THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Carmen T. Mullen

Appellate Case No. 2025-000792
Circuit Court Case No. 2025-CP-07-00051

Bear Island Distributors, LLC,.....Appellant,

v.

Lincoln & South Brewing Co., LLC,.....Respondent.

INITIAL REPLY BRIEF OF APPELLANT

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Appellant Bear Island Distributors, LLC ("**Bear Island**") respectfully submits this Reply to Respondent Lincoln & South Brewing Co., LLC's ("**Lincoln**") Initial Brief (the "**Response**").

INTRODUCTION

The central issue in this appeal is whether Bear Island is entitled to a temporary injunction under the Alcohol and Alcoholic Beverages Act, S.C. Code Ann. §§ 61-4-10, *et seq.* (the "**Act**") on the premise that Bear island "is or might be adversely affected" by Lincoln's wrongful termination of the distribution agreement (the "**Distribution Agreement**").

As discussed in more detail below, Lincoln conceded before the Circuit Court that the "adversely affected" standard in the Act applied to whether Bear Island is entitled to a temporary injunction. Yet, in its Response, Lincoln now blatantly contradicts is own arguments and asserts that the "adversely affected" standard *does not apply*. Lincoln also conceded before the Circuit Court that the common law temporary injunction elements do not apply to whether Bear Island is entitled to a temporary injunction. Yet, again, Lincoln boldly argues against itself in its Response by now asserting that Bear Island is not entitled to an injunction *based on the common law elements*. Further, in its Response, Lincoln does not dispute, and therefore concedes, that the Circuit Court relied on improper evidence when denying Bear Island's Motion for a Temporary Injunction.

Although the Circuit Court stated that it did not consider the three common law elements in denying the Motion, the Circuit Court nevertheless misapplied the "adversely affected" standard, including requiring a heightened evidentiary showing and improperly requiring Bear Island to satisfy the common law temporary injunction elements. In its Response, Lincoln does not dispute ***but eventually concedes these errors***. Furthermore, the Circuit Court erred by improperly basing its denial of the Motion for Temporary Injunction

("**Motion**") in large part on the mere arguments of Lincoln's attorney. Again, ***Lincoln does not dispute this error and, in fact, again relies on these arguments in its Response.*** **(*See* Response, p. 26)**.

In sum, Bear Island presented a *prima facie* showing that it is or might be adversely affected by the cancellation or termination of the Distribution Agreement. In view of the clear legislative intent behind the Act and the plain and ordinary meaning of the language "is or might be adversely affected," as well as a proper consideration of the Act as a whole, Bear Island is entitled to an injunction under the Act. Thus, the Court should reverse the Circuit Court's March 3, 2025, Order denying the temporary injunction and its March 26, 2025, Order denying Bear Island's Motion to Alter or Amend (collectively, the "**Orders**"), and enjoin Lincoln from continuing to violate the terms of the Distribution Agreement and the Act.

ARGUMENT

I. Lincoln argued before the Circuit Court that the "Adversely Affected" standard applies.

Lincoln argued in numerous instances before the Circuit Court that the "adversely affected" standard applied to Bear Island's Motion for Temporary Injunction. For instance, at oral argument on Bear Island's Motion for a Temporary Injunction, Lincoln's attorney conceded multiple times that the "adversely affected" standard applied. (**Hr'g. Tr. 19:7–16; 21:14–17; 30:4–14**). In Lincoln's Return to Bear Island's Motion to Alter or Amend, it expressly doubled down on this concession, explaining that: "At the hearing on Plaintiff's Motion for Temporary Injunction, ***[Lincoln] acknowledged and accepted the Statutory standard at issue***." (**Lincoln's Return to Motion to Alter or Amend, p. 6**) (emphasis added). Yet, in its Response, Lincoln now argues that the "adversely affected" standard *does not apply*

on the basis that it would be "in the face of Lincoln & South's substantial evidence." (**Response, p. 14**).

"It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). "An issue conceded in a lower court may not be argued on appeal." *TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 617, 503 S.E.2d 471, 474 (1998) (citing *Ex parte McMillan*, 319 S.C. 331, 461 S.E.2d 43 (1995)). *See also Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 0045–46, 691 S.E.2d 135, 147 (2010) (finding that an issue was not preserved for appellate review when the party's attorney *appeared* to have conceded the issue at trial); *State v. Benton*, 338 S.C. 151, 156–57, 526 S.E.2d 228, 231 (2000) ("Appellant's present issue is not preserved for appellate consideration as he previously conceded the palm print was direct evidence."); *First S. Bank v. S. Causeway, LLC*, 414 S.C. 434, 449, 778 S.E.2d 493, 500–01 (Ct. App. 2015) (finding that an argument was not properly before the appellate court when the party's counsel conceded the issue during argument).

