer to Second Amended Complaint and Counterclaim on April 4, 2022. The Respondent's Counterclaim sought damages to the Respondent based upon the "South Carolina Frivolous Claims Statute." Appellant filed her Reply to the Counterclaim.

On October 19, 2022, Respondent moved for summary judgment. Appellant filed her reply on November 9, 2022. An order denying the motion for summary judgment was entered by the Hon. Edward W. Miller immediately after the hearing on November 16, 2022.

On July 10, 2023, the matter came up for trial and a jury was impaneled. The Hon. Daniel D. Hall presided. At the conclusion of Appellant's case, Respondent moved for a directed verdict

on the ground that Appellant had failed to present any evidence supporting her claims. Over Appellant's strenuous objection, the Court granted Respondent's Motion for a Directed Verdict.

The Court entered judgment by way of a Form 4 Judgment dated July 12, 2023 just over twenty four hours prior to his attending an unrelated televised hearing (First Form Order). Appellant moved to have the Court reconsider the order and grant a new trial on July 21, 2023. (Motion to Reconsider) A hearing on that motion was had on August 7, 2023. The Court, again by way of a Form 4 Judgment, denied the motion on August 7, 2023. (Second Form Order) On September 1, 2023, Appellant duly filed her Notice of Appeal from the Judgment in a Civil Case and served a copy on Respondent's counsel.

FACTS

In November of 2018, Appellant, Sherry Duncan ("Ms. Duncan"), and Respondent, Gurdip Gill ("Mr. Gill"), entered into a partnership agreement. **(Tr. pp. 75 – 78; p. 267 ¶¶ 21-25; P. 268 ¶¶ 1-12 P. 270 ¶¶ 17-25; P. 271 ¶¶ 1-4; P. 281 ¶¶ 22-24; P. 284 ¶¶ 23-25; P. 285 ¶¶ 1-11)**. The terms of the agreement were that she was to provide her time and talent to the partnership in the flipping of the Property located at 445 Rainbow Circle, Clover, South Carolina (hereinafter referred to as "Property"). **(Tr. pp. 77- 78; p. 267 ¶¶ 21-25; p. 268 ¶¶ 1-12; p. 269 ¶¶ 5-15)**. As part of the partnership agreement, the Defendant was to (a) contribute half of the funds for the purchase of the Property and all of the funds for the purchase of the materials that the Plaintiff used in the improvements of the Property and (b) in light of Duncan foregoing other projects and employment and living off of her savings, make payments to Duncan for monthly draws of $2,400 against the future disbursement from the sale of the Property when her personal savings ran out. **(Tr. pp. 77 ¶ 25; p. 78 ¶¶ 1-5, 17-21; p.79 ¶¶ 1-25; p. 80 ¶¶ 1-5; p. 80 ¶¶19-25; p. 81 ¶¶ 1-6; p. 184 ¶¶ 11-23; p. 210 ¶¶ 5-13).**

Duncan made significant contributions to the partnership including her use of her time in making improvements to the Property, her talent in making managerial decisions as it related to the aesthetics of the Property, and her talent with regards to facilitating the remaining improvements needed to the Property. **(Tr. pp. 77 ¶¶ 19-24; p. 79 ¶¶ 12-25; p. 80 ¶¶ 1-13; p. 82 ¶¶ 20-25; p. 83 ¶¶ 1-7; p. 102 ¶¶ 2-17; p. 109 ¶¶ 1-25; p. 107 ¶¶1-12; p. 110 ¶¶ 1-6; p. 110 ¶¶ 10-19; p. 126 ¶¶ 11-23; p. 127 ¶¶ 14- 20; p. 130 ¶¶ 1-9; p. 134 ¶¶ 9-24; p. 135 ¶¶ 10-14; p. 136 ¶¶ 2-16 p. 137 ¶¶ 1-22 p. 138 ¶¶ 23-25; p. 139 ¶¶ 1-4; p. 140 ¶¶ 1-18; p. 141 ¶¶ 4-22; p. 142 ¶¶ 1-25; p. 144 ¶¶ 4-11; p. 146 ¶¶ 1-13; p. 149 ¶¶ 17-21; p. 150 ¶¶ 1-6; p. 151 ¶¶ 3-9; p. 153 ¶¶ 13-17; p. 155 ¶¶ 4-12; p. 155 ¶¶ 15-18; p. 157 ¶¶ 19-24; p. 158 ¶¶ 4-9; p. 158 ¶¶ 13-19; p. 161 ¶¶ 1-11; p. 162 ¶¶ 1-8; p. 166 ¶¶ 11-20; p. 167 ¶¶ 2- 8; p. 170 ¶¶ 2-22; p. 237 ¶¶ 18-25; p. 238 ¶¶ 1-6; p. 239 ¶ 25; p. 240 ¶¶ 1-20; p. 242 ¶¶ 15-25; p. 246 ¶¶ 20-25; p. 247 ¶¶ 1-9; p. 251 ¶¶ 11-17; p. 255- 259).** The parties agreed that when the Property was sold, the Duncan was to receive half of the net profits less any draws. **(Tr. pp. 78-79).** They further agreed that the initial agreement was for the property to be purchased together. **(Tr. pp. 75-76).** Duncan later discovered that the Property was, instead, purchased without her knowledge by the Respondent. **(Tr. pp. 75-76; 200-201).** Mr. Gill continued, however, to show that he intended to work with her and carry on with the partnership. **(TR. Pp. 84 ¶¶ 21-23; p. 96 ¶¶ 3-13; p. 105 ¶¶ 11-25; p. 106 ¶¶1-2; p. 109 ¶¶ 1-13; p. 109 ¶¶ 23-25; p. 110 ¶¶ 1-3; p. 113 ¶¶ 6-9; p. 120 ¶¶ 3-18; p. 122 ¶¶ 6-14; p. 125 ¶¶ 1-11; p. 129 ¶¶ 12-17; p. 144 ¶¶ 10-16; p. 10-17; p. 153 ¶¶ 13-17; p. 159 ¶¶ 15-25; p. 162 ¶¶ 1-8; p. 165 ¶¶ 1-9; p. 172 ¶¶ 11-20; p. 173 ¶¶ 16-19; p. 180 ¶¶ 8-12).** In reliance upon these assurances, Ms. Duncan sacrificed and passed up continued work on another project in order to begin work for this partnership immediately. **(Tr. pp. 80 ¶¶ 19-25; p. 81 ¶¶ 1-6; p. 202 ¶¶ 10-19; p. 222 ¶ 25; p. 223 ¶¶ 1-6).**

