THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Walton J. McLeod, IV, Circuit Court Judge

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Appellate Case No. 2024-000489

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212 Motors Holding Group, LLC, 212 Motors Columbia, LLC, 212 Motors Florence, LLC, Team 212 Columbia, LLC, and Team 212 Florence, LLC, Appellants,

v.

Adam Maisano, Respondent.

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# INITIAL BRIEF OF APPELLANTS

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TABLE OF CONTENTS

Tables of Authorities.....ii
Statement of Issues on Appeal.....1
Statement of the Case.....1
Standard of Review.....10
Argument.....10
Conclusion.....18

TABLE OF AUTHORITIES

CASES

*Briggs v. Blomkamp*, No. C 13-4679 PJH, 2014 WL 12567155 (N.D. Cal. Aug. 4, 2014).....17

*C-Sculptures, LLC v. Brown*, 403 S.C. 53, 56, 742 S.E.2d 359, 360 (2013).....10

*C.A.N. Enterprises, Inc. v. South Carolina Health & Human Servs. Fin. Comm'n*, 296 S.C. 373, 373 S.E.2d 584 (1988).....12, 15

*Clary v. Borrell*, 398 S.C. 287, 297, 727 S.E.2d 773, 778 (Ct. App. 2012).....11

*Crosby v. Sahuque Realty Co., Inc.*, 122 So.3d 1197, 2012-1537 (La.App. 4 Cir. 8/21/13).....17

*Floyd v. Dross*, 442 S.C. 79, 92, 897 S.E.2d 191, 198 (Ct. App. 2024).....13

*Harris v. Wells Fargo Clearing Servs., LLC*, 18-CV-4625, 2019 WL 2343383 (S.D.N.Y.).....17

*Hicks Unlimited, Inc. v. UniFirst Corp., A Mass. Corp.*, 439 S.C. 623, 634, 889 S.E.2d 564, 570 (2023).....16

*Stanley v. Atlantic Title Ins. Co.*, 377 S.C. 405, 414, 661 S.E.2d 62, 67 (2008).....12

*Takaki v. Allied Machinery Corp.*, 87 Hawai'i 57, 69, 951 P.2d 507, 519 (App.1998).....17

OTHER AUTHORITIES

17A Am.Jur.2d Contracts § 338 (1991).....11, 14

## STATEMENT OF ISSUES ON APPEAL

1. DID THE ARBITRATOR EXCEED HIS POWER BY ORDERING THE PARTIES TO VIOLATE THEIR CONTRACTUAL AGREEMENT ON CLOSING?
2. DID THE LOWER COURT ERR IN CONSIDERING THE RESPONDENT'S MOTION, MEMORANDUM, AND EXHIBITS AS EVIDENCE?

## STATEMENT OF THE CASE

### PROCEDURAL HISTORY

Maisano ("the Respondent") is a member of 212 Motors Holding Group, LLC; Team 212 Florence, LLC; and Team 212 Columbia, LLC (collectively, "212 Motors"). 212 Motors is the sole member of 212 Motors Columbia, LLC and 212 Motors Florence, LLC.

On June 30, 2020, the members of 212 Motors Holding Group, LLC executed an Amended and Restated Operating Agreement. On or about June 30, 2020, and on or about November 24, 2020, the members of Team 212 Florence, LLC, and Team 212 Columbia, LLC, respectively, executed Amended and Restated Operating Agreements (collectively, "the Operating Agreement"). (Aff. Rodney Slick, Ex. A). The Operating Agreement is a contract which provides, amongst other things, detailed requirements for the valuation and sale of a member's membership interests. *Id.*

This action commenced with the filing of a Summons and Complaint on March 3, 2023. (Compl.). On March 9, 2023, counsel for the Appellants filed an Affidavit of Service by Certified Mail and attached thereto a copy of the original return receipt indicating receipt of the mailing on March 7, 2023. (Aff. Service).

On April 25, 2023, the Appellants filed a Motion to Stay and to Compel Arbitration. (Mot. Stay and Compel Arb.). On May 8, 2023, counsel for the Respondent filed a notice of appearance. The Respondent did not then, or at any time thereafter, file an answer or any other pleading.

On May 24, 2023, the court entered an Order granting the Plaintiffs' Motion to Stay and to Compel Arbitration. (Order).

