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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 for the Ninth Circuit

The Honorable G. D. Morgan, Jr., Circuit Court Judge

Appellate Case No. 2025-002136

SHELTER, LLC, JASON HIGHSMITH, AND KACIE HIGHSMITH..... Respondents

v.

DESIGN GAPS, INC., DAVID GLOVER, AND EVA GLOVER..... Appellants

VOLUME I: RECORD ON APPEAL

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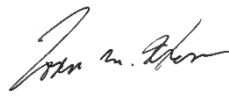
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March 9, 2026

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	
SHELTER, LLC, JASON HIGHSMITH,	)	
and KACIE HIGHSMITH,	)	C/A No.: 2025-CP-10-01835
	)	
Petitioners,	)	
	)	ORDER GRANTING PETITIONERS'
vs.	)	AMENDED PETITION FOR ORDER
	)	CONFIRMING ARBITRATION
DESIGN GAPS, INC., DAVID GLOVER,	)	AWARD
and EVA GLOVER,	)	
	)	
Respondents.	)	
	)	

This matter came before the Court on Thursday, September 4, 2025, at 11:30 A.M., on Petitioners Shelter, LLC (“Shelter”) and Jason Highsmith and Kacie Highsmith’s (the “Highsmiths”) (collectively, “Petitioners”) Amended Petition for Order Confirming Arbitration Award (the “Petition”) in the above-captioned action related to American Arbitration Association Case No. 01-21-0004-8211 (the “Arbitration”). The Court also heard Respondents Design Gaps, Inc. (“Design Gaps”), David Glover (“Mr. Glover”), and Eva Glover’s (“Ms. Glover”) (collectively, “Respondents”) Motion to Vacate the Arbitration Award.

The Honorable G.D. Morgan, Jr. presided over the hearing. Petitioners’ attorney, Jordyn N. D’Andrea, was present on their behalf. Respondents’ attorney, Todd M. Hess, was present on their behalf, along with Mr. Glover. After reviewing the pleadings and supporting documents, as well as hearing arguments from counsel, I hereby GRANT Petitioners’ Amended Petition for Order Confirming Arbitration Award in its entirety, DENY Respondents’ Motion for Vacatur in its entirety. My findings of fact and conclusions of law follow.

FINDINGS OF FACT & CONCLUSIONS OF LAW

This matter arises out of a dispute between the parties with respect to a renovation on the Highsmiths' residence. In August and September of 2020, the Highsmiths engaged Shelter to perform portions of the renovation. Shelter and the Highsmiths entered into contracts with Design Gaps for cabinetry and closet systems in the residence. *See* Am. Pet. Ex. B & C (the “Contracts”). Both Contracts entered into between the Highsmiths and Design Gaps – which were prepared on Design Gaps’ form – contained the following arbitration clause:

All disputes arising out of or in connection with this Agreement or any transaction hereunder shall be finally settled under the Commercial Arbitration Rules of the American Arbitration Association then in effect by an [sic] arbitrator appointed in accordance with such Rules. The arbitrator's award shall be final and binding. Judgment upon the award rendered may be entered in any court having jurisdiction over the party against which the award is rendered. The parties expressly consent to the jurisdiction of the federal and state courts situated in Charleston, South Carolina for the purpose of enforcing any arbitration award rendered pursuant to this Section 15 [sic]. The [sic] arbitration shall take place in Charleston, South Carolina or such other place as the parties may agree. The arbitration shall include (i) a provision that the prevailing party in such arbitration shall recover its costs of the arbitration and reasonable attorneys' fees from the other party or parties, and (ii) the amount of such fees and costs. The arbitrators shall be bound to enforce any applicable statute of limitations.

Am. Pet. Exs. B & C, at § 17 (the “Arbitration Clause”).

On May 14, 2021, after numerous and lengthy delays, the Highsmiths and Shelter terminated both Contracts with Design Gaps. Am Pet. Ex. A, at 3. On July 20, 2021, the Highsmiths and Shelter filed a demand for arbitration for breach of contract, promissory estoppel, fraud, and piercing the corporate veil against Design Gaps, Mr. Glover, and Ms. Glover. *Id.* at 1–2. Design Gaps filed counterclaims for negligence, breach of contract, fraudulent misrepresentation, failure to mitigate damages, tortious interference, civil conspiracy, conversion, unfair and deceptive trade practices, quasi-contract, and violation of the Copyright Act. *Id.* at 2.

The parties agreed that the claims against Mr. and Mrs. Glover would be reserved for another forum. *Id.* Mr. Glover,¹ on behalf of Design Gaps, deposed witnesses and conducted discovery prior to the Arbitration hearing, and, at the hearing, had the opportunity to present witnesses and cross-examine evidence put on by Petitioners. *Id.* At the end of the three-day hearing, the parties confirmed they had each “had an adequate opportunity to present in full the evidence which they thought was relevant and important for [the arbitrator] to consider in rendering [his] Award.” *Id.*

On October 7, 2022, in a ten (10) page written award (the “Award”), the Arbitrator found in favor of Respondents and denied each of Design Gaps’ counterclaims. *Id.* at 9. Nonetheless, the arbitrator did discount the damages awarded to account for the higher quality product provided by the repair contractor, Distinctive Design & Construction, LLC (“Distinctive Design”). *Id.* at 5. The Award was the “full settlement of all claims and counterclaims.” *Id.* at 2.

Subsequently, on December 29, 2022, Design Gaps filed a petition in U.S. District Court for the District of South Carolina to vacate the Award, arguing the arbitrator was evidently partial, manifestly disregarded the law, and imperfectly executed his duties. Shelter and the Highsmiths responded by moving to confirm the Award. The District Court issued an order confirming the Award and rejecting all of Design Gaps’ arguments. Am. Pet. Ex. E, at 79 (Order & Op. dated May 19, 2023). The District Court also found the Arbitration Clause entitled Shelter and the Highsmiths to attorney’s fees and costs incurred in defending the Award, holding that “[t]he plain language of the contract describes the arbitration process to include any proceeding before an arbitrator as well as any court proceeding to enforce the arbitrator’s award.” Am. Pet. Ex. E, at 89, 91 (Order & Op. dated June 7, 2023).

¹ Mr. Glover represented Design Gaps *pro se* in the Arbitration, after obtaining an opinion from the South Carolina Supreme Court’s Office of Disciplinary Counsel permitting his representation of the Respondents without a law license. *See id.* at 2 n.1.

Design Gaps then appealed the District Court’s order confirming the Award to the U.S. Court of Appeals for the Fourth Circuit. After the appeal was fully briefed and oral argument was held, the Fourth Circuit dismissed the appeal *sua sponte*, finding the federal court system lacked subject matter jurisdiction over the case. *See* Am. Pet. Ex. F. In so doing, the Fourth Circuit offered no opinion on the merits of the district court’s orders, or of the Award. On remand, the District Court carried out the Fourth Circuit’s mandate by dismissing the case for lack of jurisdiction; however, the court said nothing about the merits of its prior orders. *See* Am. Pet. Ex. E, at 96–97 (April 2, 2025 Order & Judgment).

On April 9, 2025, Petitioners filed their Amended Petition to Confirm Arbitration Award in the above captioned action (the “Petition”). On the same date, Respondents filed a Notice and Motion for Vacatur of Arbitration Award (the “Motion to Vacate”). Subsequently, both parties filed memoranda in support of their respective motions, which also set forth their reasons for opposing the other party’s petitions.

I. LEGAL STANDARD

Under the South Carolina Uniform Arbitration Act (“UAA”), “[u]pon application of a party, the court shall confirm an award, unless *within the time limits hereinafter imposed* grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in §§ 15-48-130 and 15-48-140.” S.C. Code Ann. § 15-48-120 (emphasis added).² Because “[a]rbitration is a favored method of settling disputes in South Carolina,” *Pittman Mortg. Co., Inc. v. Edwards*, 327 S.C. 72, 75, 488 S.E.2d 335, 337 (1997), “[t]he scope of judicial

² “The FAA’s substantive provisions apply to arbitration in federal or state courts, but a state’s procedural rules apply in state court unless they conflict with or undermine the purpose of the FAA.” *Henderson v. Summerville Ford-Mercury Inc.*, 405 S.C. 440, 450, 748 S.E.2d 209, 226–27. Because “the confirmation statute is procedural, not substantive” and because “the outcome would be the same under either the FAA or UAA, as both mandate confirmation unless grounds were established for vacating, modifying, or correcting the award,” the South Carolina UAA applies rather than Section 9 of the FAA. *Id.*

review for an arbitrator's decision 'is among the narrowest known at law because to allow full scrutiny of such awards would frustrate the purpose of having arbitration at all.'" *Group III Mgmt., Inc. v. Suncrete of Carolina, Inc.*, 425 S.C. 141, 149, 819 S.E.2d 781, 785 (Ct. App. 2018) (quoting *Three S Del., Inc. v. DataQuick Info. Sys., Inc.*, 492 F.3d 520, 527 (4th Cir. 2007)). "Generally, an arbitration award is conclusive and courts will refuse to review the merits of an award." *Pittman*, 327 S.C. at 76, 488 S.E.2d at 337.

II. PETITION TO VACATE.

A. There is No Timely Motion to Vacate or Modify the Award.

Pursuant to the South Carolina Uniform Arbitration Act,³ an application to vacate an arbitration award "shall be made within ninety days after delivery of a copy of the award to the applicant, except that, if predicated upon corruption, fraud or other undue means, it shall be made within ninety days after such grounds are known or should have been known." S.C. Code Ann. § 15-48-130(b). In this case, the Award was emailed to the parties the day it was issued, October 7, 2022. Design Gaps filed its motion to vacate with this Court on April 9, 2025, well outside the 90-day window.

Although Design Gaps filed its petition to vacate in district court prior to expiration of the 90-day period, there is no tolling provision under the UAA "*except*" for "corruption, fraud or other undue means." Design Gaps has not identified any corruption, fraud, or other undue means that

³ Although the South Carolina Supreme Court has not formally addressed the question of whether the UAA or FAA applies to motions to vacate an arbitration award, its prior holdings regarding applicable law for petitions to confirm awards and appealability of orders compelling arbitration, *see Henderson v. Summerville Ford-Mercury, Inc.*, 405 S.C. 440, 748 S.E.2d 221 (2013) and *Toler's Cove Homeowners Ass'n v. Trident Constr. Co.*, 355 S.C. 605, 586 S.E.2d 581 (2003), I find that application of the UAA to Respondents' motion to vacate is appropriate. Respondents filed their motion under the authority of the UAA, and, because the motion to vacate would not be granted under either state or federal law, the UAA does not "undermine the goals and policies of the FAA." *See Toler's Cove Homeowners Ass'n*, 355 S.C. at 611, 586 S.E.2d at 584.

prevented it from timely filing an application with this Court. Accordingly, I find the motion to vacate is untimely and cannot operate to prevent confirmation of the Award.

B. Merits of Design Gaps' Motion to Vacate.

Even if Design Gaps' motion to vacate had been timely filed, I am not persuaded the facts here justify interference with the arbitrator's Award. Under the South Carolina law, an award may only be vacated under the narrow statutory grounds in S.C. Code Ann. Section 15-48-130(a) or where the arbitrator manifestly disregards the law. *Waldo v. Cousins*, 442 S.C. 662, 665, 901 S.E.2d 276, 277–78 (2024). In reviewing an arbitration award, the court's function is limited "to determin[ing] whether the arbitrators did the job they were told to do—not whether they did it well, or correctly, or reasonably, but simply whether they did it." *Grp. III Mgmt.*, 425 S.C. at 151, 819 S.E.2d at 786 (internal quotation omitted).

Design Gaps' argument largely relies on their belief the arbitrator exceeded his powers in violation of S.C. Code Ann. § 15-48-130(a)(3), and refused to hear evidence material to the controversy or otherwise mis-conducted the hearing to the prejudice of Respondents. *See* S.C. Code Ann. § 15-48-130(a)(4). Design Gaps also contends the arbitrator manifestly disregarded the law. This Court disagrees.

1. The Arbitrator Issued a Reasoned Award.

Design Gaps contends the Arbitrator exceeded his authority by not issuing a "reasoned award." Mot. to Vacate. Design Gaps relies heavily on a case from the U.S. Court of Appeals for the Second Circuit, *Leeward Constr. Co. v. Am. Univ. of Antigua–Coll. of Med.*, 826 F.3d 634, 640 (2d. Cir. 2016), which is not binding on this Court or in the courts of South Carolina.

A similar argument was recently before our Court of Appeals in another arbitration-confirmation case. *See TCC of Charleston, Inc. v. Concord & Cumberland, LLC*, No. 2021-000272, 2025 WL 2161167, at *12–13 (S.C. Ct. App. July 30, 2025) (published but not yet

reported). The Court of Appeals expressed doubt about using the Second Circuit's description because settled South Carolina law provides for a lesser standard: "'arbitrators need not specify their reasoning or the basis of the award so long as the factual inferences and legal conclusions supporting the award are barely colorable and . . . a ground for the award can be inferred from the facts.'" *Id.* at *13 (quoting *Renaissance Enter., Inc. v. Ocean Resorts, Inc.*, 310 S.C. 395, 399, 426 S.E.2d 821, 823 (Ct. App. 1992)).

Applying the standard espoused in *TCC of Charleston*, I find the arbitrator issued a reasoned award. Although Design Gaps argues the arbitrator did not make did not make a "barely colorable" decision on its counterclaims, I find the arbitrator sufficiently addressed each claim and counterclaim. The arbitrator clearly stated his reasons for denying such counterclaims: first, Design Gaps' claim for material breach of contract was based upon the Highsmiths' and Shelter's termination of the Contracts and its alleged failure to pay. *See* Am. Pet. Ex. A.