During this time, Mr. Gill provided Ms. Duncan with credit cards that she was authorized to use for purchases of materials to be used to improve the Property. **(Tr. p. 79 ¶¶ 24-25; p. 80 ¶¶ 1-5; p. 155 ¶¶ 4-10; p. 163 ¶¶ 2-4; p. 214 ¶¶ 1-8).** She, similarly, had authority to make decisions with regard to aesthetic features of the Property for which she consulted with the Defendant on those choices. **(Tr. pp. 79 ¶¶ 12-23; p. 91 ¶¶ 13-22; p. 93 ¶¶13-20; p. 94 ¶¶ 18-25; p. 95 ¶¶ 1-2; p. 95 ¶¶ 6-25; P. 96 ¶¶ 1-11; p. 97 ¶¶ 23-25; p. 98 ¶¶ 1-25; p. 99 ¶¶ 1-2; p. 153 ¶¶ 13-17; p. 171 ¶¶ 10-19).** Ms. Duncan, also, managed and oversaw other workers at the property. (Tr. pp. 240-242).

Ultimately, the Property was purchased for $93,000, extensively improved, and later sold for $280,000. **(Tr. pp. 74 ¶¶ 19-24 p. 179 ¶¶ 9-16; p. 183 ¶ 25; p. 184 ¶ 1; Tr. Exhibit 1; and Tr. Exhibit 93).** Instead of receiving the agreed upon $2,400 in monthly draws, the Mr. Gill, in breach of the agreement only gave Ms. Duncan her a $2,000 draw in April 2019 and a $1,100 draw in May of 2019. **(Tr. pp. 74 ¶¶ 19-24 p. 179 ¶¶ 9-16; p. 183 ¶ 25; p. 184 ¶ 1).**

After Ms. Duncan demanded payments in accordance with the agreement, Mr. Gill withheld her access to the Property, including changing the locks. **(Tr. p. 194).** Mr. Gill then denied the existence of a partnership and attempted to extort the economically vulnerable position of the Appellant into accepting a settlement agreement. **(Tr. pp. 227 ¶¶ 21-25; p. 228 ¶¶ 1-25; p. 229 ¶¶ 1-16; p. 255 ¶¶ 6-19; P. 256 ¶¶ 5-20; P. 13-17; P. 259 ¶¶ 19-24).** She testified that after drafting a proposed settlement agreement, the Defendant demanded his attorney make changes before he would agree to sign. **(Tr. pp. 189 ¶¶ 7-19; p. 7-10; p. 191 ¶¶ 1-12; p. 195 ¶¶ 2-8; p. 196 ¶¶ 16-25; p. 197 ¶¶ 1-10).**

<u>ISSUES ON APPEAL</u>

1. WHETHER THE TRIAL COURT, IN AN EFFORT TO QUICKLY END ITS TRIAL OBLIGATIONS, ERRED IN FINDING THAT NO EVIDENCE EXISTED THAT SUPPORTED

THE CLAIMS BROUGHT BY APPELLANT AGAINST THE RESPONDENT FOR HIS FRAUDULENT ACTS?

2. WHETHER THE TRIAL COURT IMPROPERLY IGNORED RULE 408 OF THE SOUTH CAROLINA RULES OF EVIDENCE WHEN ADMITTING EVIDENCE CO

3. NCERNING COMPROMISE NEGOTIATIONS OF THE APPELLANT AND RESPONDENT?

4. WHETHER THE TRIAL COURT ERRED IN RULING THE OUT OF COURT STATEMENTS OF THE RESPONDENT WERE INADMISSIBLE HEARSAY EVIDENCE?