On June 6, 2023, all members of 212 Motors executed a Combined Certificate of Action Taken ("the Certificate"), the purpose of which was to name John Cuttino ("the Arbitrator") as arbitrator and to amend procedures for the selection of a neutral appraiser set forth in the Operating Agreement. (Aff. J. Bradley Studemeyer, Ex. C). Specifically, the Certificate granted the Arbitrator the power to select a neutral appraiser to determine the Interest Value of the Respondent's membership interests in 212 Motors. *Id.*

On June 16, 2023, the Arbitrator selected Stuart McCallum of Withum Smith+Brown, PC ("the Appraiser") to serve as the neutral appraiser. (Aff. J. Bradley Studemeyer, Ex. D).

On November 6, 2023, the Appraiser produced an initial report. (Aff. J. Bradley Studemeyer, Ex. F).The valuation contained in the initial report was conducted without reference to the requirements for determining Interest Value mandated by the Operating Agreement. (Aff. J. Bradley Studemeyer, Ex. H).

On December 14, 2023, the Arbitrator convened a conference call with the parties and the Appraiser to discuss the initial report. (Aff. J. Bradley Studemeyer). Both prior to and during the conference call, 212 Motors identified failures by the Appraiser to comply with the requirements set forth in the Operating Agreement. *Id.*

On December 21, 2023, the Appraiser produced a revised report. (Aff. J. Bradley Studemeyer, Ex. I). The valuation contained in the revised report again failed to comply with the requirements for determining Interest Value mandated by the Operating Agreement. (Aff. J. Bradley Studemeyer).

On January 29, 2024, upon demand of the Respondent, the Arbitrator ordered 212 Motors to proceed to closing at the valuation determined by the Appraiser in its revised report. (Order Lift. Stay

Confirm. Arb. Award). The Arbitrator did not hold that the Appraiser had determined the Interest Value of the Respondent's membership interests. *Id.*

212 Motors refused to proceed to closing, citing the Appraiser's repeated failure to comply with the contractual terms agreed upon by the members. *Id.*

On February 2, 2024, the Respondent filed a Motion to Lift Stay, to Compel Enforcement of Settlement and Arbitrator's Award, and for Sanctions and Attorney's Fees in the Court of Common Pleas. (Mot. Lift Stay). On February 23, 2024, the Respondent filed a Memorandum in Support of its Motion to Lift Stay, to Compel Enforcement of Settlement and Arbitrator's Award, and for Sanctions and Attorney's Fees. In neither his motion nor his memorandum did the Respondent allege that the Appraiser had determined the Interest Value of his membership interests. *Id.*

On February 23, 2024, 212 Motors filed a Memorandum in Opposition, demonstrating that closing was a matter of contract between the members of 212 Motors, that the closing was contingent on the Appraiser's determination of the Interest Value of the Respondent's membership interests, that the Appraiser had failed and refused to determine the Interest Value of the Respondent's membership interests, and that the valuation produced by the Appraiser was void *ab initio*.

On February 26, 2024, 212 Motors filed the Affidavit of Mark Swanson, CPA, CVA, in which Swanson affirmed that he had reviewed the Operating Agreement, the Certificate, and the Appraiser's reports, and confirmed that the Appraiser had never provided the parties with the Interest Value of the Respondent's membership interests. (Aff. Mark Swanson).

On March 8, 2024, the trial court issued an Order Lifting Stay and Confirming Arbitration Award. (Order Lift. Stay Confirm. Arb. Award). The trial court did not hold that the Appraiser had determined the Interest Value of the Respondent's membership interests, nor did it hold that the

arbitrator had made any such holding. *Id.* Nonetheless, the trial court ordered the parties to proceed to closing within three days. *Id.*

No closing occurred. On March 14, 2024, the Respondent filed a Motion for Rule to Show Cause. (Mot. Rule Show Cause). On March 20, 2024, the Respondent filed a Memorandum in Support of Motion for Rule to Show Cause. On March 22, 2024, 212 Motors filed a Memorandum in Opposition to Motion for Rule to Show Cause.

On March 25, 2024, 212 Motors filed a Notice of Appeal.

## FACTS

The Operating Agreement is a contract between the members of 212 Motors that governs the relations between members and relations between members and 212 Motors. (Aff. Rodney Slick, Ex. A).

