THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

William H. Seals Jr., Circuit Court Judge

Appellate Case No.: 2025-001409

Civil Case No.: 2022-CP-40-02958

Michael D. Jordan, Apple Services, Inc. and Plumbinator 1051, LLC ..... Respondents,

v.

Liquid Services and Logistics, LLC and Tim Freeman ..... Defendants,

Of whom Liquid Services and Logistics, LLC is ..... Appellant.

INITIAL REPLY BRIEF OF APPELLANT

Beth B. Richardson (SC Bar No. 69552)
Cordes B. Kennedy (SC Bar No. 102287)
ROBINSON GRAY STEPP & LAFFITTE, LLC
2151 Pickens Street, Suite 500 (29201)
Post Office Box 11449
Columbia, SC 29211
Telephone: 803-929-1400
Facsimile: 803-929-0300
brichardson@robinsongray.com
ckennedy@robinsongray.com
Counsel for Appellant

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REPLY ARGUMENT

I. Respondents' interpretation of the APA would strike LSL's contractual "right" to set off, contradicts the plain language of the APA, and fails to satisfy South Carolina's cardinal rules for contract interpretation.

Respondents' entire argument is undermined by two critical facts. First, it is undisputed that the APA's prescribed deadlines require that the Post-Closing Adjustment be finalized *before* payment on the Earn-out, at least seven months before the Earn-out payment deadline.[1] Respondents do not deny this fact, nor could they with any sincerity.

Second, the APA provides LSL a contractual **"*right*"** to withhold and set off any unpaid Post Closing Adjustment owed to it from the Earn-out payment. This right to set off protects against overpayment on the Earn-out. The right is expressly identified *twice* in the APA. It is first cited in APA § 3.2(a)(ii), which defines when the Post Closing Adjustment is due, stating: "[LSL] may set off any past due Post-Closing Adjustment against amounts due to [Respondents] under this Agreement, including amounts payable pursuant to Section 3.3 [the Earn-out provision]." The right is identified a second time in the specific Earn-out payment provisions, APA §§ 3.3(e), (d). Plus, Sections 3.3(e) and (d) provide that the "timing of payment" was subject to the contractual right of set off. All the Court must do is follow the embedded references in each Section to see how the clauses work together and are contingent upon the other:

> (a) Earn-out Payment. As additional consideration for the Acquired Assets, ***at the time provided in Section 3.3(d)***, Buyer shall pay to Seller with respect to the Earn-out Period an amount, if any (the "Earn-out Payment"), equal Eight Hundred Eighty-two Thousand and 00/100 Dollars ($882,000.00) so long as LTM Revenue for the Earn-out Period exceeds the Revenue Threshold. (emphasis added)
>
> (d) Timing of Payment of Earn-out Payments. ***Subject to Section 3.3(e)***, if Buyer is required to make the Earn-out Payment pursuant to Section 3.3(a), such payment shall be made no later than twelve (12) months after the Closing Date…. (emphasis added).

[1] For conciseness, see timeline in Appellant's Initial Brief, pp. 23–24.

> (e) Right of Set-off. Buyer [LSL] ***shall have the right to withhold and set off*** against any amount otherwise due to be paid pursuant to this Section 3.3 by the amount of any (i) ***Post-Closing Adjustment owed to it pursuant to Section 3.2***…. (emphasis added).

When read together, the amount owed on the Earn-out, and its timing of payment, is affected by and conditioned upon finalizing the Post Closing Adjustment. This makes sense considering the APA required the Post Closing Adjustment to be finalized before payment on the Earn-out. *See* Footnote 1, *supra*.

Tellingly, Respondents' leading argument proves that the Post Closing Adjustment must be known before the Earn-out payment can be a sum certain. Respondents contend that the amount owed on the Earn-out, including its due date, cannot be "subject to" LSL's contractual right to set off because "it is equally possible…that the calculation of the Post Closing Adjustment could result *in an amount owed to Jordan*," and "[i]n such a case, LSL's right of set-off would not exist." Respondents' Brief at p. 9 (original emphasis). This is exactly the point. Whether LSL may exercise its contractual right to set off — thus reducing the amount owed on the Earn-out to avoid overpayment on the asset — requires first finalizing the Post Closing Adjustment. Whether the right exists is contingent on knowing the Post Closing Adjustment. The APA provides that the Post Closing Adjustment must be paid or set off against any payment of the Earn-out, and before payment on the Earn-out can be due.

