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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2023-001599

Full Moon Investments, LLC; Stellar Naomi, a series of Yield Capital, LLC; and John David Engel, ... Respondents,

v.

Campbell Teague, LLC; George A. Campbell, Jr.; Elizabeth Teague; Emily O'Brian; Molly Cash; and Beau Brogdon, ... Appellants.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

Respondents sued Appellants in the Court of Common Pleas, asserting three causes of action: legal malpractice, breach of fiduciary duty, and defamation *per se*. Respondents attached to the Complaint several agreements between Respondents and Appellants or their wholly owned entity, and the agreements provided for arbitration of all claims arising out of, or in connection with, or relating to the agreements. Appellants filed a motion to compel arbitration and a motion to dismiss. The Circuit Court, the Honorable Perry Gravely presiding, denied the motion to compel arbitration and granted the motion to dismiss in part.[1] Appellants filed a timely motion to alter or amend pursuant to Rule 59 of the South Carolina Rules of Civil Procedure. Judge Gravely denied that motion as well. The question presented is whether the Circuit Court should have compelled Respondents to arbitrate their claims in accord with the arbitration clauses in the agreements attached to the Complaint. In particular,

A. Whether Respondents are bound to arbitrate all claims covered by the arbitration agreements.

B. Whether Appellants can enforce the arbitration agreements against Respondents.

C. Whether Respondents' claims are within the scope of the broad arbitration agreements.

D. Whether the Circuit Court lacked jurisdiction to decide issues of substantive arbitrability.

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[1] The Court's Order dismissing Plaintiffs' cause of action for breach of fiduciary duty has not been appealed.

INTRODUCTION

Respondents, John David Engel ("Engel") and his wholly-owned or wholly-controlled entities, purchased a Spanish company to acquire a bankrupt rose business in Spain, financed by private investment from the United States. Engel drafted the private placement memorandum and other agreements relative to the investment and associated transactions. Engel hired Appellant George A. Campbell ("Campbell"), and his law firm, Campbell Teague, LLC ("Campbell Teague"), to review the agreements and related documents Engel had drafted. With Engel's agreement, the individual Appellants invested in Respondent Stellar Naomi, through a combination of deferred legal fees and cash. As part of the deal, Campbell was to serve as President of the Spanish company and move his family to Spain. After almost a year of operating the Spanish Company, Engel terminated Campbell as an employee and director of the Spanish entity, and Campbell Teague withdrew as attorneys for Respondents.

The relevant agreements, admittedly drafted by Engel, contain broad and inclusive arbitration provisions, covering all claims arising out of or related to the investment or associated transactions. In this action, Respondents claim that Appellants improperly invested in Stellar Naomi, in violation of the Rules of Professional Conduct, and that Campbell improperly used his position as a director of the Spanish Company owned by Stellar Naomi. The gravamen of Respondents' claims against Appellants arises from two sources: (1) Appellants' allegedly wrongful investment in Stellar Naomi, and (2) Campbell's management of the Spanish company. The agreements at issue containing the arbitration provisions specifically govern investment in Stellar Naomi and

management of the Spanish company. As a result, Respondents' claims directly relate to those agreements and should be arbitrated.

The Circuit Court, however, refused to compel arbitration, ruling the Appellants were not parties to the agreement and the arbitration provisions did not relate to the issues raised in the pleadings. The Circuit Court also impliedly ruled that the court, rather than the arbitrator, should decide issues of substantive arbitrability. This was error. The record clearly demonstrates that the parties intended to be bound by the agreements, and that disputes related to the investment or associated transactions would be subject to the agreements' arbitration provisions. Appellants may enforce the arbitration provisions against Respondents, who are signatories to those agreements. Moreover, because the agreements contain a delegation clause, the Circuit Court was precluded from ruling on such substantive arbitrability issues.

This Court should reverse the order under appeal and remand with instructions to compel arbitration.

STATEMENT OF THE CASE

A. Factual Background

All of the facts and claims alleged in the Complaint arise out of an investment in a Spanish company owned by Respondent Stellar Naomi: Ondara Directorship SLU ("Ondara"). Respondent Engel manages Stellar Naomi. (R. p. 14, ¶ 39). Engel is a founder and managing partner of "an investment company focused on cannabis related ventures." (R. p. 29). Engel "has completed dozens of debt and equity capital engagements totaling in excess of $300,000,000 in a variety of industries." *Id.* Engel's sophistication—demonstrated by his actions, the investment as it is described in the record, and in the documents themselves—is important and highly relevant to the application of the arbitration clause.

Sometime in 2020, Respondents Full Moon Investments, LLC ("Full Moon") and Engel, its manager, learned of an investment in Spain. Specifically, they learned about an opportunity buy a bankrupt Spanish company, Aleia Roses, which cultivated roses in a 36-acre greenhouse in Spain. (R. p. 11, ¶ 15). Aleia Roses declared bankruptcy in Spain. (R. p. 11, ¶ 16). Aleia Roses owned land, equipment, and a 36-acre greenhouse. (R. p. 11, ¶ 15). Full Moon and Engel decided to buy the assets of Aleia Roses. (R. p. 11, ¶ 19). To raise money for the project, Engel formed Yield Capital, LLC ("Yield Capital"), a series limited liability company, and Respondent Stellar Naomi, a series of Yield Capital ("Stellar Naomi"). (R. p. 11, ¶ 20; R. p. 615, lines 4-21). Respondents were going to raise money by way of a private placement memorandum. (R. p. 12, ¶¶ 21, 25).