STANDARD OF REVIEW

"A directed verdict should be granted where the evidence raises no issue for the jury as to the Respondent's liability." Fletcher v. Med. Univ. of S.C., 390 S.C. 458, 462, 702 S.E.2d 372, 374 (Ct. App. 2010) (quoting Guffey v. Columbia/Colleton Reg'l Hosp., Inc., 364 S.C. 158, 163, 612 S.E.2d 695, 697 (2005). "A jury issue exists where the evidence is susceptible of more than one reasonable inference." *Jones v. Ridgely Commc'ns*, 304 S.C. 452, 454, 405 S.E.2d 402, 403 (1991). "When considering directed verdict and JNOV motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence." *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (2000). The trial court should be "concerned only with the existence or non-existence of evidence," not its credibility or weight. Jones v. General Elec. Co., 331 S.C. 351, 356, 503 S.E.2d 173, 176 (1998) (citing Garrett v. Locke, 309 S.C. 94, 99, 419 S.E.2d 842, 845 (Ct. App. 1992)). Further,

> it is not unusual for a case to have contradictory evidence and inconsistent testimony from a witness. In a law case tried before a jury, it is the jury that must decide what part of the witness's testimony it wants to believe and what part it wants to disbelieve. Under such circumstances, it is not the function of this Court to weigh the evidence and determine the credibility of the witnesses.

Weaver v. Lentz, 348 S.C. 672, 680-81, 561 S.E.2d 360, 365 (2002).

ARGUMENT

The Court erred when it (1) directed verdict for the Respondent; (2) allowed inadmissible evidence of settlement discussions; and (3) precluded evidence exempt from the rule of hearsay. The evidence presented to the Court and jury provided ample evidence raising issues of fact for the jury to decide whether the Respondent breached a contract with the Appellant, such breach was accompanied by fraudulent acts, a constructive trust was created with regard to the Property, and whether Appellant was entitled to damages under the betterment statute. These errors were prejudicial and, therefore, should be overturned and a new trial granted to the Appellant.

I. The Court erred in directing a verdict for the Respondent.

The evidence presented to the Court and jury provided ample evidence raising issues of fact for the jury to decide whether the Respondent breached a contract with the Appellant, such breach was accompanied by fraudulent acts, a constructive trust was created with regard to the Property, and whether Appellant was entitled to damages under the betterment statute. Therefore, the Court erred in directing a verdict for the Respondent.

A. Appellant adequately presented a prima facie case for a breach of contract action.

In the first cause of action brought by Appellant, Duncan alleged Gill had breached a contract between the two of them regarding a partnership or joint venture regarding a certain piece of real Property. "The elements for breach of contract are the existence of the contract, its breach, and the damages caused by such breach." *Branche Builders, Inc. v. Coggins*, 386 S.C. 43, 48, 686 S.E.2d 200, 202 (2009). The evidence presented to the Court and jury, including testimony, photographs, and records of deeds, demonstrated the terms of the agreement, the Respondent's failure to perform under that agreement, and the damages Duncan suffered as a direct result of Respondent's breach of the agreement. Such evidence foreclosed the granting of a

directed verdict and, therefore, this Court should find the trial court's ruling erroneous.

i. The evidence supported a finding of an existence of a contract.

South Carolina law provides that the partnership arrangement between Duncan and Gill and Gill's subsequent failure to pay Duncan from the profits of the sale of the Property meet the requirements for an action for breach of contract.

> Where the parties to a contract, by their acts, conduct, or agreement show that they intended to combine their property, labor, skill and experience, or some of these elements on one side, and some on the other, to carry on, as principals or co-owners, a common business, trade, or venture as a commercial enterprise, and to share, either expressly or by implication, the profits and losses or expenses that may be incurred, such parties are partners.

Stephens v. Stephens, 213 S.C. 525, 532, 50 S.E.2d 577, 580 (1948). A partnership is an association of two or more persons to carry on as co-owners a business for profit. S.C. Code Ann. § 33-41-210 (Supp. 2003); *see Wyman v. Davis*, 223 S.C. 172, 174, 74 S.E.2d 694, 698 (1953); *Halbersberg v. Berry*, 302 S.C. 97, 101, 394 S.E.2d 7, 10 (1990); *Beck v. Clarkson*, 300 S.C. 293, 301, 387 S.E.2d 681, 685 (1989); *Buffkin v. Strickland*, 280 S.C. 343, 345, 312 S.E.2d 579, 580 (1984). "A partnership agreement may rest in parol. It may be implied and without express intention." *Wyman*, 223 S.C. at 174, 74 S.E.2d at 698; *Halbersberg*, 302 S.C. at 101, 394 S.E.2d at 10; *accord Beck*, 300 S.C. at 301, 387 S.E.2d at 685; *Buffkin*, 280 S.C. at 345, 312 S.E.2d at 580. Further, a partnership may be found to exist by implication from the parties' conduct. *Corley v. Ott*, 326 S.C. 89, 92, 485 S.E.2d 97, 99 (1997); *Stephens*, 213 S.C. at 532, 50 S.E.2d at 580. "One of the most important tests as to the existence of a partnership is the intention of the parties." *Id.* at 530-31, 50 S.E.2d at 579. The evidence presented supported a finding that the Duncan and Gil, by their acts, conduct, and agreement intended to combine their property, labor, skill, and experience to carry on, as partners in the common venture of flipping the Property, and to share the profits and losses or expenses that may be incurred. Specifically,

[...]. Thus, Duncan and Gill entered into a partnership.