When addressing the Highsmiths' and Shelter's claim for breach of contract, the arbitrator found "[Design Gaps'] repeated failure to meet the many dates promised for completion justifies the termination of the contracts [by Claimants]." Am. Pet. Ex. A, p. 5. As the arbitrator turned to Design Gaps' counterclaims, he found "[Design Gaps] conceded they had not completed its work by May 2021. I find this arbitration involves contract claims. The parties [sic] rights are all set out in the contracts. Design Gaps has received an offset against Claimants' completion costs for its contract balance. That is all it is entitled to receive." Am. Pet. Ex. A, p. 6. On the counterclaim for fraud, the arbitrator found "[Design Gaps] did not prove any false or reckless representation made by Claimants which caused it any damage; therefore, it is not entitled to anything on these claims." *Id.*

Further, the arbitrator addressed the counterclaims for tortious interference and civil conspiracy together as they were based on the same facts—that by meeting with and engaging Distinctive Design while the Highsmiths and Shelter were under contract with Design Gaps—they “did Torturously [sic] Interfere with the Master Closet Contract . . . did so commit Civil Conspiracy in the act of doing so, Conversion of the Design Gaps, Inc. Copyrighted and Protected Designs” *See* Am. Pet. Ex. A. (including allegations in support of several counterclaims together)). The Arbitrator identified the specific facts supporting his decision on these counterclaims:

Respondents did not establish any tortious interference in its contract by any party. It further did not establish that there was a civil conspiracy between and among the Claimants, Distinctive Design or any other party. While Claimants did meet with Distinctive Design as early as January 2021 to review Respondents’ performance, the Claimants were advised by Distinctive Design to continue working with Design Gaps to achieve completion. When completion had not been accomplished by May 2021, only then did Claimants terminate the contract.

Am. Pet. Ex. A, p. 6.

Additionally, the arbitrator provided a brief explanation for his denial of the counterclaim for unfair and deceptive trade practices based on Design Gaps’ failure to establish essential elements in support of its claim. “Respondents did not establish that Claimants’ conduct was unfair or deceptive and therefore cannot sustain an unfair trade practices act claim. Respondents did not establish that the conduct it complains of was repetitive or in violation of the public interest.” *Id.*

Finally, the arbitrator provided ample support and explanation of his decision on the copyright issues. The arbitrator provides a lengthy explanation of his decision and the facts and testimony supporting it:

Respondents gave to the Claimants their drawings for the cabinets. Obviously, this was for Claimants’ review, approval, and use during the construction process. Claimants were free to use the drawings to measure the compliance of Design Gaps with these drawings and its obligation to install the designed cabinets in accordance with its contractual obligation. Respondents failed to enter into evidence a valid copyright registration; however, even if they had, Claimants certainly established

fair use of the design work, especially considering that Shelter did not profit from the design. The sharing of a pdf of the design did not materially impair the marketability of the design. Respondents failed to prove that Claimants or anyone else converted its designs for this project. Bryan Reiss of Distinctive Design confirmed that he did not use Design Gaps' designs for the cabinets. I am convinced by Reiss's testimony and the exhibits provided that any similarity in the designs is due to the limitations of the space and the client's desired layout. Therefore, there has been no violation of any copyright which Respondent may have had.

Am. Pet. Ex. A, pp. 6-7. This Court finds the Award is sufficiently clear and that "the factual inferences and legal conclusions supporting the award" are more than "barely colorable" to meet the applicable standard in South Carolina. *See TCC of Charleston*, 2025 WL 2161167, at *13.

Even if this Court were to apply the standard set forth in *Leeward Construction*, the award more than exceeds that bar as well as it sets forth more than bare conclusions. *See Leeward Constr. Co. v. Am. Univ. of Antigua-Coll. of Med.*, 826 F.3d at 640 (defining a "reasoned award" as "something more than a line or two of unexplained conclusions, but something less than full findings of fact and conclusions of law on each issue raised before the panel.>").

2. *The Arbitrator did not Exceed his Powers.*

"The question of whether arbitrators have exceeded their powers [under Section 15-48-130(a)(3)] relates to the arbitrability of the issue they have attempted to resolve." *Pittman Mortg. Co. v. Edwards*, 327 S.C. at 76, 488 S.E.2d at 338. "Arbitrators exceed their powers only if the issue resolved by them is not within the scope of the agreement to arbitrate. Factual and legal errors by arbitrators do not constitute an abuse of their powers, and the court is not required to review the merits of the decision so long as the arbitrators do not exceed their powers." *Id.* (citation omitted).

Design Gaps challenges the arbitrator's finding regarding termination of its contracts with the Highsmiths and Shelter, arguing the arbitrator imposed deadlines not set forth in the contract. First, I find that, under the Arbitration Clause, "[a]ll disputes arising out of or in connection with

[the Contracts] or any transaction [thereunder]” were subject to arbitration and properly considered by the arbitrator. This includes issues of timely performance and termination of the Contracts. Although the arbitrator found the Contracts did not contain “specified completion dates,” he provided a list of subsequent representations by Design Gaps regarding a promised or reasonable completion date. Am. Pet. Ex. A., at 3–4. The arbitrator also noted that “the expressed goal for the time of completion of the project was approximately four to eight weeks from contract signing.” *Id.* at 1. The arbitrator found Design Gaps’ “repeated failure to meet the many dates promised for completion justifies the termination of the contracts.” *Id.* at 5.

Even if the arbitrator made a legal error in determining these issues, such is not grounds for vacatur under the UAA. I find the arbitrator did not exceed his powers and did not consider issues outside the scope of the Arbitration Agreement.

3. The Arbitrator did not Refuse to Hear Evidence, Nor did the Arbitrator Conduct the Hearing so as to Substantially Prejudice Respondents’ Rights.

Design Gaps claims the arbitrator refused to hear evidence material to the controversy, or otherwise so conducted the hearing contrary to the provisions of § 15-48-50 as to substantially prejudice the rights of Respondents, warranting vacatur of the award. S.C. Code Ann. § 15-48-130(a)(4). Design Gaps further states it was not afforded a full and fair opportunity to litigate because the arbitrator (1) did not join as parties certain persons who were not parties to the arbitration agreement and did not consent to arbitration; (2) allegedly did not consider Design Gaps’ copyright registration in rendering his opinion; and (3) did not consider the alleged substantial similarity between Distinctive Design’s work and Design Gaps’ designs. This Court disagrees.

First, Design Gaps argues it was not allowed to fully present its case because Distinctive Design, its owner and/or agents, and the owners and/or agents of Shelter were not joined as parties

in the Arbitration. However, Design Gaps was permitted to conduct discovery, depose these non-parties, and cross-examine the non-party witnesses at the three-day arbitration hearing. This Court finds no error in the arbitrator's finding that he could not join parties to the arbitration if they were not parties to the Arbitration Agreement. Moreover, Design Gaps has not shown how the refusal to join the non-parties prevented it from presenting its case in accordance with S.C. Code § 15-48-50, since it was able to present witnesses and cross-examine the non-parties. Most importantly, at the conclusion of the hearing, Design Gaps confirmed it had a full and fair opportunity to present their case:

At the conclusion of that testimony, as arbitrator, I asked each side if they had an adequate opportunity to present in full the evidence which they thought was relevant and important for me to consider in rendering my Award. Each side advised that they had adequate opportunity to present their case with all relevant testimony and exhibits. Therefore, the merits hearing was closed and the parties afforded an opportunity to present post-hearing briefs and proposed orders.

Am. Pet. Ex. A, at 2.

Second, Design Gaps contends the arbitrator refused to hear evidence related to its copyrights. Although the arbitrator noted Design Gaps failed to enter its certificate of copyright as evidence at the hearing, the arbitrator explicitly stated the copyright registration would not have changed the result. Even if the arbitrator had improperly refused to consider the copyright registration (which this Court finds it did not⁴), such refusal did not substantially prejudice Respondents as required for vacatur under S.C. Code Ann. § 15-48-130(a)(4). The arbitrator plainly stated it would not have changed the result: "Respondents failed to enter into evidence a

⁴ Design Gaps provided no applicable rule under the Commercial Arbitration Rules of the American Arbitration Association, which the parties agreed in the Arbitration Clause would govern the arbitration proceedings, requiring the arbitrator to consider unadmitted evidence nor any rule requiring that the arbitrator admit evidence not presented at the hearing.

valid copyright registration; however, even if they had, Claimants certainly established fair use of the design work, especially considering that Shelter did not profit from the design. The sharing of a pdf of the design did not materially impair the marketability of the design. Respondents failed to prove that Claimants or anyone else converted its designs for this project.” Am. Pet. Ex. A, p. 6–7. This Court finds Design Gaps was not substantially prejudiced due to the arbitrator’s refusal to admit the copyright registration as evidence, particularly since the arbitrator considered the registration in reaching his conclusions.

Finally, Design Gaps’ argument that the arbitrator did not consider the similarity between designs as part of his copyright analysis is not supported by the record. The Award discusses the similarities between the designs and found that it did not constitute infringement: “Bryan Reiss of Distinctive Design confirmed that he did not use Design Gaps’ designs for the cabinets. I am convinced by Reiss’s testimony and the exhibits provided that any similarity in the designs is due to the limitations of the space and the client’s desired layout. Therefore, there has been no violation of any copyright which Respondent may have had.” Am. Pet. Ex. A, at 7. Simply because Design Gaps disagrees with the arbitrator’s analysis is not sufficient to vacate an award under § 15-48-130(a)(4). I find the arbitrator did not refuse to hear material evidence and did not conduct the hearing contrary to § 15-48-50 so as to substantially prejudice Design Gaps’ rights.

4. The Arbitrator Did Not Manifestly Disregard the Law.

South Carolina law recognizes one non-statutory ground for vacatur—manifest disregard of the law—which is “rarely applied.” *Swentor v. Swentor*, 336 S.C. 472, 486, 520 S.E.2d 320, 338 (Ct. App. 1999). “[F]or a court to vacate an arbitration award based upon an arbitrator’s manifest disregard of the law, the governing law ignored by the arbitrator must be well defined, explicit, and clearly applicable.” *Gissel v. Hart*, 382 S.C. 235, 241 (2009). “The focus is on the conduct of the arbitrator and **presupposes something beyond a mere error in construing or**

applying the law.” *Id.* (emphasis in original). “A manifest disregard of the law is established only where the ‘arbitrator understands and correctly states the law, but proceeds to disregard the same.’” *Group III Mgmt.*, 425 S.C. 155, 819 S.E.2d 787 (quoting *Patten v. Signator Ins. Agency, Inc.*, 441 F.3d 230, 234 (4th Cir. 2006)) (cleaned up). “Courts may now vacate an arbitration award, but only when it is untethered from controlling legal principles known to, but shrugged off by, the arbitrator.” *Waldo v. Cousins*, 442 S.C. 662, 669, 901 S.E.2d 276, 279 (2024).

Design Gaps argues the arbitrator misapplied the fair use doctrine in his copyright infringement analysis. Even accepting such argument as true, “error in construing or applying the law” does not constitute manifest disregard. *Gissel*, at 241. Design Gaps is unable to show the arbitrator acknowledged a legal principle yet refused to apply it. The arbitrator engaged in a lengthy discussion on the copyright claims in the various forms. *See* Am. Pet. Ex. A, pp. 6–7. Design Gaps has identified no rule requiring a contrary result and is simply challenging the arbitrator’s application of the law. The Court holds this is not sufficient to show manifest disregard of the law.

Last, Design Gaps challenges, again, the arbitrator’s holding with respect to the competing breach of contract claims. However, again, Design Gaps has provided no black letter law mandating the arbitrator find in a certain way; rather, Design Gaps simply challenges the findings of fact and law based on the arbitrator’s analysis. This is simply insufficient.

Our Supreme Court has noted when considering an alleged manifest disregard of the law, “[e]ven a ‘clearly erroneous interpretation of the contract’ cannot be disturbed.” *Gissel*, at 241 (quoting *Trident Tech. Coll.*, 286 S.C. at 108, 333 S.E.2d at 787). As explained by the district court, “the Arbitrator outlined the facts he found relevant and credible, and then he found that Design Gaps, not the Highsmiths, was in material breach. [Design Gaps] can point to no binding

precedent that required the Arbitrator to determine otherwise.” Am. Pet. Ex. E (May 19, 2023 Order & Op at 8.). Accordingly, this Court rejects all of Design Gaps’ grounds for vacatur.

III. PETITION TO CONFIRM.

Having rejected Design Gaps’ motion to vacate as both untimely and on the merits, the UAA mandates that I confirm the award: [T]he court *shall* confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award S.C. Code Ann. § 15-48-120 (emphasis added). I, therefore, find the Award shall be confirmed and also award prejudgment interest and attorneys’ fees for Petitioners.

With respect to prejudgment interest, Petitioners cite to S.C. Code Ann. § 34-31-20, stating in all cases wherein any sum of money shall be ascertained and, being due, such shall draw interest according to law. Interest begins accruing on the date “when, either by agreement of the parties or operation of law, the payment is demandable, if the sum is certain or capable of being reduced to certainty.” *Babb v. Rothrock*, 310 S.C. 350, 353, S.E.2d 789, 791 (1993). When an arbitrator awards a specific dollar amount, interest begins accruing on the date of the award – accordingly, the Award entered on October 7, 2022, began the clock for pre-judgment interest to accrue on the total Award amount of \$296,409.17. Am. Pet. Ex. A.

As Design Gaps has failed to make any payment efforts to Petitioners since the date the Award was issued, interest has accrued on the full value of the Award, as follows:

October 7, 2022 – December 31, 2022	\$ 6,039.85
January 1, 2023 – December 31, 2023	\$ 25,684.75
January 1, 2024 – December 31, 2024	\$ 25,684.75
January 1, 2025 – September 22, 2025	\$ 23,219.34
TOTAL	\$ 80,628.69

Pursuant to the applicable prejudgment interest statute and the South Carolina Supreme Court's orders regarding annual interest rates, the Court orders Design Gaps to pay Petitioners prejudgment interest on the full amount of the Award, running from the date of the Award's issuance to the date this Order is entered.

As to attorneys' fees, Petitioners reiterate their argument that attorneys' fees should be awarded, pursuant to the Arbitration Clause and prevailing party provision. I find that the language of the contract unambiguously provides for the prevailing party to be awarded reasonable attorneys' fees in the arbitration and that the arbitration process includes efforts to enforce or defend the Award. *See, e.g., Henderson*, 405 S.C. at 452, 748 S.E.2d at 227 ("Confirmation is not a separate judicial process; it is merely a continuation of the arbitration procedure.").

Further, even if this Court were to view the language of the Arbitration Clause as ambiguous, "[a]mbiguous language in a contract should be construed liberally and most strongly in favor of the party who did not write or prepare the contract and is not responsible for the ambiguity; and any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who prepared the contract or is responsible for the verbiage." *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 499–500, 649 S.E.2d 494, 592 (Ct. App. 2007). To the extent a court were to read any ambiguity into the contractual language regarding the award of attorney fees for court proceedings to enforce an arbitration award (which this Court does not), any ambiguity must be construed against Design Gaps, the drafter of the mandatory arbitration clause with its attorneys' fee provision.

Therefore, I award Petitioners' their reasonable attorneys' fees incurred in enforcing and defending the Arbitration Award.