LSL's right to set off is a contractually bargained for protective measure between two sophisticated commercial parties that allows it to reduce the amount owed to Respondents on the Earn-out if Respondents fail to pay LSL the amount owed on the Post Closing Adjustment. These protections prevent overpayment on the asset. Critically, LSL believes it is entitled to payment on the Post Closing Adjustment, but Respondents have rejected LSL's assessment and filed suit here. The admission and evidence in the record show that LSL delivered to Respondent Jordan an Earn-

out statement, including a deduction of the Post Closing Adjustment owed to it by Jordan. And Jordan repeatedly rejected the amount while refusing to cooperate with LSL to reach an agreed upon amount for payment. *See* LSL's Resp. to Req. to Admit ¶¶ 9, 10. As the trial court correctly determined, there is a genuine dispute over the Post Closing Adjustment. But, inexplicably, the trial court failed to also rule that this genuine issue creates a genuine issued of fact as to the sum owed on the Earn-out too. And, in any event, the trial court also failed to conclude that the Earn-Out cannot be due under the plain language of the APA until such Post Closing Adjustment is agreed upon by the Parties or resolved through the APA's provisions for alternative dispute resolution or litigation. Simply put, the Earn-out payment cannot be a sum certain if it is subject to a contractual right to set off that has not been applied.

Moreover, before entering judgment on damages, it is hornbook that the evidence must show "the amount thereof with reasonable certainty or accuracy." *Gray v. S. Facilities, Inc.*, 256 S.C. 558, 570, 183 S.E.2d 438, 444 (1971). Here, the Earn-out can hardly be reduced to reasonable certainty or accuracy in the absence of applying LSL's contractual right to set off, which may reduce the amount owed on that payment. Such a contingency is not properly decided at the summary judgment stage. *Ray v. City of Rock Hill*, 434 S.C. 39, 45, 862 S.E.2d 259, 263 (2021) ("Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law."); *see also Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 265, 267, 692 S.E.2d 894, 894 (2010) (holding "[a] final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined").

Respondents would have this Court focus on LSL's admission that the Earn-out payment has been *earned*, but the critical issues before the Court are the amount by which that amount may

be set off by the Post Closing Adjustment and trigger then when the Earn-out is *due to be paid*. While an Earn-out of some kind may be owed, the amount to be paid remains in question, which in turn affects when the payment is due. Afterall, the "Timing of Payment" clause begins by stating that it is "subject to" LSL's right to set off, *see* APA §§ 3.3(d), (e), and Respondents cannot — through bad faith and failure to cooperate — force LSL to pay an Earn-out without first allowing LSL to exercise its contractual right to set off, the agreed upon protective measure allowed by the APA.

II. LSL's contractual right to set off is not independent of the Earn-out payment.

Respondents continue to insist that the Earn-out payment is an independent obligation under the APA owed irrespective of the Post Closing Adjustment. *See* Respondents' Brief pp. 12–13. This argument fails for many reasons.

First, if the Earn-out payment were truly independent of the Post Closing Adjustment, then both provisions allowing for the right of set off would be meaningless. *See* APA § 3.2(a)(ii) ("[LSL] may set off any past due Post-Closing Adjustment against amounts due to [Respondents] under this Agreement, including amounts payable pursuant to Section 3.3 [the Earn-out provision]."); *id*. § 3.3(e) ("[LSL] shall have the right to withhold and set off against any amount otherwise due to be paid pursuant to this Section 3.3 [the Earn-out] by the amount of any (i) Post-Closing Adjustment owed to it pursuant to Section 3.2…."). Respondents cannot create such massive ambiguity by hyper focusing on a single section of the APA's payment deadlines and scheme and ignoring the remainder of the contractual provisions applying to the calculation and payment of the Earn-out. *Herrington v. SSC Seneca Operating Co., LLC*, 435 S.C. 243, 248, 866 S.E.2d 579, 581 (Ct. App. 2021) ("We are bound to interpret the agreement by looking at *the entire agreement from beginning to end*: precedent explains that when construing a contract, all of its

provisions should be considered, and one may not, by pointing out a single sentence or clause, create an ambiguity.") (emphasis added).

