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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Case No, 2012-CP-10-00580

Thomas H. Morgan …….Respondent,

v.

John L. Gilbert, Stuart L. Fred, Bella Vista Partnership, A Texas General Partnership, Bomasada Group, Inc., A Texas Corporation, Bomasada Investment Group II, LLC, A Texas Limited Liability Company, Lauralis Management, Inc., A Texas Corporation, and 150 Bee Street, LLC, A South Carolina Limited Liability Company, Defendants,

Of which John L. Gilbert, Stuart L. Fred, Bella Vista Partnership, A Texas General Partnership, Bomasada Group, Inc., A Texas Corporation, Bomasada Investment Group II, LLC, A Texas Limited Liability Company, and Lauralis Management, Inc., A Texas Corporation are the Appellants.

[INITIAL] BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

(TIMELINE)

The following is an undisputed timeline of the facts of this case.

1) February, 2000 – 150 Bee Street, LLC, (the "Company") was organized and acquired the property located at 150 Bee Street at its intersection with Lockwood Blvd in Charleston (the "Property")

2) February/March, 2005 -- The Company's members adopted a Second Amended and Restated Operating Agreement, which has remained in place since then (the "150 Bee Street, LLC Second Amended Operating Agreement") [Def. Ex. 20] [NOTE: All references noted as "Def. Ex" are to the numbered documents in Appellants' Index to their proposed Record on Appeal].

   As of February, 2005, the four (4) members of the Company and their percentages of ownership were:

   Neal Baker ("Baker")…… 26.67%

   Bella Vista……..26.67%

   Thomas Morgan ("Morgan") [Plaintiff/Respondent]….26.66%

   Edwin Pearlstine ("Pearlstine")……. 20.00%

   Defendants John Gilbert ("Gilbert") and Stuart Fred ("Fred") were the principals in Defendant Bella Vista.

   Until Neal Baker's death in August, 2011, Baker and Fred of Bella Vista were the Company's Managing Members, collectively owning 53.34% of the Company membership interests. They could therefore exercise "Majority Consent" as defined in the Second Amended Operating Agreement.

   The Company's purpose was to construct a residential building on its property.

3) March/April, 2005 – Construction of the building began.

4) April, 2007 – Morgan became increasingly concerned about how Fred and Baker, who was Morgan's brother-in-law, were managing the Company as well as concerned about the possibility of an economic downturn. (Morgan Tr. pp. 520-22)

5) April 26, 2007 – Morgan emailed Fred: "Please address your comments to my lawyer from this point forward. I will no longer communicate with you or your staff. …From now on you can deal through my lawyer! Mr. Joel Goldman." [Def. Ex. 29]. Within days, Goldman and the Company's general counsel, John Hagerty, exchanged letters (Hagerty to Goldman, 4/30/07) [Def. Ex. 31]; (Goldman to Hagerty, 5/15/07) [Def. Ex. 32].

6) July 6, 2008 – Morgan emailed all other Company members:

"I am turning all my correspondence on this project over to my lawyer and accountants. Stewart [sic., "Stuart"], you have stolen too much money from us. There is no way we have spent $450,000 on travel expenses. I am tired of all your theft and bullshit. Don't ever contact me again. I am going to sue your ass and get our money back." [Def. Ex. 40]

Morgan had in fact involved his accountant, Rich Merg, in May, 2008, to begin investigating the Company's financial records [Def. Ex. 37]

7) August 23, 2008 -- Morgan emailed Company Managing Member Neal Baker [Def. Ex. 48]:

> "The only reason I don't plan to sue John and Stuart is that I don't want to involve you in the middle of a this."

All three of these emails from Mr. Morgan were sent by him well beyond three (3) years before he finally filed suit on January 26, 2012.

8) July 13, 2011 – Morgan retained new counsel, Chris Staubes of Clawson and Staubes of Mt. Pleasant, SC.

9) August, 2011 -- Neal Baker died. His interest became non-voting, and Morgan, with the involvement and vote of member Edwin Pearlstine, could control the Company. (Morgan Tr. 374) [Def. Ex. 19]

10) December 7, 2011 -- Defendants agreed to a tolling agreement [Def. Ex. 21] drafted by Morgan's counsel. Morgan's counsel drafted the Tolling Agreement (the "Tolling Agreement") with a Court of Common Pleas caption with Morgan as Plaintiff and multiple named defendants, including 150 Bee Street, LLC, Gilbert, and Fred. It was signed by Morgan in his individual capacity and by Henry E. Grimball as attorney for all of the "defendant" parties named in the caption except 150 Bee Street, LLC

11) January 26, 2012 – The Tolling Agreement having expired 10 days earlier, Morgan filed his **verified** Complaint [Def. Ex. 8] in this case (the 2012 "Original Complaint").

The case caption is identical to that in the Tolling Agreement except that the case caption of the Summons and of the Complaint as well as the text of the Complaint did not name 150 Bee Street, LLC as a party plaintiff or defendant. No affidavit of service of the Complaint on 150 Bee Street, LLC was ever filed with the Clerk of Court as required by Rule 4(g), SCRCP.

[Obviously, Morgan at that time did not include 150 Bee Street, LLC as a party in his derivative suit.]

12) March 13, 2012 -- Defendants served their Answer [Def. Ex. 9] which in paragraph 79 expressly asserted "this Court lacks subject matter jurisdiction." (Def. 2012 Answer)

13) July 9, 2012 – By order of Judge Thomas L. Hughston [Def. Ex. 1] and with the consent of the parties, this case was sent to arbitration as required by the Company's Second Amended Operating Agreement. The Order expressly provided that the Court retained jurisdiction to enforce it and to enter any Order it found appropriate. The parties entered the arbitration process based on their pre-July 2012 pleadings (Order of Judge Hughston 7/9/12).

14) February 26, 2018 – More than six (6) years after Morgan filed the 2012 Original Complaint on January 26, 2012, Morgan filed a motion with the Arbitration Panel (the "Panel") to amend his January 26, 2012, Original Complaint to name 150 Bee Street, LLC as a party. On June 5, 2018, the Defendants filed their Memorandum Opposing Motion to Amend Answer. On January 7, 2019, Panel Chair Cooke granted Morgan's motion without prejudice to the Defendants' objections to the amendment based on both the Court's and Panel's lack of subject matter jurisdiction and the three year statute of limitations bar. (Morgan Motion 2/26/18) [Def. Ex. 13]; (Defendants' Memorandum Opposing Motion to Amend Complaint 6/5/18) [Def. Ex. 14]; (Order of Arbitration Chair Cooke 1/7/19) [Def. Ex. 2]

15) May 18, 2018 – Morgan sent the Panel and defense counsel a draft of Morgan's First Amended Complaint. In paragraph 4 Morgan asserted that 150 Bee Street, LLC "is an indispensable party to this derivative proceeding. Morgan, as a member, brings this case derivatively on the LLC's behalf." (Morgan "Draft First Amended Complaint") [Def. Ex. 10]

16) Jan 22, 2019 -- Morgan served his First Amended Complaint. It omitted the allegation that 150 Bee Street, LLC was an indispensable party and simply alleged in paragraph 2: "The Defendant 150 Bee Street, LLC …is named as a nominal party Defendant to this Derivative proceeding." (the "Filed First Amended Complaint") [Def. Ex. 11]

17) Feb 19, 2019 – Defendants served their Rule 12 Motion to Dismiss Morgan's case, a derivative action, because the Panel and the Court lacked subject matter jurisdiction. (Def. "Rule 12 Motion to Dismiss - Subject Matter Jurisdiction." 2/19/19) [Def. Ex. 15]

18) April 3, 2019 – Defendants served their Rule 12 Motion to Dismiss Morgan's case because Morgan did not comply with the three (3) year statute of limitations when he filed his initial suit on January 26, 2012. (Def. "Rule 12 Motion to Dismiss [SoL]" 4/3/19) [Def. Ex. 16]

19) June 16, 2022 -- The Panel heard the Defendants' motions and denied them by its Order of July 11, 2022. The Defendants timely raised these issues again at the conclusion of the trial in October/November, 2022, and again in subsequent motions. The Panel issued each decision without findings of fact and conclusions of law, without any explanation, and without even being "barely colorable." i.e., barely plausible. (Panel Order 7/11/22) [Def. Ex. 3]

20) October 31-November 8, 2022 – The Panel heard the case.