To assist with soliciting funds from investors, Engel and a "Spanish gentlemen" prepared all the documents. (R. pp. 620-621). Full Moon retained Appellants to represent

Full Moon in the "Aleia Roses Transaction". (R. p. 11, ¶ 19). When asked about the Stellar Naomi deal, Engel testified Appellants "did cursory review *after [Engel] prepared everything*...." (R. p. 618, lines 6-12) (emphasis added).) Asked to specify the work Appellants were hired to perform, Engel testified Appellants only "reviewed the documents for typos, inconsistencies, that kind of thing..." (R. p. 621, lines 20-23). Engel directly contradicts himself in the Complaint, alleging that Appellants drafted the relevant documents. (R. p. 12, ¶ 24).

Engel managed Full Moon, Yield Capital, and Stellar Naomi. (R. p. 14, ¶ 39). Yield Capital then sold membership interests in Stellar Naomi via the Private Placement Memorandum ("PPM") to investors. (R. p. 12, ¶ 21).) As the PPM states, Yield Capital would be governed by its Operating Agreement. (R. p. 33). Each series, like Stellar Naomi, would in turn have its own Series Agreement, which incorporates the Yield Capital Operating Agreement. *Id.*

Respondents provided a supplemental PPM specifically for Stellar Naomi dated June 23, 2020. (R. p. 56). Respondents planned to invest up to $5.75 million equity in the purchase of Aleia Roses. (R. p. 61). Respondents planned to use Stellar Naomi to purchase Ondara as the Spanish shell company with which to bid for Aleia Roses in the bankruptcy sale. (R. p. 12, ¶ 25; R. p. 56). The global law firm of Herbert Smith Freehills represented Respondents in Spain. (R. p. 64). The PPM warns potential investors their investment "is subject to significant risks, including possible loss of [the] entire investment." (R. p. 34).

Respondents requested a minimum investment of $100,000 per investor. (R. p. 33). In all, Respondents allegedly raised $29 million dollars for Stellar Naomi to invest in

the Aleia Roses Transaction. (R. p. 12, ¶ 26). Engel had the discretion to close the offering whenever he chose. (R. p. 41).

Soria, a series of Belltower, LLC ("Soria"), invested in Stellar Naomi. (R. p. 12, ¶ 28). The individual Appellants are members of Soria. (R. p. 13, ¶ 31). Soria invested $150,000 in, and is a member of, Stellar Naomi. (R. p. 12, ¶¶ 28-29; R. pp. 185-186). Engel signed Yield Capital's Operating Agreement on July 20, 2020. (R. p. 150). Campbell counter-signed the Operating Agreement on behalf of Soria. (R. p. 13, ¶ 30; R. p. 151). Engel signed the Stellar Naomi Series Agreement on July 20, 2020. (R. p. 172). Campbell counter-signed the Stellar Naomi Series Agreement on behalf of Soria. (R. p. 173). Engel signed the Stellar Naomi Subscription Agreement July 20, 2020 (R. p. 190). Campbell also signed the Stellar Naomi Subscription Agreement July 20, 2020. (R. p. 186).

Respondents successfully bid on the assets of Aleia Roses. (R. p. 12, ¶ 25). To effectuate the acquisition stated above, Stellar Naomi had acquired Ondara to serve as a special purpose vehicle in Spain to make the bankruptcy bid and acquire all the assets of Aleia Roses SLU, which included the purchase of land, equipment, and a thirty-six-acre greenhouse. *Id*. As late as May 2021, Engel told Campbell that Stellar Naomi owned all of Ondara. (R. p. 224). Later, Engel testified that Full Moon actually owned Ondara; that Ondara was a wholly-owned subsidiary of Full Moon Investments; that Stellar Naomi never owned Ondara; and that Engel held Ondara in "constructive trust". (R. p. 616, line 22 – p. 617, line 22).

Campbell and Engel agreed in 2020 that Campbell would move to Spain to operate Ondara as its President. (R. pp. 13-14, ¶¶ 35-36). To assist Campbell's "international

move," Engel, on behalf of Full Moon, signed a letter stating Campbell was an investor and legal representative of Full Moon Investments. (R. p. 14, ¶36).

Later in 2021, Engel transferred ownership of the greenhouse—the main asset of Ondara—to Spain Real Estate Capital, LLC ("SREC"). (R. pp. 217-219; R. p. 240; R. p. 245). Engel owns all of SREC. (R. p. 240). The sale of the greenhouse to SREC left Ondara insolvent. (R. p. 226, ¶ 11; R. p. 227, ¶¶ 15-16). SREC in turn defaulted on its purchase obligations to Ondara. (R. p. 229, ¶ D). This left Ondara without any assets and a large amount of debt. (R. p. 247) ("ONDARA's only asset has disappeared…") (R. pp. 249-250).) Despite Engel's representation that Stellar Naomi owned Ondara and through Ondara the greenhouse, Engel *never transferred either* to Stellar Naomi. Contrary to his prior representation, Engel has asserted Stellar Naomi never owned Ondara.[2] (R. p. 617, lines 8-22).