IT IS, THEREFORE, ORDERED, that Petitioners' Amended Petition for Order Confirming the Arbitration Award is hereby granted in its entirety and Respondents' Motion for Vacatur is denied in its entirety. The Court hereby confirms the Arbitration Award in the amount of \$296,409.17; awards prejudgment interest calculated at the rate of 8.75% beginning October 7, 2022; and awards Petitioners' their reasonable attorneys' fees and costs pursuant to the Contracts. Petitioners are hereby ordered to provide documentation and evidence supporting their claim for attorneys' fees within ten (10) days of this Order. Respondents may file a response if they so desire concerning the fee award requested within ten (10) days thereafter.

AND IT IS SO ORDERED.

The Honorable G.D. Morgan Jr.



Charleston Common Pleas

Case Caption: Shelter, Llc , plaintiff, et al VS Design Gaps Inc , defendant, et al

Case Number: 2025CP1001835

Type: Order/Other

So Ordered

G.D. Morgan Jr.

Electronically signed on 2025-09-29 12:28:50 page 17 of 17

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF South Carolina
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2025 10-01835
CP-

Shelter, LLC, Jason Highsmith, and

Kacie Highsmith

PLAINTIFF(S)

Design Gaps, Inc., David Glover, and

Eva Glover

DEFENDANT(S)

Submitted by: Andrea L. McDonald

Attorney for : ☒ Plaintiff ☐ Defendant
or

☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: _____

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Shelter, LLC, Jason Highsmith and Kacie Highsmith	Design Gaps, Inc.	\$ 377,530.44
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

Judge Code

Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: _____

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Fileers or who are appearing pro se. See Rule 77(d), SCRCp.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.



Charleston Common Pleas

Case Caption: Shelter, Llc , plaintiff, et al VS Design Gaps Inc , defendant, et al

Case Number: 2025CP1001835

Type: Order/Other

So Ordered

G.D. Morgan Jr.

Electronically signed on 2025-10-03 15:27:05 page 3 of 3

Kacie and Jason Highsmith
376 Ralston Creek Street
Daniel Island, SC 29492
kaciehighsmith@yahoo.com
843.819.9691

Highsmith, Kacie and Jason
Proposal Page
Designed: 7/20/2020 4:22:00 PM
LeadTime: 2 Week +
Notes:

A Closet Case
260-D Seven Farms Drive
Daniel Island SC 29492
843.971.9069
aclosetcase@homesc.com
aclosetcase@gmail.com

Kacies Closet

\$21772.87

Room Options: Organizers **Direct Options:** Finish: White, Hardware Finish: Chrome, Door Handle Style: Button, Primary Door/Drawer Style: Milan, Base Notch: Notch, Rod Style: Signature, Scoop Drawer Glides: FullExt, Secondary Door/Drawer Style: Milan, Drawer Box Type: Birch, Drawer Glides: Soft Close, Door Handle Style: Button, Primary Top Finish: Matching, Accent Top Finish: Antique White
Accessories: Double Jewelry Tray (2), Valet Rack (4), Belt Rack (1)
Storage Lengths: Shelf Length: 163.688 ft, Hang Length: 24.396 ft, Shoe Length: 50 ft



Jasons Closet

\$19171.76

Room Options: Organizers **Direct Options:** Finish: White, Hardware Finish: Chrome, Door Handle Style: Knob, Primary Door/Drawer Style: Milan, Base Notch: Notch, Rod Style: Signature, Scoop Drawer Glides: FullExt, Secondary Door/Drawer Style: Milan, Drawer Box Type: Birch, Drawer Glides: Soft Close, Door Handle Style: Knob, Primary Top Finish: Matching, Accent Top Finish: Antique White
Accessories: Valet Rack (3), Mirror (1)
Storage Lengths: Shelf Length: 114.776 ft, Hang Length: 17.49 ft, Shoe Length: 26 ft



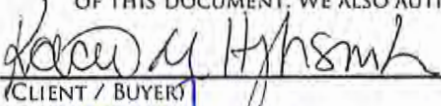
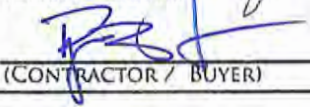
Total:\$40944.63
Deposit: \$0.00
Balance Due:\$40944.63

Notes: Once order is placed no refunds will be issued due to the custom nature of our product.

X

X

Kacie M Highsmith
Jason M Highsmith

		DESIGN GAPS, INC. 4810 ASHLEY PARK LANE SUITE G CHARLOTTE, NC 28210 (704) 965-2400 OFFICE (866) 337-1020 FAX				
BUYER		LEGAL DESCRIPTION OF JOB SITE ADDRESS		DATE		
CONTRACTOR: Shelter Custom Living ADDRESS: CLIENT NAME: Kacie Highsmith CLIENT STREET: 376 Ralston Creek CLIENT CITY: Daniel Island CLIENT PHONE: 843-819-9691		SUB-DIV: 376 Ralston Creek SITE CITY: Daniel Island SITE STATE: CONTRACTOR PHONE:		8/18/2020 CONTRACT NO 1068 REVISION NO. 0		
DESIGN RETAINER AGREEMENT FOR THE SUM OF : \$ 21,255.60 DESIGN GAPS, INC. AGREES TO DEVELOP A CONCEPT PLAN FOR A CABINET LAYOUT FOR THE JOBSITE INDICATED ABOVE. PLEASE NOTE THAT NOT INCLUDED ARE ANY ARCHITECTURAL OR STRUCTURAL SPECIFICATIONS IN THE CONCEPT PLAN. THE RETAINER WILL BE APPLIED TO THE CABINET ORDER FROM DESIGN GAPS, INC. SUCH AN APPLICATION AMOUNT SHALL NOT EXCEED 10% OF THE CABINET CONTRACT. THE RETAINER AMOUNT IS NON-REFUNDABLE. BUYERS' AGREEMENT TO THIS DESIGN RETAINER IN NO WAY BINDS THE PARTIES TO THE EXECUTION OF THIS PROJECT. ALL DESIGNS CREATED REMAIN THE SOLE PROPERTY OF DESIGN GAPS, INC. AND MAY NOT BE REPRODUCED IN WHOLE OR IN PART WITHOUT THE WRITTEN CONSENT OF DESIGN GAPS, INC.						
(CLIENT/BUYER)		(DESIGN GAPS, INC./SELLER)		DATE		
NOTICE: THE ABOVE DESIGN RETAINER AND BELOW PURCHASE CONTRACT ARE EACH SUBJECT TO BINDING ARBITRATION PURSUANT TO SC TITLE 15 CHAPTER 48 OF THE SOUTH CAROLINA UNIFORM ARBITRATION ACT. SEE ADDITIONAL TERMS AND CONDITIONS AS SET FORTH ON THE REVERSE SIDE OF THIS DOCUMENT.						
PURCHASE CONTRACT DESIGN GAPS, INC. (DGI) WILL PROVIDE THE FOLLOWING ITEMS AS PER THE ATTACHED SIGNED PLANS. INSTALLATION IS INCLUDED ONLY IF PRICING IS NOTED. PLEASE REVIEW THE BACK OF THIS CONTRACT AND INITIAL WHERE REQUESTED.						
AREA	ROOM	DESCRIPTION	STYLE	SPECIE	FINISH	COST
Kitchen Range Wall		Artigiano 3/4" Frameless w/ Legra Drawers	Stepped Shaker	MDF	SW7005 Semi-gl	10,155.75
Kitchen Custom Swoop Hood and wall units		Artigiano 3/4" Frameless w/ Legra Drawers	Stepped Shaker	MDF	SW7005 Semi-gl	9,825.75
Kitchen Sink Island		Artigiano 3/4" Frameless w/ Legra Drawers	Stepped Shaker	MDF	SW7005 Semi-gl	5,823.00
Kitchen Bar Island		Artigiano 3/4" Frameless w/ Legra Drawers	Stepped Shaker	MDF	SW7005 Semi-gl	8,105.70
Kitchen Ref. Wall		Artigiano 3/4" Frameless w/ Legra Drawers	Stepped Shaker	MDF	SW7005 Semi-gl	12,401.25
Kitchen Wet Bar Wall		Artigiano 3/4" Frameless w/ Legra Drawers	Stepped Shaker	MDF	SW7005 Semi-gl	13,364.25
Lacq Glass Door Dish (Interior SW 7005)		Artigiano 3/4" Frameless w/ Legra Drawers	Stepped Shaker	MDF	SW7005 Semi-gl	7,490.25
Lacq Glass Door Dish (Interior SW 7005)		Artigiano 3/4" Frameless w/ Legra Drawers	Stepped Shaker	MDF	SW7005 Semi-gl	7,490.25
Pantry		Artigiano 3/4" Frameless w/ Legra Drawers	Stepped Shaker	MDF	SW7005 Semi-gl	13,113.75
Pantry Hallway Tall Units		Artigiano 3/4" Frameless w/ Legra Drawers	Stepped Shaker	MDF	SW7005 Semi-gl	6,808.05
Office		Artigiano 3/4" Frameless w/ Legra Drawers	Stepped Shaker	MDF	SW7005 Semi-gl	10,631.70
Office Tall Units		Artigiano 3/4" Frameless w/ Legra Drawers	Stepped Shaker	MDF	SW7005 Semi-gl	6,808.05
Guest Vanity		Artigiano 3/4" Frameless w/ Legra Drawers	Stepped Shaker	MDF	SW7005 Semi-gl	2,218.50
Guest Toilet Wall Cabinet		Artigiano 3/4" Frameless w/ Legra Drawers	Stepped Shaker	MDF	SW7005 Semi-gl	1,087.50
Mudroom Locker		Artigiano 3/4" Frameless w/ Legra Drawers	Stepped Shaker	MDF	BM HC-166 Satin	5,875.50
Mudroom Bench-Deep Drawer		Artigiano 3/4" Frameless w/ Legra Drawers	Stepped Shaker	MDF	BM HC-166 Satin	1,052.25
Master Vanities w/ Countertop units		Artigiano 3/4" Frameless w/ Legra Drawers	Stepped Shaker	MDF	SW7005 Semi-gl	8,996.10
Purse Display Lacquer parts only		Artigiano 3/4" Frameless w/ Legra Drawers	Stepped Shaker	MDF	SW7005 Semi-gl	3,648.75
Purse Display 3/8" Glass Shelving and Doors		Artigiano 3/4" Frameless	Stepped Shaker	MDF	SW7005 Semi-gl	3,996.78
Master Morning Bar		Artigiano 3/4" Frameless w/ Legra Drawers	Stepped Shaker	MDF	SW7005 Semi-gl	11,194.40
Carter's Vanity		Artigiano 3/4" Frameless w/ Legra Drawers	Stepped Shaker	MDF	Graphite Satin	2,628.00
Laundry		Artigiano 3/4" Frameless w/ Legra Drawers	Stepped Shaker	MDF	SW7005 Semi-gl	13,687.31
Game Room Bar		Artigiano 3/4" Frameless w/ Legra Drawers	Stepped Shaker	MDF	BM HC-166 Satin	10,861.65
LED strip lighting installed for: Kitchen Hood, Wet Bar Glass Cabinetry, Office, Lower Pantry Shelf, Master Morning Bar, Laundry.						8,048.44
Approx. 184 in ft alumn channel and 4.4 w 3000k led with 8 drivers installed						6,887.00
RETAINER			\$ 21,255.60			
DEPOSIT TO BE PAID			\$ 96,045.57		SUB-TOTAL \$ 192,199.93	
TOTAL DEPOSIT DUE UPON ORDER AND SIGNING THIS CONTRACT			\$ 117,301.17		SALES TAX \$ 17,377.95	
DEPOSIT TO BE PAID UPON RECEIVING AT LOCAL WAREHOUSE/SITE			\$ 105,588.94		FREIGHT \$ 1,600.00	
DUE UPON TOTAL COMPLETION OF THIS CONTRACT			\$ 11,712.23		INSTALLATION \$ 23,424.47	
TOTAL CONTRACT			\$ 234,602.35		TOTAL \$ 234,602.35	
WE HAVE REVIEWED THE DRAWINGS AND AGREE TO THE ABOVE TERMS AND CONDITIONS SET FORTH ON THE REVERSE SIDE OF THIS DOCUMENT. WE ALSO AUTHORIZE THE ORDERING OF MATERIALS AND WORK TO COMMENCE AS DESCRIBED ABOVE.						
 (CLIENT / BUYER)			8/18/2020 DATE		(CLIENT / BUYER)	
 (CONTRACTOR / BUYER)			8/18/2020 DATE		(DESIGN GAPS, INC./SELLER) DATE	

TERMS AND CONDITIONS

Downsview Kitchen of Charlotte and Downsview Kitchens of Charleston are trade names of Design Gaps, Inc.