In its decision to grant the Respondent's Motion for Directed Verdict, the trial court stressed concern over whether adequate evidence was presented concerning Appellant's control over the "partnership." Not only was adequate evidence of control presented by Appellant, but no such showing is required under South Carolina law. To determine whether a partnership exists, the following tests are used: (1) the sharing of profits and losses; (2) community of interest in capital or property; and (3) community of interest in control and management. *Wyman*, 223 S.C. at 181, 74 S.E.2d 694; *Stephens*, 213 S.C. at 531, 50 S.E.2d at 579; *Halbersberg*, 302 S.C. at 101, 394 S.E.2d at 10. Importantly, South Carolina's Supreme Court has expressly held that a failure of the agreement to meet all three of these would not preclude a finding of a partnership. *Price v. Middleton*, 75 S.C. 105, 108-09, 55 S.E. 156, 157-58 (1906) (subsequently cited approvingly by Kuznik v. Bees Ferry Assocs., 342 S.C. 579, 598, 538 S.E.2d 15, 25 (Ct. App. 2000)). In *Price*, the Supreme Court explicitly held:

> Nor is the [finding of a partnership] ***determined*** by the fact that there is community of interest and that each party is a principal with authority to act as agent for all the others concerned, nor by the ***lack*** of such authority; for there may be common ownership of property and a power of attorney to each owner from the others to sell and divide the proceeds, but this would confer no right on each to bind the others as partners or to do anything beyond the express authority conferred; and, on the other hand, a valid contract of partnership may be made stipulating that one of the partners would have the management of the business to the exclusion of all the others, and the stipulation would be good between the parties.

Id. (emphasis added). Thus, partners are free to stipulate as to what types of "control" or management authority each partner may have in the partnership. While true, South Carolina courts have required evidence of control for purposes of finding a joint venture in relation to an imputation of liability to third parties to members of a common enterprise or joint venture, these cases are not only distinguishable but do not concern disputes amongst the partners or joint

ventures. *See Spradley v. Houser*, 247 S.C. 208, 212, 146 S.E.2d 621, 623 (1966) (holding control of enterprise as essential for finding common purpose on the part of all employees). Respectfully, the evidence presented at trial provided overwhelming and ample evidence of a partnership between Duncan and Gill.

ii. The evidence supported a finding of the Respondent's breach.

Duncan testified that the Respondent breached three material terms of the partnership agreement. All three were material terms. First, a material term of the partnership agreement was the joint purchasing of the property. Duncan testified that the Respondent, in breach of the agreement, purchased the property in his own name. Second, a material term of the partnership agreement between Duncan and Gill was that they would split the profits. Duncan testified that Gill made no such payments. Further, Duncan testified that while she used her savings during the first four months of the partnership, Respondent promised to make payments of $2,400 per month as a draw against her share of the profit she was to receive when the Property sold. Appellant testified that Respondent refused to advance the $2,400 after Ms. Duncan's savings had been exhausted.

iii. The evidence supported a finding of Appellant being directly harmed.

Additionally, the evidence presented provided ample support for a finding that Respondent's breaches, specifically his failure to pay the Appellant her share of the profits, directly harmed her. The purpose of an award of damages for breach of contract is "to give compensation, that is, to put the Appellant in as good a position as he would have been in had the contract been performed." *Drews Co. v. Ledwith-Wolfe Assocs., Inc.*, 296 S.C. 207, 209, 371 S.E.2d 532, 533 (1988) (citing 11 S. WILLISTON, *A TREATISE ON THE LAW OF CONTRACTS* § 1338 (3d ed. 1968)). The proper measure of that compensation, then, "is the loss

actually suffered by the [Appellant] as the result of the breach." *Id.* (citing *S.C. Fin. Corp. v. W. Side Fin. Co.*, 236 S.C. 109, 122, 113 S.E.2d 329, 335 (1960)).

> In a breach of contract action, damages serve to place the nonbreaching party in the position he would have enjoyed had the contract been performed. [...] In the normal case, the damage will consist of two distinct elements: (1) out-of-pocket costs actually incurred as a result of the contract; and (2) the gain above costs that would have been realized had the contract been performed.

S.C. Fed. Sav. Bank v. Thornton-Crosby Dev. Co., 303 S.C. 74, 77, 399 S.E.2d 8, 10-11 (1990).

> Generally, in order for damages to be recoverable, the evidence should be such as to enable the court or jury to determine the amount thereof with reasonable certainty or accuracy. While neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation, proof with mathematical certainty of the amount of loss or damage is not required.

Whisenant v. James Island Corp., 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981). Here, the Appellant explicitly testified and presented documented evidence concerning the promise for a split in profits resulting from the agreement and the Respondent's failure to pay those profits to Appellant. Thus, adequate evidence of damages were presented.