As a result of Engel's actions, on August 24, 2021, Defendant Elizabeth Teague ("Teague") wrote Engel informing him that an irreparable conflict had arisen requiring Campbell Teague to withdraw from representing Engel and his related business entities. (R. p. 15, ¶ 44; R. p. 222). On September 27, 2021, Soria filed an arbitration demand with the American Arbitration Association against Stellar Naomi seeking an accounting (the "Soria/Stellar Naomi Arbitration"). (R. p. 15, ¶ 47). And, on October 13, 2021, the joint administrators of Ondara, including Campbell, were forced to file a criminal complaint in Spain against Engel. (R. pp. 15-16, ¶ 49). Engel terminated Campbell as the director of Ondara. (R. p. 15, ¶ 45).

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[2] Because Stellar Naomi never owned Ondara, as conceded by Respondent Engel under oath, the $29 million allegedly raised for Stellar Naomi went somewhere unknown to Appellants.

At the time Respondents filed the Complaint, the arbitration between Soria and Stellar Naomi was pending, and is referenced in Respondents' Complaint. (R. p. 13, ¶ 30; R. pp. 194-198). The arbitrator, the Honorable Robert N. Hunter, Jr., rendered a decision on August 30, 2023, finding Soria was a member of Stellar Naomi and entitled to an accounting. (R. pp. 596-604; R. pp. 585-595).

Respondents filed this lawsuit on March 30, 2023, alleging Campbell committed defamation *per se* against Engel in connection with statements pertaining to the criminal acts at issue in the criminal complaint. (R. p. 16, ¶ 52). Specifically, Respondents allege Campbell, while a director for Ondara, the wholly owned subsidiary of Full Moon, defamed Engel in Engel's management of Ondara and Stellar Naomi. (R. p. 16, ¶ 52; R. pp. 259-266). Respondents also allege that Appellants committed legal malpractice and breached their fiduciary duties by entering into a business transaction with and "[investing] in their client, Stellar Naomi via Soria." (R. p. 15, ¶ 48; R. p. 18, ¶ 60; R. p. 19, ¶ 64). It is undisputed that the individual Appellants are members of Soria, and that Soria is a member of Stellar Naomi. In fact, the Appellants' investment in Steller Naomi forms the basis for most of Respondents' claims against Appellants, to wit:

- "Defendants created Soria … to invest in Stellar Naomi." (R. p. 12, (¶ 28).
- "The members and equity owners of Soria are Campbell, Teague, O'Brian, Cash, and Brogdon…." (R. p. 13, ¶ 31).
- "Campbell, with his family, moved to Spain to operate Stellar Naomi's wholly owned Spanish entity Ondara…". (R. pp. 13-14, ¶ 35).

- "Campbell Teague attorney 'investors' (Campbell, Teague, O'Brian, Cash, and Brogdon) violated the South Carolina Rules of Professional Conduct when they invested in their client, Stellar Naomi via Soria". (R. p. 15, ¶ 48).

Similarly, Respondents' expert William O. Higgins opines that

> Defendants … [were required] to fully disclose to the Plaintiffs the extent of the existing conflict of interest in … (b) entering into a business transaction with the Plaintiffs in connection with the Aleia Roses Transaction by investing in the Plaintiff, Stellar Naomi, through their wholly owned Delaware limited liability company, Soria…. (R. pp. 268-269, ¶ 8(i)(b).
>
> and
>
> Defendant George A. Campbell, Jr. … engaged in various negligent acts and omissions … including the following: … [e]ntering into a business transaction with Plaintiff, Stellar Naomi, through Soria…. (R. p. 269, ¶ 9.c.).

In short, this Court cannot divorce the Respondents' claims from the Appellants' investment in Stellar Noami.

The document governing the transaction the Complaint alleges as a basis for this lawsuit is the Stellar Naomi Series Agreement for Yield Capital (the "Series Agreement") and the Operating Agreement for Yield Capital. (R. pp. 166-178; pp. 123-165). The Series Agreement provides that the Limited Liability Company Agreement of Yield Capital (the "Master Agreement") controls the affairs of Stellar Naomi unless contradicted by the Series Agreement, which is also expressly incorporated into the Master Agreement. (R. p. 169, § 1.3) ("[a]ny subject matter not covered in this STELLAR NAOMI Series Agreement shall be governed by the Master Agreement and the [Delaware Uniform Limited Liability Company Act]").) Section 12.6 of the Master Agreement provides, in relevant part:

> SECTION 12.6 Arbitration. ANY DISPUTE, CONTROVERSY OR CLAIM, INCLUDING WITHOUT LIMITATION ANY DISPUTES FOR WHICH A DERIVATIVE SUIT COULD OTHERWISE BE BROUGHT PURSUANT TO THE [DELAWARE UNIFORM LIMITED LIABILITY COMPANY ACT], ARISING OUT OF OR IN CONNECTION WITH, OR RELATING TO, THIS AGREEMENT ANY BREACH OR ALLEGED BREACH HEREOF SHALL, UPON THE REQUEST OF ANY PARTY INVOLVED, BE SUBMITTED TO, AND SETTLED BY, ARBITRATION IN THE CITY OF GREENVILLE, STATE OF SOUTH CAROLINA, PURSUANT TO THE COMMERCIAL ARBITRATION RULES THEN IN EFFECT OF THE AMERICAN ARBITRATION ASSOCIATION (OR AT ANY TIME OR AT ANY OTHER PLACE OR UNDER ANY OTHER FORM OF ARBITRATION MUTUALLY ACCEPTABLE TO THE PARTIES SO INVOLVED). ANY AWARD RENDERED SHALL BE FINAL AND CONCLUSIVE UPON THE PARTIES AND A JUDGMENT THEREON MAY BE ENTERED IN THE HIGHEST COURT OF THE FORUM, STATE OR FEDERAL, HAVING JURISDICTION.