Lincoln conceded before the Circuit Court that the "adversely affected" standard applied to whether Bear Island is entitled to an injunction under the Act. Therefore, Lincoln cannot now argue on appeal that the "adversely affected" standard does not apply. *TNS Mills*, 331 S.C. at 617, 503 S.E.2d at 474. Lincoln has conceded this argument and, therefore, it is not properly before the Court. Thus, the Court should disregard Lincoln's contradictory arguments when deciding this Appeal.[1]

[1] If Lincoln disagreed with the Circuit Court's finding that the appropriate standard was the statutory language, it could have appealed the Circuit Court's orders. It did not. *See Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733 (1998).

II. Lincoln does not dispute that Bear Island made an unrebutted *prima facie* showing that it is entitled to a temporary injunction.

In its Initial Brief, Bear Island asserted that it was only required to present a *prima facie* showing that it "is or might be adversely affected" by the termination of the Distribution Agreement for the Circuit Court to enter a temporary injunction against Lincoln. (**Initial Brief, p. 19**). In its Response, Lincoln does not rebut that the *prima facie* standard applies. Indeed, Lincoln expressly argued that the *prima facie* standard applies before the Circuit Court. (**Lincoln's Return to Bear Island's Motion to Alter or Amend the Order, pp. 2–3**). Thus, as Lincoln does not dispute that Bear Island established a *prima facie* showing that it was entitled to a temporary injunction, Lincoln tacitly admits that Bear Island is entitled to an injunction under the Act. *See TNS Mills*, 331 S.C. at 617, 503 S.E.2d at 474.

As explained in its Initial Brief, Bear Island made an unrebutted, *prima facie* showing that the entirety of Bear Island's business is or might be adversely affected by the cancellation or termination of the Distribution Agreement. (**Initial Brief, pp. 19–21**). Specifically, Bear Island presented testimonial evidence establishing, without limitation, that the loss of Bear Island's Lincoln account with any particular Retailer would not only result in the loss of the Lincoln account, but it would also result in the loss of ***all*** Bear Island's accounts with such Retailers. (**Affidavit of William Cram, ¶¶ 6, 8**). Bear Island presented further testimonial evidence establishing that the loss of such accounts with Retailers will further harm Bear Island in that it will be forced to ***hand over all of the goodwill and brand loyalty that it has developed with such Retailers, over the span of more than three years, to a direct competitor of Bear Island***. (***Id.***).

In its Response, Lincoln does not attempt to point to any specific evidence that rebuts Bear Island's *prima facie* showing, nor does it explain *how*, in its view, the Circuit Court applied the correct standard. Rather, it merely offers the conclusory statement that the Circuit Court's Order was somehow proper because Bear Island "failed to present sufficient evidence to persuade, induce, or influence, sway, encourage, and/or convince the Circuit Court to impose a preliminary injunction on Lincoln & South pursuant to S.C. Code Ann. § 61-4-1120." (**Response, p. 18**). By not identifying any specific evidence that rebuts Bear Island's *prima facie* showing and then arguing that the Order was proper because Bear Island did not "convince" the Circuit Court, ***Lincoln effectively concedes that the Circuit Court applied the incorrect standard***. Notably, in the Orders, the Circuit Court does not explain how it weighed the evidence other than that Bear Island's evidence was not "convincing". On its face, this is not the *prima facie* standard, and Lincoln has not articulated any substantive arguments to the contrary.

As explained herein and in its Initial Brief, Bear Island made a *prima facie* showing that it is entitled to injunctive relief under the Act, and this showing was not rebutted. Thus, under the proper framework, Bear Island is entitled to injunctive relief. The Circuit Court clearly erred when it ignored the *prima facie* framework and instead required heightened evidence sufficient to "convince" it. Therefore, the Court should reverse the Order denying Bear Island's Motion for Temporary Injunction and enter an injunction against Lincoln during the pendency of this case.

III. Lincoln does not dispute the Circuit Court's reliance on counsel's argument, as opposed to evidence within the record was improper, and, quizzically, continues to rely on counsel's argument in its Response.