Section 8.2 of the Operating Agreement, "Right of First Refusal," provides that a member who wishes to transfer any membership interest (an "Offering Member") shall "be deemed to have offered to sell his, her, or its Membership Interest otherwise to be Transferred (the 'Offered Interest'*) to the LLC* at the Agreement Price." *Id.* [emphasis added]. Section 8.3, "Agreement Price," provides that if a proposed transfer of membership interests is "not a bona-fide, third-party transaction," the "Agreement Price" that 212 Motors must pay for a member's membership interests is "an amount equal to the Interest Value." *Id.*

Section 8.3 defines Interest Value as follows:

> The "Interest Value" shall be equal to fair market value of the Offered Interest, as determined by appraisers selected as provided in this Section 8.3 and considering

the fair market value of the LLC's assets, less an imputed sales commission equal to seven percent (7%) of the LLC's assets;

the amount of LLC liabilities;

the percentage of ownership represented by that Offered Interest; and

the Offering Member's Capital Account, and debt obligations owed to and by the Offering Member to the LLC.

*Id.*

Section 8.3 of the Operating Agreement further provides that "[t]he Offering Member and the LLC shall each select one (1) appraiser to determine the Interest Value of the Offered Interest." *Id.* Section 8.3 of the Operating Agreement provides instructions for when the appraisers disagree as to the Interest Value of the Offered Interest; "If the two (2) appraisers so selected cannot agree upon the Interest Value of the Offered Interest, the two (2) appraisers shall select a third appraiser, whose decision in this matter shall be conclusive." *Id.* The Operating Agreement does not, however, provide a method for selecting a third appraiser when the two appraisers could not agree upon a neutral appraiser. *Id.*

The appraiser selected by 212 Motors and the appraiser selected by the Respondent could not agree upon a third appraiser. (Aff. J. Bradley Studemeyer, Ex. C). To address this impasse, the members executed the Certificate on June 6, 2023. *Id.* The Certificate is a contract between the members of 212 Motors. *Id.* The first substantive paragraph of the Certificate provides, in its entirety,

WHEREAS, the Undersigned Members agree that the membership interests of [the Respondent] will be purchased **by the Company at their "Interest Value," as that term is defined in § 8.3** in each operating agreement executed for the above-mentioned companies (collectively, "the Operating Agreement").

[emphasis added].

The parties then agreed that "the Operating Agreement fails to provide a method for determining the Interest Value of a member's membership interests when the offering member and the Company are unable to agree upon a neutral appraiser," and further agreed, that the Respondent "and the Company are unable to agree upon a neutral appraiser to determine the Interest Value of [the Respondent's] membership interests." *Id.* Having acknowledged their impasse, the parties resolved to amend "the valuation and purchase procedures contained within the Operating Agreement." *Id.*

Specifically, the parties agreed "to submit the selection of an appraiser to arbitration," with arbitration conducted by a single arbitrator (rather than a panel of three arbitrators as required by § 12.14 of the Operating Agreement). *Id.* Once the appraiser was selected by the arbitrator, the following was to occur:

> VII. The undersigned Members agree that they will cooperate with the requests of the appraiser, including, but not limited to, by providing access to all governing documents, books, accounts, and records that the appraiser may deem relevant to the preparation of his report;
>
> VIII. The undersigned Members agree that **the appraiser will value the Company and the Interest Value of [the Respondent's] membership interests** in the Company as of December 31, 2022;
>
> IX. The undersigned Members agree that they will **accept the valuations determined by the appraiser as definitive and binding**.
>
> X. The undersigned Members agree that no later than 30 days **following the appraiser's determination of the Interest Value of [the Respondent's] membership interests**, the purchase of [the Respondent's] membership interest by the Company will take place at a closing pursuant to § 8.5 of the operating agreement.

*Id.* [Emphasis added].

The parties thus explicitly conditioned the purchase of the Respondent's membership interests upon an appraiser's determination of their Interest Value in not one, but *two* separate contracts.