Even Respondents' leading authority, *Colaco v. Cavotec SA,* 25 Cal. App. 5th 1172, 236 Cal. Rptr. 3d 542 (2018), is severely misplaced and inapplicable. *Colaco* is a California case wherein the buyer argued it was excused from making an earn-out payment because the seller failed to forward post-closing customer payment materials to the buyer. *Id*. at 1182, 236 Cal. Rptr. 3d at 552. There, the court emphasized that whether contract obligations "are independent or dependent [of the other] is a matter of contract interpretation based on the contract's plain language and the parties' intent," *id*. at 1183, 236 Cal. Rptr. 3d at 553, and in that case, the court concluded that "[n]othing in the APA" conditioned payment on the earn-out on the seller's delivery of post-closing customer documents. *Id*. at 1185, 236 Cal. Rptr. 3d at 554.

The current matter is drastically different from California's *Colaco*. Here, the APA is replete with language proving that the Earn-out payment is dependent — not independent — on the Post Closing Adjustment. The APA's Post Closing Adjustment payment clause states that LSL may set off any past due payment owed to it from any amount owed to Respondent Jordan through the Earn-out. *See* APA § 3.2(a)(ii). And the pertinent Earn-out provisions state that the timing of payment is subject to LSL's right to set off. *See* APA §§ 3.3(d), (e).

The pertinent Earn-out clauses also include embedded citations that lead to Section 3.3(e) ("Right of Set-off"). The first section, 3.3(a) ("Earn-out Payment"), expressly cites to Section 3.3(d) ("Timing of Payment of Earn-out Payments"), which in turn cites Section 3.3(e) ("Right of Set-off"). Even the section most heavily relied on by Respondents, Section 3.3(c) ("Independent of Earn-out Payments"), cites to Section 3.3(a), which — again — leads to Section 3.3(e) ("Right of Set-off").

Equally as important, California's *Colaco* is inapposite because one of the critical issues here is the amount *owed* under the Earn-out payment after the post-closing working capital adjustment is paid or set off against the Earn-out payment as allowed by the APA. *Colaco* did not address in the slightest a contractual right of set off, so while the earn-out payment there may have been a sum certain, it is not in this case because the set off protections afforded to LSL may reduce the amount owed on the Earn-out, and as the court concluded the amount of the post-closing working capital adjustment is a disputed issue of material fact.

The most troublesome part of Respondents' brief is they fail to offer a single, rational explanation for what the "subject to" language means in Section 3.3(d) if not to mean the Earn-out payment is contingent on LSL's right to set off the Post Closing Adjustment. While Respondents deny LSL's interpretation of "subject to," and by extension Webster's definition of the phrase,[2] they offer no alternative explanation of their own, as if to suggest the language has no meaning. That is not how South Carolina courts interpret contracts. *See Bardsley v. Gov't Emples. Ins.,* 405 S.C. 68, 76, 747 S.E.2d 436, 440 (2013) ("It is a well-settled principle of contract interpretation that absent a contractual definition to the contrary, contract language is given its ordinary and plain meaning."); *see also York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 81, 749 S.E.2d 139, 146 (Ct. App. 2013) (defining a contract clause being "subject to" a statute as being in light of that statute, falling under or submitting to the power of that statute, or under the power or authority of that statute).

The "subject to" language is part of the contractual protections afforded to LSL to prevent overpayment on an asset, and Respondents' bad faith cannot nullify that protection, nor should

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[2] Webster's Dictionary defines "subject to" to mean: "affected by or possibly affected by (something);" "dependent on something else to happen to be true." Webster's Dictionary, https://www.merriam-webster.com/dictionary/subject %20to (last visited June 4, 2025).

this Court strike the term from the APA. For these reasons, the Earn-out is not an independent obligation, as Respondents claim, and this Court should reverse summary judgment so that discovery can be completed on these critical issues and the parties' right and obligations under the APA can be fully realized.