In its Initial Brief, Bear Island explained that at least five (5) of the nine (9) "facts" that the Circuit Court relied on in denying the Motion <u>were not facts at all</u> but, instead, were mere

arguments made by Lincoln's counsel during the Motion hearing, without having a basis in any underlying evidence. For instance, in denying the injunction, the Circuit Court specifically relied on the following statements: "[Lincoln] is only one of the 28 beer suppliers that have exclusive distribution agreements with [Bear Island]" and "[Bear Island] can and has continued to do business with its 27 other beer suppliers." (**Second Order, p. 5**). However, those statements are not facts in evidence at all. Rather, ***they come directly from the unsupported arguments of Lincoln's own counsel***. (***See*** **Lincoln's Return to Bear Island's Motion to Alter or Amend the Order, p. 3, 7**).

In its Response, Lincoln does not dispute that the Circuit Court relied on arguments of Lincoln's counsel in denying the Motion. In fact, Lincoln does not address this issue at all. Instead, ***Lincoln merely cites to its own attorney's arguments in the Order as if they were fact*** (**Response, p. 11**) and then proceeds to make the bare statement that "[t]he Circuit Court's decision should be affirmed in all respects." (**Response, p. 18**). It is axiomatic that argument by counsel, without any supporting evidence, is not evidence for a Court to consider. *Owens v. Stirling*, 438 S.C. 352, 359, 882 S.E.2d 858, 862 (2023) (citing *Chapman v. Allstate Ins. Co.*, 263 S.C. 565, 567, 211 S.E.2d 876, 877 (1975)) (explaining that "[t]he arguments of counsel are not evidence."); *Bowers v. Bowers*, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991)). *See also, e.g.*, *McManus v. Bank of Greenwood*, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933) ("This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered.").

Thus, the Circuit Court erred when it relied on the arguments of Lincoln's counsel as "evidence" in denying Bear Island's Motion. Therefore, because Lincoln does not dispute that the Circuit Court relied on counsel's argument as evidence in denying the Motion, ***including***

specifically the arguments of its own counsel no less, Lincoln cannot reasonably deny that, in doing so, the Circuit Court also erred. *See First Union Nat'l Bank v. FCVS Communications*, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996) (explaining that if a respondent fails to respond to an issue in its brief, the appellate court may treat the failure to respond as a concession that the appellant's position is correct), rev'd on other grounds, 328 S.C. 290, 494 S.E.2d 429 (1997). *See also Dixon v. Pattee*, 442 S.C. 233, 259, 898 S.E.2d 158, 171–72 (Ct. App. 2023); *Turner v. S.C. Dep't of Health & Envtl. Control*, 377 S.C. 540, 547, 661 S.E.2d 118, 121 (Ct. App. 2008).

IV. Lincoln's Response Brief contradicts its prior argument to the Circuit Court, contending that the common law elements for temporary injunction should apply when Lincoln previously conceded that the common law elements did not.

As explained in Bear Island's Initial Brief, Bear Island, Lincoln, and the Circuit Court have all previously agreed on numerous occasions that the common law elements for an injunction, including the requirement for an inadequate remedy at law, do not apply in this case and that, instead, the statutory "adversely affected" standard in the Act applies. (**Initial Brief, p. 23**). Indeed, in Lincoln's Return to Bear Island's Motion to Alter or Amend, it expressly argued this point under the heading "**The Order Does Not Address the Common Law Elements for Temporary Injunction, Because They Are Not Applicable**", explaining that:

> ***Lincoln did not argue***, and to its knowledge, the Court did not consider, ***the common law elements for Temporary Injunction***. At the hearing on Bear Island's Motion for Temporary Injunction, ***Lincoln acknowledged and accepted the Statutory standard at issue***.

(**Lincoln's Return to Motion to Alter or Amend, p. 6**) (emphasis added). Lincoln's attorney also argued the same before the Circuit Court at the hearing on Bear Island's Motion for a Temporary Injunction. (***See, e.g.*, Hr'g. Tr. 19:7–13**).

Yet, in its Response, Lincoln now contends that "the Circuit Court appropriately addressed all three elements of a common law temporary injunction" and then proceeds to argue each element. (**Response, p. 12**). Lincoln strikes its argument made to the Circuit Court and, in an about-face, contends that all three common law elements should apply. (***Id.***). Lincoln cannot argue one ground at the Circuit Court and then an opposite ground on appeal. *Byrd v. McLeod Physician Assocs. II*, 427 S.C. 407, 418, 831 S.E.2d 152 , 157 (Ct. App. 2019) ("a party cannot argue one ground at trial then another ground on appeal") (quoting *State v. McCray*, 332 S.C. 536, 542, 506 S.E.2d 301, 303 (1998)). *See also State v. Byram*, 326 S.C. 107, 113, 485 S.E.2d 360, 363 (1997). Thus, Lincoln's argument that the Circuit Court properly considered the common law elements for a temporary injunction is "procedurally barred." *See State v. Tucker*, 319 S.C. 425, 428, 462 S.E.2d 263, 265 (1995). Further, the Court should treat Lincoln's contradictory arguments in this appeal as its concession that the Circuit Court clearly erred. Lincoln has conceded that the "adversely affected" standard applies rather than the common law elements and, in its Response, it argues that the Circuit Court applied the common law elements. Therefore, it cannot now dispute that the Circuit Court clearly erred. *See Byrd*, 427 S.C. at 418, 831 S.E.2d at 157.