"'Profits' have been defined as 'the net pecuniary gain from a transaction, the gross pecuniary gains diminished by the cost of obtaining them.' Id. (citing Restatement of Contracts § 331, Comment B (1932); *See Mali v. Odom*, 295 S.C. 78, 367 S.E.2d 166 (1988) (defining "profits" as the net of income over expenditures during a given period)). Profits lost by a business as the result of a contractual breach have long been recognized as a species of recoverable consequential damage in this state. *John D. Hollingsworth on Wheels, Inc. v. Arkon Corp.*, 279 S.C. 183, 305 S.E.2d 71 (1983); *S.C. Fin. Corp. v. W. Side Fin. Co.*, 236 S.C. 109, 113 S.E.2d 329 (1960). The case of *Drews Co. v. Ledwith-Wolfe Assocs.* articulates the standard of proof for proving lost profits:

> The same standards that have for years governed lost profits awards in South Carolina will apply with equal force to cases where damages are sought for a new

> business or enterprise. First, profits must have been prevented or lost "as a natural consequence of" the breach of contract.
>
> The second requirement is foreseeability; a breaching party is liable for those damages, including lost profits, "which may reasonably be supposed to have been within the contemplation of the parties at the time the contract was made as a probable result of the breach of it."
>
> The crucial requirement in lost profits determinations is that they be established with reasonable certainty, for recovery cannot be had for profits that are conjectural or speculative. The proof must pass the realm of conjecture, speculation, or opinion not founded on facts, and must consist of actual facts from which a reasonably accurate conclusion regarding the cause and the amount of the loss can be logically and rationally drawn.

Drews Co., 296 S.C. at 213, 371 S.E.2d at 535-36 (internal citations and quotations omitted); *see Beck v. Clarkson, 300 S.C. 293, 298, 387 S.E.2d* 681, 684 (Ct. App. 1989) (citing the factors in Drews). The requirement to establish lost profits with "reasonable certainty" permits "an inherent flexibility facilitating the just assessment of profits lost to a new business due to contractual breach." *Drews Co.*, 296 S.C. at 214, 371 S.E.2d at 536.

The standard for proving lost profits complies with the general rule for recovery of damages, which mandates that the fact finder determine the amount of damages with reasonable certainty from the evidence. *Minter v. GOCT, Inc.*, 322 S.C. 525, 528, 473 S.E.2d 67, 70 (1996). The amount of damages cannot be left to conjecture, guess, or speculation; however, mathematical certainty is not required. *Id. .; see Yadkin Brick Co. v. Materials Recovery Co., L.P.*, 339 S.C. 640, 646, 529 S.E.2d 764, 767 (2000) ("The amount of damages need not be proved with mathematical certainty. The evidence, however, should be such that a court or jury can reasonably determine an appropriate amount."); *Minter*, 322 S.C. at 528, 473 S.E.2d at 70 ("While proof of mathematical certainty is not required, the amount of damages cannot be left to conjecture, guess, or speculation."). Case law in South Carolina has defined "reasonable certainty":

> To warrant such recovery, loss of profits must be established with reasonable certainty, for recovery cannot be had for profits that are conjectural or speculative. But it must be borne in mind that since profits are prospective they must, to some extent, be uncertain and problematical, and so, on that account or on account of the difficulties in the way of proof, a person complaining of breach of contract cannot be deprived of all remedy, and uncertainty merely as to the amount of profits that would have been made does not prevent a recovery. The law does not require absolute certainty of data upon which lost profits are to be estimated, but all that is required is such reasonable certainty that damages may not be based wholly upon speculation and conjecture, and it is sufficient if there is a certain standard or fixed method by which profits sought to be recovered may be estimated and determined with a fair degree of accuracy.

Beck, 300 S.C. at 298-99, 387 S.E.2d at 684 (quoting *S.C. Fin. Corp. v. W. Side Fin. Co.*, 236 S.C. 109, 122-23, 113 S.E.2d 329, 336 (1960)).

Here, Duncan not only testified regarding the original purchase price and later sales price of the Property, but the very deeds evidencing these transactions were presented. Not only did the evidence prevent a jury from needing to conjecture, guess, or speculate; it provided with a mathematical certainty not required. The trial court erroneously assumed for expedience that additional evidence might be presented concerning additional costs that might reduce the lost profit amount. This is especially ergregious in conjunction with a motion for directed verdict. *See Jones*, 331 S.C. at 356, 503 S.E.2d at 176. Thus, ample evidence was presented as to the direct harm suffered by Duncan as a result of Gill's breaching the agreement.

B. Appellant adequately presented a prima facie case for a breach of contract accompanied by a fraudulent act.

In order to maintain a claim for breach of contract accompanied by a fraudulent act, a plaintiff must prove three elements: (1) a breach of contract; (2) "[f]raudulent intent relating to the breaching of the contract and not merely to its making;" and (3) "[a] fraudulent act accompanying the breach." *Floyd v. Country Squire Mobile Homes, Inc.*, 287 S.C. 51, 53-54, 336 S.E.2d 502, 503-04 (1985) (citations omitted). "The fraudulent act is any act characterized

by dishonesty in fact or unfair dealing." *Conner v. City of Forest Acres*, 348 S.C. 454, 466, 560 S.E.2d 606, 612 (2002).

> "Fraud," in this sense, "assumes so many hues and forms, that courts are compelled to content themselves with comparatively few general rules for its discovery and defeat, and allow the facts and circumstances peculiar to each case to bear heavily upon the conscience and judgment of the court or jury in determining its presence or absence."