21) April 10, 2023 – The Panel issued its initial Arbitration Award. On April 18, 2023, the Defendants moved for reconsideration by the Panel ("Panel's Initial Award") [Def. Ex. 5]; (Defendants' Motion for Reconsideration 4/18/23) [Def. Ex. 17]

22) June 19, 2023 – The Panel issued its Final Arbitration Award. (the "Panel Final Award") [Def. Ex. 6]

23) June 30, 2023 – The Defendants/Appellants filed in the Court of Common Pleas their Motion to Vacate or Modify the Final Arbitration Award. (Def. Motion to Vacate or Modify Panel Final Award 6/30/23) [Def. Ex. 18]

24) February 26, 2024 – Judge Bentley D. Price filed his Order denying the Appellants' Motion to Vacate or Modify the Final Arbitration Award. (Judge Price's Order 2/26/24) [Def. Ex. 4]

25) March 4, 2024 – The Appellants served and filed their Notice of Appeal to the Court of Appeals. (Notice of Appeal 3/4/24) [Def. Ex. 12]

ARGUMENTS

1. THE PLAINTIFF/RESPONDENT MORGAN'S FAILURE TO NAME 150 BEE STREET, LLC (THE "COMPANY") IN MORGAN'S DERIVATIVE ACTION FILED IN 2012 DEPRIVED THE COURT AND ARBITRATION PANEL OF SUBJECT MATTER JURISDICTION AND REQUIRES DISMISSAL OF THIS CASE AS A MATTER OF INDISPUTABLE "BLACK LETTER" LAW BECAUSE THE COMPANY WAS AN "INDISPENSIBLE PARTY" TO MORGAN'S SUIT.

A. FACTS

Since the filing of their original Answer in this action on March 13, 2012, [Def. Ex. 9] Appellants other than 150 Bee Street, LLC (collectively, the "**Appellants**") have challenged whether subject matter jurisdiction exists in the instant derivative action. The issue can be raised at any time in any proceeding. At its most fundamental, Appellants have repeatedly pointed out that Respondent Thomas H. Morgan ("**Morgan**" or "**Respondent**") failed to name 150 Bee Street, LLC, (the "**Company**" or "**150 Bee Street**") as an indispensable party as indisputably and universally required by applicable law. Morgan tried to muddy this issue in his 2012 Original Complaint [Def. Ex. 8] by alleging both derivative and individual claims. In the Panel's Initial Award of April 10, 2023, [Def. Ex. 5] the Panel dismissed all of Morgan's individual claims, leaving only derivative claims over which there was no subject matter jurisdiction.

Neither the Respondent nor the Panel has cited a single case, statute, or rule of civil procedure disputing the unquestioned legal principle that a limited liability company is an indispensable party to any derivative claims brought on its behalf. Indeed, Morgan acknowledged in 2019 that the Company is an indispensable party in his **Draft** First Amended Complaint [Def. Ex. 10] but omitted this language in the Filed First Amended Complaint [Def. Ex. 11] actually filed after Appellants noted the inclusion of the "indispensable party" language in the draft.

Appellants submit that Respondent's failure to name the Company as an indispensable party is reason enough to dismiss the instant case as a matter of undisputed law.

On January 26, 2012, Morgan filed his verified 2012 Original Complaint [Def. Ex. 8] against Bella Vista, Fred, Gilbert and other related defendants. There is no dispute, nor can there be any, that the 2012 Original Complaint did not name the Company as a defendant, although the Company was an indispensable party to any derivative claims. Instead, Morgan asserted all claims

"individually and in a representative capacity as a derivative claim," failing to distinguish any alleged individual claims from derivative claims.

Interestingly, in December, 2011, before Morgan filed the 2012 Original Complaint, Morgan's attorneys proposed a tolling agreement (the "Tolling Agreement") [Def. Ex. 21] which they drafted and to which the parties agreed. The title/caption of the Tolling Agreement was a lawsuit case caption styled in the Charleston County Court of Common Pleas, with Morgan as the named plaintiff and naming various defendants including Appellants Gilbert and Fred. The Tolling Agreement's caption also included the Company as a defendant. Morgan filed the 2012 Original Complaint ten (10) days after the Tolling Agreement expired but failed to name the Company as a party or in the caption. The case caption in the 2012 Original Complaint is identical to that in the Tolling Agreement except that the case caption of the Summons and case caption and text of the 2012 Original Complaint do not name 150 Bee Street, LLC as a party plaintiff or defendant.

On March 13, 2012, Appellants raised the defense of lack of subject matter jurisdiction in paragraph 79 of their original Answer (Def. 2012 Answer) [Def. Ex. 9] to the 2012 Original Complaint. The case was referred to arbitration by consent order filed July 9, 2012. (Order of Judge Hughston 7/9/12) [Def. Ex. 1], with the Court of Common Pleas retaining jurisdiction over the instant action. Since the Company was not a party, the Company did not consent to this order.

Morgan did nothing to correct his failure to name the Company as an indispensable party until six (6) years later when he served a motion on February 26, 2018, (Morgan "2018 Motion to Amend") [Def. Ex. 13] seeking to amend his 2012 Original Complaint to add the Company as a party, years beyond South Carolina's applicable three (3) year statute of limitations. Appellants repeatedly objected to the Panel Chair, (Def. emails 3/12/19) [Def. Ex. 51] arguing that the Panel

had no subject matter jurisdiction over the alleged derivative claims. On June 5, 2018, Appellants filed a Memorandum in Opposition to Plaintiff's Motion to Amend. (Def. Memorandum Opposing Morgan's Motion to Amend 6/15/18). [Def. Ex. 14] Over the Appellants' objections, the Panel Chair allowed the amendment in a one paragraph order of January 7, 2019, "without prejudice to the Defendants' [Appellants'] ability to make any legal arguments they may have asserted in opposition to this motion." (Order of Arbitration Chair Cooke 1/7/19) [Def. Ex. 2]

On January 22, 2019, Morgan served his Filed First Amended Complaint. [Def. Ex. 11] On February 19, 2019, Appellants filed their Rule 12 Motion to Dismiss Plaintiff's case, a derivative action, because of jurisdictional defects. (Def. Rule 12 Motion to Dismiss – Subject Matter Jurisdiction, 2/19/19) [Def. Ex. 15]

The Panel did not hear this motion until over three (3) years later, on June 16, 2022 (the "Motion Hearing").

The Panel denied the motion by order dated July 11, 2022. (Panel Order 7/11/22) [Def. Ex. 3].

During the trial of this case conducted before the Panel between October 31 and November 8, 2022 (the "Hearing"), Appellants presented additional evidence and timely renewed their motion, which the Panel took under advisement.

Based upon the motions, memoranda, and exhibits submitted to the Panel, the Panel should have dismissed the instant action for lack of subject matter jurisdiction.

B. STANDARD OF REVIEW

A threshold issue that must be determined in every case is whether the Court has jurisdiction over the dispute. Subject matter jurisdiction is the power of a court to hear and determine a case, *Bluffton Town Council Election v. Fulgham*, 385 S.C. 632, 637, 686 S.E.2d 683,

685 (2009), and is reviewed *de novo*, if raised, at every level of the proceeding. Despite Respondent's assertions to the contrary, subject matter jurisdiction may not be waived even with consent of the parties. *Hunter v. Boyd*, 203 S.C. 518, 525, 28 S.E.2d 412, 416 (1943).

No less an authority than the United States Supreme Court has declared: "The corporation is a necessary party to the action; without it, the case cannot proceed." *Ross v. Bernhard*, 396 U.S. 531, 538 (1970). The corporation is an indispensable party in a derivative action because any adverse judgment must be binding upon the corporation.

Subject matter jurisdiction may not be waived, and this fundamental issue may be raised at any time, including when raised for the first time on appeal to the South Carolina Supreme Court. *See Bluffton Town Council Election v. Fulgham*, 385 S.C. 632, 686 S.E.2d 683, 685-86 (2009); *Brown v. State*, 343 S.C. 342, 346, 540 S.E.2d 846, 848-49 (2001); Tatnall v. Gardner, 350 S.C. 135, 137, 564 S.E.2d 377, 378 (Ct. App. 2002). A court therefore reviews an arbitrator's determination of subject matter jurisdiction *de novo*. *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, n. 569 (2013) (citing *AT & T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649 (1986)); *MBNA Am. Bank v. Christianson*, 377 S.C. 210, 213, 659 S.E.2d 209, 211 (Ct. App. 2008); *Hatcher v. Edward D. Jones & Co., L.P.*, 379 S.C. 549, 552, 666 S.E.2d 294, 296 (Ct. App. 2008) ("The determination of whether a claim is subject to arbitration is subject to de novo review.")(quoting *Wellman, Inc. v. Square D Co.*, 366 S.C. 61, 67, 620 S.E.2d 86, 89 (Ct. App. 2005)).