Following the selection of the Arbitrator, the Arbitrator solicited recommendations for a neutral appraiser from the parties. (Aff. J. Bradley Studemeyer). The Appraiser selected by the Arbitrator was the candidate contacted and proposed by the Respondent. *Id.*

The Appraiser produced its initial report on November 6, 2023. (Aff. J. Bradley Studemeyer, Ex. F). The valuation contained therein was performed without any reference to the requirements of Section 8.3 of the Operating Agreement. (Aff. J. Bradley Studemeyer, Ex. H). 212 Motors brought this failure to the attention of the Appraiser, who responded, "We did not value the company based on the shareholder agreement." *Id.*

In addition to admitting that it *had not* performed a valuation that complied with the requirements mandated by Section 8.3 of the Operating Agreement, the Appraiser admitted in the report that it *could not* perform such a valuation. (Aff. J. Bradley Studemeyer, Ex. F).

Specifically, while the standard of value mandated by Section 8.3 of the Operating Agreement is "fair market value," the Appraiser represented that he used a different standard of value, "fair value." *Id.* In the introduction to its initial report, the Appraiser noted, "Fair Value is a legally created standard of value that lacks a clear and concise definition and is generally used in dissenting and oppressed shareholder disputes." *Id.* In the body of the report, the Appraiser admitted that he could not utilize any market-based approach because the databases on which the Appraiser relied did not contain "a sufficient number of comparable transactions to utilize." *Id.* Put differently, because the Appraiser (who is based in Orlando, Florida, and whose firm maintains no offices in South Carolina, North Carolina, or Georgia) lacked familiarity with market conditions, the Appraiser could make no findings

whatsoever concerning fair market value. *Id.*

Upon discovering that the Appraiser had failed to abide by the terms of the contract between the members of 212 Motors, 212 Motors alerted the Respondent, the Arbitrator, and the Appraiser. (Aff. J. Bradley Studemeyer). 212 Motors additionally consulted with Mark Swanson and John Beauston with Moore Beauston & Woodham LLP, who, in addition to confirming that the Appraiser had failed to produce the Interest Value of the Respondent's membership interest, also determined that the initial report contained material errors, both of fact and in professional judgment. (Aff. Mark Swanson). 212 Motors requested that the Arbitrator convene a conference call for the parties, their retained valuation experts, and the Appraiser to discuss this initial draft. (Aff. J. Bradley Studemeyer).

The arbitrator convened a conference call on December 14, 2023. *Id.* On the call, the Appraiser agreed to revise their report to conform to requirements of Section 8.3 of the Operating Agreement. McCallum and Shaw also agreed to review the material errors identified by Swanson and Beauston throughout the report. *Id.*

In the revised report, dated December 21, 2023, the Appraiser refused to correct any of the material errors identified by 212 Motors and again refused to abide by the terms of the contract between the members of 212 Motors. (Aff. J. Bradley Studemeyer, Ex. I). Specifically, the Appraiser refused to determine the Interest Value of the Respondent's membership interests as required by Section 8.3 of the Operating Agreement. *Id.* Instead, the Appraiser simply applied "minority and marketability discounts" to the valuation determined in the initial report and declared this new value to be the "Interest Value." *Id.*; (Aff. Mark Swanson).

Nowhere in its revised report did the Appraiser consider an "imputed sales commission equal to seven percent (7%) of the fair market value of the LLC's assets," "the amount of LLC liabilities," or "the Offering Member's Capital Account, and debt obligations owed to and by the Offering Member to

the LLC" in determining the value of the Respondent's membership interests. *Id.* The Appraiser's failure to consider the imputed sales commission and the debts obligations owed by the Respondent are apparent upon a review of the report, but its failure to consider "the amount of LLC liabilities" is admitted by the Appraiser in its introduction, wherein it states,

> [212 Columbia, LLC] has total debt of $1,554,070 as of the Valuation Date. It is our understanding that this is a loan for working capital purposes, and Mr. Maisano is a co-signer for this loan. **We offer no opinion how this loan would factor into the Agreement Price as it falls outside the scope of our determination of fair market value.**

*Id.* [emphasis added].

## STANDARD OF REVIEW

An arbitrator's award will be vacated "when the arbitrator exceeds his or her powers and/or manifestly disregards or perversely misconstrues the law." *C-Sculptures, LLC v. Brown*, 403 S.C. 53, 56, 742 S.E.2d 359, 360 (2013).

## ARGUMENTS

1. An arbitrator's award may be vacated when the arbitrator manifestly disregards or perversely misconstrues the law. The parties agreed to proceed to closing only after the appraiser determined the Interest Value of the Respondent's membership interests. The appraiser did not determine the Interest Value of the Respondent's membership interests, and the arbitrator did not find that the appraiser had determined the Interest Value of the Respondent's membership interests. Did the arbitrator manifestly disregard or perversely misconstrue the law in nonetheless ordering the parties to proceed to closing?