Id. (quoting *Sullivan v. Calhoun*, 117 S.C. 137, 139, 108 S.E. 189, 189 (1921)).

> Breach of contract accompanied by a fraudulent act . . . requires proof of fraudulent intent relating to the breaching of the contract and not merely to its making. Such proof may or may not involve false representations.

Ball v. Canadian Am. Express Co., 314 S.C. 272, 276, 442 S.E.2d 620, 623 (1994) (citation omitted). "Fraudulent intent is normally proved by circumstances surrounding the breach." *Floyd*, 287 S.C. at 54, 336 S.E.2d at 503-04. "The fraudulent act may be prior to, contemporaneous with, or subsequent to the breach of contract, but it must be connected with the breach itself and cannot be too remote in either time or character." *Id.* at 53-54, 336 S.E.2d at 503-04 (citations omitted) . In *Corley v. Coastal States Life Ins. Co.*, 244 S.C. 1, 135 S.E.2d 316 (1964), the Supreme Court held that a misrepresentation made in reckless disregard for the truth will support an action for breach of contract accompanied by a fraudulent act. Finally, good faith is implied in every contract in South Carolina. Good faith is defined as "honesty in fact."

The record is clear that the Respondent's conduct was intentionally dishonest in every way and was directly connected with his failure to pay the Appellant in accordance with the agreement. Duncan testified that the agreement was to purchase the Property together. Several days later she discovered from others that Gil purchased the Property in his name alone. Duncan testified that Gil promised to begin making certain draw payments against her portion of the profit after a certain period of time. Not only did the draws either not get paid or were underpaid,

but Gill continued to intentionally mislead Duncan with promises that he would make the payments. Further, Duncan testified as to the Respondents taking advantage of her financial distress so as to try and force Appellant to accept a reduced percentage of profit. Finally, Duncan testified that when she refused to continue performing work as long as Gill did not pay her the draws, Gill forcibly kept her from returning to the Property of the partnership. All of these acts evidence a dishonesty in fact or unfair dealing necessary to find a breach of contract accompanied by fraudulent acts.

C. Appellant adequately presented a prima facie case for the establishment of a constructive trust.

A constructive trust arises whenever the circumstances under which a property was acquired make it inequitable that it should be retained by the other party. It results from fraud, bad faith, abuse of confidence, or violation of a fiduciary duty which gives rise to an obligation in equity to make restitution. It is resorted to by equity to vindicate right and justice or frustrate fraud. Thus, in order to show the Respondent held certain property for the benefit of the Appellant under a constructive trust, the Appellant must show that the Respondent obtained the property through some fraudulent or bad faith act that would make it inequitable for them to hold the property without considering the rights of the Appellant to that property. *See Lollis v. Lollis*, 291 S.C. 525, 530, 354 S.E.2d 559, 561 (1987); *Whitmire v. Adams*, 273 S.C. 453, 457, 257 S.E.2d 160, 163 (1979); *Strategic Res. Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006).

Here, the Appellant presented clear and convincing evidence that she entered into a partnership agreement with the Respondent regarding the Property. The very purpose of the partnership agreement was to purchase, increase the value of, and later sell the Property for a profit to be split by the partners.

> The law holds each member of a partnership to the **highest degree of good faith** in his dealings with reference to any matter which concerns the business of the common engagement, and each partner, being the agent of the firm, must be held to the same accountability as other trustees, in all matters which affect the common interest. The relationship of a partnership is fiduciary in character and imposes on the members the obligation of refraining from taking any advantage of one another by the slightest misrepresentation or concealment.

Lawson v. Rogers, 312 S.C. 492, 498-99, 435 S.E.2d 853, 857 (1993). In *Corley*, 326 S.C. 89, 485 S.E.2d 97, the Court held a partner's failure to disclose to another partner that he had purchased land later purchased by the partnership constituted a breach of fiduciary duty even though a written partnership agreement did not come into existence until after the land was purchased. The evidence before this Court clearly established, not only a partnership relationship, but a breach of the duties of highest degree of good faith and actions of bad faith by the Respondent's obtaining the Property in his name alone and without notice to his partner. Finally, the evidence clearly supported a finding that the Respondents retaining the Property or the proceeds from its sale would be inequitable. Thus, South Carolina law provides that the Appellant met its burden and the trial court erred in granting the directed verdict.

D. Appellant adequately presented a prima facie case for an action under South Carolina's betterment statute.

South Carolina's Betterment Statute, provide remedies for individuals that make improvements to real property. A person who may have made improvements or betterments on such land, believing at the time he made such improvements or betterments that they had an interest in the property, may have a claim against the [other party] for so much money as the land has been increased in value as a consequence of the improvements made by that person or by any person directed by that person. *See* S.C. Code Ann. § 27-27-10 (Supp. 2003). Thus, if a party believes that they have an interest in the land, such as an interest in any profits made from the sale of that land, and makes improvements based upon this belief, then that person is entitled to

recover the value created by the improvements. *Id.* . This statute, however, requires that any person claiming such an interest in the land must show that the owner of the land neglected to fulfill some part of a contract regarding that land.