While Bear Island presented sufficient evidence to satisfy the three common law elements for a temporary injunction (***See* Motion to Alter or Amend, pp. 8–11**), the parties and the Circuit Court agree, this is not the correct standard under the Act. Since Bear Island has also presented sufficient, unrebutted evidence to satisfy the "adversely affected" standard, it is entitled to an injunction under the Act. Therefore, the Court should reverse the Order and enjoin Lincoln.

V. Bear Island is Entitled to a Temporary Injunction under the "Adversely Affected" standard.

"Questions of statutory interpretation are questions of law, which [this Court is] free to decide without any deference to the court below." *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (citing *City of Rock Hill v. Harris*, 391 S.C. 149, 152, 705 S.E.2d 53, 54 (2011)). "The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature." *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). In doing so, the Court "must give the words found in the statute their 'plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation.'" *CFRE*, 395 S.C. at 74, 716 S.E.2d at 881 (citing *Sloan*, 371 S.C. at 498, 640 S.E.2d at 459). "Thus if the words are unambiguous, [the Court] must apply their literal meaning." *Id.* (citing *Sloan*, 371 S.C. at 498, 640 S.E.2d at 459). In addition, "the statute must be read as a whole and sections which are part of the same general statutory law must be construed together and each one given effect." *S.C. State Ports Auth. v. Jasper Cnty.*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006). The Court "therefore should not concentrate on isolated phrases within the statute" but, instead, "read the statute as a whole and in a manner consonant and in harmony with its purpose." *CFRE*, 395 S.C. at 74, 716 S.E.2d at 881 (citing *S.C. State Ports Auth*., 368 S.C. at 398, 629 S.E.2d at 629; *State v. Sweat*, 379 S.C. 367, 376, 665 S.E.2d 645, 650 (Ct. App. 2008), *aff'd*, 386 S.C. 339, 688 S.E.2d 569 (2010)). "In that vein, [the Court] must read the statute so 'that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous,' . . . for '[t]he General Assembly obviously intended [the statute] to have some efficacy, or the legislature would not have enacted it into law.'" *Id.* (citing *Sweat*, 379 S.C. at 377, 382, 665 S.E.2d at 651, 654).

With respect to the Act, the General Assembly explained that:

> The State has a ***substantial interest in regulating*** alcoholic liquors and other beverages containing alcohol; ***the activities of manufacturers, importers, wholesalers, and retailers***; and the influences that affect the consumption levels of alcoholic liquors and other beverages containing alcohol by the people of the State.
>
> . . .
>
> The State has a ***substantial interest in*** exercising its police power to promote the public health, safety, and welfare of the State by ***regulating the business of manufacturing, distributing, and retail sales of alcoholic liquors and other beverages containing alcohol in the manner and to the extent allowed by law*** to promote and preserve public health and safety through legitimate, nonprotectionist measures, ***which include regulating and controlling alcoholic beverage transactions in this State*** and the means and manner in which licensed micro-distilleries and alcoholic liquor manufacturers may sell alcoholic beverages to the state's qualifying consumers.

2021 S.C. Acts 60 (emphasis added) [2]. Furthermore, the General Assembly has added, in pertinent part, that:

> It is the intent of the General Assembly that this act do all of the following:
>
> (3) promote and assure the public's interest in ***fair and efficient distribution*** and quality control of alcoholic beverages in this State;
>
> . . .
>
> (11) promote and maintain a ***sound, stable, and viable three-tier system of distribution of beverages*** containing alcohol to the public.

Id. (emphasis added). In addition, S.C. Code Ann. § 61-4-1120, the provision allowing for temporary injunctions under the Act, provides that:

> The court of common pleas has jurisdiction and power to enjoin the cancellation or termination of a franchise or agreement between a beer wholesaler and a registered producer upon the application of a beer wholesaler or producer who is or might be adversely affected by the cancellation or termination; and in granting an injunction, ***the court must make provisions necessary to protect the beer wholesaler or registered producer while the injunction is in effect including, but not limited to, a provision that the registered producer must not supply the customers of***

[2] In its Initial Brief, Bear Island cited to "S.C. Code Ann § 61-4-720". However, Bear Island clarifies that this text comes from the General Assembly's Findings and Purpose concerning 2021 amendments to the Act, and is also included as an Editor's Note in various parts of the S.C. Code Annotated, including S.C. Code Ann § 61-4-720.