1. **CONTRACT.** This contract sets forth the entire transaction between the parties. All supporting documents, in particular the cabinet drawings, must be signed by the Buyer and Seller to be valid.
2. **DRAWINGS.** They are the cabinet drawings for your future cabinetry layout. Whatever is specified on the blueprint or drawing paper is what we order. It is the Buyer's responsibility to verify color, materials, style and layout. No verbal agreements will be honored or accepted. The drawing is neither a construction plan nor an architect's plan. The drawing requires your signature of acceptance before placement of an order.
3. **DIMENSIONS.** All measurements, sizes and dimensions as set forth in this contract are approximate. The purpose is to define the cabinet sizes and placement and are not intended as construction plans. We are not liable for changes made on job site regarding dimensions once we take field measurements for use in cabinet fabrication.
4. **CHANGE ORDERS.** All changes to the contract shall be reflected by written change orders signed and dated by all parties and specifically stating the changes and increase or decrease in contract price. Any revised plans and specifications when signed and dated by the parties shall completely amend prior plans and specifications.
5. **CANCELLATION.** The contract involves specialty designed and custom-built articles and is therefore not subject to cancellation by the Buyer for any reason.
6. **TITLE.** Title, right of possession to, and ownership of all goods and merchandise furnished under this contract shall remain property of the Seller until all payments required to be made hereunder by the Buyer have been made in full.
7. **PERFORMANCE.** The Seller shall not be responsible for damage by others, delays, or inability to complete contract resulting from acts of God, strikes, fires, accidents, storms, defaults of carrier, inability to obtain materials, or other causes beyond its control.
8. **PERMITS, CODES, ASSESSMENTS, TAX.** The Seller is not responsible for ascertaining the acceptability of the plan or approval by any governmental agency, or entity. Buyer is responsible for obtaining any necessary permits, or paying any assessments. The Seller is not responsible for any violations of building, electric, plumbing, zoning, or other municipal or government codes, ordinances, or regulations, which may presently exist in the building. Corrections of such violations, should they exist, are not included in the contract price and shall be the responsibility of the Buyer. Sales or Use Tax if itemized separately are the responsibility of the Buyer.
9. **ADDITIONAL MATERIALS.** If specifications call for re-use of existing materials or equipment, no responsibility on the part of the Seller for appearance, function, or service shall be implied.
10. **NATURAL MATERIALS.** Wood, granite, or other natural materials which are used in the contract are subject to textural and color variations. The Seller shall not be responsible for varied or different grains, design, characteristics, color tones, or patterns. Inconsistencies in color, graining and pattern are to be expected. The inconsistencies are not under the control of the Seller. INITIAL _____
11. **INSTALLATION.** Installation requires experienced, competent tradesman. In addition to the proper installation of the cabinets it is the installer's job to do the final adjustments to doors and drawers and to perform minor touch up which is required after installation. The Seller is not responsible for incorrect installation by others not contracted by or not employed by the Seller.
 - 11a. The Buyer acknowledges the Seller alone shall determine the job site's readiness for installation of cabinetry and may choose to delay installation if Job Site in the Seller's opinion is not at a suitable condition for proper delivery and or installation of cabinetry.
 - 11b. Any deviation from 11a. and the Buyer assumes responsibility for damage and/or any additional cost incurred by the Seller or Seller's installers. Buyer shall have all flooring down and installed wall to wall. Hardwood floors shall initial heavy sanding completed prior to start of installation of cabinetry.
 - 11c. It is expressly understood by both Buyer and Seller that the Seller shall not be responsible for situations created by uneven floors or levels, or walls out of square or plumb, or for variations of size, design or shape of existing or new appliances or by any other situation not covered by this contract.
 - 11d. This contract does not include any work, material or labor in connection with any excavation, site work, plumbing, electrical, ducting, masonry, flooring, floor coverings, painting, or decorating work unless specifically provided herein and any portion thereof, the Seller shall not be responsible for any additional cost which may result from the removal of any hidden concealed pipes, wire, duct or the obstructions which may exist.
 - 11e. The Seller can not be responsible for changes in the job site humidity, temperature or other conditions beyond our control that may impact the Seller's products and strongly recommends the Buyer or Contractor to condition the jobsite prior to installation to minimize environmental changes.
 - 11f. DGI if providing installation will install at no charge hardware purchased through DGI. Hardware provided by others will be installed for \$ 2.00 per knob and \$ 3.00 per pull only if the hardware is on site and buyer has signed off on location of all hardware. An additional trip charge of \$ 85.00 will be charged if hardware by others is not present at time of installation. No hardware will be installed without signoff by Buyer on our elevations indicating positioning.
12. **PAYMENT.** See terms on reverse side of this document. The materials, freight, and sales tax are due in full upon arrival of materials to DGI warehouse or the jobsite, whichever is first. A finance charge of 1 1/2% will accrue monthly on any unpaid balances from their due date and must be paid prior to delivery.
13. **BREACH OF CONTRACT.** The Seller retains the right upon breach of this agreement by the Buyer or any unpaid balances to Design Gaps, Inc. to sell any goods or merchandise in the Seller's possession. In effecting any resale on breach of this agreement, the Buyer shall remain liable for any net deficiency on resale. The Seller shall be entitled to reasonable attorney's fees and costs.
 - 13a. Buyer shall pay all monies when due in accordance with this contract and may not withhold any money or payment after substantial completion of work. Failure to pay will constitute a breach by Buyer. However, after completion, Buyer may only retain an amount equal to the value of the material or service in question. A finance charge of 1 1/2% will accrue monthly on any unpaid balances from their due date and must be paid before any warranty will be in effect. *Substantial Completion* is defined as having ninety-eight percent (98%) of the value of materials and work completed. Items such as hardware, plumbing, appliances, countertops, etc that are not supplied by DGI are excluded from the Substantial Completion percentage.
14. **INSURANCE AND COVERAGE.** DGI shall maintain adequate insurance coverage on the cost of the goods sold to the Buyer while in the possession of Design Gaps, Inc. including transit to the jobsite. The Buyer or Contractor is responsible for any and all coverage after delivery to Jobsite or assigned storage by Buyer. Design Gaps, Inc. and their installers shall also maintain proper Workman's' Compensation and General Liability during the Installation phase if Installation is provided herein.
15. **DAMAGE.** Any claims of damage resulting from shipping shall be confirmed by the Buyer to the Seller in writing within seven (7) days after delivery to make a freight claim with the carrier. The Seller will file all necessary claims if the Seller receives the delivery of the merchandise.
16. **PROMOTIONAL USE.** Any promotional use by others depicting the cabinetry and design will reference Design Gaps, Inc. as the supplier and designer for the said area. Buyer agrees Design Gaps, Inc. may photograph use the areas of work or materials supplied by Design Gaps, Inc. in promotional material both printed and electronic format. Buyer's name shall remain confidential unless written permission is granted by the Buyer.
17. **ARBITRATION.** All disputes arising out of or in connection with this Agreement or any transaction hereunder shall be finally settled under the Commercial Arbitration Rules of the American Arbitration Association then in effect by an arbitrator appointed in accordance with such Rules. The arbitrator's award shall be final and binding. Judgment upon the award rendered may be entered in any court having jurisdiction over the party against which the award is rendered. The parties expressly consent to the jurisdiction of the federal and state courts situated in Charleston, South Carolina for the purpose of enforcing any arbitration award rendered pursuant to this Section 15. The arbitration shall take place in Charleston, South Carolina or such other place as the parties may agree. The arbitration shall include (i) a provision that the prevailing party in such arbitration shall recover its costs of the arbitration and reasonable attorneys' fees from the other party or parties, and (ii) the amount of such fees and costs. The arbitrators shall be bound to enforce any applicable statute of limitations.
18. **ENTIRE AGREEMENT.** This contract contains the entire agreement between the parties. There are no other agreements, verbal or otherwise, between the parties, except as contained in this contract, with addenda, or as contained in valid change orders.



DESIGN GAPS, INC.
4810 ASHLEY PARK LANE SUITE G
CHARLOTTE, NC 28210
(704) 965-2400 OFFICE
(866) 337-1020 FAX



	BUYER	LEGAL DESCRIPTION OF JOB SITE ADDRESS	DATE
CONTRACTOR:	Shelter Custom Living	SUB-DIV:	8/18/2020
ADDRESS:		376 Ralston Creek	
CLIENT NAME:	Jason and Kacie Highsmith	SITE CITY: Daniel Island	SITE STATE:
CLIENT STREET:	376 Ralston Creek	SITE ZIP:	CONTRACT NO
CLIENT CITY:	Daniel Island		1068
CLIENT PHONE:	843-819-9691	CONTRACTOR PHONE:	REVISION NO.
	CLIENT ZIP:		0

DESIGN RETAINER AGREEMENT

FOR THE SUM OF : \$ - DESIGN GAPS, INC. AGREES TO DEVELOP A CONCEPT PLAN FOR A CABINET LAYOUT FOR THE JOBSITE INDICATED ABOVE. PLEASE NOTE THAT NOT INCLUDED ARE ANY ARCHITECTURAL OR STRUCTURAL SPECIFICATIONS IN THE CONCEPT PLAN. THE RETAINER WILL BE APPLIED TO THE CABINET ORDER FROM DESIGN GAPS, INC. SUCH AN APPLICATION AMOUNT SHALL NOT EXCEED 10% OF THE CABINET CONTRACT THE RETAINER AMOUNT IS NON-REFUNDABLE. BUYERS' AGREEMENT TO THIS DESIGN RETAINER IN NO WAY BINDS THE PARTIES TO THE EXECUTION OF THIS PROJECT. ALL DESIGNS CREATED REMAIN THE SOLE PROPERTY OF DESIGN GAPS, INC. AND MAY NOT BE REPRODUCED IN WHOLE OR IN PART WITHOUT THE WRITTEN CONSENT OF DESIGN GAPS, INC.

(CLIENT/BUYER) DATE (DESIGN GAPS, INC./SELLER) DATE

NOTICE: THE ABOVE DESIGN RETAINER AND BELOW PURCHASE CONTRACT ARE EACH SUBJECT TO BINDING ARBITRATION PURSANT TO SC TITLE 15 CHAPTER 48 OF THE SOUTH CAROLINA UNIFORM ARBITRATION ACT SEE ADDITIONAL TERMS AND CONDITIONS AS SET FORTH ON THE REVERSE SIDE OF THIS DOCUMENT.

PURCHASE CONTRACT

DESIGN GAPS, INC. (DGI) WILL PROVIDE THE FOLLOWING ITEMS AS PER THE ATTACHED SIGNED PLANS. INSTALLATION IS INCLUDED ONLY IF PRICING IS NOTED. PLEASE REVIEW THE BACK OF THIS CONTRACT AND INITIAL WHERE REQUESTED.

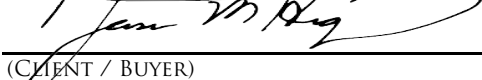
AREA	ROOM	DESCRIPTION	STYLE	SPECIE	FINISH	COST
Master Closet- Hers		Artigiano Closet System	Step Shaker	Paint	SPF-MK	33,108.69
Master Closet Upper Cabinetry-Hers		Artigiano Closet System	Step Shaker	Paint	SPF-MK	11,294.00
Master Closet- His		Artigiano Closet System	Step Shaker	Paint	SPF-MK	27,683.12
Master Closet Upper Cabinetry-His		Artigiano Closet System	Step Shaker	Paint	SPF-MK	6,858.00

Note: We increased the overall height to the full 12' ceiling with our matching deep cove crown molding applied to our fascia board and added the itemized top boxes. All of the hanging will come double hung with removable rods.

Optional Pull-down Closet Rod system in the widths of 35" to 47" with a weight capacity of 33 lbs are available for \$ 85.63 each
Lead Time is approx. 8 weeks.

RETAINER	\$ -		
DEPOSIT TO BE PAID	\$ 48,817.29	SUB-TOTAL	\$ 78,943.81
TOTAL DEPOSIT DUE UPON ORDER AND SIGNING THIS CONTRACT	\$ 48,817.29	SALES TAX	\$ 7,232.19
DEPOSIT TO BE PAID UPON RECEIVING AT LOCAL WAREHOUSE/SITE	\$ 43,888.00	FREIGHT	\$ 1,600.00
DUE UPON TOTAL COMPLETION OF THIS CONTRACT	\$ 4,929.29	INSTALLATION	\$ 9,858.58
TOTAL CONTRACT	\$ 97,634.59	TOTAL	\$ 97,634.59

WE HAVE REVIEWED THE DRAWINGS AND AGREE TO THE ABOVE TERMS AND CONDITIONS SET FORTH ON THE REVERSE SIDE OF THIS DOCUMENT. WE ALSO AUTHORIZE THE ORDERING OF MATERIALS AND WORK TO COMMENCE AS DESCRIBED ABOVE.

 9/6/20

(CLIENT / BUYER) DATE

(CLIENT / BUYER) DATE

(CONTRACTOR / BUYER) DATE

(DESIGN GAPS, INC./SELLER) DATE DATE

TERMS AND CONDITIONS

Downsview Kitchen of Charlotte and Downsview Kitchens of Charleston are trade names of Design Gaps, Inc.