### i. The Operating Agreement and the Certificate are contracts.

The operating agreement of a limited liability company is a binding contract that governs the relations among the members, managers, and the company. *Clary v. Borrell*, 398 S.C. 287, 297, 727 S.E.2d 773, 778 (Ct.App.2012). Generally, operating agreements are superior to statutory authority where they are in place and address a matter, inasmuch as it is only when an operating agreement is silent as to some matter that statutory law will apply. *Id.* The Certificate is a binding contract that governs the relations among the members of 212 Motors. (Aff. Rodney Slick, Ex. A).

### ii. The Certificate defines the scope of arbitration and limits the powers of the Arbitrator.

The Certificate does not grant the Arbitrator a broad array of powers in the valuation process. Instead, the Certificate essentially restricts the arbitrator's authority to two tasks: selecting an appraiser and dividing fees. (Aff. J. Bradley Studemeyer, Ex. C, Par. I, IV, VI). In the Certificate, the parties agreed "to submit the selection of an appraiser to arbitration," and further agreed that "the arbitrator's

choice of appraiser will be definitive." (*Id.*, Par. I, V). The parties further agreed that fee split for both the cost of the appraiser and the arbitrator would be determined by the arbitrator. (*Id.*, Par. IV, VI).

The Certificate explicitly conditions the occurrence of a closing on "the appraiser's determination of the *Interest Value* of [the Respondent's] membership interests," with closing to occur "no later than 30 days following" this determination. (*Id.*, Par. X). [emphasis added]. The Certificate does not grant the Arbitrator *any* authority to modify the preconditions for closing or the timing of closing. (*Id.*, Par. VIII, X).

The Certificate thus explicitly conditions a closing upon an appraiser's determination of the Interest Value of the Respondent's membership interests, as that term is defined by Section 8.3 of the Operating Agreement. (*Id.*, p. 1). Therefore, the Arbitrator was only empowered to order a closing once the parties had received the Interest Value of the Respondent's membership interests from the Appraiser. (*Id.*, Par. X).

**iii. The terms of the Certificate are not reasonably susceptible to more than one interpretation.**

A contract is ambiguous when the terms of the contract are inconsistent on their face, or are reasonably susceptible of more than one interpretation. 17A Am.Jur.2d Contracts § 338, at 345 (1991). "A contract is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." *Id.*

Basic contract law provides that when a contract is clear and unambiguous, the language alone determines the contract's force and effect. *C.A.N. Enterprises, Inc. v. South Carolina Health & Human Servs. Fin. Comm'n*, 296 S.C. 373, 373 S.E.2d 584 (1988). Generally, a contract is "interpreted according to the terms the parties have used, and the terms are to be taken and understood in their plain,

ordinary, and popular sense." *Stanley v. Atlantic Title Ins. Co.*, 377 S.C. 405, 414, 661 S.E.2d 62, 67 (2008).

In the Certificate, the parties agreed that the membership interests of the Respondent "will be purchased by the Company at their 'Interest Value,' as that term is defined in § 8.3" of the Operating Agreement. (Aff. J. Bradley Studemeyer, Ex. C, p. 1).The Interest Value of membership interests is defined in Section 8.3 of the Operating Agreement as

> [E]qual to the fair market value of the Offered Interest, as determined by appraisers selected as provided in this Section 8.3 and **considering**
>
> [1] the fair market value of the LLC's assets, less an imputed sales commission equal to seven percent (7%) of the fair market value of the LLC's assets;
>
> [2] the amount of LLC liabilities;
>
> [3] the percentage of ownership represented by that Offered Interest; **and**
>
> [4] the Offering Member's Capital Account, and debt obligations owed to and by the Offering Member to the LLC.

(Aff. Rodney Slick, Ex. A). [emphasis added].

"Considering," according to Merriam-Webster, means, "taking into account." Merriam-Webster.com Dictionary, Considering (https://www.merriam-webster.com/dictionary/considering. Accessed 3 Apr. 2024). "And" is a "conjunction connecting words or phrases expressing the idea that the latter is to be added or taken along with the first." Black's Law Dictionary, And (4th ed. 1968).