Here the Appellant presented evidence that the Respondent failed to fulfill his obligations relating to the Partnership agreement. The Respondent allowed the Appellant to use her time and talent to make the improvements to the Property that increased its value from $93,000 to $280,000. The Respondent failed to fulfill his obligations to share in the profits of the sale of the Property. Therefore, the Appellant has presented sufficient evidence to allow a jury to award a judgment based upon the betterment statute.

II. The Trial Court erred in admitting into evidence Rule 408 evidence.

Prior to trial, Appellant moved *in limine* to bar Respondent from introducing certain Rule 408 discussions between Appellant and Respondent. The trial court erroneously overruled the objection, holding such evidence was not covered under Rule 408 because it was specifically being presented not only to establish the parties were attempting to put into writing a compromise of the agreement, but what the terms of the settlement may have been and that it was negotiated prior to actual litigation being brought. Specifically, the trial court ruled:

> "I'll allow it in. It appears what was presented to the Court was during the course of the relationship, that what was presented to the Court, that that particular contract was an attempt to create a contract, which is certainly one of the issues in the case. Whether there's a contract (indiscernible) or not, certainly 408 generally anticipating that litigation has begun and certainly 408 prohibits offers of compromise and settlement after litigation has started. That's not the facts of this particular case in that particular document, so I'll allow the defense to refer to it in their opening."

(Tr. pp. 37 ¶¶ 19-25 through P. 38 ¶¶ 1-5). This ruling stands in direct contrast to the South Carolina rules of evidence, was prejudicial to the Appellant, and should result in Appellant being granted a new trial.

South Carolina courts "hold fast to the longstanding principle that evidence of conduct or statements made in compromise negotiations is inadmissible because the law favors compromise." *Edwards v. Scapa Waycross, Inc.*, 437 S.C. 396, 426-27, 878 S.E.2d 696, 712-13 (Ct. App. 2022); *see QHG of Lake City, Inc. v. McCutcheon*, 360 S.C. 196, 209, 600 S.E.2d 105, 111 (2004). Rule 408, SCRE, provides:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Rule 408, SCRE. The document and accompanying testimony directly related to the Appellant and Respondent seeking to compromise the then pending claims among them regarding services alleged to have taken place at the Property. In other words, evidence of an offer to compromise.

The evidence before the trial court plainly established Rule 408 protected the contract from being used as evidence. The Appellant presented evidence that the Respondent had already failed to perform obligations under the alleged agreement prior to the discussions and drafting of the agreement Respondent placed into evidence and elicited testimony from Appellant. The Appellant testified that Respondent had already hired an attorney regarding the dispute. Ignoring these facts, the Court erroneously permitted counsel for the Respondent to discuss in opening arguments the document and testimony regarding that document and later enter into evidence the same for the purpose of establishing terms of the offer of settlement as evidence of an accord and satisfaction.

Although these claims could amount to a party admission, this type of admission—made for the purpose of settling a claim—is precisely what Rule 408, SCRE, was designed to exclude at trial. *Edwards*, 437 S.C. at 426-27, 878 S.E.2d at 712-13.

> The purpose of Rule 408 is to encourage free and unfettered negotiation while providing parties peace of mind that their negotiations—concessions, denials, admissions, and claim amounts—cannot be used against them to prove liability for the disputed claims or its amount at trial.

Id. (citations omitted); *see also QHG of Lake City, Inc.*, 360 S.C. at 209, 600 S.E.2d at 111 ("Because the law favors compromises, our appellate courts have long held that testimony as to negotiations and offers to compromise are inadmissible for proving liability."); *Hunter v. Hyder*, 236 S.C. 378, 387, 114 S.E.2d 493, 497 (1960) ("This Court has held that compromises are favored and evidence of an offer or attempt to compromise or settle a matter in dispute cannot be given in evidence against the party by whom such offer or attempt was made."); *Fesmire v. Digh*, 385 S.C. 296, 307-08, 683 S.E.2d 803, 809 (2009) ("[Rule 408, SCRE] contemplates that the parties need to feel free to make certain assumptions for the purpose of settlement negotiations and that those statements are assumed by the author to be true only for the purpose of compromise negotiations.").

Other jurisdictions have ruled that for Rule 408 to apply, there must be actual dispute, or at least apparent difference of opinion between parties, as to validity of claim. *See Dallis v. Aetna Life Ins. Co.*, 768 F.2d 1303, 18 (11th Cir. 1985) Fed. R. Evid. Serv. (CBC) *976*, 1985 U.S. App. LEXIS 21351 (1985) (11th Cir. 1985); *see also Weems v. Tyson Foods, Inc.*, 665 F.3d 958, 114 (8th Cir. 2011) Fair Empl. Prac. Cas. (BNA) 65, 87 Fed. R. Evid. Serv. (CBC) *301*, 2011 U.S. App. LEXIS 25876 (2011) (8th Cir. 2011) (Dispute need not crystallize to point of threatened litigation for Fed. R. Evid. 408 exclusion rule to apply; dispute exists for Rule 408 purposes so long as there is actual dispute or difference of opinion regarding party's liability for

or amount of claim); *Bradbury v. Phillips Petrol. Co.*, 815 F.2d 1356, 1364 (10th Cir. 1987) (explaining "when the issue is doubtful, the better practice is to exclude evidence of compromises or compromise offers"). Here, there has been established by the testimony that not only had an actual dispute arisen, but that both parties were disagreeing as to how it should be resolved. The disagreement was of such an extent, that the Respondent had already hired counsel regarding the very dispute.