1. **CONTRACT.** This contract sets forth the entire transaction between the parties. All supporting documents, in particular the cabinet drawings, must be signed by the Buyer and Seller to be valid.
2. **DRAWINGS.** They are the cabinet drawings for your future cabinetry layout. Whatever is specified on the blueprint or drawing paper is what we order. It is the Buyer's responsibility to verify color, materials, style and layout. No verbal agreements will be honored or accepted. The drawing is neither a construction plan nor an architect's plan. The drawing requires your signature of acceptance before placement of an order.
3. **DIMENSIONS.** All measurements, sizes and dimensions as set forth in this contract are approximate. The purpose is to define the cabinet sizes and placement and are not intended as construction plans. We are not liable for changes made on job site regarding dimensions once we take field measurements for use in cabinet fabrication.
4. **CHANGE ORDERS.** All changes to the contract shall be reflected by written change orders signed and dated by all parties and specifically stating the changes and increase or decrease in contract price. Any revised plans and specifications when signed and dated by the parties shall completely amend prior plans and specifications.
5. **CANCELLATION.** The contract involves specialty designed and custom-built articles and is therefore not subject to cancellation by the Buyer for any reason.
6. **TITLE.** Title, right of possession to, and ownership of all goods and merchandise furnished under this contract shall remain property of the Seller until all payments required to be made hereunder by the Buyer have been made in full.
7. **PERFORMANCE.** The Seller shall not be responsible for damage by others, delays, or inability to complete contract resulting from acts of God, strikes, fires, accidents, storms, defaults of carrier, inability to obtain materials, or other causes beyond its control.
8. **PERMITS, CODES, ASSESSMENTS, TAX.** The Seller is not responsible for ascertaining the acceptability of the plan or approval by any governmental agency, or entity. Buyer is responsible for obtaining any necessary permits, or paying any assessments. The Seller is not responsible for any violations of building, electric, plumbing, zoning, or other municipal or government codes, ordinances, or regulations, which may presently exist in the building. Corrections of such violations, should they exist, are not included in the contract price and shall be the responsibility of the Buyer. Sales or Use Tax if itemized separately are the responsibility of the Buyer.
9. **ADDITIONAL MATERIALS.** If specifications call for re-use of existing materials or equipment, no responsibility on the part of the Seller for appearance, function, or service shall be implied.
10. **NATURAL MATERIALS.** Wood, granite, or other natural materials which are used in the contract are subject to textural and color variations. The Seller shall not be responsible for varied or different grains, design, characteristics, color tones, or patterns. Inconsistencies in color, graining and pattern are to be expected. The inconsistencies are not under the control of the Seller. INITIAL_____
11. **INSTALLATION.** Installation requires experienced, competent tradesman. In addition to the proper installation of the cabinets it is the installer's job to do the final adjustments to doors and drawers and to perform minor touch up which is required after installation. The Seller is not responsible for incorrect installation by others not contracted by or not employed by the Seller.
- 11a. The Buyer acknowledges the Seller alone shall determine the job site's readiness for installation of cabinetry and may choose to delay installation if Job Site in the Seller's opinion is not at a suitable condition for proper delivery and or installation of cabinetry.
- 11b. Any deviation from 11a. and the Buyer assumes responsibility for damage and/or any additional cost incurred by the Seller or Seller's Installers. Buyer shall have all flooring down and installed wall to wall. Hardwood floors shall initial heavy sanding completed prior to start of installation of cabinetry.
- 11c. It is expressly understood by both Buyer and Seller that the Seller shall not be responsible for situations created by uneven floors or levels, or walls out of square or plumb, or for variations of size, design or shape of existing or new appliances or by any other situation not covered by this contract.
- 11d. This contract does not include any work, material or labor in connection with any excavation, site work, plumbing, electrical, ducting, masonry, flooring, floor coverings, painting, or decorating work unless specifically provided herein and any portion thereof, the Seller shall not be responsible for any additional cost which may result from the removal of any hidden concealed pipes, wire, duct or the obstructions which may exist.
- 11e. The Seller can not be responsible for changes in the job site humidity, temperature or other conditions beyond our control that may impact the Seller's products and strongly recommends the Buyer or Contractor to condition the jobsite prior to installation to minimize environmental changes.
- 11f. DGI if providing installation will install at no charge hardware purchased through DGI. Hardware provided by others will be installed for \$ 2.00 per knob and \$ 3.00 per pull only if the hardware is on site and buyer has signed off on location of all hardware. An additional trip charge of \$ 85.00 will be charged if hardware by others is not present at time of installation. No hardware will be installed without signoff by Buyer on our elevations indicating positioning.
12. **PAYMENT.** See terms on reverse side of this document. The materials, freight, and sales tax are due in full upon arrival of materials to DGI warehouse or the jobsite, whichever is first. A finance charge of 1 1/2% will accrue monthly on any unpaid balances from their due date and must be paid prior to delivery.
13. **BREACH OF CONTRACT.** The Seller retains the right upon breach of this agreement by the Buyer or any unpaid balances to Design Gaps, Inc. to sell any goods or merchandise in the Seller's possession. In effecting any resale on breach of this agreement, the Buyer shall remain liable for any net deficiency on resale. The Seller shall be entitled to reasonable attorney's fees and costs.
- 13a. Buyer shall pay all monies when due in accordance with this contract and may not withhold any money or payment after substantial completion of work. Failure to pay will constitute a breach by Buyer. However, after completion, Buyer may only retain an amount equal to the value of the material or service in question. A finance charge of 1 1/2% will accrue monthly on any unpaid balances from their due date and must be paid before any warranty will be in effect. *Substantial Completion* is defined as having ninety-eight percent (98%) of the value of materials and work completed. Items such as hardware, plumbing, appliances, countertops, etc that are not supplied by DGI are excluded from the Substantial Completion percentage.
14. **INSURANCE AND COVERAGE.** DGI shall maintain adequate insurance coverage on the cost of the goods sold to the Buyer while in the possession of Design Gaps, Inc. including transit to the jobsite. The Buyer or Contractor is responsible for any and all coverage after delivery to Jobsite or assigned storage by Buyer. Design Gaps, Inc. and their installers shall also maintain proper Workman's' Compensation and General Liability during the Installation phase if Installation is provided herein.
15. **DAMAGE.** Any claims of damage resulting from shipping shall be confirmed by the Buyer to the Seller in writing within seven (7) days after delivery to make a freight claim with the carrier. The Seller will file all necessary claims if the Seller receives the delivery of the merchandise.
16. **PROMOTIONAL USE.** Any promotional use by others depicting the cabinetry and design will reference Design Gaps, Inc. as the supplier and designer for the said area. Buyer agrees Design Gaps, Inc. may photograph use the areas of work or materials supplied by Design Gaps, Inc. in promotional material both printed and electronic format. Buyer's name shall remain confidential unless written permission is granted by the Buyer.
17. **ARBITRATION.** All disputes arising out of or in connection with this Agreement or any transaction hereunder shall be finally settled under the Commercial Arbitration Rules of the American Arbitration Association then in effect by an arbitrator appointed in accordance with such Rules. The arbitrator's award shall be final and binding. Judgment upon the award rendered may be entered in any court having jurisdiction over the party against which the award is rendered. The parties expressly consent to the jurisdiction of the federal and state courts situated in Charleston, South Carolina for the purpose of enforcing any arbitration award rendered pursuant to this Section 15. The arbitration shall take place in Charleston, South Carolina or such other place as the parties may agree. The arbitration shall include (i) a provision that the prevailing party in such arbitration shall recover its costs of the arbitration and reasonable attorneys' fees from the other party or parties, and (ii) the amount of such fees and costs. The arbitrators shall be bound to enforce any applicable statute of limitations.
18. **ENTIRE AGREEMENT.** This contract contains the entire agreement between the parties. There are no other agreements, verbal or otherwise, between the parties, except as contained in this contract, with addenda, or as contained in valid change orders.



AMERICAN
ARBITRATION
ASSOCIATION®

INTERNATIONAL CENTRE
FOR DISPUTE RESOLUTION®

COMMERCIAL ARBITRATION RULES DEMAND FOR ARBITRATION

You are hereby notified that a copy of our arbitration agreement and this demand are being filed with the American Arbitration Association with a request that it commence administration of the arbitration. The AAA will provide notice of your opportunity to file an answering statement.

Name of Respondent: DESIGN GAPS, INC., EVA GLOVER, AND DAVID GLOVER

Address: 3690 BOHICKET RD STE 2C

City: JOHNS ISLAND

State: South Carolina



Zip Code: 29455

Phone No.: (704) 302-1334

Fax No.:

Email Address: david.glover@designgaps.com

Name of Representative (if known):

Name of Firm (if applicable):

Representative's Address:

City:

State: Select...

Zip Code:

Phone No.:

Fax No.:

Email Address:

The named claimant, a party to an arbitration agreement which provides for arbitration under the Commercial Arbitration Rules of the American Arbitration Association, hereby demands arbitration.

Brief Description of the Dispute:

See Attached Arbitration Demand.

Dollar Amount of Claim: \$ 350,000.00

Other Relief Sought: ☒ Attorneys Fees ☒ Interest ☒ Arbitration Costs ☒ Punitive/Exemplary

☒ Other: All damages allowed by contract and case law.

Amount enclosed: \$ 4,400.00

In accordance with Fee Schedule: ☐ Flexible Fee Schedule ☒ Standard Fee Schedule

Please describe the qualifications you seek for arbitrator(s) to be appointed to hear this dispute:

An arbitrator well-versed in construction law.

Hearing locale: Charleston, South Carolina

(check one) ☐ Requested by Claimant ☒ Locale provision included in the contract

Estimated time needed for hearings overall:

hours or 1

days

Please visit our website at www.adr.org/support to file this case online.
AAA Customer Service can be reached at 800-778-7879.

R_026



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COMMERCIAL ARBITRATION RULES DEMAND FOR ARBITRATION

Type of Business:		
Claimant: SHELTER, LLC, DR. JASON AND KACIE HIGHSMITH Respondent: DESIGN GAPS, INC., EVA AND DAVID GLOVER		
Are any parties to this arbitration, or their controlling shareholder or parent company, from different countries than each other? No.		
Signature (may be signed by a representative): <i>R. Andrew Walden</i>		Date: 7/15/2021
Name of Claimant: SHELTER, LLC, DR. JASON HIGHSMITH, AND KACIE HIGHSMITH		
Address (to be used in connection with this case): See Representative below		
City:	State: Select...	Zip Code:
Phone No.:	Fax No.:	
Email Address:		
Name of Representative: R. Andrew Walden		
Name of Firm (if applicable): Womble Bond Dickinson (US) LLP		
Representative's Address: 5 Exchange Street		
City: Charleston	State: South Carolina ☐	Zip Code: 29401
Phone No.: 843-720-4634	Fax No.:	
Email Address: Andrew.Walden@wbd-us.com		
To begin proceedings, please file online at www.adr.org/fileonline . You will need to upload a copy of this Demand and the Arbitration Agreement, and pay the appropriate fee.		

SHELTER, LLC, DR. JASON HIGHSMITH, AND KACIE HIGHSMITH

V.

DESIGN GAPS, INC., EVA GLOVER, AND DAVID GLOVER

Factual Background in Support of Claimants' Demand for Arbitration

Parties

1. Shelter, LLC (“Shelter”) is a South Carolina limited liability company registered to do business in South Carolina. Shelter is a custom home builder operating on Daniel Island, South Carolina, and is currently renovating Dr. Jason and Kacie Highsmith’s residence located at 376 Ralston Creek Street, Daniel Island, South Carolina (the “Residence”).

2. Dr. Jason and Kacie Highsmith (collectively, the “Highsmiths”) are citizens of Daniel Island, Berkeley County, South Carolina, and are the owners of the Residence.

3. Design Gaps, Inc. (“Design Gaps”) is incorporated in North Carolina, but operates in South Carolina pursuant to its registration with the South Carolina Secretary of State.

4. On information and belief, David Glover (“Glover”) and Eva Glover (collectively the “Glovers”) are the owners of Design Gaps and, on information and belief, are residents of North Carolina. The Glovers transact business in South Carolina and entered into several contracts with Shelter and the Highsmiths in South Carolina for the fabrication and installation of high-quality cabinetry at the Residence.

Factual Allegations

5. In June 2020, the Highsmiths contacted Glover to quote the design and installation of a Downsview Kitchens (“Downsview”) cabinet system in the Residence. The Highsmiths previously used Glover to install Downsview cabinetry at a prior residence and were looking for the same quality of cabinets in their new home.

6. On July 6, 2020, Glover presented the Highsmiths with a quote for Downsview but immediately began to pivot the Highsmiths towards his “in-house” cabinet line – Artigiano. Unbeknownst to Shelter or the Highsmiths, the Artigiano cabinet line was a new business undertaking that Glover was developing to provide not only design services, as he had done with Downsview, but also manufacturing, production and installation.

7. On July 8, 2020, the Highsmiths accepted the Downsview quote and signed a Design Retainer Agreement for Glover to develop a concept plan and layout for the cabinetry in the kitchen, pantry, and office using Downsview cabinets and paid a retainer of \$15,226.78.

8. On July 10, 2020, Glover indicated that he could build his in-house Artigiano cabinets to the Downsview specifications but have them delivered and installed with only a four to six weeks lead time, as opposed to the twelve week lead time for Downsview.

9. On July 12, 2020, Glover provided the Highsmiths with a quote for his Artigiano cabinets. Again, Glover indicated that the Artigiano cabinets were an equal alternative to Downsview, but with a six week lead time for the Artigiano box carcasses.

10. Based on these promises and representations, on July 12, 2020, the Highsmiths executed a contract for the Artigiano cabinets instead of their original choice of Downsview.

11. During July and August 2020, the Highsmiths, Shelter and Design Gaps worked to choose paint colors, finishes and other details for the cabinets.

12. On August 16, 2020, Design Gaps finalized the drawings and specifications, and, on August 18, 2020, the Highsmiths approved the color and finishes and executed a final revised and consolidated contract for the Kitchen, Pantry, Office, Guest Bathroom, Mudroom, Master Bathroom, Purse Display, Master Bedroom Morning Bar, Study, Son’s Bathroom, Laundry Room

and Game Room for a total sum of \$234,602.35. This contract was signed by both Shelter and the Highsmiths. *See Exhibit A.*

13. On September 3, 2020, the Highsmiths requested that Glover and Design Gaps also quote a cabinet system for the master closets.

14. On September 4, 2020, Glover provided a simple floor plan layout, and similar to the first contract, provided the following options for purchase:

- Downsvie painted materials approx.. 12 week lead time.
- Our inhouse line “Artigiano” in a painted satin finish (matched to Benjamin Moore or SW) 8 week lead time
- Our inhouse line “Artigiano” in a Textured Melamine (several finishes to choose from) 5 week lead time.

15. On September 5, 2020, Glover provided renderings and, on September 6, 2020, the Highsmiths executed a contract for a Artigiano Textured Melamine master closet system at a cost of \$97,634.59. *See Exhibit B.* The Highsmiths paid for the closet system in full.

16. Collectively, the contracts executed on August 18, 2020, and September 6, 2020, equal the sum of \$332,236.94.

Inexcusable Delay

17. Beginning in October, the Highsmiths began to experience the excuses and delays that would ultimately lead to this arbitration. Specifically, after the five week lead time passed for the Artigiano Textured Melamine closet system, and due to the necessity to sequence the cabinet installation with other trades, Shelter and the Highsmiths began inquiring about the status of the cabinets.

18. On October 20, 2020, Kacie Highsmith asked Glover for an update on the arrival of the closets, to which Glover responded “ASAP . . . working on them as well as rest.” As of May 2021, the closets were not even close to being finished.

19. On November 2, 2020, Shelter requested an accurate delivery date and installation completion date for the missing carcasses, some of which were needed to sequence with the installation of the countertops. Specifically, Shelter sent the following email:

Hello David.

I hope this finds you well. I am emailing to obtain an accurate delivery date and installation completion date for all missing boxes. I also do need a date when all side panels will be installed in full so I can reschedule the countertop installation for the entire home, reschedule the appliance installation as well as give the Highsmith's a realistic move-in date so they can plan accordingly for their family in advance and not have to scramble for a place to live.

Thank you.
Jenny

Again, in May 2021, the project was still missing some of the box carcasses.

20. The Highsmiths also began to follow up with Glover in text messages and correspondences indicting that any additional delay was going to result in the Highsmiths living in a hotel during the month of December and over the Christmas holiday. Glover's response to each inquiry was that he had to check with the cabinet finishers, but he ultimately provided verbal deadlines of December 1, 2020, and December 15, 2020. He missed each promised deadline.

21. On November 13, 2020, Glover indicated in an email that he had loaded the "remaining carcass cabinets" for delivery but that his vehicle broke down. Interestingly, these cabinets were not delivered until April 2021 and were the wrong color and finish when received.

22. In December 2020, the Highsmiths began to notice a lack of installers on the project, and when confronted with this observation, on December 22, 2020, Glover indicated that he would place additional installers on the Project until finished.

23. On December 29, 2020, Glover provided a detailed installation update and indicated that he was nearing substantial completion.

24. Throughout January 2021, Glover failed to staff the project with installers on a consistent basis and, at the end of January, contrary to his statement in December, substantial completion was nowhere in sight.

25. On January 21, 2021, Glover created a punch list and reconciled that against the amount of man hours it should take to complete the project. *See Exhibit C.* Glover determined that 32.2 days would be needed to complete the project with one installer and 16.1 days with two installers. Based on his detailed estimate, Glover gave a total completion date of March 1, 2021.