III. A genuine issue of fact shows that Respondents failed to act in good faith in calculating the Post Closing Adjustment, thus impacting the timing of payment on the Earn-out and the amount owed thereon, and it is for the jury to decide whether Respondents' conduct affected the parties' performance under the APA and what amount is owed by either party under the APA.

There is no dispute that the APA required the Post-Closing Adjustment to be calculated and paid before, or set off against, the Earn-out payment. And here, LSL attempted to finalize the Post Closing Adjustment and related payments but was prohibited from doing so by Respondent Jordan's repeated rejections and failure to cooperate in finalizing the payments. LSL's discovery responses dated December 28, 2023, over two years ago, show that it provided several working capital statements to Jordan, who rejected each of the statements and then refused to provide financial documentation to finalize same. *See* LSL's Resp. to Req. to Admit Nos. 13, 14. The evidence further shows that LSL prepared an Earn-out statement applying the estimated set off to which it was entitled, but again Jordan rejected the assessment and refused to cooperate to reach an agreed upon amount. *Id*. at Nos. 9, 10. This evidence creates a genuine issue of fact related to Respondents' breach of its express[3] and implied covenants[4] of good faith and fair dealing, and in South Carolina, these facts create a question for the jury. *See, e.g.*, *Shelton v. Oscar Mayer Foods Corp.*, 319 S.C. 81, 91, 459 S.E.2d 851, 857 (Ct. App. 1995) ("[T]he question of whether Louis

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[3] *See, e.g.*, APA § 3.2(b)(ii), Working Capital ("Buyer and Seller shall negotiate in good faith to resolve such objections…."); *Id*. § 3.3(b)(ii), Earn-out ("Buyer and Seller shall negotiate in good faith to resolve the disputed items….").

[4] *Nichols v. State Farm Mut. Auto.,* 279 S.C. 336, 306 S.E.2d 616 (1983) ("Every contract an implied covenant of good faith and fair dealing that neither party will do anything which will injure the right of the other to receive the benefits of the agreement.").

Rich breached an implied covenant of good faith and fair dealing based on an employment contract is for the jury to decide.").

It should be a *red flag* that Respondents have repeatedly denied any obligation to participate in finalizing the payments, suggesting that the burden belonged solely to LSL:

- "There is not one single sentence in the asset purchase agreement which obligates Mr. Jordan or Apple Services, Inc. or any other party on the Plaintiff side of this lawsuit to cooperate with them in producing the statement of working capital, here. It is solely within their control." Transcript of Hearing, Apr. 17, 2025, at 22.

- "[T]here is no obligation whatsoever in the asset purchase agreement that Mr. Jordan is to cooperate in that process." *Id*.

- "[T]he APA does not require Jordan to cooperate with LSL in order to produce the Working Capital Statement. The plain language of the documents puts the onus completely on LSL to prepare those statements." Pls.' Suppl. Mem. at 6.

Respondents are wrong, and their failure to acknowledge a duty to cooperate gives credence to LSL's contentions that Respondents' bad faith has prevented performance under the APA.

Even now, Respondents do not deny failing to cooperate. Instead, Respondents' last-ditch argument is that LSL failed to present evidence of Respondents' bad faith. *See* Resp. Brief at p. 13. This argument must fail because LSL's responses to requests to admit are evidence that may be properly considered by the Court. *See* Rule 56(c), SCRCP ("The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, *and admissions on file*, together with the affidavits, if any, show that there is no genies issue as to any material fact….") (emphasis added). Per the Rule, requests for admission encompass "statements or opinions ***of fact***," Rule 36(a), SCRCP, and thus, LSL's responses are properly part of the factual record for the Court's consideration. A simple comparison of LSL's discovery responses and Respondents' Affidavits show a genuine issue of fact, as these documents offer competing statements of fact and

evidentiary positions. Together, they present a quintessential example of genuine issues that should preclude summary judgment.