(R. p. 147). The Series Agreement was made an exhibit to, and is specifically incorporated by reference into, the Master Agreement. (R. p. 126; R. p. 153). Section 3.8 of the Series Agreement further provides that each party thereto "irrevocably consents … to the enforcement of an arbitrator's ruling under Section 12.6 of the Master Agreement …." (R. p. 170). Both the Master Agreement and Series Agreement are signed by Engel, as the manager of Full Moon, by Engel on behalf of Full Moon, as the manager of Yield Capital, and by Campbell, as the managing member of Soria. (R. pp. 150-151; R. pp. 172-173).

The Stellar Naomi Subscription Agreement (the "Subscription Agreement"), pursuant to which Soria obtained its equity membership interest in Stellar Naomi, also incorporates by reference the Master Agreement and Series Agreement, and is signed by Engel as the managing partner of Full Moon, and by Campbell as the managing member of Soria. (R. p. 180; R. p. 186; R. p. 190). The Master Agreement, Series

Agreement, and Subscription Agreement are referred to herein collectively as the "Agreements." Delaware law governs all of the Agreements. (R. pp. 147-148, § 12.11; R. p. 170, § 3.8; R. p. 184, § 10).

B. Procedural History

Respondents filed their Complaint March 30, 2023. The Complaint alleges claims for legal malpractice, breach of fiduciary duty, and defamation. Appellants filed a Motion to Compel Arbitration and to stay on April 18, 2023. Appellants also filed a Motion to Dismiss. The Circuit Court conducted a hearing on the Motions on August 21, 2013. The Circuit thereafter denied the Motion to Compel Arbitration by Order dated August 29, 2023. The Court granted in part the Motion to Dismiss, dismissing the cause of action for breach of fiduciary duty.[3] Appellants filed a Motion to Alter or Amend on September 6, 2023. The Court, without a hearing, denied the Motion to Alter or Amend by Order dated October 9, 2023. (R. p.4). Appellants filed their Notice of Appeal October 18, 2023.

[3] Respondents have not appealed the portion of the Order denying the remainder of the Motion to Dismiss.

STANDARD OF REVIEW

"Arbitrability determinations are subject to de novo review." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d. 663, 667 (2007) (citing *Wellman, Inc. v. Square D Co.*, 366 S.C. 61, 67, 620 S.E.2d 86, 89 (Ct. App. 2005)). Factual findings "will not be overruled if there is any evidence reasonably supporting them." *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 664-65, 521 S.E.2d 749, 753 (Ct. App. 1999). It does not appear the Circuit made any findings of fact in its brief order, so there are no findings of fact requiring deference from this Court.

ARGUMENT

As an initial matter, and although not addressed by the Circuit Court, the Federal Arbitration Act ("FAA") applies to the arbitration Agreements. The Federal Arbitration Act ("FAA") applies in state or federal court to any arbitration agreement involving interstate commerce, unless the parties contract otherwise. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001). The FAA applies here because the Agreements and transactions at issue clearly involve interstate commerce. The FAA provides that an arbitration provision in "a contract evidencing a transaction involving [interstate] commerce ... shall be valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. *See also Munoz*, 343 S.C. 531 at 538, 542 S.E.2d at 363 (holding that the FAA applies to "a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction"). "A party seeking to compel arbitration under the FAA must establish that (1) there is a valid agreement, and (2) the claims fall within the scope of the agreement." *Wilson v. Willis*, 426 S.C. 326, 336, 827 S.E.2d 167, 172-73 (2019).

Respondents did not dispute the validity of the Agreements—and, indeed, attached executed copies of the Agreements as exhibits to their Complaint—rather, they argued that: (1) the parties did not intend to arbitrate the claims in this lawsuit; (2) the claims in this lawsuit are not within the scope of the Agreements' arbitration provisions; and (3) if the Agreements require arbitration of malpractice claims, then they are unconscionable under Rule 1.8 of the South Carolina Rules of Professional Conduct. The Circuit Court ruled that Appellants could not compel arbitration of Respondents' claims

because none of the Appellants were "actual parties" to the Master Agreement and that the arbitration provisions in the Master Agreement did not relate to the issues presented by the pleadings. (R. p. 2).

These substantive arbitrability questions were delegated to the arbitrator, and should not have been decided by the Circuit Court. *See, Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019)(holding that the FAA allows parties to agree to have an arbitrator decide "whether the parties have agreed to arbitrate."). Nevertheless, Respondents' arguments fail because the parties intended to be bound to the Agreements' arbitration provisions with respect to any claim arising out of, in connection with, or relating to the Agreements, which form the basis of this lawsuit. Moreover, the arbitration Agreements are not unconscionable under Rule 1.8 of the South Carolina Rules of Professional Responsibility because it is not applicable to the Agreements, and, even if it were, Respondents themselves drafted the Agreements, and cannot now claim provisions they drafted are unconscionable. *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 555, 606 S.E.2d 752, 758 (2004) (explaining that a party seeking to prove an arbitration agreement is unconscionable must allege he lacked a meaningful choice as to the arbitration clause specifically, not merely that he lacked a meaningful choice as to the contract as a whole). Because Respondents drafted the Agreements and the arbitration clause specifically, they did not lack meaningful choice in the matter.