26. As of the end of February 2021, Glover and Design Gaps still had a significant amount of work to perform. For example, a significant amount of the cabinets for the guest room had not yet been fabricated. Glover stated in an email dated February 21, 2021, “When I return back to the shop next week we will fabricate the columns, sides, rear panel and underside panel for finishing.” This was a shocking email seeing as how the contract was entered into six months prior.

27. When Glover failed to complete the project within his own stated March 1, 2021, final completion deadline, the Highsmiths yet again extended the final completion deadline in writing until March 15, 2021, and noted that time was of the essence.

28. On March 7, 2021, Glover informed the Highsmiths that another installer quit and that the project would not be 100% complete on March 15th, but should not be far behind.

29. After a project site visit and walkthrough on March 15, 2021, Glover informed the Highsmiths that the final completion deadline would now be the end of April 2021, another 45+ days. Again, in the spirit of good faith, the Highsmiths extended the project completion deadline to April 30, 2021, and noted that time was of the essence.

30. Over the next 45 days, Glover again failed to provide installers on a consistent basis and, on April 30, 2021, final project completion was nowhere in sight.

31. On or about April 16, 2021, the Highsmiths met with one of Glover's installers, Trey, and he indicated that the cabinets at the Residence were miscut, mismeasured, incomplete and that he did not have what he needed to complete **any** of the **fourteen** work locations at the Residence. Trey further indicated that a lot of the cabinets were not square and could not be installed properly.

32. On April 31, 2021, one day after the project was supposed to be fully complete, the same installer, Trey, sent Glover a text message with an extensive list of cabinets that were either incorrectly measured or still needed to be placed into production. To add insult to injury, the Highsmiths also discovered that all of the cabinets delivered to the project at the end of April were the wrong color and finish and were not ready for installation.

33. When Glover failed to finalize the project by the end of April, he pulled all of his installers to work on another project near Asheville, North Carolina, which, on information and belief, is in a similar predicament. Glover informed the Highsmiths that he was unsure of when he could have his installers back on the project.

34. On May 14, 2021, after two weeks passed without any installers working on the cabinets, the Highsmiths determined that Glover had effectively abandoned the project and decided to mitigate their losses by retaining another cabinet company.

35. Over the course of installation, the installers noted numerous failures in execution from the earliest stages between design and milling. Milling is where the wood pieces are cut to specification to match the design. The problem is, not only were the wrong dimensions used for milling but the milling procedure itself was not accounted for. When wood is cut you have to

ensure the width of the sawblade is taken off the waste side of the board. That was not consistently done, so even matching doors were not made symmetrically. Numerous boards had to be redone and many are still awaiting reproduction. Shelter and the Highsmiths had no idea that Glover himself was attempting to undertake production, including milling and other trades, in which he had no expertise.

36. The design of three major areas (guest door system, purse cabinet, and master coffee bar) were not even finalized by Glover until months after the deadline for installation had passed. The purse cabinet and master coffee bar were rushed through production in April 2021, eight months after the contracts were signed, with numerous design flaws. The wood was not even sanded on some components and could not be completed as intended. They are still incomplete, while the third (guest door system) has no functioning components and is less than 5% completed to this date.

Quality Concerns

37. In addition to the inexcusable delays, the cabinets that were delivered and installed had numerous quality defects.

38. On December 23, 2020, Glover confirmed that the master closets were built to the wrong dimensions and would need to be rebuilt. On December 24, 2020, the laundry room was also noted to be measured incorrectly and remedial work would be necessary.

39. In February 2021, Dr. Jason Highsmith addressed the quality issues of the master closets directly with Glover and provided details of the defects in a series of emails and photographs. These issues were never addressed and remain to this day.

40. In late April, the cabinet installers noted that Glover delivered the wrong color cabinets for the guest door system, purse cabinet and master coffee bar. During this time, the

Highsmiths were also informed that Design Gaps had finished all of the cabinets in a satin finish, when the specifications and drawings clearly stated semi-gloss.

41. On April 30, 2021, the Highsmiths met with Glover at the house to do a walk through and discuss the quality concerns. Glover admitted that the quality of the cabinets was not to his standards but insisted that he just could not find good craftsmen.

Distinctive Design

42. In May 2021, presented with this dire situation, with seemingly no path forward with Design Gaps, Shelter and the Highsmiths retained Bryan Reese and Distinctive Design to inspect the present condition of the cabinetry and formulate a plan to finish the project to the quality originally contracted for with Design Gaps.

43. Reese evaluated the present condition and estimated \$260,736 to finish the project to the quality contracted for with Design Gaps. This estimate is attached hereto as **Exhibit D**. Notably, this estimate is detailed and provides the reason that the work needs to be accomplished (i.e., missing parts, incorrect sizing, bad workmanship, etc.).

44. Additionally, Reese obtained a quote from a third-party finisher to finalize the cabinets for \$25,017.50. See **Exhibit E**.

45. As a result of the facts alleged herein, the Highsmiths have resigned to pay Distinctive Design to finish the cabinets in their home and to seek arbitration for their damages.

Claims Against the Glovers and Design Gaps

Breach of Contract

46. The Highsmiths entered into two contracts with Design Gaps, in August and September 2020, respectively, for high-quality cabinetry at the Residence for the sum of \$332,236.94. To date, the Highsmiths have paid \$264,935.77 to Design Gaps and Glover.

47. As of May 2021, nine months later, Design Gaps and Glover failed to complete the project timely and had effectively abandoned the project. The cabinets that Design Gaps had fabricated and installed were defective in numerous ways including but not limited to being the wrong size, wrong color, wrong finish, and being installed improperly with numerous visual defects.

48. Design Gaps breached the contracts by (1) failing to timely complete the Project, (2) failing to deliver the contracted goods and services in a good and workmanlike manner free of defects, and (3) effectively abandoning the project.

49. Design Gaps has no legal excuse for failing to perform under the terms of the contracts.

50. As a direct result of Glover and Design Gaps' failure to timely complete the project, and due to the quality issues with the cabinets installed, the Highsmiths have been forced to retain Distinctive Design to complete the Project at a cost of \$285,753.50.

51. As a direct and proximate result of the breach of the contracts, the Highsmiths have been damaged in such amounts as may be proven at the arbitration of this matter in the form of actual damages of no less than \$218,452.33¹, and consequential damages of at least \$24,000.00. The Highsmiths will also be entitled to recover reasonable attorney's fees and costs under the terms of the contracts.

Promissory Estoppel

52. Glover made numerous promises to the Highsmiths regarding lead times and deadlines, and the Highsmiths relied on these promises to their detriment.

¹ Distinctive Design and its finisher have quoted a total of \$285,753.50 to complete the project that was originally bargained for with Design Gaps, which results in a total project costs to the Highsmith of \$550,689.27, a delta from the original contract value of \$218,452.33.

53. Glover promised an equivalent product to Downsview and lead times of only four to six weeks if the Highsmiths used his in-house brand – Artigiano.

54. Further, Glover promised numerous deadlines to complete the project by a certain date only to miss those deadlines. Specifically, Glover missed verbal deadlines on December 1st, 2020, December 15, 2020, January 3, 2021, and January 11, 2021. Additionally, Glover missed written deadlines that **he himself chose to committed to** on March 1st, March 15th, and April 30th.

55. Glover and Design Gaps expected the Highsmiths to rely on these promises, and it was foreseeable that the Highsmiths would do so.

56. As a direct and proximate result of Glover and Design Gaps' promises, the Highsmith suffered damages, including but not limited to loss of use of the Residence during the month of December 2020 and the Christmas holiday, with a corresponding hotel stay that costs at least \$24,000.00.

57. For the reasons set forth above, the Highsmiths are entitled to relief under the doctrine of promissory estoppel as to the Glovers and Design Gaps.

Fraud

58. The Glovers and Design Gaps represented that they could provide the same quality of high-end cabinetry as Downsview with a four to six week lead time, instead of Downsview's twelve week lead time.

59. This representation was material as it caused the Highsmiths to change their choice of cabinetry from Downsview to Glover's in-house Artigiano system.

60. Notwithstanding their representations, the Glovers and Design Gaps knew that they did not have the production capabilities to perform the work timely and provide a quality product

equal to Downsview. Design Gaps fraudulently represented their capabilities and competence for the job, with actual knowledge of its falsity, or at least a reckless disregard for the truth.

61. Specifically, the Glovers and Design Gaps knew that they could not produce the cabinets in four to six weeks but represented otherwise to promote and support its new cabinetry line. The project was still missing box carcasses eight months later, even though Design Gaps represented lead times of no more than four to six weeks on the carcasses.

62. Further, the Glovers and Design Gaps knew that they could not produce the same quality product equal to Downsview. Mr. Glover's plant lacked the proper technicians and he himself lacked the proper skills to execute CNC (Computerized Numerical Control) and CAM (Computer Aided Manufacturing), which are essential component of the manufacturing process. This led to multiple delays, wrong sized components, and pieces that simply did not fit at the install site.

63. With Design Gaps' rights to distribute Downsview terminating within the year, Glover knowingly and intentionally made these representations with the intent that Shelter and the Highsmiths would change their choice of cabinetry from Downsview to Artigiano.

64. Neither Shelter nor the Highsmiths knew at the time they entered into the contracts that the Glovers and Design Gaps were incapable of performing the work timely and to the quality they represented.

65. Shelter and the Highsmiths had the right to rely and, in fact, did rely on Design Gaps' representations of the same quality with must shorter lead times to enter into two contracts valued at \$332,236.94.

66. Never once did Design Gaps reveal that their line of cabinetry was at best a start-up without the ability or personnel to deliver on their promises of completion let alone quality.

67. The Glovers and Design Gaps have committed fraud against the Highsmiths, and, as such, the Highsmiths are entitled to actual damages, consequential damages, special damages, punitive damages, and attorney fees.

Piercing the Corporate Veil/ Amalgamation

68. Design Gaps' corporate veil should be pierced and individual liability should be imposed upon Eva and David Glover for all claims asserted by the Highsmiths because, on information and belief.

- a. The Glovers and Design Gaps failed to observe corporate formalities;
- b. Design Gaps was "grossly undercapitalized"; and
- c. Design Gaps is functionally insolvent.

69. Additionally, equity demands that the arbitrator disregard the corporate entity and pierce the veil to assist the Highsmiths in being made whole who otherwise will suffer injustice or fundamental unfairness.

Total Damages

70. The total estimated damages as of this demand, inclusive of actual, consequential and special damages, and attorney's fees and costs, are up to \$350,000.00. These damages are subject to change as discovery takes place and more information as to the extent of damage and costs are obtained.