In South Carolina, the question of "…whether subject matter jurisdiction exists is a question of law…" which an appellate court "is free to determine with no particular deference to the circuit court.…" "Therefore, on appeal, we [the South Carolina Court of Appeals] review the

circuit court's findings de novo." *South Carolina Public Interest Foundation v. Wilson*, 437 S.C. 334, 339, 878 S.E.2d 891, 894 (2022). (Citations omitted).

Thus, a reviewing court independently examines whether the matter to determine if the arbitrators have exceeded their powers by deciding a claim that was not arbitrable under the arbitration agreement. *See, e.g., First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 299–300 (2010).

This Court is therefore not bound by the limited instances in which a court may vacate an arbitration award as set forth in S.C. Code Ann. 15-48-130 or by a finding that an arbitration panel has issued an award resulting from a "manifest disregard or perverse misconstruction of the law" as discussed in *Batten v. Howell*, 300 S.C. 545, 549, 389 S.E.2d 170, 172 (Ct. App. 1990).

C. LAW

RESPONDENT'S FAILURE TO NAME AN INDISPENSABLE PARTY IN HIS DERIVATIVE ACTION REQUIRES THE COURT TO DISMISS THIS CASE FOR LACK OF SUBJECT MATTER JURISDICTION

Subject matter jurisdiction lies at the very heart of the problem created by Respondent's failure to name the Company as a party in his initial 2012 Original Complaint. Despite inclusion of the Company as a party to the Tolling Agreement, Morgan undeniably did not name the Company as a party to his suit until 2019.

Case law is crystal clear, and unrefuted by any citation of law by Morgan or by the Panel, that in this derivative action, the Company was an "**indispensable**" party. Morgan admitted as much in his **Draft** of his First Amended Complaint attached to his 2018 Motion to Amend, an allegation conspicuously omitted from the First Amended Complaint filed in 2019. Morgan's failure to name and serve the Company as a party resulted in not simply a mere technical defect in his 2012 Original Complaint but left Morgan without a derivative cause of action. This

immediately deprived the Court in 2012, and thereafter the Panel, of subject matter jurisdiction. Without subject matter jurisdiction, the Panel had no power in 2018 to order the amendment.

Because Morgan could find no law contrary to the proposition that failure to name and serve the Company in a derivative action deprived the Court and Panel of subject matter jurisdiction, Morgan raised the specious argument that because the Appellants agreed that the case belonged in arbitration, they waived the subject matter jurisdiction issue. First, the Company itself did not agree to arbitrate because it was not a party to the case at that time and therefore not a party to any agreement to arbitrate. Nor did Judge Hughston have jurisdiction over it when he issued his Order of July 9, 2012. Second, the lack of subject matter jurisdiction may not be waived, even by consent of the parties.

Morgan's derivative claims belong to the Company. Any judgment in the instant case must be binding on the Company. Hence, the Company is a necessary and indispensable party in a derivative proceeding since any right of recovery belongs to the Company. Without the Company as a party, if the Defendants prevailed, the verdict would not be *res judicata* as to the Company.

The rationale for requiring the Company to be included as a party in a derivative action is succinctly expressed in *Turner v. United Mineral Lands Corp.*, 308 Mass. 351, 33 N.E.2d 282, 286-87 (1941):

> The corporation on behalf of which a stockholder's bill is brought is an indispensable party to the suit. Justice requires that the corporation itself be bound by the result of such a suit and not be left free to bring its own suit later against the same defendants for the same alleged wrongs.

A case almost identical to the instant case is *Riccuitti & Rubinstein v. McEwan*, 2015 WL 10015196 (Unpublished Opinion, Superior Court of New Jersey, Appellate Division, 2016).

In *Riccuitti*, developer R.D.R. Properties, Inc. (RDR), formed 1211 Grand Avenue Condominium, a residential development. The Chancery Court dismissed the plaintiffs' complaint

in part for failure to join RDR and other indispensable parties and also denied the plaintiffs' motion to amend their Complaint to assert claims against RDR and other parties. The plaintiffs argued that the Chancery Court erred in denying their motion to amend their complaint and further erred in dismissing their Complaint for failure to join RDR and other indispensable parties. In rejecting these arguments, the Superior Court wrote in part:

> If an association wrongly fails to act by filing a claim to protect the unit owner's common interest, "a unit owner may file a derivative suit against the association."…In such a situation,… **"the association must be named as a party."**…
>
> Finally, the Chancery Court correctly found that **any claim plaintiffs may have against RDR with regard to the amendment to the master deed or any misrepresentation would be time-barred….**
>
> In summary, plaintiffs have no viable claim against defendant. Moreover, the claims in their proposed amended complaint either fail to state a cause of action or are time-barred. Thus, **it would be futile to allow such an amendment**.
>
> (Citations omitted) (Emphasis added).

The *Riccuitti* case is only one of many state court cases across the United States which have uniformly reached the identical result. For example, the 1961 Georgia case, *Smyly v. Smith*, 216 Ga. 529, 118 S.E.2d 188 (1961), involved a minority stockholder's suit brought against the individual directors of a corporation without making the corporation either a party plaintiff or a party defendant. Sustaining the dismissal of the case, the Georgia Supreme Court wrote:

> . . .[T]o the stockholder's action the corporation is not merely a proper party, but is an essential, indispensable party, and a failure to make the corporation a party is not a mere defect of parties, but **leaves the stockholder without a cause of action and the court without jurisdiction**. 14 C.J. 941, § 1461; 18 C.J.S. Corporations § 570; *Steele Lumber Co. v. Laurens Lumber Co.*, 98 Ga. 319, 24 S.E. 755; *Smith v. Coolridge Banking Co.*, 147 Ga. 7, 8, 92 S.E. 519; *Wagner v. Biscoe*, 190 Ga. 474, 9 S.E.2d 650; *Kimbrough v. Gainesville Mather Co.*, 53 Ga. App. 735, 187 S.E. 169; *Greenwood v. Greenblatt*, 173 Ga. 551(3), 161 S.E. 135. (Emphasis added)

In all of his filings on this subject, Morgan has never presented a single case to the contrary. Similarly, the Panel never cited any law supporting its exercise of subject matter jurisdiction.

In a 1981 Florida case, *Daniels v. Vann*, 396 So.2d 723 (D.Ct.App.Fl. 4th Dist.) (1981), a stockholder sued a corporation in a derivative action but made no attempt to name the corporation as a party.

In reversing the trial court, the District Court of Appeals declared:

> The law on this subject is clear. In a stockholder's derivative action, the corporation on whose behalf the action is brought is an indispensable party. **The absence of the corporate defendant as at least a nominal party serves to divest the court of jurisdiction** . . . . (Emphasis added)

In the 1983 Pennsylvania case of *Fitzpatrick v. Shay*, 314 Pa. Super 450, 461 A.2d 243 (1983), the plaintiff stockholder sued Shay, an officer and director of Great Oak Enterprises, Inc., but did not name Great Oak as a party. Affirming the trial court's summary judgment awarded Shay in the derivative action, the Superior Court reasoned:

> It is axiomatic that a shareholder may assert a derivative action on behalf of the corporation where the shareholder has demanded that the corporation assert the right underlying the action and the corporation has refused . . . In a derivative action, the corporation is a required party. . . The appellant's cause of action was improperly brought in that the real party in interest, Great Oak, an indispensable party to the action, was not made a party. Furthermore, we find that appellees did not waive this argument by raising it in a motion for summary judgment instead of in their pleadings. . . . **Whenever it appears by suggestion or otherwise that the court lacks jurisdiction of the subject matter or that there has been a failure to join an indispensable party, the court shall dismiss the action** [citations omitted]. (Emphasis added)

In re McCoy, 157 B.R. 705 (Bankr. M.D. Fla. 1993), is a case remarkably similar to the instant case and addresses the issues discussed in *Riccuitti, supra*. In *McCoy*, corporate shareholders commenced a proceeding against McCoy, a Chapter 7 debtor, but failed to name the corporation, HCA, as a party litigant. After the claims bar date [the bankruptcy court's equivalent to the three year- statute of limitations here], the plaintiffs amended their complaint to add, for the

first time, HCA as a party litigant. The debtor attacked the amended complaint and sought dismissal on the ground that the Amended Complaint was time-barred.