Accordingly, and consistent with the state and federal policies favoring arbitration, *see, e.g.*, *Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 125, 747 S.E.2d 461, 466 (2013), the Court should reverse the Circuit Court, remand with

instructions to grant Appellants' Motion, and compel Respondents send their claims to arbitration.

I. Appellants Must Arbitrate All Claims Against Respondents Covered by the Arbitration Agreements Because the Parties Intended to be Bound by Their Provisions.

Each of the Agreements contains a governing law provision stating that the contract is governed by Delaware law, such that it is undisputed that the validity of the Agreements' arbitration provisions is decided applying the laws of the State of Delaware.[4] *See Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010) (explaining that one of the elements of a valid contract under Delaware law is "intent to be bound"). A "parties' intent to be bound by [an arbitration agreement] [may be] manifested by their signatures," *Smash v. Dover Downs, Inc.*, No. CV 21-1568, 2022 WL 2966431, at *2 (D. Del. July 27, 2022), or by "objective manifestations of assent and surrounding circumstances," *Wells v. Merit Life Ins. Co.*, 671 F.Supp.2d 570, 574 (D. Del. 2009). Here, the record clearly demonstrates the intent of the parties to be bound to the Arbitration Agreements.

A. Respondents' Manifestations of Intent

The Agreements were signed by Full Moon, Yield Capital, Stellar Naomi, and Engel, as the managing member of Full Moon and on behalf of Full Moon, as the manager of and on behalf of Yield Capital, and on behalf of Stellar Naomi. Engel, as the managing member and sole owner of Full Moon, effectively acts for Full Moon; and as Full Moon is the sole manager of Stellar Naomi, Engel also effectively acts for Stellar Naomi. (R. p. 615, lines 4-21; R. p. 617, lines 2-7). The signatures of Full Moon, Yield Capital, and

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[4] "The consideration of contract validity is normally addressed applying general principles of state law governing the formation of contracts." *Wilson*, 426 S.C. at 336, 827 S.E.2d at 173 (*citing Munoz*, 343 S.C. at 539, 542 S.E.2d at 364 (holding that "[g]eneral contract principles of state law apply to arbitration clauses governed by the FAA")).

Engel on the Agreements prove their intent to be bound by the Agreements, including their arbitration provisions.

Additionally, Stellar Naomi was created, and is governed, by the Agreements, which control its operation and existence. (R. p. 170, § 3.3) (providing the Series Agreement, Master Agreement, and Subscription Agreement constitute the "entire agreement among the parties with respect to the affairs of [Yield Capital] and [Stellar Naomi]").). The provisions of the Master Agreement, including its arbitration provisions, are made "generally applicable" to Stellar Naomi. (R. p. 129, § 1.8(d)). And, the acts of Full Moon are expressly binding upon Stellar Naomi. (R. p. 132, § 5.1(b)) ("Persons dealing with [Yield Capital] or [Stellar Naomi] shall have no duty to inquire whether the act of any Manager in carrying on in the usual way the business of [Yield Capital] or [Stellar Naomi] is pursuant to the Manager's actual authority under this agreement, and such acts shall be binding upon [Yield Capital] and [Stellar Naomi] regardless of whether such Manager had actual authority.").) These express provisions and circumstances manifest Stellar Naomi's intent to be bound by the Agreements.

Finally, Engel admits not only to signing the Agreements, but also to drafting them. (R. p. 618, lines 2-17; R. p. 619, lines 8-21; R. p. 622, line 14- p. 623, line 7). Specifically, Engel testified as follows:

> Q Okay. And they billed you for those services and you or your entities paid for those services, right?
> A Yes.
> Q All right. And Campbell Teague did work on the Stellar Naomi deal, right?
> A I looked at that. I'm prepared -- ... They did cursory review after I prepared everything, yeah.
> Q Okay. So yes, they did -- the firm did do some work?
> A Very minimal. Maybe four hours' work reviewing the docs.

(R. p. 618, lines 2-17). In direct contravention of the Complaint's allegations suggesting Campbell Teague drafted the Agreements, Engel, under oath, characterized Appellants' work on the Stellar Naomi deal as "very minimal". (R. p. 620, lines 14-25). Engel described Appellants' contribution to the Agreements as "review[ing] the documents for typos, inconsistencies, that kind of thing…" (R. p. 621, lines 13-24). Therefore, the execution of the Agreements and the attendant arbitration clauses were the work product of Respondents, not Appellants.

The intent of Engel and of the Respondent entities he controls to be bound by the Agreements' arbitration provisions is also found in the broad scope of the arbitration language, which applies to any and all disputes, controversies, or claims arising out of, in connection with, or relating to the Agreements. (R. p. 147, § 12.6). Further, it provides that such disputes must be sent to mandatory, binding arbitration "upon the request of any party involved," which is not limited to parties to the agreement, but rather **includes all parties involved** in the dispute.[5] *Id.*

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[5] Respondents did not dispute that they are signatories to the Agreements. Notably, however, Delaware law compels Respondents to arbitrate their claims against Appellants under these circumstances, regardless of whether or not they are signatories (which they are). *See, e.g., Capano v. Lockwood*, No. CIV.A. N10C11228 WCC, 2011 WL 7063422, at *2 (Del. Super. Ct. Dec. 28, 2011) (holding individual defendants who had executed an LLC Agreement containing an arbitration clause on behalf of their respective LLCs, and not in their individual capacities, were compelled to arbitration where the individuals controlled the actions of the LLCs); *Melendez v. Horning*, 908 N.W.2d 115, 119 (N.D. 2018) (applying Delaware law) (holding equitable estoppel compelled non-signatories to arbitrate claims under an arbitration clause in LLC operating agreement where the conduct of the non-signatories was intertwined with related signatories to the agreement); *Sanum Inv. Ltd. v. San Marco Cap. Partners LLC*, 263 F. Supp.3d 491, 496 (D. Del. 2017) (holding "[w]here the parties to [an arbitration] clause unmistakably intend to arbitrate all controversies which might arise between them, their agreement should be applied to claims against agents or entities related to the signatories").