Respondents then argue that LSL may only create a genuine issue of fact by putting forth a competing affidavit to Jordan's affidavit, or by producing a copy of the working capital statements referenced in its responses to the requests to admit. *See* Resp. Brief at 13 ("Notably LSL did not put any affidavit or any of these 'several' Closing Working Statements in the record before the trial court. Thus, there was no evidence to refute the properly made and supported Motion presented by Jordan."). The Rules do not require LSL or any other party to produce a competing affidavit for every affidavit submitted by Respondents. Instead, Rule 56(e), SCRCP, provides that a party may not respond to a motion for summary judgment by resting on "the mere allegations or denials of his *pleading*," which is inapplicable here. LSL does not rely on the allegations or denials of its pleadings; it relies on its discovery responses and the plain terms of the APA, all of which are properly before the Court.

Furthermore, LSL bears no burden to produce evidence in opposition to a motion for summary judgment where the moving party fails to establish an absence of material fact upon which the court can then resolve a legal issue. *Standard Fire Ins. v. Marine Contracting & Towing Co.,* 301 S.C. 418, 422, 392 S.E.2d 460, 462 (1990) ("A party who fails to show the absence of a genuine issue of material fact is not entitled to summary judgment even though his adversary does not come forward with opposing materials."). Respondents are fixated on pursuing judgment before the parties can exchange evidence and litigate the present issues.[5]

[5] Summary judgment is especially inappropriate as both parties continue to litigate even the scope of the pleadings in this case. Currently pending before the court are Appellant's Motion for Judgment on the Pleadings, Appellant's Motion to Amend and add a counterclaim against Respondent Jordan, and Respondents' Motion to Amend and add defendants and more claims to this case.

Both parties were required to cooperate in finalizing the payment figures, and there is enough evidence of Respondents' bad faith to avoid summary judgment. As a matter of law, LSL's contractual right to reduce the Earn-out by the Post Closing Adjustment should not be voided simply because Respondents have failed to cooperate in calculating the Post Closing Adjustment. *See Drummond Coal Sales, Inc. v. Norfolk S. Ry.,* 3 F.4th 605, 611 (4th Cir. 2021) ("'Every contract imposes an obligation of good faith and fair dealing between the parties in its performance and its enforcement….' This obligation means 'neither party will do anything to injure or destroy the right of the other party to receive the benefits of the agreement.'") (citing 23 Williston on Contracts § 63:22 (4th ed. 2021)). For these reasons, ample evidence of a genuine issue of material facts was presented by Respondents' own motion for summary judgment and precluded summary judgment.

IV. Respondents fail to acknowledge the procedural history involving the Eviction case and its impact on discovery in the APA case.

Respondents condemn LSL for failing to conduct additional discovery before the hearings on its Motion, but the lack of discovery is inasmuch Respondents' failure as it is LSL, and it was not LSL who was seeking summary judgment. Moreover, in doing so, Respondents fail to acknowledge that the companion Eviction case consumed these parties until its resolution in January 2025. Only after the Eviction Matter was voluntarily dismissed pursuant to Rule 40(j), SCRCP, did the Respondents turn their focus back to this matter and request that its Motion— that had been pending for over a year and a half—finally be heard. A simple comparison of the two underlying dockets shows that the Eviction Matter was actively litigated while the APA Matter remained dormant.[6] In fact, looking just to the APA's docket, the parties to the APA designated

[6] *Compare* Public Index for APA Case (Civil Action No.: 2022-CP-40-02958); *with* Public Index for Eviction Matter (Civil Action No.: 2023-CP-40-01360).

the case for Business Court on May 31, 2024, where it remained dormant until the undersigned appeared as counsel of record on March 25, 2025, just a few weeks before the hearing on Respondents' Motion was scheduled for April 17, 2025:

Liquid Services And Logistics Llc	Notice/Notice of Appearance	Filing		03/25/2025-09:45	05/07/2025-09:45	
Jordan, Michael D	NEF(05-31-2024 09:44:35 AM) Order/Case Assignment to Bus...	Filing		05/31/2024-09:44	05/07/2025-09:44	
Jordan, Michael D	Order/Case Assignment to Business Court Approved	Order		05/31/2024-09:44	05/07/2025-09:44	