Finally, the Respondent is unable to show another permissible cause for admission of the evidence. *See, e.g.,* B*reuer Elec. Mfg. Co. v. Toronado Sys. of Am., Inc.,* 687 F.2d 182, 185 (7th Cir. 1982) (holding existence of settlement negotiations admissible to rebut claim that party had no knowledge of suit); *Prudential Ins. Co. v. Curt Bullock Builders, Inc.*, 626 F. Supp. 159, 165 (N.D. Ill. 1985) (holding occurrence of settlement talks admissible to establish agency relationship). Thus, the document and any testimony regarding the same must be held as inadmissible.

The document introduced and testimony elicited by counsel for the Respondent was inadmissible under Rule 408 of the South Carolina Rules of Evidence. Contrary to the holding of the trial court, litigation need not be even threatened, let alone started for the protections to apply under South Carolina law. It is not being offered for any of the potentially allowable purposes such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. The only evidence that even arguably contradicted the testimony of the witnesses, was the settlement offer. Without such evidence, no reasonable person could grant a directed verdict. Therefore, the court erroneously admission of such evidence was prejudicial and should be reversed.

III. The Trial Court erred in excluding witness testimony it deemed hearsay.

The trial court erroneously applied its own hearsay rule in sustaining counsel for the Appellants objections concerning what it ruled was hearsay testimony. On multiple occasions, when presenting her case in chief, the Appellant sought to testify concerning conversations with the Respondent and statements the Respondent made to her. On many of these occasions, counsel for the Respondent objected on the grounds that such testimony was hearsay. The court erroneously sustained these objections, effectively precluding the admission of relevant evidence that could further establish the necessary facts in support of Appellant's claims against the Respondent. The trial court's rulings were not only grossly erroneous, but ultimately prejudicial, as the trial court ignored the rest of the mountain of evidence supporting Appellant's claims when granting the directed verdict.

"The rule against hearsay prohibits the admission of evidence of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies." *Fowler v. Nationwide Mut. Fire Ins. Co.*, 410 S.C. 403, 411, 764 S.E.2d 249, 253 (2014); see also Rule 802, SCRE ("Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute."). "A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . the party's own statement in either an individual or representative capacity." Rule 801(d)(2)(A), SCRE. "As a general rule, statements or declarations made by one accused of a crime are admissible against him." *State v. Beck*, 342 S.C. 129, 134, 536 S.E.2d 679, 682 (2000) (quoting *State v. Plyler*, 275 S.C. 291, 295, 270 S.E.2d 126, 128 (1980)). "Of course, such evidence must meet the threshold test of admissibility." Id. 342 S.C. 129, 134, 536 S.E.2d 679, 682.

Generally, all relevant evidence is admissible. Rule 402, SCRE; *State v. Saltz*, 346 S.C. 114, 127, 551 S.E.2d 240, 247 (2001). Relevant evidence is evidence having any tendency to

make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rule 401, SCRE. Relevant evidence may be excluded where "its probative value is substantially outweighed by the danger of unfair prejudice." *Saltz*, 346 S.C. at 127, 551 S.E.2d at 247.

Here, the Court did not find that the evidence was irrelevant or even unfairly prejudicial. Rather, the Court failed to apply Rule 801(d)(2)(A), SCRE. The testimony counsel for Appellant sought to enter into evidence included statements made by the Respondent in discussions with the Appellant and statements made by the Respondent in discussions with the Appellant that were overheard by another witness. This testimony is admissible under the South Carolina rules of evidence and the Court erred in ruling otherwise.

CONCLUSION

The Court erred when it (1) directed verdict for the Respondent; (2) allowed inadmissible evidence of settlement discussions; and (3) precluded evidence exempt from the rule of hearsay. The evidence presented to the Court and jury provided ample evidence raising issues of fact for the jury to decide whether the Respondent breached a contract with the Appellant, such breach was accompanied by fraudulent acts, a constructive trust was created with regard to the Property, and whether Appellant was entitled to damages under the betterment statute. The erroneous rulings regarding evidence were prejudicial. Thus, this Court should, respectfully, overturn the ruling of the Trial Court and grant the Appellant a new trial.

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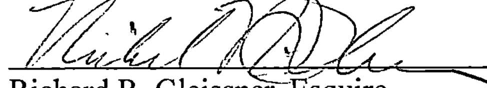

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February 16, 2024

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable Daniel D. Hall, Circuit Court Judge

Case No: 2019-CP-28-00680
Appellate Court Case Number 2022-001789

Sherry Killian Duncan, ... Appellant,

v.

Gurdip S. Gill a/k/a Gary Gurdip a/k/a Gary Gurdip Gill, ... Respondent.

PROOF OF SERVICE

I certify that I have served the Appellant's Initial Brief and Designation of Matter on the Respondents by email on February 16, 2024, addressed to their attorneys of record as follows:

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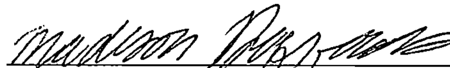

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