B. Appellants' Manifestations of Intent

Appellants also intended to be bound by the Agreements, including their arbitration provisions. Soria was formed to be a member of Stellar Naomi, for purposes of the relevant transactions pursuant to these specific Agreements containing the arbitration provisions. Campbell in fact signed the Agreements, both as the managing member of Soria and on behalf of Soria, as a member of Stellar Naomi. And, further, all of the individual Appellants are members and/or owners of Soria. In becoming members and/or owners, they knowingly and willingly subjected themselves to the Agreements governing the entity and the transaction, and intended that any claims related to their involvement in the entity and/or to the transaction would be subject to the terms and conditions of the Agreements, including their arbitration provisions.

II. Appellants Can Enforce the Valid Arbitration Agreements Against Respondents.

Notwithstanding that Campbell signed the Agreements and that all of the individual Appellants are members and/or owners of an entity subject to and governed by the Agreements, Appellants can compel Respondents to arbitrate their claims even if they are non-signatories to the Agreements. While it is true that arbitration is a matter of contract, overwhelming legal authority holds that a non-signatory may compel arbitration in certain circumstances. "Well-established common law principles dictate that in an appropriate case a non-signatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties." *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416-17 (4th Cir. 2000). Particularly where, as here, the parties opposing arbitration are signatories to the agreements containing the arbitration provisions.

Delaware law controls these entities and permits non-signatories to an arbitration agreement to compel arbitration. *See Ashall Homes Ltd. v. ROK Entertainment Group Inc.*, 992 A.2d 1239, 1249 (Del. Ch. 2010) (holding non-signatories to investment agreement could invoke its forum selection clause because their relationship to the signatory entities as officers and directors); *see also McLaughlin v. McCann*, 942 A.2d 616, 627 nn. 42, 43 (Del. Ch. 2008) (recognizing signatories may not escape arbitration under equitable estoppel when non-signatories consent to arbitration, there is a close relationship between the involved entities, and the signatory's claims are intertwined with the underlying contractual obligations); *Douzinas v. American Bureau of Shipping, Inc.*, 888 A.2d 1146, 1153 (Del. Ch. 2006) (holding "[u]nder abundant authority, non-signatories are permitted to compel signatories to arbitrate disputes under a theory of equitable estoppel[,]" such as where refusing to compel arbitration of claim against a signatory's affiliates "would render the arbitration between the signatories meaningless and thwart the state and federal policy in favor of arbitration"). South Carolina courts have also recognized that a non-signatory can enforce an arbitration provision within a contract executed by other parties. *See Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 287-97, 733 S.E.2d 597, 599-605 (Ct. App. 2012) (reversing Circuit Court's denial of motion to compel arbitration and discussing, with approval, that "the Fourth Circuit has recognized the right to compel a nonsignatory" and that courts are even "more inclined to compel arbitration when the person or entity to be compelled was a signatory…").

"A party may not rely on [a] contract when it works to its advantage, and repudiate it when it works to its disadvantage." *Pearson*, 400 S.C. at 295, 733 S.E.2d at 604 (citation omitted). This is because "[t]o allow [a plaintiff] to claim the benefit of [a] contract

and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactments of the [FAA]." *Int'l Paper*, 206 F.3d at 418 (citation omitted). Here, the Agreements containing the arbitration provisions are attached as exhibits to the Complaint and form part of the foundation of every claim asserted by the Respondents, who seek damages and other remedies pursuant thereto. Engel testified that Appellants provided legal work in relation to the Steller Naomi investment as consideration for investing in that venture, which was governed by and pursuant to the Agreements containing the arbitration provisions. As a result of those Agreements, Respondents raised millions of dollars. Thus, the Respondents have directly benefited from the Agreements containing arbitration provisions. They cannot, on the one hand, receive a benefit from those documents while, on the other, avoid the Agreements' requirement that such disputes be arbitrated. *See Pearson*, 400 S.C. at 297, 733 S.E.2d at 605 (reversing denial of motion to compel arbitration where, even though the plaintiff did not have an arbitration agreement with the hospital, he sought damages under multiple contracts, one of which contained an arbitration provision with another defendant, and thus the plaintiff sought a benefit under the contract containing the arbitration provision).

Not only may Appellants enforce the arbitration Agreements as a matter of law, but Campbell is in fact a signatory to the Agreements containing the arbitration provisions. (R. pp. 106-199). Indeed, citing to the arbitration discovery answers from Soria in the Complaint, Respondents alleged that Campbell signed the Subscription Agreement on behalf of Soria, and that Appellants are members and owners of Soria. (R. p. 13, ¶¶ 30-31; R. p. 197, ¶ 8). Based on the totality of these circumstances and evidence in the

record, the FAA requires Respondents' claims be arbitrated. The Appellants and Respondents are all "parties" entitled to enforce the arbitration clause in the Agreements. *See, e.g.*, *Capano, supra; Melendez, supra*; *Sanum Inv. Ltd., supra*.