The debtor contended that HCA was an indispensable party to the derivative action and was not a party to the suit until brought in by the amended complaint. Debtor further contended **the original complaint was in fact a nullity** as a stockholders' derivative action.

The Bankruptcy Court agreed, analyzing the issues as follows:

> …the center [sic. "central"] and controlling issue of this controversy… is whether or not the Amended Complaint relates back to the filing date of the original Complaint that was timely filed.
>
> . . . This question, of course, can only be answered by analyzing the nature of stockholder derivative actions and applicable rules governing procedure of such actions.
>
> . . . The validity *vel non* of a suit by stockholders on behalf of a corporation must be tested by considering the applicable local law. . . . It is uniformly established in this State, that a corporation on whose behalf a claim is asserted by stockholders is an indispensable party to a stockholder's derivative action and the absence of a corporate litigant at least as a nominal party divests the court of jurisdiction to entertain a stockholder's derivative action. . . . In the present instance, it is without dispute that HCA was not named either as a party plaintiff or a defendant in the original Complaint. Therefore, this Court clearly has no jurisdiction to entertain the original Complaint to the extent that it attempted to assert a derivative claim on behalf of HCA. …This being the case, **whether or not the Plaintiff now may rely on the relation back doctrine …is academic since there remained no viable complaint to which the Amended Complaint could have related back**.
>
> …This Court is satisfied that the Amended Complaint is time barred… [and] that it is appropriate to dismiss the Amended Complaint.
>
> (Emphasis added)

Numerous other courts have reached the same conclusion. See, also, *Koster v. American Lumbermens Mut. Cas. Co.,* 330 U.S. 518 (1947) (finding that the corporation for whose benefit an action is brought is the real party in interest and is an indispensable party); *Schaler v. Feder*, 184 N.Y.S.2d 933 (Supp. 1959) ("In a stockholder derivative action, the corporation is ordinarily

a necessary party"); *Agostino v. Hicks,* 845 A.2d 1110 (Del. Ch. 2004) ("Although not specified by derivative action rule, the corporation is an indispensable party to a derivative action."); *Gabriel v. Preble*, 396 F.3d 10 (1st Cir. 2005) ("In shareholder derivative action, corporation is indispensable party within meaning of civil procedure rule governing joinder of persons needed for just adjudication.").

Although the Panel originally allowed in 2018 the amendment by Morgan of his 2012 Original Complaint, while expressly preserving the Appellants' legal objections, it was entirely improper for the Panel to permit Morgan to join a necessary party after the applicable statute of limitations, here three (3) years, had barred the claim. *See Gillman v. City of Beaufort*, 368 S.C. 24, 627 S.E.2d 746 (Ct. App. 2006).

As the plaintiff in the *McCoy* case, *supra*, unsuccessfully attempted, Morgan claimed in 2019 that the addition of 150 Bee Street, LLC as a party should relate back to the filing of Morgan's 2012 Original Complaint of January 2012, so as to avoid the three (3) year statute of limitations. However, the addition of a party differs from a substitution or change of a party governed by Rule 15(c), SCRCP. Substitutions relate back; additions do not. *See Jackson v. Doe*, 342 S.C. 552, 537 S.E.2d 567 (Ct. App. 2000). And with the 2012 Original Complaint effectively a nullity, Morgan had no pleading to amend. There was nothing to which an amendment could relate back.

The rule governing the relation back of amendments does not permit Morgan to cure his mistake by Morgan's failing to name an indispensable party. Rule 15(c), SCRCP does not cover a "deliberate decision not to sue a party whose identity the plaintiff knew from the outset." *See Sundevil Power Holdings, LLC v. Arizona Dept. of Revenue*, 240 Ariz. 339, 379 P.3d 236 at 244 (Ct. App. 2016). Regardless of whether Morgan claims that his failure to name the Company as

an indispensable party to the 2012 Original Complaint was a mistake or a deliberate decision, the subsequent addition of the Company in 2019 does not relate back to the filing of the 2012 Original Complaint. Lacking subject matter jurisdiction, the Panel had no power to order the amendment.

It is axiomatic that to avoid the applicable statute of limitations barring litigation, a party must be timely served with a complaint that seeks specific relief.

The claims asserted in a derivative lawsuit actually belong to the corporation. *See In re MAXXAM, Inc./Federated Dev. S'holders Litig*., 698 A.2d 949, 956 (Del. Ch. 1996). The Company is an indispensable party to this derivative lawsuit and would receive any damages awarded. See *Sternberg v. O'Neil*, 550 A.2nd 1105, 1124 (Del. 1988). As an individual, Morgan had no claims. As a non-party, 150 Bee Street, LLC did not agree to submit the derivative claims to arbitration.

Without the corporation named as a party, "[t]he court has no jurisdiction to adjudicate its rights in its absence." 15 Cal. Jur.3d Corporations §522; *Keeler v. Schulte,* 47 Cal.2d 801, 306 P. 2d 430 (1957); *Beyerbach v. Juno Oil Co.*, 42 Cal.2d 111 (1954). Complete relief in a derivative action cannot be accorded unless the "owner" of the claim, the company, is a party. The claims in a derivative action are "owned" by the company and the company is therefore an indispensable party under Rule 19(a), SCRCP. Accordingly, when a limited liability company/corporation is an indispensable party to a derivative action but not joined as a party, the action is subject to dismissal for lack of subject matter jurisdiction.

The Appellants in the instant action raised the defense of lack of subject matter jurisdiction in 2012 in paragraph 79 of their original Answer where they pled as a defense that the Court "lacks subject matter jurisdiction under the provisions of the arbitration agreement contained within the Operating Agreement."

Without subject matter jurisdiction, anything that a court does is void *ab initio*. See, e.g., *Coon v. Coon*, 364 S.C. 563, 566, 614 S.E.2d 616, 617 (2005) ("A judgment of a court without subject-matter jurisdiction is void.") As a result, a Court has a duty to take notice of the jurisdictional boundaries set by the legislature. See, e.g., *Bluffton Town Council Election v. Fulgham*, 385 S.C. 632 at 637, 686 S.E.2d 683 at 686 (2009) ("The lack of subject matter jurisdiction may not be waived, even by consent of the parties, and should be taken notice of by this Court.").

Similarly, should this Court instead decide to judge the Panel's decisions dealing with this issue on the more narrow standard of "manifest disregard or perverse misconstruction of the law," that analysis should likewise result in vacating the award.

The South Carolina Supreme Court has held: "…for a court to vacate an arbitration award based on an arbitrator's "manifest disregard for the law," the "governing law ignored by the arbitrator must be well defined, explicit, and clearly applicable." "An arbitrator's 'manifest disregard of the law,' as a basis for vacating an arbitration award occurs when the arbitrator knew of the governing legal principle yet refused to apply it." *C-Sculptures, LLC v. Brown*, 403 S.C. 53, 57, 742 S.E.2d 359, 361 (2013) (citations omitted).

And while arbitrators need not specify their reasoning or the basis of the award, the factual inferences and legal conclusions supporting the award must be, at least, "barely colorable," i.e. barely plausible. *Pittman Mortg. Co., Inc. v. Edwards*, 327 S.C. 72, 77, 488 S.E. 2d 335, 338 (1997).

Appellants submit that a review by this Court of the record submitted to the Panel without any doubt shows the Panel chose to disregard law that is well defined, explicit, and clearly applicable to the case. The Panel knew of the governing legal principles yet without reason refused

to apply them. This is contrary to the General Assembly's intent in enacting S.C. Code Ann. 33-44-1103.

As pointed out above, in South Carolina, the factual inferences and legal conclusions denying Appellants' Motion to Dismiss must be, at the least, "barely colorable," i.e. barely plausible. A corollary to this is that the arbitrators' failure to explain their decision may be considered a factor in this Court's determination that the arbitrators manifestly disregarded the law. *See Halligan v. Piper Jaffray, Inc*., 148 F.3d 197 (C.A.2, 1998).