Respondents then argue that LSL waited until the appeal to request additional discovery and thus did not preserve that issue for review. (Respond. Brief at p. 15). Respondents are wrong. Before the trial court, LSL *repeatedly* pled for more time to develop the issues affecting damages:

- "[A]s Mr. Becker said, his motion was filed in October of '23. This case has sat stagnant while everybody has focused, seemingly, on the eviction matter. And when the eviction matter was 40[(j)'d] and dismissed just in January of this year, here we are now turning back to this case. And, what we would request, Your Honor, is that, because of the very clear damages dispute on the face of the motion and the exhibits that Plaintiff has set forth, we just want a scheduling order in order to fully and fairly evaluate what these damages would be." (Transcript at p. 15:1–10);

- "There has been very little to no discovery completed in this case that we're here before you about today. There has been, what I understand, to be written -- some written discovery has been exchanged, but to my knowledge and, Mr. Becker, Mr. Porter, y'all correct me if I'm wrong, I'm not aware of any deposition taking place." (*Id*. at p. 13:4–9).[7]

- "I got back to my initial points. There are disputes of fact as to the damages and our case law is very, very clear. That issues of damages are for the jury.… [W]e just ask that the Court would deny the motion and allow us specified time to get some discovery done so that we can figure out what that number is." (Id. at p. 19:8–15);

- I just refer to the docket and show all the activity that's been taking place there, and what little activity is taking place here. We just need some more discovery, Your Honor, and because the damages are at issue, I think this is a pretty clear one that needs to be denied at this time. (*Id*. at p. 20:19–24);

[7] The undersigned was later informed that two, perhaps three *non-party* depositions were completed in the APA case, but upon information and belief, those depositions do not resolve the damages' issue currently on appeal, and most importantly, the depositions have not been cited by Respondents in support of summary judgment. Despite this, it remains true that no parties have been deposed in this case, nor experts deposed.

- "We don't want to delay any further, Your Honor. I understand there's a history here, but it seems to me that most of these lawyers' time has been spent in the [E]viction case, and this one's been sitting stagnant for a while, until just recently. We would like an opportunity to do some limited discover[y] and get caught up ourselves, and that's all, Your Honor. Thank you." (*Id*. at p. 28:13–19).

V. Prejudgment interest is inappropriate on the Earn-out payment.

Under both South Carolina law and the express language of the APA, Respondents are not entitled to prejudgment interest on the Earn-out. Not only is the language of the APA plain on this issue, APA § 3.3(f)(iii) (stating, "no interest is payable with respect to the Earn-out payment"), but the parties also agreed to an interest provision related to the Post Closing Adjustment. *Cf.* APA § 3.2(a)(ii) (allowing interest at 12% per annum until the Post-Closing Adjustment is paid). The APA thus precludes payment of prejudgment interest on the Earn-out, and even Respondents acknowledge in their Initial Brief that contracting parties can waive by contract any statutory right to pre-judgment interest. *See* Respond. Brief at p. 23.

Respondents' suggestion that somehow the provision precluding interest on the Earn-out is limited to issues of securities law grasps for straws. *See N. Am. Rescue Prods. v. Richardson,* 411 S.C. 371, 379, 769 S.E.2d 237, 241 (2015) ("However, only if the document itself creates an ambiguity should a court look to outside evidence to aid in interpretation."). Nor does it seem right or convincing that a party should be able to argue to a court that the application of an otherwise plain and broadly applicable provision precluding pre-judgment interest on the Earn-out, should only apply only if a regulatory body may inquire or come calling, but not in the context of this litigation too.

Moreover, LSL has not waived this argument for appeal. First, LSL argued at the hearing on Respondents' Motion for Partial Summary Judgment that pre-judgment interest could not be applied in this case because the Earn-out was not a sum certain. (Transcript at p. 19:17 – 20:18).