EXHIBIT A

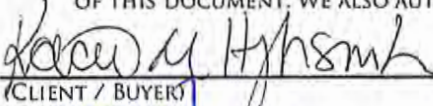
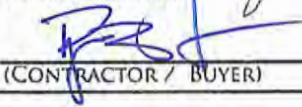
		DESIGN GAPS, INC. 4810 ASHLEY PARK LANE SUITE G CHARLOTTE, NC 28210 (704) 965-2400 OFFICE (866) 337-1020 FAX				
BUYER		LEGAL DESCRIPTION OF JOB SITE ADDRESS		DATE		
CONTRACTOR: Shelter Custom Living ADDRESS: CLIENT NAME: Kacie Highsmith CLIENT STREET: 376 Ralston Creek CLIENT CITY: Daniel Island CLIENT PHONE: 843-819-9691		SUB-DIV: 376 Ralston Creek SITE CITY: Daniel Island SITE STATE: CONTRACTOR PHONE:		8/18/2020 CONTRACT NO 1068 REVISION NO. 0		
DESIGN RETAINER AGREEMENT FOR THE SUM OF : \$ 21,255.60 DESIGN GAPS, INC. AGREES TO DEVELOP A CONCEPT PLAN FOR A CABINET LAYOUT FOR THE JOBSITE INDICATED ABOVE. PLEASE NOTE THAT NOT INCLUDED ARE ANY ARCHITECTURAL OR STRUCTURAL SPECIFICATIONS IN THE CONCEPT PLAN. THE RETAINER WILL BE APPLIED TO THE CABINET ORDER FROM DESIGN GAPS, INC. SUCH AN APPLICATION AMOUNT SHALL NOT EXCEED 10% OF THE CABINET CONTRACT. THE RETAINER AMOUNT IS NON-REFUNDABLE. BUYERS' AGREEMENT TO THIS DESIGN RETAINER IN NO WAY BINDS THE PARTIES TO THE EXECUTION OF THIS PROJECT. ALL DESIGNS CREATED REMAIN THE SOLE PROPERTY OF DESIGN GAPS, INC. AND MAY NOT BE REPRODUCED IN WHOLE OR IN PART WITHOUT THE WRITTEN CONSENT OF DESIGN GAPS, INC.						
(CLIENT/BUYER)		DATE		(DESIGN GAPS, INC./SELLER) DATE		
NOTICE: THE ABOVE DESIGN RETAINER AND BELOW PURCHASE CONTRACT ARE EACH SUBJECT TO BINDING ARBITRATION PURSUANT TO SC TITLE 15 CHAPTER 48 OF THE SOUTH CAROLINA UNIFORM ARBITRATION ACT. SEE ADDITIONAL TERMS AND CONDITIONS AS SET FORTH ON THE REVERSE SIDE OF THIS DOCUMENT.						
PURCHASE CONTRACT DESIGN GAPS, INC. (DGI) WILL PROVIDE THE FOLLOWING ITEMS AS PER THE ATTACHED SIGNED PLANS. INSTALLATION IS INCLUDED ONLY IF PRICING IS NOTED. PLEASE REVIEW THE BACK OF THIS CONTRACT AND INITIAL WHERE REQUESTED.						
AREA	ROOM	DESCRIPTION	STYLE	SPECIE	FINISH	COST
Kitchen Range Wall		Artigiano 3/4" Frameless w/ Legra Drawers	Stepped Shaker	MDF	SW7005 Semi-gl	10,155.75
Kitchen Custom Swoop Hood and wall units		Artigiano 3/4" Frameless w/ Legra Drawers	Stepped Shaker	MDF	SW7005 Semi-gl	9,825.75
Kitchen Sink Island		Artigiano 3/4" Frameless w/ Legra Drawers	Stepped Shaker	MDF	SW7005 Semi-gl	5,823.00
Kitchen Bar Island		Artigiano 3/4" Frameless w/ Legra Drawers	Stepped Shaker	MDF	SW7005 Semi-gl	8,105.70
Kitchen Ref. Wall		Artigiano 3/4" Frameless w/ Legra Drawers	Stepped Shaker	MDF	SW7005 Semi-gl	12,401.25
Kitchen Wet Bar Wall		Artigiano 3/4" Frameless w/ Legra Drawers	Stepped Shaker	MDF	SW7005 Semi-gl	13,364.25
Lacq Glass Door Dish (Interior SW 7005)		Artigiano 3/4" Frameless w/ Legra Drawers	Stepped Shaker	MDF	SW7005 Semi-gl	7,490.25
Lacq Glass Door Dish (Interior SW 7005)		Artigiano 3/4" Frameless w/ Legra Drawers	Stepped Shaker	MDF	SW7005 Semi-gl	7,490.25
Pantry		Artigiano 3/4" Frameless w/ Legra Drawers	Stepped Shaker	MDF	SW7005 Semi-gl	13,113.75
Pantry Hallway Tall Units		Artigiano 3/4" Frameless w/ Legra Drawers	Stepped Shaker	MDF	SW7005 Semi-gl	6,808.05
Office		Artigiano 3/4" Frameless w/ Legra Drawers	Stepped Shaker	MDF	SW7005 Semi-gl	10,631.70
Office Tall Units		Artigiano 3/4" Frameless w/ Legra Drawers	Stepped Shaker	MDF	SW7005 Semi-gl	6,808.05
Guest Vanity		Artigiano 3/4" Frameless w/ Legra Drawers	Stepped Shaker	MDF	SW7005 Semi-gl	2,218.50
Guest Toilet Wall Cabinet		Artigiano 3/4" Frameless w/ Legra Drawers	Stepped Shaker	MDF	SW7005 Semi-gl	1,087.50
Mudroom Locker		Artigiano 3/4" Frameless w/ Legra Drawers	Stepped Shaker	MDF	BM HC-166 Satin	5,875.50
Mudroom Bench-Deep Drawer		Artigiano 3/4" Frameless w/ Legra Drawers	Stepped Shaker	MDF	BM HC-166 Satin	1,052.25
Master Vanities w/ Countertop units		Artigiano 3/4" Frameless w/ Legra Drawers	Stepped Shaker	MDF	SW7005 Semi-gl	8,996.10
Purse Display Lacquer parts only		Artigiano 3/4" Frameless w/ Legra Drawers	Stepped Shaker	MDF	SW7005 Semi-gl	3,648.75
Purse Display 3/8" Glass Shelving and Doors		Artigiano 3/4" Frameless	Stepped Shaker	MDF	SW7005 Semi-gl	3,996.78
Master Morning Bar		Artigiano 3/4" Frameless w/ Legra Drawers	Stepped Shaker	MDF	SW7005 Semi-gl	11,194.40
Carter's Vanity		Artigiano 3/4" Frameless w/ Legra Drawers	Stepped Shaker	MDF	Graphite Satin	2,628.00
Laundry		Artigiano 3/4" Frameless w/ Legra Drawers	Stepped Shaker	MDF	SW7005 Semi-gl	13,687.31
Game Room Bar		Artigiano 3/4" Frameless w/ Legra Drawers	Stepped Shaker	MDF	BM HC-166 Satin	10,861.65
LED strip lighting installed for: Kitchen Hood, Wet Bar Glass Cabinetry, Office, Lower Pantry Shelf, Master Morning Bar, Laundry.						8,048.44
Approx. 184 in ft alum channel and 4.4 w 3000k led with 8 drivers installed						6,887.00
RETAINER			\$ 21,255.60			
DEPOSIT TO BE PAID			\$ 96,045.57		SUB-TOTAL \$ 192,199.93	
TOTAL DEPOSIT DUE UPON ORDER AND SIGNING THIS CONTRACT			\$ 117,301.17		SALES TAX \$ 17,377.95	
DEPOSIT TO BE PAID UPON RECEIVING AT LOCAL WAREHOUSE/SITE			\$ 105,588.94		FREIGHT \$ 1,600.00	
DUE UPON TOTAL COMPLETION OF THIS CONTRACT			\$ 11,712.23		INSTALLATION \$ 23,424.47	
TOTAL CONTRACT			\$ 234,602.35		TOTAL \$ 234,602.35	
WE HAVE REVIEWED THE DRAWINGS AND AGREE TO THE ABOVE TERMS AND CONDITIONS SET FORTH ON THE REVERSE SIDE OF THIS DOCUMENT. WE ALSO AUTHORIZE THE ORDERING OF MATERIALS AND WORK TO COMMENCE AS DESCRIBED ABOVE.						
 (CLIENT / BUYER)			8/18/2020 DATE		(CLIENT / BUYER) DATE	
 (CONTRACTOR / BUYER)			8/18/2020 DATE		(DESIGN GAPS, INC./SELLER) DATE	

EXHIBIT A
TERMS AND CONDITIONS

Downsview Kitchen of Charlotte and Downsview Kitchens of Charleston are trade names of Design Gaps, Inc.

1. **CONTRACT.** This contract sets forth the entire transaction between the parties. All supporting documents, in particular the cabinet drawings, must be signed by the Buyer and Seller to be valid.
2. **DRAWINGS.** They are the cabinet drawings for your future cabinetry layout. Whatever is specified on the blueprint or drawing paper is what we order. It is the Buyer's responsibility to verify color, materials, style and layout. No verbal agreements will be honored or accepted. The drawing is neither a construction plan nor an architect's plan. The drawing requires your signature of acceptance before placement of an order.
3. **DIMENSIONS.** All measurements, sizes and dimensions as set forth in this contract are approximate. The purpose is to define the cabinet sizes and placement and are not intended as construction plans. We are not liable for changes made on job site regarding dimensions once we take field measurements for use in cabinet fabrication.
4. **CHANGE ORDERS.** All changes to the contract shall be reflected by written change orders signed and dated by all parties and specifically stating the changes and increase or decrease in contract price. Any revised plans and specifications when signed and dated by the parties shall completely amend prior plans and specifications.
5. **CANCELLATION.** The contract involves specialty designed and custom-built articles and is therefore not subject to cancellation by the Buyer for any reason.
6. **TITLE.** Title, right of possession to, and ownership of all goods and merchandise furnished under this contract shall remain property of the Seller until all payments required to be made hereunder by the Buyer have been made in full.
7. **PERFORMANCE.** The Seller shall not be responsible for damage by others, delays, or inability to complete contract resulting from acts of God, strikes, fires, accidents, storms, defaults of carrier, inability to obtain materials, or other causes beyond its control.
8. **PERMITS, CODES, ASSESSMENTS, TAX.** The Seller is not responsible for ascertaining the acceptability of the plan or approval by any governmental agency, or entity. Buyer is responsible for obtaining any necessary permits, or paying any assessments. The Seller is not responsible for any violations of building, electric, plumbing, zoning, or other municipal or government codes, ordinances, or regulations, which may presently exist in the building. Corrections of such violations, should they exist, are not included in the contract price and shall be the responsibility of the Buyer. Sales or Use Tax if itemized separately are the responsibility of the Buyer.
9. **ADDITIONAL MATERIALS.** If specifications call for re-use of existing materials or equipment, no responsibility on the part of the Seller for appearance, function, or service shall be implied.
10. **NATURAL MATERIALS.** Wood, granite, or other natural materials which are used in the contract are subject to textural and color variations. The Seller shall not be responsible for varied or different grains, design, characteristics, color tones, or patterns. Inconsistencies in color, graining and pattern are to be expected. The inconsistencies are not under the control of the Seller. INITIAL_____
11. **INSTALLATION.** Installation requires experienced, competent tradesman. In addition to the proper installation of the cabinets it is the installer's job to do the final adjustments to doors and drawers and to perform minor touch up which is required after installation. The Seller is not responsible for incorrect installation by others not contracted by or not employed by the Seller.
- 11a. The Buyer acknowledges the Seller alone shall determine the job site's readiness for installation of cabinetry and may choose to delay installation if Job Site in the Seller's opinion is not at a suitable condition for proper delivery and or installation of cabinetry.
- 11b. Any deviation from 11a. and the Buyer assumes responsibility for damage and/or any additional cost incurred by the Seller or Seller's Installers. Buyer shall have all flooring down and installed wall to wall. Hardwood floors shall initial heavy sanding completed prior to start of installation of cabinetry.
- 11c. It is expressly understood by both Buyer and Seller that the Seller shall not be responsible for situations created by uneven floors or levels, or walls out of square or plumb, or for variations of size, design or shape of existing or new appliances or by any other situation not covered by this contract.
- 11d. This contract does not include any work, material or labor in connection with any excavation, site work, plumbing, electrical, ducting, masonry, flooring, floor coverings, painting, or decorating work unless specifically provided herein and any portion thereof, the Seller shall not be responsible for any additional cost which may result from the removal of any hidden concealed pipes, wire, duct or the obstructions which may exist.
- 11e. The Seller can not be responsible for changes in the job site humidity, temperature or other conditions beyond our control that may impact the Seller's products and strongly recommends the Buyer or Contractor to condition the jobsite prior to installation to minimize environmental changes.
- 11f. DGI if providing installation will install at no charge hardware purchased through DGI. Hardware provided by others will be installed for \$ 2.00 per knob and \$ 3.00 per pull only if the hardware is on site and buyer has signed off on location of all hardware. An additional trip charge of \$ 85.00 will be charged if hardware by others is not present at time of installation. No hardware will be installed without signoff by Buyer on our elevations indicating positioning.
12. **PAYMENT.** See terms on reverse side of this document. The materials, freight, and sales tax are due in full upon arrival of materials to DGI warehouse or the jobsite, whichever is first. A finance charge of 1 1/2% will accrue monthly on any unpaid balances from their due date and must be paid prior to delivery.
13. **BREACH OF CONTRACT.** The Seller retains the right upon breach of this agreement by the Buyer or any unpaid balances to Design Gaps, Inc. to sell any goods or merchandise in the Seller's possession. In effecting any resale on breach of this agreement, the Buyer shall remain liable for any net deficiency on resale. The Seller shall be entitled to reasonable attorney's fees and costs.
- 13a. Buyer shall pay all monies when due in accordance with this contract and may not withhold any money or payment after substantial completion of work. Failure to pay will constitute a breach by Buyer. However, after completion, Buyer may only retain an amount equal to the value of the material or service in question. A finance charge of 1 1/2% will accrue monthly on any unpaid balances from their due date and must be paid before any warranty will be in effect. *Substantial Completion* is defined as having ninety-eight percent (98%) of the value of materials and work completed. Items such as hardware, plumbing, appliances, countertops, etc that are not supplied by DGI are excluded from the Substantial Completion percentage.
14. **INSURANCE AND COVERAGE.** DGI shall maintain adequate insurance coverage on the cost of the goods sold to the Buyer while in the possession of Design Gaps, Inc. including transit to the jobsite. The Buyer or Contractor is responsible for any and all coverage after delivery to Jobsite or assigned storage by Buyer. Design Gaps, Inc. and their installers shall also maintain proper Workman's' Compensation and General Liability during the Installation phase if Installation is provided herein.
15. **DAMAGE.** Any claims of damage resulting from shipping shall be confirmed by the Buyer to the Seller in writing within seven (7) days after delivery to make a freight claim with the carrier. The Seller will file all necessary claims if the Seller receives the delivery of the merchandise.
16. **PROMOTIONAL USE.** Any promotional use by others depicting the cabinetry and design will reference Design Gaps, Inc. as the supplier and designer for the said area. Buyer agrees Design Gaps, Inc. may photograph use the areas of work or materials supplied by Design Gaps, Inc. in promotional material both printed and electronic format. Buyer's name shall remain confidential unless written permission is granted by the Buyer.
17. **ARBITRATION.** All disputes arising out of or in connection with this Agreement or any transaction hereunder shall be finally settled under the Commercial Arbitration Rules of the American Arbitration Association then in effect by an arbitrator appointed in accordance with such Rules. The arbitrator's award shall be final and binding. Judgment upon the award rendered may be entered in any court having jurisdiction over the party against which the award is rendered. The parties expressly consent to the jurisdiction of the federal and state courts situated in Charleston, South Carolina for the purpose of enforcing any arbitration award rendered pursuant to this Section 15. The arbitration shall take place in Charleston, South Carolina or such other place as the parties may agree. The arbitration shall include (i) a provision that the prevailing party in such arbitration shall recover its costs of the arbitration and reasonable attorneys' fees from the other party or parties, and (ii) the amount of such fees and costs. The arbitrators shall be bound to enforce any applicable statute of limitations.
18. **ENTIRE AGREEMENT.** This contract contains the entire agreement between the parties. There are no other agreements, verbal or otherwise, between the parties, except as contained in this contract, with addenda, or as contained in valid change orders.



DESIGN GAPS, INC.
4810 ASHLEY PARK LANE SUITE G
CHARLOTTE, NC 28210
(704) 965-2400 OFFICE
(866) 337-1020 FAX



	BUYER	LEGAL DESCRIPTION OF JOB SITE ADDRESS	DATE
CONTRACTOR:	Shelter Custom Living	SUB-DIV:	8/18/2020
ADDRESS:		376 Ralston Creek	
CLIENT NAME:	Jason and Kacie Highsmith	SITE CITY: Daniel Island	CONTRACT NO
CLIENT STREET:	376 Ralston Creek	SITE STATE:	1068
CLIENT CITY:	Daniel Island	SITE ZIP:	REVISION NO.
CLIENT PHONE:	843-819-9691	CONTRACTOR PHONE:	0
	CLIENT ZIP:		

DESIGN RETAINER AGREEMENT

FOR THE SUM OF : \$ - DESIGN GAPS, INC. AGREES TO DEVELOP A CONCEPT PLAN FOR A CABINET LAYOUT FOR THE JOBSITE INDICATED ABOVE. PLEASE NOTE THAT NOT INCLUDED ARE ANY ARCHITECTURAL OR STRUCTURAL SPECIFICATIONS IN THE CONCEPT PLAN. THE RETAINER WILL BE APPLIED TO THE CABINET ORDER FROM DESIGN GAPS, INC. SUCH AN APPLICATION AMOUNT SHALL NOT EXCEED 10% OF THE CABINET CONTRACT THE RETAINER AMOUNT IS NON-REFUNDABLE. BUYERS' AGREEMENT TO THIS DESIGN RETAINER IN NO WAY BINDS THE PARTIES TO THE EXECUTION OF THIS PROJECT. ALL DESIGNS CREATED REMAIN THE SOLE PROPERTY OF DESIGN GAPS, INC. AND MAY NOT BE REPRODUCED IN WHOLE OR IN PART WITHOUT THE WRITTEN CONSENT OF DESIGN GAPS, INC.