> ***the beer wholesaler by servicing the customers through other distributors*** or means or a provision that the beer wholesaler must continue to supply to his customers the products of the registered producer.

As explained herein and in Bear Island's Initial Brief, this is a case of first impression that involves a question of statutory interpretation. The phrase "is or might be adversely affected" is not defined in the Act, nor have courts in South Carolina opined on the meaning of "is or might be adversely affected" or what the requirements for satisfying the "adversely affected" standard are. Thus, the Circuit Court was required to engage in statutory interpretation by looking to the intent of the legislature while also giving the words in the Act their "plain and ordinary meaning" and reading the Act such that "no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." Neither of the Orders indicates that the Circuit Court engaged in any such statutory interpretation. The fact that the Circuit Court improperly required a heightened evidentiary standard and also interjected the common law elements into its analysis demonstrates that the Circuit Court did not engage in proper statutory interpretation or, if it did, it clearly erred when doing so.

This is a clear question of statutory interpretation, and so the Court should decide it without any deference to the Circuit Court. A proper analysis of the intent of the General Assembly, the "plain and ordinary meaning" of the statutory text, as well as a proper consideration of the Act as a whole, reveals that Bear Island has undeniably satisfied the "adversely affected" standard and is therefore entitled to its injunction.

As explained above, the General Assembly has recognized that it has a "substantial interest" in regulating the activities of beer wholesalers like Bear Island and registered producers like Lincoln, including by regulating their business and transactions. The General Assembly has articulated its clear goal under the Act to promote and assure the "fair and

efficient distribution" of alcohol and to promote and maintain "a sound, stable, and viable three-tier system of distribution of beverages containing alcohol to the public." In view of the legislature's intent with respect to the Act, it is undeniable that it intended to regulate the parties' activities under the Distribution Agreement, including Lincoln's improper termination of the Distribution Agreement. Thus, an injunction preventing Lincoln from terminating the Distribution Agreement is in accordance with the legislative intent behind the Act, as enjoining Lincoln from terminating the Distribution Agreement would promote both the "fair and efficient distribution" of alcohol and "a sound, stable, and viable three-tier system of distribution of beverages containing alcohol to the public."

In looking at the plain and ordinary meaning of the term, the "adversely affected" standard is abundantly clear: ***if Bear Island is or might be adversely affected by Lincoln's termination of the Distribution Agreement, then it is entitled to an injunction***. As explained above, Bear Island presented unrebutted evidence demonstrating that, should Lincoln terminate the Distribution Agreement, Bear Island would not only lose its Lincoln account with Retailers, but it would further lose all such accounts with Retailers, including its accounts associated with other registered producers. In addition, Bear Island presented unrebutted evidence that, should Lincoln terminate the Distribution Agreement, Bear Island's competitors would be able to unfairly trade on the goodwill and brand loyalty that Bear Island has developed for years to ***specifically compete against Bear Island in commerce***. Therefore, based on the plain and ordinary meaning of "is or might be adversely affected," Bear Island is entitled to an injunction.

In addition, to determine the "adversely affected" standard, the Court must also look to the statute as a whole, including, specifically, the remaining language in S.C. Code Ann. § 61-

4-1120. In doing so, it is further clear that Bear Island met the "adversely affected" standard. S.C. Code Ann. § 61-4-1120 provides that "in granting an injunction, the court must make provisions necessary to protect the beer wholesaler or registered producer while the injunction is in effect including, but not limited to, ***a provision that the registered producer must not supply the customers of the beer wholesaler by servicing the customers through other distributors***." (emphasis added). This language cannot be treated as mere surplusage, and the General Assembly included it for a specific reason. Bear Island is seeking the exact kind of relief that that S.C. Code Ann. § 61-4-1120 was intended to provide beer wholesalers like Bear Island. Consequently, the Circuit Court erred in its application of the "adversely affected" standard, and the Court should reverse the Circuit Court's Orders and enjoin Lincoln from continuing to violate the terms of the Distribution Agreement and the Act.

CONCLUSION

Based on the foregoing and the Initial Brief, Appellant Bear Island respectfully requests that this Court reverse the Order Denying Bear Island's Motion for Temporary Injunction and enter an Order enjoining Lincoln from violating the Distribution Agreement and requiring it to sale its brands to Bear Island throughout the pendency of this case.

(Signature on following page)

Respectfully Submitted,

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