Thus, the propriety of applying pre-judgment interest to the Earn-out was an issue before the trial court before it issued its initial order. Second, LSL specifically argued that the plain language of the APA precluded pre-judgment interest in its Rule 59(e) motion to reconsider the court's Initial Order, as an additional ground supporting its argument that the court's award of pre-judgment interest, despite the Earn-out not being a sum certain, was in error. *See* LSL's Mot. to Recons. at p. 14. Thereafter, the trial court entered an Amended Order, which is the subject of this appeal. Therefore, the issue was squarely before the trial court before it issued the Order before this court on appeal.

Under these circumstances, there is no preservation issue as to the court's consideration and application of the plain language of the APA to determine that the trial court erred in awarding prejudgment interest on the Earn-out. The purpose of issue preservation is to allow the trial court to consider all issues and arguments before an appellate court will consider same. *Elam v. S.C. DOT*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) ("This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments."); *see also I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments."). "It is absolutely necessary *to justice*, that there should, upon many occasions, be opportunities of *reconsidering* the cause by a new trial." *Elam*, 361 S.C. at 23, 602 S.E.2d at 779 (original emphasis).

In any case, even if the court ruled that the plain language of the contract did not control for purposes of this appeal, the court also erred in awarding prejudgment interest because South

Carolina law prohibits an award of prejudgment interest when the amount of damages is not certain. *See Hess v. Morphis Pediatric Grp. of Lancaster,* 446 S.C. 389, 416, 920 S.E.2d 1, 15 (Ct. App. 2025) (finding damages unliquidated when the sum was subject to non-static "debts, expenses, royalties, and expenditures"); *see also Butler Contr., Inc. v. Ct. St., LLC*, 369 S.C. 121, 133, 631 S.E.2d 252, 259 (2006) ("The proper test for determining whether prejudgment interest may be awarded is whether the measure of recovery, not necessarily the amount of damages, is fixed by conditions at the time the claim arose."). This argument was raised by counsel at the hearing on Respondents' Motion for Partial Summary Judgment, and Respondents do not claim that this argument is waived on appeal.

For all the reasons discussed above, the Earn-out is not a sum certain. This Court's analysis in *Hess* is directly on point, and Respondents' disregard for *Hess* is unavailing. Just as in *Hess*, where the salary to which the physician was owed (50% of the year's profits) was known, so is too the Earn-out amount. Yet just as there was confusion about what "debts, expenses, royalties, and expenditures" can be taken out of the physician's profits before calculating the his bonus with certainty in *Hess*, so too here, there are disputed issues of material fact as to amount of the Post Closing Adjustment which must be set off against the Earn-out amount before the Earn-out is due and payable under the APA. 446 S.C. at 416, 920 S.E.2d at 15 (finding 50% of the year's profits an unliquidated amount because the contract "[did] not make certain when [amounts could] be taken out of the profits before calculating his bonus"). So, while the parties agree Respondents earned the Earn-out, that sum must also be adjusted by the Post Closing Adjustment before the Earn-out amount is certain and due under the plain terms of the APA. Thus, because the Post Closing Adjustment remains a disputed issue of material fact, the amount of the Earn-out remains

uncertain and not due under the APA. Under these circumstances, South Carolina law does not allow an award or pre-judgment interest and the trial court erred an awarding it.

For the same reasons that this case is akin to *Hess*, it is also distinguishable from the other cases cited in Respondents' Brief. Unlike *Hess* and this case, those cases involve disputes where the contract's principle is no longer disputed under the contract itself and the sum is certain. *Cf. Miller Constr. Co., LLC v. PC Constr. of Greenwood,* 418 S.C. 186, 208, 791 S.E.2d 321, 333 (Ct. App. 2016) (reversing trial court's refusal to apply prejudgment interest to sum that defendant's president testified was due under the contract, and court had denied offsetting any delay damages); *see also Butler*, 369 S.C. at 134, 631 S.E.2d at 259 (reversing trial court denial of prejudgment interest where principle amount due under the contract itself was disputed by counterclaims only, not under the language of the contract itself). Here, just as the sum in *Hess* could not be determined under the plain terms of the employment agreement, without determining other issues related to the doctor's salary under the terms of the contract as well, so too the Earn-out cannot be certain, due, and payable under the APA, until the Post Closing Adjustment is determined and contractually set off against the Earn-out as required by the APA.