The definition of Interest Value thus imposes four mandatory considerations on an appraiser. A fair market valuation that addresses each of these considerations is a determination of Interest Value. A fair market valuation that fails to address each of these considerations is not.

Paragraphs VIII – X of the Certificate provide the scope of an appraiser's

responsibilities and the requirements to proceed to closing. Paragraph VIII provides that an appraiser would value both 212 Motors and the Interest Value of the Respondent's membership interests. (Aff. J. Bradley Studemeyer, Ex. C, Par. VIII). No specific method of valuation is mandated for 212 Motors, but a specific method of valuation *is* mandated for the Respondent's membership interests: they are to be valued at their Interest Value. (*Id.*, Par. VIII, X).

Paragraph IX provides that once the Members have received the value of 212 Motors and the Interest Value of the Respondent's membership interests, "they will accept the valuations determined by the appraiser as definitive and binding." (*Id.*, Par IX). While the Respondent has spilled a great deal of ink attempting to sever the meaning of this paragraph from its context, there is only one reading of this paragraph that does not result in an absurd outcome. See *Floyd v. Dross*, 442 S.C. 79, 92, 897 S.E.2d 191, 198 (Ct. App. 2024).

As is immediately apparent from its definition in the Operating Agreement, an appraiser must exercise a degree of subjectivity with some of the considerations in order to determine the Interest Value of membership interests. While the amount of LLC liabilities is an objective, determinable amount upon which reasonable minds cannot disagree, the "fair market value of the LLC's assets" is not fixed in the same way. (Aff. Rodney Slick, Ex. A). The agreement to "accept the valuations determined by the appraiser as definitive and binding" in paragraph IX, then, plainly refers to an acceptance by the parties of this exercise of subjectivity or discretion; two competent appraisers, addressing the four considerations as required by Section 8.3, could end up with different determinations of the "Interest Value" of membership interests. (Aff. J. Bradley Studemeyer, Ex. C, Par. IX). The parties acknowledged this reality and agreed to accept it.

Paragraph X confirms this interpretation as the only reasonable interpretation by providing that a closing will take place "no later than 30 days following the appraiser's *determination of the Interest Value* of [the Respondent's] membership interests." (*Id.*, Par. X). [emphasis added].

"When viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business," the terms of the Certificate are not susceptible to more than one interpretation. 17A Am.Jur.2d Contracts § 338, at 345 (1991).

The Arbitrator was empowered to select the Appraiser and allocate both his fees and the Appraiser's fees amongst the parties. (Aff. J. Bradley Studemeyer, Ex. C, Par. I – VI). The Appraiser was to determine the Interest Value of the Respondent's membership interests. (*Id.*, Par. VIII). Once the Appraiser had complied with the terms of the contract between the members of 212 Motors by determining the Interest Value of the Respondent's membership interests in accordance with the requirements of Section 8.3, the valuation would be definitive and binding upon the parties, and a closing would occur within 30 days. (*Id.*, Par. IX – X).

**iv. Because the Appraiser never determined the Interest Value of the Respondent's membership interests, the Arbitrator exceeded his power by ordering the parties to proceed to closing.**

The Appraiser never determined the Interest Value of the Respondent's membership interests. (Aff. of Mark Swanson). In the Order issued on January 29, 2024, the Arbitrator did not make a finding that the Appraiser had determined the Interest Value of the Respondent's membership interests, nor did the Arbitrator even mention Interest Value. (*See* Order Lift. Stay Confirm. Arb. Award). The Arbitrator did not make such a finding because the Appraiser plainly failed to determine the Interest Value of the Respondent's membership interests. Even the Respondent, by failing to allege that the Appraiser determined the Interest Value of its membership interests in any motion or memoranda filed with the court, tacitly acknowledges that the parties did not receive the benefit of their bargain from the Appraiser. (*See* Mot. Lift Stay).

Nevertheless, the Arbitrator ordered the parties to proceed to closing at the valuation determined

by the Appraiser in its revised report. (Order Lift. Stay Confirm Arb. Award).