A review of the Panel's decisions as to the Motion to Dismiss for lack of subject matter jurisdiction clearly shows that the Panel issued each decision without findings of fact, without conclusions of law, and without any explanation. Judge Bentley Price, hearing the Appellants' Motion to Vacate the Award, likewise did the same. Theirs was "a manifest disregard or perverse misconstruction of the law." Even under this standard of judicial review, Judge Price's Order should be reversed, and the Award should be vacated and the case dismissed.

2. BECAUSE THE PLAINTIFF/RESPONDENT MORGAN THREATENED TO SUE THE APPELLANTS AND HIRED BOTH AN ACCOUNTANT AND ATTORNEYS TO INVESTIGATE DOING SO IN 2007/2008, THE THREE YEAR STATUTE OF LIMITATIONS HAD RUN WHEN MORGAN FILED HIS SUIT IN 2012.

A. INTRODUCTION

On separate occasions, (i) April 2007 [Def. Exs. 27, 29, and 30], (ii) July 2008 [Def. Exs. 39, 40, and 42], and (iii) August 2008 [Def. Ex. 48], Respondent Morgan, advised by counsel, in emails threatened the Appellants in this case with a lawsuit. All of these threats are documented by emails from Morgan and are undeniable and in no way open to question or debate. After the statute of limitations ran, more than three (3) years later on January 26, 2012, Morgan filed his 2012 Original Complaint in this derivative case. His claims are indisputably time-barred.

On April 3, 2019, Appellants filed and served their "Rule 12 Motion to Dismiss [SoL]" Plaintiff's case [Def. Ex. 16] because Morgan filed his original Complaint long after the applicable three (3) year statute of limitations had run.

Three years later, the Panel heard the motion on June 16, 2022, and denied it by Order of July 11, 2022. (Panel Order 7/11/22) [Def. Ex. 3] In this order, the Panel made no findings of fact and no conclusions of law, gave no reason, and made no comment.

In the Hearing conducted before the Panel between October 31 and November 8, 2022, Appellants presented evidence directly related to this issue and, with consent, timely renewed their Motion to Dismiss. In the Panel's Initial Award on April 10, 2023 [Def. Ex. 5], the Panel denied Appellants' motion but once again made no findings of fact and no conclusions of law, gave no reason, and made no comment. On April 18, 2023, Appellants served their Motion for Reconsideration of Arbitration Award. (Motion for Reconsideration 4/18/23) [Def. Ex. 17]. In the Panel's Final Award on June 19, 2023, [Def. Ex. 6] for a third time, the Panel denied Appellants' Motion and, again, made no findings of fact or conclusions of law, gave no reason, and made no comment.

If South Carolina's statutes of limitations are to mean anything, based upon the record and the facts and law set forth below, this Court should vacate the Award and dismiss the instant action.

B. FACTS

In February 2000, 150 Bee Street, LLC, acquired the Property on which it subsequently developed the 150 Bee Street condominium project (the "**Project**"). The Company's original members were Baker, his brother-in-law Morgan, Pearlstine, and Masters, with each member owning a twenty-five (25%) percent membership interest in the Company.

In connection with the Company obtaining construction financing from Amegy Bank in February 2005, the Members entered into a Second Amended and Restated Operating Agreement. (150 Bee Str eet. LLC "**Second Amended Operating Agreement**") [Def. Ex. 20]. The Company's ownership structure became as follows:

Baker…….26.67%

Morgan……..26.66%

Pearlstine……...20.00%

Bella Vista…….26.67%

The terms of the Second Amended Operating Agreement were negotiated with Morgan, who was represented by attorneys Joel Maser and Joel Goldman ("**Goldman**") of the Greenberg Traurig firm in Miami. Baker and Fred became the Company's Managing Members.

Morgan testified during the Hearing that in December, 2006, while in Baker's office, Morgan saw on Baker's desk several draw requests from Appellant Bomasada Investment Group II ("**BIG II**") to Amegy Bank. (Morgan Tr. pp. 561-63) [Def. Ex. 19].

Morgan testified that in April 2007, the condominium market in Miami had started to collapse. He likened that market to the proverbial "canary in a coal mine," a harbinger of the looming Great Recession. (Morgan Tr. pp. 657-58) [Def. Ex. 19].

This worried Morgan, and, on April 25, 2007, he emailed the Company's other members about an article he had read in the *Wall Street Journal*. (Morgan email 4/25/07) [Def. Ex. 23]. Morgan's email elicited immediate responses from Baker, (Baker email 4/25/07) [Def. Ex. 24]; Gilbert, (Gilbert email 4/25/07) [Def. Ex. 25]; and Fred, (Fred email 4/25/07) [Def. Ex. 26], each suggesting that Morgan consider getting out of the Company.

Morgan singled out Fred in his caustic email reply the next morning, April 26, 2007, (Morgan email 4/26/07) [Def. Ex. 27], in which Morgan wrote in part:

> I am astounded by your pompous attitude…. I really don't appreciate you and John's confrontational attitude…. You have provided me with very little reporting requirements as required by the agreement…. Never in my life have I been treated so rudely…. Please change your attitude if you want my cooperation. I would also like to see all of your invoices for travel expenses. I don't understand why there is $750,000 in travel expenses for this project.

Fred responded later that day: (Fred email 4/26/07) [Def. Ex. 28]

> I am a little stunned by your email…. I have forwarded your email to John and he and I both agree that we will be more than happy to move out of the way and let you complete the development and construction of the project of Bee Street as stated in your email…. In closing, I now consider you a hostile partner and will be taking all necessary actions afforded me as the managing member of the LLC to protect the LLC until this transfer has taken effect.

Morgan replied later that night. (Morgan email 4/26/07) [Def. Ex. 29]

> Please address all your comments to my lawyer from this point forward. I will no longer communicate with you or your staff…. [Y]ou should provide your partners with the monthly information that is required under the operating agreement Article 6.01, which I have never received from you; or answer my questions in a business like manner…. **From now on you can deal through my lawyer! Mr. Joel Goldman [with Goldman's address given]….** (emphasis added).

Four days later, John Hagerty, the Company's general counsel ("**Hagerty**") wrote Goldman, (Hagerty letter 4/30/07) [Def. Ex. 31], who responded on May 15, 2007. (Goldman letter 5/15/07) [Def. Ex. 32]. Thereafter, on September 20, 2007, at Morgan's request, Baker's CPA, Julia DuMars, sent Morgan a copy of draw request No. 30, (DuMars letter 9/20/07) [Def. Ex. 33], and on December 17, 2007, sent him the final draw request, No. 33. (DuMars email 12/17/07) [Def. Ex. 34].

Morgan acknowledged at the Hearing that in reviewing draw request No. 30: (Morgan Tr. pp. 563-66) [Def. Ex. 19].

1) It covered the period August 1 to August 31, 2007.

2) On page 3, "Developer Overhead" had been increased by $150,000 to $454,414 and "Interim Property Operations" had been increased by $150,000 to $450,000.

3) On page 4, charge orders of $4,851,062 had increased the "Original Contract Sum" to $29,851,062; [AND in subsequent draw request No. 33, to $31,230,240].

Morgan testified that what really caught his eye was on page 5, line item 01145, "Construction Travel Expense," which had increased $50,000 to $400,000 and increased later in draw request 33 by an additional $81,250. He also saw that the salaries of BIG II managers had each increased by tens of thousands of dollars, e.g., line item 01220 "Division Manager," had increased by $85,250. (Morgan Tr. pp. 566-69) [Def. Ex. 19]

Morgan testified that when he asked about all these things, the response he received was: "We've given you everything that we're going to give you based on the operating agreement," and that Company counsel Hagerty had advised that the Managing Members did not have to provide Morgan anything else. (Morgan Tr. pp. 585-86) [Def. Ex. 19].

Many of Morgan's major contentions in the instant litigation involve the use of private aviation on Company business. Morgan alleged essentially that most, if not all, of the flights on the private aircraft owned by Lauralis Management, Inc. ("**Lauralis**"), though clearly authorized by Majority Consent of both Fred and Baker, were improper. Fred owned Lauralis.

Morgan acknowledged in his testimony that he received by email a financial report from Gilbert of May 2, 2008, (Gilbert email 5/2/08) [Def. Ex. 35] which contained a "Schedule of Soft, Hard, and General and Administrative Costs" which included line item 6035, "Airplane Fuel," showing a cost of $18,873.69, which Morgan thought "…might be going to the jet." (Morgan Tr.

p. 570) [Def. Ex. 19]. He certainly knew Fred wasn't "buying it for Delta Airlines," (Morgan Tr. p. 701) [Def. Ex. 19], and Morgan himself had previously flown in the Lauralis jet. (Morgan Tr. p. 571) [Def. Ex. 19].