For all the reasons provided above, it was error of law for the trial court to award prejudgment interest as to the Earn-out.

CONCLUSION

For these reasons, this Court should reverse the trial court's Amended Order and remand this case to the trial court for further proceedings. In doing so, this Court will provide sanctity to the parties' agreement and allow a jury to determine genuine issues of disputed material fact.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

s/ Beth B. Richardson
Beth B. Richardson (SC Bar No. 69552)
brichardson@robinsongray.com
Cordes B. Kennedy (SC Bar No. 102287)
ckennedy@robinsongray.com
ROBINSON GRAY STEPP & LAFFITTE, LLC
2151 Pickens Street, Suite 500 (29201)
Post Office Box 11449
Columbia, SC 29211
Telephone: 803-929-1400
Facsimile: 803-929-0300

Counsel for Appellant

Columbia, South Carolina
February 25, 2026

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

William H. Seals Jr., Circuit Court Judge

Appellate Case No.: 2025-001409

Civil Case No.: 2022-CP-40-02958

Michael D. Jordan, Apple Services, Inc. and Plumbinator 1051, LLC ..... Respondents,

v.

Liquid Services and Logistics, LLC and Tim Freeman ..... Defendants,

Of whom Liquid Services and Logistics, LLC is ..... Appellant.

PROOF OF SERVICE

Pursuant to Rule 262(c)(3), SCACR, I certify that on February 25, 2026, the **Initial Reply Brief of Appellant** was served on the following counsel of record by AIS at the following addresses:

James Y. Becker
Mary M. Caskey
Haynsworth Sinkler Boyd, P.A.
Post Office Box 11889
Columbia, South Carolina 29211
jbecker@hsblawfirm.com
mcaskey@hsblawfirm.com

Sarah P. Spruill
Haynsworth Sinkler Boyd, P.A.
ONE North Main, 2nd Floor
Greenville, South Carolina 29601-2772
sspruill@hsblawfirm.com

Stephen Porter
Porter & Quinn, LLC
3700 Forest Drive, Suite 303
Columbia, South Carolina 29204
stephen@porterquinnlaw.com

Counsel for Respondents

s/ Beth B. Richardson

Beth B. Richardson (SC Bar No. 69552)
Cordes B. Kennedy (SC Bar No. 102287)
Robinson Gray Stepp & Laffitte, LLC
2151 Pickens Street, Suite 500 (29201)
Post Office Box 11449
Columbia, SC 29211
Telephone: 803-929-1400
Facsimile: 803-929-0300
brichardson@robinsongray.com
ckennedy@robinsongray.com

Counsel for Appellant

From:	Victoria Cordoni
To:	Becker, James; Caskey, Mary; Spruill, Sarah; Stephen Porter
Cc:	Beth B. Richardson; Cordes Kennedy; Joseph McNeila; Dara Carmichael; Harrington, Helen
Bcc:	"{F621541}.CLIENTS@mail.cloudimanage.com"
Subject:	Jordan et al. v. Liquid Services et al.; Appellate Case No.: 2025-001409
Date:	Wednesday, February 25, 2026 6:31:06 PM
Attachments:	image001.png 2026-02-25 Initial Reply Brief of Appellant - AS FILED.pdf 2026-02-25 Proof of Service - Initial Brief and Designation of Matter to be Included in the Record on Appeal - AS FILED.pdf

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Dear Counsel:

Pursuant to Rule 262(c)(3), SCACR, attached for service is Appellant's Initial Reply Brief being filed in the Court of Appeals of South Carolina today. A copy of this email will be filed with the Proof of Service.

Should you have any questions or concerns, please don't hesitate to contact us.

Thanks,

Victoria

ROBINSON GRAY
Litigation + Business

VICTORIA CORDONI **PARALEGAL**

DIRECT 803.231.7811
VCARD
ROBINSONGRAY.COM

2151 Pickens Street
Suite 500
PO Box 11449 (29211)
Columbia, SC 29201

MERITAS LAW FIRMS WORLDWIDE