III. The Arbitration Agreements Cover the Claims Alleged in the Complaint.

The arbitration clauses at issue are broad in scope and apply to "any dispute, controversy or claim … arising out of or in connection with, or relating to [the Agreements]" and require binding and mandatory arbitration "upon the request of any party involved…." (R. p. 147 § 12.6). "A clause which provides for arbitration of all disputes 'arising out of or relating to' the contract is construed broadly and is capable of an expansive reach." *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 95, 749 S.E.2d 139, 153-54 (Ct. App. 2013). "Thus, a claim is within the scope of an arbitration clause that purports to cover all related disputes, so long as a significant relationship exists between the claim and the contract containing the arbitration agreement." *Id.* at 95, 749 S.E.2d at 154.

Respondents attached the Agreements, including the arbitration provisions, as exhibits to their Complaint, and the allegations in the Complaint demonstrate that the Agreements form the core of Respondents' claims. Specifically, Respondents' claims arise from Appellants' entering into the Agreements. Moreover, a dispute about the scope of an arbitration agreement must be resolved in favor of arbitration, "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Mey v. DIRECTV, LLC*, 971 F.3d 284, 292 (4th Cir. 2020) (*quoting Warrior v. Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960)). Delaware law compels the same result, holding "[a]ny doubt as to arbitrability is to be resolved in favor of arbitration." *E. Hedinger AG v. Brainwave Sci., LLC*, 363 F. Supp. 3d 499, 508

(D. Del. 2019); *SBC Interactive, Inc. v. Corp. Media Partners*, 714 A.2d 758, 761 (Del. 1998).

Respondents argued in the Circuit Court that legal malpractice claims can never fall within the scope of an arbitration provision that does not appear in the engagement letter. This argument is unfounded and, indeed, Respondents did not provide any legal support for their contention, particularly as applied to a situation where the client itself drafted the applicable arbitration clause. Here, there is an inseparable relationship between the Agreements and Respondents' claims, all of which arise under the Agreements and which constitute the complained-of conduct. The factual allegations underlying Respondents' claims arise directly from, and relate directly to, the Agreements. And, the parties Appellants seek to compel to arbitration are signatories to the Agreements and their arbitration provisions. Thus, Respondents' claims are within the scope of the broad arbitration provisions.

IV. The Circuit Court Lacked Jurisdiction to Decide Questions of Substantive Arbitrability.

Questions of arbitrability, if any, should have been decided by the arbitrator or arbitration panel, rather than the Circuit Court. It is undisputed that Respondents have agreements to arbitrate disputes related to any series of Yield Capital, including Stellar Naomi, or arising out of or in connection with any investment therein. As set forth above, Respondents' claims arise out of and directly relate to the Agreements containing the arbitration provisions. The American Arbitration Association ("AAA") rules referenced in the Agreements provide that the arbitrator is to decide both the scope of his/her own jurisdiction and "any objections with respect to the existence, scope, or validity of the

arbitration agreement or to the arbitrability of any claim or counterclaim." *See* AAA Rule R-7.

"By incorporating the AAA Rules into their agreement, the parties clearly and unmistakably agreed that the arbitrator should decide whether the arbitration clause is valid." *Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1332 (11th Cir. 2005). The United States Supreme Court has held that the FAA allows parties to agree to have an arbitrator decide "whether the parties have agreed to arbitrate." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019). *See also Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 65 (2010). "[T]he FAA requires [this Court] to honor that agreement" and leave any and all arbitrability issues, including the existence, validity and scope of an arbitration agreement and/or of the underlying contract, to the arbitrator. *Doe v. TCSC, LLC*, 430 S.C. 602, 608, 846 S.E.2d 874, 877 (Ct. App. 2020).

In addition to the foregoing authority, Judge Hunter's Arbitration Order dated August 30, 2023, addresses the arbitrator's belief he has jurisdiction to determine issues of arbitrability:

> At the request of the Respondent, the Arbitrator will hold this matter open for 90 days to determine ***if any matters filed in the case involving parties in privity with these parties*** will be set for arbitration as well.

(R. p. 604) (emphasis added).) Not only did Judge Hunter conclude that he has the authority to decide these arbitrability questions, but one of the Respondents in this action, Stellar Naomi, requested Judge Hunter to hold the arbitration open for such determination. *Id.* Accordingly, this Court should reverse the arbitrability determination of the Circuit Court and remand this matter to the Circuit Court with instructions to refer all questions of arbitrability to an arbitrator.

V. Respondents' Unilateral, *Post Hac* Amendments to the Arbitration Provisions Do Not Prevent Arbitration of Respondents' Claims.

Respondents filed a Supplemental Memorandum on August 15, 2023, wherein they raised, for the first time, the contention that Respondents' *unilateral, post hac amendments* to the Operating Agreement's arbitration clause precluded the Appellants' Motion to Compel Arbitration. (R. pp. 436-584). Respondents argued that the 2022 and 2023 unilateral amendments to the Operating Agreement required Appellants first to prove they paid the required "investment amounts". (R. pp. 438-441). Specifically, they argued that Respondents' unilateral changes to the arbitration clause prevent Appellants from compelling arbitration of any claim without first showing that Appellants paid the subscription fee. Respondents alleged that Appellants did not pay the subscription fee in cash, and that the consideration of in-kind legal work or international relocation was insufficient to constitute the required investment amount. *Id.* at 4-5. Although not addressed by the Circuit Court, Respondents' arguments fail because the amendments were invalid and, even if they were valid, they do not prevent arbitration of Respondents' claims.