When a contract is clear and unambiguous, the language alone determines the contract's force and effect. *C.A.N. Enterprises, Inc. v. South Carolina Health & Human Servs. Fin. Comm'n*, 296 S.C. 373, 373 S.E.2d 584 (1988). The Certificate is clear and unambiguous in stating what is required to proceed to closing, and it does not grant the Arbitrator any power to alter those requirements. (Aff. J. Bradley Studemeyer, Ex. C). The Arbitrator had no right or authority to compel a closing on terms other than those agreed to by the parties. *Id.* The Arbitrator ignored the plain language of the contract and exceeded the powers granted to him by it. *Id.*

The governing legal principles in this matter are as well defined, explicit, and clearly applicable to the case as one might ever find. Therefore, this Court should vacate the award of the arbitrator and the lower court's confirmation of the award.

2. Statements in motions and memoranda are not evidence, and attachments to memoranda are not evidence. In its Order Lifting Stay and Confirming Arbitration Award, the trial court indicated that it relied on statements in the Respondent's motion and memorandum, as well as exhibits attached to the memorandum. Did the trial court err as a matter of law?

**i. A memorandum is not evidence.**

In *Hicks Unlimited, Inc. v. UniFirst Corp., A Mass. Corp.*, 439 S.C. 623, 634, 889 S.E.2d 564, 570 (2023), the South Carolina Supreme Court underscored the need for a court's conclusions to be based upon evidence properly before the court. In reversing the Court of Appeals' determination that a contract involved interstate commerce, the Court noted that certain points relied upon by the Court of Appeals should not have been considered because

> ...the points came from assertions made by UniFirst's counsel. They are not mentioned in the pleadings, not apparent from the language of the contract, nor supported by

affidavits or other evidence. It was error to rely on them in deciding whether contract involves interstate commerce. See *McClurg v. Deaton*, 395 S.C. 85, 86 n.1, 716 S.E.2d 887, 887 n.1 (2011) ("[A m]emorandum in support of a motion is not evidence."); 6 C.J.S Arbitration § 70 ("Statements in motions and briefs do not constitute evidence to be considered by a trial court when ruling on a motion to compel arbitration.").

*Id.* at *4.

**ii. An exhibit attached to a memorandum is not evidence.**

In the present case, the Respondent did not file pleadings or affidavits at any stage. Rule 10(c), SCRCP provides

> Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any plat, photograph, diagram, document, or other paper which is an exhibit to a pleading is a part thereof for all purposes if a copy is attached to such pleading.

While Rule 7(a), SCRCP indicates that a memorandum is not a pleading, the broader suggestion of Rule 10(c), SCRCP is that an exhibit attached to a document filed with the circuit court is deemed to be of the same substance as the filed document. Because a memorandum is not evidence, exhibits attached to memoranda do not constitute evidence. In reviewing this issue, state and federal jurisdictions around the country have reached this exact conclusion. *See e.g. Crosby v. Sahuque Realty Co., Inc.*, 122 So.3d 1197, 2012-1537 (La.App. 4 Cir. 8/21/13) ("Exhibits attached to memoranda, but not filed into the record as evidence, cannot be considered as evidence on appeal."); *Id.* (Tobias, J. concurring) ("Our jurisprudence clearly states, as the majority correctly notes, that **attachments to a memorandum are not evidence** unless formally introduced into evidence at the appropriate trial.") [emphasis added]; *Harris v. Wells Fargo Clearing Servs., LLC*, 18-CV-4625, 2019 WL 2343383 (S.D.N.Y.) ("The defendant's exhibits are attached to its memorandum of law improperly because a memorandum of law

is not evidence."); *Briggs v. Blomkamp*, No. C 13-4679 PJH, 2014 WL 12567155, at *1 (N.D. Cal. Aug. 4, 2014) (holding that exhibits attached to a memorandum and not supported by an affidavit are not admissible evidence); *Takaki v. Allied Machinery Corp.*, 87 Hawai'i 57, 69, 951 P.2d 507, 519 (App.1998) (holding that exhibits attached to a memorandum could not be considered by court where the exhibits did not appear to be sworn, certified or authenticated by affidavit accompanying exhibit).

In its Order Lifting Stay and Confirming Arbitration Award, the trial court indicated that it relied on statements in the Respondent's motion and memorandum, as well as exhibits attached to the memorandum. (Order Lift. Stay Confirm Arb. Award, p. 1). Therefore, this Court should find that the circuit court erred in considering the exhibits submitted by the Respondent as evidence properly before it.

## CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court and vacate the arbitrator's award.

Respectfully submitted,

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April 19, 2024