Morgan testified that his immediate reaction was to email Baker on May 4, 2008, complaining: (Morgan email 5/4/08) [Def. Ex. 36]

> Since Bomasada is both the developer and general contractor, this statement doesn't provide us with the information we need to know concerning charges for overhead, corporate salaries, travel expenses, etc. All these items are lumped in with construction hard and soft costs.

Rich Merg ("**Merg**") of the accounting firm Ian D. Gardenswartz Associates, P.C., had been Morgan's CPA for years. On May 5, 2008, Morgan sent Merg the financial report Morgan had just received from Gilbert. On May 12, Merg emailed Gilbert requesting a QuickBooks backup file and other financial records as part of Merg's investigation into the Company on Morgan's behalf. (Merg email 5/12/08) [Def. Ex. 37].

Clearly, by May 5, 2008, Morgan had engaged both an attorney, Goldman, and a CPA, Merg, to investigate the financial operations of the Company. This occurred not quite four (4) years before Morgan filed the instant derivative suit.

Responding to an emailed status report to the Company's members from Gilbert dated July 3, 2008, (Gilbert email 7/3/08) [Def. Ex. 38], Morgan wrote an email dated Sunday, July 6, 2008, at 12:10 AM: (Morgan email 7/6/08) [Def. Ex. 39]

> John,
>
> Please give us a spreadsheet of whether we are going to make money on this project or not. I have been asking you for over six months to give us a projection. I expect an answer within a week. **I'm tired of fucking around with your bullshit reports. Please give us the straight shit not bullshit anymore.**
>
> (emphasis added).

In Morgan's words at the Hearing, "I could say whatever I want legally. But I don't think it was a nice email." (Morgan Tr. p. 574) [Def. Ex. 19]. Without waiting for the "answer within a week," twenty-five minutes later, at 12:35 AM, Morgan sent the following not "very endearing" email to the other Company members: (Morgan email #2 7/6/08) [Def. Ex. 40]

> I am turning all my correspondences on thus project over to my lawyers and accountants. **Stewart** [sic. "Stuart"] **you have stolen too much money from us.** There is no way we have spent $450,000 on travel expenses. I am tired of all your theft and bullshit. Don't ever contact me again. **I am going to sue your ass and get our money back.**

(emphasis added).

By his email of July 7, 2008, Morgan's brother-in-law, Baker, whose private email address was Kneeleye@aol.com, tried to calm Morgan down, writing in part: (Baker email 7/7/08) [Def. Ex. 41]

> Tommy,
>
> I can't tell you how disappointed I am in your last nonprofessional emails. You have no idea the damage you've done to our relationship and this partnership. There is one thing I'm sure of is that John nor Stuart will not respond to you. You need to be very careful about calling someone a thief. You are opening yourself up to a serious lawsuit.

Morgan responded on July 8, 2008, at 12:03 AM in part: (Morgan email 7/8/08) [Def. Ex. 42]

> **I've been telling you for 3 years** that Stuart and John have no intention of doing good for us….
>
> I am feed [sic. "fed"] up with their [Stuart and John's] bullshit. They are total assholes as far as I am concerned and **they have fucked up this entire project…**
>
> They have never given us the information on the travel expenses, overhead, etc.
>
> … If you want to believe their bullshit then go ahead. I've had it with them and am not going to stand for their arrogant attitude any more. I will not respond to them. **My attorney's and accountants will handle it from here in the courtroom. I do plan to sue them if they don't respond with the entire construction expenses.**

(Emphasis added)

Morgan testified that it was "…right after that I asked my accountants to try and find out, you know, look at the books to try to find out looking at the books." (Morgan Tr. pp. 578-79) [Def. Ex. 19].

On July 17, 2008, Merg wrote Hagerty requesting copies of Company financial records. (Merg letter 7/17/08) [Def. Ex. 43]. Eleven days later, the Company's outside accountant William Shields ("**Shields**") emailed Merg (with a copy to Hagerty) three sets of Company financial documents. (Shields email 7/28/08) [Def. Ex. 44]. Merg responded to Shields on August 8, 2008, (Merg email 8/8/08) [Def. Ex. 45], restating financial information he said he had requested in his July 16 email but had not yet received. He then stated: "Tom Morgan and I reviewed the "Applications and Certificates for Payment," [the 33 draws requests to Amegy Bank]. "As a result we are requesting the detail transactions…for the following [11] items." Item No. 1 was "Construction Travel Expense $481,250." Items No.2-9 included payments to BIG II employees, e.g., Item No. 2. "Division Manager $240,250." Merg ended his email with a final request: "One other detail item is from the 'Schedule of Soft, Hard and General Administrative Costs for Jan-Dec 2007. Please provide similar schedule for account 6035 airplane fuel for $18,873.69."

Shields responded to Merg's request for these additional documents later the same day, August 8, 2008, (Shields email 8/8/08) [Def. Ex. 46], advising he had reviewed Merg's request with Gilbert who, "under advice from the Company's legal counsel," confirmed that they had already provided Merg with all the documents required pursuant to the Second Amended Operating Agreement. Morgan provided no evidence that Hagerty, copied on that email, disagreed with that position, (Morgan Tr. pp. 585-86) [Def. Ex. 19], and Morgan admitted he knew at that

point that Fred and Gilbert were not going to provide him with the backup of construction expenses. (Morgan Tr. pp. 584-87) [Def. Ex. 19].

Shields testified that he gave Merg access to the requested QuickBooks backup in September 2008, by link to a web portal. (Shields Tr. pp. 1427-28; 1433; 1444-45) [Def. Ex. 19]. There was no mention of any outstanding document requests in a September 17, 2008, letter from the Gardenswartz accounting firm to Hagerty's partner Richard Farrier. (Gardenswatrz letter 9/17/08) [Def. Ex. 49] (Morgan Tr. pp. 594-95).

On August 22, 2008, Baker wrote his brother-in-law Morgan (Baker email 8/22/08) [Def. Ex. 47], that Baker had

> spent to [*sic*. "too"] many years of my life with this deal to end up in a major lawsuit because this deal is heading down that road. It needs to come to an end now.

Despite being on inquiry, if not actual, notice of his potential claims and retaining an accountant and attorney to investigate them, Morgan **affirmatively and unambiguously** chose not to file his threatened lawsuit, **not** because he felt he lacked sufficient cause or information to do so [an excuse he raised years later] but for **the sole reason** that he did not want to involve his brother-in-law Baker. Although he waited until January 26, 2012, to file suit, on August 23, 2008, Morgan replied to Baker: (Morgan email 8/23/08) [Def. Ex. 48]

> My problem is with Stuart and John. My Mom reviewed all the emails that you sent her and highlighted in yellow the most important parts, and she is in complete agreement with me that both Stuart and John are not acting in our best interest. I don't want to be in business with Stuart or John, and I know they don't want to be in business with me. Also, I'm pretty sure you and Edwin don't want to be in business with me either on this particular deal because I have been critical of John and Stuart and you both think that they have done a good job. I know my recent e-mails to John and Stuart were not very business-like and did contain foul language, but I have tried to be nice and complement them in the past they still wouldn't give me the information that was required in our partnership agreement.

The only reason I don't plan to sue John and Stuart is that I don't want to involve you in the middle of all this. So anyway you don't have to worry about ending this deal in a lawsuit in any case.

Morgan admitted at the Hearing he knew that Baker was very friendly with Fred and was taking Fred's side: "I [Morgan]was upset that he was siding with Mr. Fred and Mr. Gilbert and not his brother-in-law that he'd been in business with for 30 years." (Morgan Tr. pp. 591-92) [Def. Ex. 19].

The relationship between Morgan and his brother-in-law deteriorated as the real estate market and the health of both Baker and his wife Elizabeth, Morgan's sister, declined. Despite his unambiguous language in his August 23, 2008 email, Morgan sued Baker on December 16, 2009, in litigation involving another project in Miami, Florida within a year, when he filed a derivative suit against Baker, (Morgan Miami Complaint 12/16/09) [Def. Ex. 7], after Baker failed to make a capital call. [In contrast with Morgan's derivative case *sub judice*, in his verified Miami Complaint, Morgan named as a party the corporation for which he was filing suit.] The deteriorating relationship is further evidenced in an April 9, 2010, email from Morgan's controller, Leslie Berry, to Morgan, (Berry email 4/9/10) [Def. Ex. 50], in which she wrote, in part: "I think you need to tell Neal how hurt and betrayed you felt over his siding with Stuart [Fred] and treating you so poorly."