A. Respondents' Unilateral Amendment is Void Because It Materially Affects Appellants' Rights to Distributions and to Seek Remedies.

The Operating Agreement states the Manager (Respondent Full Moon Investments) can unilaterally change the Agreement as long as the amendment does not have a "material adverse effect" on one or more members. (R. pp. 146-147, § 12.4). The amendment requiring Appellants to show they made the required capital contribution in court before arbitration materially affects their rights to distributions, their rights to seek remedies for breaches of the Agreements, and the forum in which they may seek such remedies. If the Manager decides to stop paying distributions to Appellants, they would

have to prove they paid some investment amount before suing to recover their distributions. As a result, the amendment is void by the express terms of Section 12.4.

Both Delaware law and South Carolina law compel this conclusion. "Unless there is ambiguity, Delaware courts interpret contract terms according to their plain, ordinary meaning." *Alta Berkeley VI C.V. v. Omneon, Inc.*, 41 A.3d 381, 385 (Del. 2012). The "contract's construction should be that which would be understood by an objective, reasonable third party." *Salamone v. Gorman*, 106 A.3d 354, 367–68 (Del. 2014) (internal citation omitted). "[A]rbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms. … An arbitration clause is a contractual term, and general rules of contract interpretation must be applied ...." *Palmetto Wildlife Extractors, LLC v. Ludy*, 435 S.C. 690, 699, 869 S.E.2d 859, 864 (Ct. App. 2022) (internal citations omitted). "If the contract's language is clear and unambiguous, the language alone determines the contract's force and effect. When a contract is unambiguous, a court must construe its provisions according to the terms the parties used as understood in their plain, ordinary, and popular sense." *Id.* at 700, 869 S.E.2d at 864.

B. Respondents' Argument is Moot Because the Arbitrator, Judge Robert N. Hunter, Jr., Ruled Appellants Satisfied This Element.

Second, Respondents' contention that Appellants will have to prove they paid the investment amount is moot. Appellants, through Soria, demanded—in arbitration—an accounting of Engel's, Full Moon Investment's, and Stellar Naomi's handling of the Ondara Investment. Judge Hunter conducted a hearing on that arbitration claim, and excerpts from that hearing transcript are in the record on appeal. By Order, Judge Hunter upheld Soria's right to maintain an arbitration claim against Respondents. As a result, Respondents' contention that Soria (or Appellants) must prove they paid the prescription

as a prerequisite to arbitration is moot. *See Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 26, 630 S.E.2d 474, 477 (2006) (holding that " [a] moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court"); *see also Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) (holding that mootness arises when some event occurs making it impossible for the court to grant effectual relief). Any ruling to the contrary would contradict the valid order in arbitration.

C. Respondents' Argument is Waived Because They Did Not Raise the Unilateral Amendments to the Arbitrator in the Pending Arbitration.

Third, Respondents' contention that Appellants will have to prove they paid the investment amount is waived. In response to Soria's arbitration demand, none of the Respondents argued that Soria would first have to prove—in court—that they paid the investment amounts as a *prerequisite* to arbitration. As a result, that argument is waived. *See Bazzle v. Green Tree Financial Corp.*, 351 S.C. 244, 255, 569 S.E.2d 349, 355 (2002) (holding that "a party that by its conduct consents to arbitration of a dispute waives any subsequent judicial challenge to its arbitrability"). *Cf.*, *Laser Supply & Servs., Inc. v. Orchard Park Assocs.*, 382 S.C. 326, 338, 676 S.E.2d 139, 145 (Ct. App. 2009) (holding that a waiver is the intentional relinquishment of a known right); *Steinmetz v. Am. Media Servs., LLC*, 393 S.C. 72, 75, 709 S.E.2d 708, 709 (Ct. App. 2011) (holding that circuit courts have limited jurisdiction over arbitration awards). Where, as here, there is clear evidence of a failure to raise an argument in the proper forum (the arbitration), that argument is waived. *Id.*

D. By Order Dated August 30, 2023, the Sole Arbitrator, Judge Robert N. Hunter, Jr., Ruled that Soria, a Series of Bell Tower, LLC, Has a Right to Demand an Accounting from Stellar Naomi.

While the Arbitration Order was not issued until after the Court's Order denying the motion to compel arbitration, Judge Robert N. Hunter, Jr. found that Soria had a right to arbitrate and demand an accounting, despite allegations that Soria had not paid the subscription fee. (R. pp. 603-604, ¶ 19). In his well-reasoned opinion, Judge Hunter concluded that Soria's status as a member turned on the language of the Subscription Agreement, which stated Soria was a member of Stellar Naomi upon the acceptance by the Manager (Respondent Full Moon Investments), not upon proof of payment of the subscription fee. *Id.* at ¶ 11. As such, there is a binding order stating that Soria is a member of Stellar Naomi, entitled to compel arbitration. Appellants, the principals and members of Soria, as alleged in the Complaint, are entitled to compel arbitration of Respondents' claims as well.

CONCLUSION

This Court should reverse the Circuit Court's Form 4 Order and remand this matter with instructions to enter an order compelling Respondents to arbitrate their claims against Appellants.

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