At trial, Morgan offered as his excuse for not bringing the instant action within the three year statutory period that he had been seeking additional information from Gilbert and Fred, but they had refused. (Morgan Tr. 584) [Def. Ex. 19]. While Morgan may not have wanted to go to the Company's offices in Houston to inspect records or pay for copies, all as authorized by S.C. Code Ann. 33-44-408, he was on inquiry, if not actual, notice of possible claims and long since had retained counsel and an accountant.

Baker died in August 2011, approximately three (3) years after Morgan's August 23, 2008, email where he said he would not sue Baker [even though he sued him in the Miami matter]. Five (5) months after Baker's death, on January 26, 2012, Morgan filed the 2012 Original Complaint to commence the instant suit. With the inordinate passage of time, Baker, who had served with Fred as the Company's two Managing Members until shortly before his 2011 death, was then no longer available to testify in favor of the Defendants, who would have called Baker as a witness regarding material issues in this case. Similarly, documents important to the case had been lost or destroyed due to the passage of time and changed in computer hardware and software. (Renaud Tr. p. 815, l. 14 – p. 816, l. 5; Tr. p. 959, l. 21 – p. 961, l. 4) [Renaud is an accountant called by Morgan to testify].

Finally, at the conclusion of Morgan's direct examination at the Hearing, he offered as Plaintiff's Exhibit 202 a five-page spreadsheet as evidence for reimbursement of his attorneys' and accountants' fees. (Morgan Hearing Spreadsheet) [Def. Ex. 22]

The first entry, check number 646, was dated January 3, 2011, with this and all other entries within one year and a few days of Morgan filing his 2012 Original Complaint in January 2012. Morgan admitted that he knew, "…given the timeframe here, [that] none of these entries deal with a trigger – a problem with the three year statute of limitations because the first entry is January 3, 2011." The record shows, however that Morgan had retained counsel as early as April 2007, (Morgan email 4/27/07) [Def. Ex. 30]; (Morgan Tr. pp. 722-23) [Def. Ex. 19] to whom he referred Hagerty and others and had Merg at work investigating this case by May 5, 2008.

In short, Morgan undeniably threatened to file suit in April 2007, January 2008, and August 2008, all more than three (3) years before he commenced the instant derivative action.

C. LAW

STANDARD OF REVIEW

S.C. Code 15-48-130 states five grounds for vacating an arbitration award. In addition to these grounds, an Appellant, as is the case here, may challenge an arbitration award by contending the arbitrators' denial of Appellants' motions to dismiss amounted to a "manifest disregard of the law."

The Supreme Court of South Carolina has held: "[F]or a court to vacate an arbitration award based on arbitrator's "manifest disregard for the law," the . . ."governing law ignored must be well defined, explicit, and clearly applicable." "An arbitrator's 'manifest disregard of the law,' as a basis for vacating an arbitration award occurs when the arbitrator knew of the governing legal principle yet refused to apply it."" *C-Sculptures, LLC v. Brown,* 403 S.C. 53, 57, 742 S.E. 2d 359, 361 (2013) (citations omitted).

And though arbitrators need not specify their reasons or the basis of the award, the factual inferences and legal conclusions supporting the award must be, at least, "barely colorable." *Pittman Mortg. Co., Inc. v. Edwards,* 327 S.C. 72, 77, 488 S.E. 2d 335, 338 (1997).

A recent decision of the South Carolina Supreme Court is instructive here. In *Waldo v. Cousins*, ---S.E.2d.---, 2024 WL 1900583 (S.C. May 1, 2024), Waldo, a real estate broker, represented purchasers of thirteen golf courses from National Golf Management, LLC [NGM]. Cousins, also a broker, had represented NGM in an earlier transaction and now claimed a commission in the golf course deal despite not having a written representation agreement. The dispute was sent to arbitration by agreement, and the panel awarded Cousins half of the commission. On referral to the Court of Common Pleas, the Court vacated the award, stating that the panel had ignored statutory law governing real estate agency. The Court of Appeals reversed this decision, ruling that there was a "barely colorable" ground for panel's award based on a line

of cases upholding oral and implied contracts for real estate commissions. The Supreme Court reversed and vacated the panel's award to Cousins. The Supreme Court held that the panel had manifestly disregarded several statutes governing real-estate agency law in a legislative act governing real estate licensing which requires written agreements for real estate agency and forbids oral or implied ones. The Supreme Court also rejected Cousins' argument that he was entitled to a commission because the line of cases on which he relied were decided before the act became law.

In reaching its decision, the Supreme Court found: "The record tells us the arbitrators were not only aware of the Act but had in hand the unappealed circuit court order dismissing similar claims arising from the same transaction on the ground that §40-57-139(G) [of the Act] had rendered oral and implied contracts for real estate commissions unenforceable." The Court continued:

> But when parties calculate the benefits of their exchange [of expansive litigation rights for arbitration], they do not bargain to have their dispute resolved by whim … We have progressed from the days, described by the 19th century Scottish judge, when an arbitrator "may believe what nobody else believes, and he may disbelieve what all the world believes. He may overlook or flagrantly misapply the most ordinary principles of law, and there is no appeal for those who have chosen to submit themselves to his despotic power." … Courts may now vacate an arbitration award, but only when it is untethered from controlling principles known to, but shrugged off by the arbitrator. This may occur when an arbitrator substitutes his personal policy views in place of a plainly binding legal principle.

STATUTE OF LIMITATIONS

All of the causes of action which Morgan has elected to pursue are controlled, and barred, by South Carolina's plainly binding three-year statute of limitations codified in S.C. Code Ann §15-3-530 (1976, as amended).

The question arises in this litigation as to the applicability of the statute of limitations and the "discovery rule" for any cause of action presented by Morgan against the Appellants.

In *Bayle v. S.C. Dept. of Transp.*, 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001), the South Carolina Court of Appeals interpreted the discovery rule as follows:

> According to the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered…. The statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct…. The date on which discovery of the cause of action should have been made is an objective, rather than subjective, question. "In other words, whether the particular plaintiff actually knew he had a claim is not the test. Rather, courts must decide whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist"…
>
> …
>
> … [T]he statute of limitations begins to run **when the plaintiff should know that he might have a potential claim** against another, **not when he develops a full-blown theory of recovery.**
>
> **…**
>
> [T]he statute of limitation begins to run when a person of common knowledge and experience would **be on notice a claim might exist**, not when the plaintiff discovers a witness to support or prove the case

Id., 542 S.E.2d at 739-41 (citations omitted) (emphasis added).

In *Smith v. Smith*, 291 S.C. 420, 354 S.E.2d 36 (1987), the South Carolina Supreme Court held that **the statute of limitations begins to run not as late as when "… advice of counsel is sought or a full blown theory of recovery developed."** *Id.,* 354 S.E.2d at 40. Instead,

> [t]he exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of the injury would put a person of common knowledge **on notice that some right of his has been invaded or that some claim against another party might exist.**
>
> *Id*.
>
> (Emphasis added).

The court held that consultation with an attorney indicates that a claimant has discovered or reasonably ought to have discovered a potential claim. *Id.*

In the instant case, by July, 2008, Morgan had retained not only an attorney but also a CPA to investigate claims against the Defendants and threatened suit not once but twice. In South Carolina, constructive knowledge alone is sufficient to start the statute of limitations running. *See Burgess v. American Cancer Soc.,* 300 S.C. 182, 386 S.E.2d 798 (Ct. App. 1989), where the court stated:

> In applying the discovery rule, inquiry is focused upon whether the complaining party acquired knowledge of any existing facts "sufficient to put said party on inquiry which, if developed, will disclose the alleged [cause of action]". . . A party cannot escape the application of this rule by claiming ignorance of existing facts and circumstances, because the law also provides that if such facts and circumstances *could have been known* to the party through the exercise of ordinary care and reasonable diligence, the same result follows. ... Thus, either actual or constructive knowledge of facts or circumstances, indicative of... [an existing cause of action], triggers a duty on the part of the aggrieved party to exercise reasonable diligence in investigating and, ultimately, in pursuing a claim arising therefrom....
>
> [T]he statutory period of limitations begins to run when a person *could or should have known,* through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto.

Id., 386 S.E.2d at 799-800 (citations omitted) (emphasis in original).

In applying the discovery rule, the South Carolina Supreme Court has defined what is meant by "the exercise of reasonable diligence" as follows:

> The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. The statute of limitations begins to run from this point and *not when advice of counsel is sought or a full-blown theory of recovery developed.*
>
> …
>
> The important date under the discovery rule is the date that a plaintiff discovers the injury, not the date of the discovery of the identity *of another alleged wrongdoer*. If, on the date of injury, a plaintiff knows or should know that she had some claim against someone else, the statute of limitations begins to run *for all claims based on that injury.*

Wiggins v Edwards, 314 S.C. 126, 442 S.E.2d 169 at 170 (1994) (emphasis added).

There is no dispute that Morgan believed he had been injured by the Appellants no later than July 2008, and likely well before that, when he retained counsel in early 2007. He was clearly engaging his "lawyers and accountant" for the purpose of investigating and pursuing claims he might have against the Appellants.

In these circumstances, and in accordance with South Carolina law governing the discovery rule as it relates to the statute of limitations, it is immaterial whether Morgan claims he did not know the exact nature of the wrongs or extent of the damages allegedly caused by the Appellants back in 2007 and July 2008. It is likewise immaterial that, as claimed by Morgan, the Appellants were refusing to provide him documents he sought to develop his claims. The statutory period of limitations of three (3) years began to run no later than July 2008, because Morgan could or should have known through the exercise of reasonable diligence that some cause of action "**might** exist" in his favor, rather than when he developed a full-blown theory of recovery. Because Morgan believed he had been injured no later than July 2008, the statute of limitations for claims arising therefrom began to run no later than that time. In Morgan's own words in an email to Stuart Fred on July 6, 2008: **"[Y]ou have stolen too much money from us. ... I am going to sue your ass and get our money back."** [Def. Ex. 40] But Morgan then affirmatively chose to delay and file the 2012 Original Complaint in January 2012.

In the words of the Fourth Circuit in *Roe v. Doe,* 28 F.3d 404 (4th Cir. 1994):

> South Carolina's statute of limitations begins to run when the facts and circumstances would alert an injured person of common knowledge and experience that she might have a cause of action, not that she certainly has one.... Plainly, *it takes* ***very little*** *to start the clock.*

Id., 28 F.3rd at 407 (emphasis added) (citation omitted).

Morgan cannot seriously claim that he was not on inquiry notice by July 2008, and, arguably, much earlier. His own contemporaneous emails contradict that claim.

Morgan cannot now escape his own words in his July 6, 2008 email to Gilbert or his discussion with his brother-in-law in August 2008.

In an effort to avoid the application of the applicable statute of limitation, Morgan asked the Panel to invoke the doctrines of equitable estoppel and equitable tolling. These claims are also unpersuasive in light of Morgan's own words in contemporaneous emails discussed above.

> The touchstone of equitable estoppel is that some conduct or representation by the defendant has induced the plaintiff to delay filing suit... An inducement for delay may consist of either an express representation that the claim will be settled without litigation or other conduct that suggests a lawsuit is not necessary.... Settlement negotiations which are commenced, but not finalized, will not bar assertion of the statute of limitations.

Hedgepath v. American Tel. & Tel. Co., 348 S.C. 340, 359, 559 S.E.2d 327, 338 (Ct. App. 2001). There are no facts in this case to justify application of the equitable estoppel doctrine.

Equitable tolling has been characterized as:

> ...a doctrine rarely applied in South Carolina to stop the running of the statute of limitations....Equitable tolling is reserved for extraordinary circumstances. [W]hile equitable tolling was allowed where claimant actively pursued remedies but filed defective pleadings, or was induced by an adversary into allowing a deadline to pass, "[w]e have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.

Pelzer v. State, 378 S.C. 516, 520 -21, 662 S.E.2d 618, 620 (Ct. App. 2008).

"[E]quitable tolling, which allows a plaintiff to initiate an action beyond the statute of limitations deadline, is typically available only if the claimant was prevented in some extraordinary way from exercising his or her rights, or, in other words, if the relevant facts present sufficiently rare and exceptional circumstances that would warrant application of the doctrine." *Id*.

Morgan has not produced any evidence of any rare and exceptional circumstances preventing him in some extraordinary way from timely exercising his rights. The Panel never mentioned either doctrine in its Orders.

Morgan's untimely delay in filing his suit had several very important consequences:

1] Morgan avoided the testimony of a most material witness in this case, Neal Baker, a Managing Member of the Company until his death in 2011, presumably adverse to Morgan;

2] with the inordinate passage of time, not only was a key witness lost, but with the consequent changes in computer hardware and software, material financial records were lost, as complained of by both accountants Merg and Shields.

3] Assuming, *arguendo*, Morgan had a valid claim for damages against the Defendants, the alleged damages would, *a fortiori*, be much greater in 2023 than in 2008.

The reasons for the application of the statute of limitations are discussed in detail in *City of North Myrtle Beach v. Lewis-Davis*, 360 S.C. 225, 230-01, 599 S.E.2d 462, 464-65 (Ct. App. 2004) (citations omitted):

> There is a universal acceptance of the logic of the Statute of Limitations that litigation must be brought within a reasonable time in order that evidence be reasonably available and there be some end to litigation.
>
> Statutes of limitations evolved over time with definite purposes in mind. They protect people from being forced to defend themselves against stale claims. The statutes recognize that with the passage of time, evidence becomes more difficult to obtain and is less reliable. Physical evidence is lost or destroyed, witnesses become impossible to locate, and memories fade. With passing time, a defendant faces an increasingly difficult task in formulating and mounting an effective defense. Additionally, statutes of limitations encourage plaintiffs to initiate actions promptly while evidence is fresh and a court will be able to judge more accurately.

Appellants submit that a review by this Court of the testimony, memoranda, and exhibits submitted to the Panel without any doubt show the Panel chose to disregard law that was well defined, explicit, and clearly applicable to this case.

As pointed out above, in South Carolina, the factual inferences and legal conclusions denying Appellants' Motion to Dismiss have to be, at the least, "barely colorable." As a corollary to this, the Panel's failure to provide any explanation for its decisions may be considered a factor in this Court's determination that the arbitrators manifestly disregarded the law. *See Halligan v. Piper Jaffray, Inc*., 148 F.3d 197 (C.A.2, 1998)

Applying this standard of judicial review, the Award should be vacated and this case dismissed.

CONCLUSION

Morgan filed his original derivative action without naming 150 Bee Street, LLC as a party. By law and by Morgan's own admission in his draft of his 2019 First Amended Complaint, the Company was, and is, an indispensable party. His failure to name the Company as an indispensable party deprived the Court and the Panel of subject matter jurisdiction over this derivative action. By the time Morgan realized his error, South Carolina's three (3) year statute of limitations had long-since barred his joining the Company as a party.

The record is also crystal clear in this case that when Morgan finally filed his original Summons and Complaint on January 26, 2012, he had long-since missed the deadline of South Carolina's three (3) year statute of limitations.

On either or both of these grounds, this Court should overturn the Order of the Circuit Court and dismiss the Panel's Award.

Respectfully submitted this 18th day of June, 2024.

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Case No, 2012-CP-10-00580

Thomas H. Morgan …….Respondent,

v.

John L. Gilbert, Stuart L. Fred, Bella Vista Partnership, A Texas General Partnership, Bomasada Group, Inc., A Texas Corporation, Bomasada Investment Group II, LLC, A Texas Limited Liability Company, Lauralis Management, Inc., A Texas Corporation, and 150 Bee Street, LLC, A South Carolina Limited Liability Company, Defendants,

Of which John L. Gilbert, Stuart L. Fred, Bella Vista Partnership, A Texas General Partnership, Bomasada Group, Inc., A Texas Corporation, Bomasada Investment Group II, LLC, A Texas Limited Liability Company, and Lauralis Management, Inc., A Texas Corporation are the Appellants.

PROOF OF SERVICE

[INITIAL] BRIEF OF APPELLANTS

I do hereby certify that on June 18, 2024, a copy of the **[Initial] Brief of Appellants** was emailed to and also deposited with the United States Postal Service, as first class mail, in an envelope addressed to:

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June 17, 2024