(CLIENT/BUYER) DATE (DESIGN GAPS, INC./SELLER) DATE

NOTICE: THE ABOVE DESIGN RETAINER AND BELOW PURCHASE CONTRACT ARE EACH SUBJECT TO BINDING ARBITRATION PURSANT TO SC TITLE 15 CHAPTER 48 OF THE SOUTH CAROLINA UNIFORM ARBITRATION ACT SEE ADDITIONAL TERMS AND CONDITIONS AS SET FORTH ON THE REVERSE SIDE OF THIS DOCUMENT.

PURCHASE CONTRACT

DESIGN GAPS, INC. (DGI) WILL PROVIDE THE FOLLOWING ITEMS AS PER THE ATTACHED SIGNED PLANS. INSTALLATION IS INCLUDED ONLY IF PRICING IS NOTED. PLEASE REVIEW THE BACK OF THIS CONTRACT AND INITIAL WHERE REQUESTED.

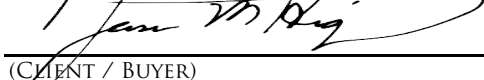
AREA	ROOM	DESCRIPTION	STYLE	SPECIE	FINISH	COST
Master Closet- Hers		Artigiano Closet System	Step Shaker	Paint	SPF-MK	33,108.69
Master Closet Upper Cabinetry-Hers		Artigiano Closet System	Step Shaker	Paint	SPF-MK	11,294.00
Master Closet- His		Artigiano Closet System	Step Shaker	Paint	SPF-MK	27,683.12
Master Closet Upper Cabinetry-His		Artigiano Closet System	Step Shaker	Paint	SPF-MK	6,858.00

Note: We increased the overall height to the full 12' ceiling with our matching deep cove crown molding applied to our fascia board and added the itemized top boxes. All of the hanging will come double hung with removable rods.

Optional Pull-down Closet Rod system in the widths of 35" to 47" with a weight capacity of 33 lbs are available for \$ 85.63 each
Lead Time is approx. 8 weeks.

RETAINER	\$ -		
DEPOSIT TO BE PAID	\$ 48,817.29	SUB-TOTAL	\$ 78,943.81
TOTAL DEPOSIT DUE UPON ORDER AND SIGNING THIS CONTRACT	\$ 48,817.29	SALES TAX	\$ 7,232.19
DEPOSIT TO BE PAID UPON RECEIVING AT LOCAL WAREHOUSE/SITE	\$ 43,888.00	FREIGHT	\$ 1,600.00
DUE UPON TOTAL COMPLETION OF THIS CONTRACT	\$ 4,929.29	INSTALLATION	\$ 9,858.58
TOTAL CONTRACT	\$ 97,634.59	TOTAL	\$ 97,634.59

WE HAVE REVIEWED THE DRAWINGS AND AGREE TO THE ABOVE TERMS AND CONDITIONS SET FORTH ON THE REVERSE SIDE OF THIS DOCUMENT. WE ALSO AUTHORIZE THE ORDERING OF MATERIALS AND WORK TO COMMENCE AS DESCRIBED ABOVE.

 9/6/20
(CLIENT / BUYER) DATE

(CLIENT / BUYER) DATE

(CONTRACTOR / BUYER) DATE

(DESIGN GAPS, INC./SELLER) DATE DATE

TERMS AND CONDITIONS

Downsview Kitchen of Charlotte and Downsview Kitchens of Charleston are trade names of Design Gaps, Inc.

1. **CONTRACT.** This contract sets forth the entire transaction between the parties. All supporting documents, in particular the cabinet drawings, must be signed by the Buyer and Seller to be valid.
2. **DRAWINGS.** They are the cabinet drawings for your future cabinetry layout. Whatever is specified on the blueprint or drawing paper is what we order. It is the Buyer's responsibility to verify color, materials, style and layout. No verbal agreements will be honored or accepted. The drawing is neither a construction plan nor an architect's plan. The drawing requires your signature of acceptance before placement of an order.
3. **DIMENSIONS.** All measurements, sizes and dimensions as set forth in this contract are approximate. The purpose is to define the cabinet sizes and placement and are not intended as construction plans. We are not liable for changes made on job site regarding dimensions once we take field measurements for use in cabinet fabrication.
4. **CHANGE ORDERS.** All changes to the contract shall be reflected by written change orders signed and dated by all parties and specifically stating the changes and increase or decrease in contract price. Any revised plans and specifications when signed and dated by the parties shall completely amend prior plans and specifications.
5. **CANCELLATION.** The contract involves specialty designed and custom-built articles and is therefore not subject to cancellation by the Buyer for any reason.
6. **TITLE.** Title, right of possession to, and ownership of all goods and merchandise furnished under this contract shall remain property of the Seller until all payments required to be made hereunder by the Buyer have been made in full.
7. **PERFORMANCE.** The Seller shall not be responsible for damage by others, delays, or inability to complete contract resulting from acts of God, strikes, fires, accidents, storms, defaults of carrier, inability to obtain materials, or other causes beyond its control.
8. **PERMITS, CODES, ASSESSMENTS, TAX.** The Seller is not responsible for ascertaining the acceptability of the plan or approval by any governmental agency, or entity. Buyer is responsible for obtaining any necessary permits, or paying any assessments. The Seller is not responsible for any violations of building, electric, plumbing, zoning, or other municipal or government codes, ordinances, or regulations, which may presently exist in the building. Corrections of such violations, should they exist, are not included in the contract price and shall be the responsibility of the Buyer. Sales or Use Tax if itemized separately are the responsibility of the Buyer.
9. **ADDITIONAL MATERIALS.** If specifications call for re-use of existing materials or equipment, no responsibility on the part of the Seller for appearance, function, or service shall be implied.
10. **NATURAL MATERIALS.** Wood, granite, or other natural materials which are used in the contract are subject to textural and color variations. The Seller shall not be responsible for varied or different grains, design, characteristics, color tones, or patterns. Inconsistencies in color, graining and pattern are to be expected. The inconsistencies are not under the control of the Seller. INITIAL_____
11. **INSTALLATION.** Installation requires experienced, competent tradesman. In addition to the proper installation of the cabinets it is the installer's job to do the final adjustments to doors and drawers and to perform minor touch up which is required after installation. The Seller is not responsible for incorrect installation by others not contracted by or not employed by the Seller.
- 11a. The Buyer acknowledges the Seller alone shall determine the job site's readiness for installation of cabinetry and may choose to delay installation if Job Site in the Seller's opinion is not at a suitable condition for proper delivery and or installation of cabinetry.
- 11b. Any deviation from 11a. and the Buyer assumes responsibility for damage and/or any additional cost incurred by the Seller or Seller's Installers. Buyer shall have all flooring down and installed wall to wall. Hardwood floors shall initial heavy sanding completed prior to start of installation of cabinetry.
- 11c. It is expressly understood by both Buyer and Seller that the Seller shall not be responsible for situations created by uneven floors or levels, or walls out of square or plumb, or for variations of size, design or shape of existing or new appliances or by any other situation not covered by this contract.
- 11d. This contract does not include any work, material or labor in connection with any excavation, site work, plumbing, electrical, ducting, masonry, flooring, floor coverings, painting, or decorating work unless specifically provided herein and any portion thereof, the Seller shall not be responsible for any additional cost which may result from the removal of any hidden concealed pipes, wire, duct or the obstructions which may exist.
- 11e. The Seller can not be responsible for changes in the job site humidity, temperature or other conditions beyond our control that may impact the Seller's products and strongly recommends the Buyer or Contractor to condition the jobsite prior to installation to minimize environmental changes.
- 11f. DGI if providing installation will install at no charge hardware purchased through DGI. Hardware provided by others will be installed for \$ 2.00 per knob and \$ 3.00 per pull only if the hardware is on site and buyer has signed off on location of all hardware. An additional trip charge of \$ 85.00 will be charged if hardware by others is not present at time of installation. No hardware will be installed without signoff by Buyer on our elevations indicating positioning.
12. **PAYMENT.** See terms on reverse side of this document. The materials, freight, and sales tax are due in full upon arrival of materials to DGI warehouse or the jobsite, whichever is first. A finance charge of 1 1/2% will accrue monthly on any unpaid balances from their due date and must be paid prior to delivery.
13. **BREACH OF CONTRACT.** The Seller retains the right upon breach of this agreement by the Buyer or any unpaid balances to Design Gaps, Inc. to sell any goods or merchandise in the Seller's possession. In effecting any resale on breach of this agreement, the Buyer shall remain liable for any net deficiency on resale. The Seller shall be entitled to reasonable attorney's fees and costs.
- 13a. Buyer shall pay all monies when due in accordance with this contract and may not withhold any money or payment after substantial completion of work. Failure to pay will constitute a breach by Buyer. However, after completion, Buyer may only retain an amount equal to the value of the material or service in question. A finance charge of 1 1/2% will accrue monthly on any unpaid balances from their due date and must be paid before any warranty will be in effect. *Substantial Completion* is defined as having ninety-eight percent (98%) of the value of materials and work completed. Items such as hardware, plumbing, appliances, countertops, etc that are not supplied by DGI are excluded from the Substantial Completion percentage.
14. **INSURANCE AND COVERAGE.** DGI shall maintain adequate insurance coverage on the cost of the goods sold to the Buyer while in the possession of Design Gaps, Inc. including transit to the jobsite. The Buyer or Contractor is responsible for any and all coverage after delivery to Jobsite or assigned storage by Buyer. Design Gaps, Inc. and their installers shall also maintain proper Workman's' Compensation and General Liability during the Installation phase if Installation is provided herein.
15. **DAMAGE.** Any claims of damage resulting from shipping shall be confirmed by the Buyer to the Seller in writing within seven (7) days after delivery to make a freight claim with the carrier. The Seller will file all necessary claims if the Seller receives the delivery of the merchandise.
16. **PROMOTIONAL USE.** Any promotional use by others depicting the cabinetry and design will reference Design Gaps, Inc. as the supplier and designer for the said area. Buyer agrees Design Gaps, Inc. may photograph use the areas of work or materials supplied by Design Gaps, Inc. in promotional material both printed and electronic format. Buyer's name shall remain confidential unless written permission is granted by the Buyer.
17. **ARBITRATION.** All disputes arising out of or in connection with this Agreement or any transaction hereunder shall be finally settled under the Commercial Arbitration Rules of the American Arbitration Association then in effect by an arbitrator appointed in accordance with such Rules. The arbitrator's award shall be final and binding. Judgment upon the award rendered may be entered in any court having jurisdiction over the party against which the award is rendered. The parties expressly consent to the jurisdiction of the federal and state courts situated in Charleston, South Carolina for the purpose of enforcing any arbitration award rendered pursuant to this Section 15. The arbitration shall take place in Charleston, South Carolina or such other place as the parties may agree. The arbitration shall include (i) a provision that the prevailing party in such arbitration shall recover its costs of the arbitration and reasonable attorneys' fees from the other party or parties, and (ii) the amount of such fees and costs. The arbitrators shall be bound to enforce any applicable statute of limitations.
18. **ENTIRE AGREEMENT.** This contract contains the entire agreement between the parties. There are no other agreements, verbal or otherwise, between the parties, except as contained in this contract, with addenda, or as contained in valid change orders.

EXHIBIT C

376 Ralston Creek
Daniel Island, SC
Highsmith Cabinet punch list
1/21/2021

Kitchen

2	1. Install All Toekicks (onsite)
0.25	2. Carcass Shelving in shallow bases on both island 6 each for 80 cm cabinet
0.1	3. Carcass Shelving above Speed Oven 60 cm full depth cabinet
0.25	4. New DW Door Panel (finishing)
0.1	5. Install new Door on back of Sink Island (finishing)
0.5	6. Sub-Zero Wine full door appliance panel (at finisher ready)
1	7. Sub-Zero Wine Upper Door panels (2) (at finisher ready)
0.1	8. Matching door height above LH Sub-Zero Wine on Bar wall
12	9. Install all Fascia and Crown Moldings (on site)
1	10. Retrieve waste bin units (the sent the wrong ones and replace with the single pull-outs. In
6	11. Remove Kitchen Bar Glass door cabinetry, route for LED channel, install LED and re-install.
3	12. ¼" Glass for Kitchen Bar wall unit doors (ordered)
	37.0cm x 107.4cm
	37.0cm x 33.2cm
1	13. 3/8" Glass Shelving for Kitchen Bar Wall Units(ordered)
	a. 8 each for 95cm wall unit
2	14. Change/Add - Possible reconfigure waste bin to under sink then deep pull-out and interna
1	15. Change/Add - Possible pull-out waste bin under Kitchen Bar Sink.
1.5	16. Finishing panel under Kitchen Bar with LED lighting strip, notch for outlet boxes. (on site)
1	17. Rip small verticals filler to set back on both island where the top is too long.
32.8	

Guest Entrance

8	1. 2 each Custom Entry Doors 1-1/2" thick (on site)
	2. Upper Active cabinets above (on-site) (will move to garage temporarily)
	3. Side Columns with Polished Brass hidden hinges (to be fabricated and finished)
	4. False panels for backside towards Guest Room (to be fabricated and finished)
8	

Dish Storage

1	1. Install 30 each 50.5cm x 42.0 cm x 3/8" glass shelving (5 per cabinet) Ordered.
3	2. Install 6 each 44.1cm x 189.5 x ¼" Glass in door frames (ordered) Matching Wood retain
2	3. Install LED strip and connect to drivers (materials on van)
0.2	4. Install left side vertical finishing panel (on site material)
0.2	5. Caulk in the 4 end panels at wall.
6.4	

EXHIBIT C

Office

0.2	1.	Fabricate open shelf lacquer wall unit with 3 shelves 80.1cm x 144.5cm x 35cm deep and
0.2	2.	Design and propose pull-out keyboard like previous home. 76.3cm x 63.5d x (79.3 to unde
1	3.	Install all Overlay wall and base fillers (on site)
1	4.	Fabricate 7.2cm w x 79.2cm x 15 cm column for left end of desk,
2	5.	Install underside finishing panel under wall units, route for aluminum led strip and install
1	6.	Install toekicks (on site)
0.15	7.	Fabricate 2 upper carcass material shelves for the two wide wall units.
2	8.	Install Fascia and Crown (on site)
7.55		

Pantry

0.15	1.	Install the two blind corner carcass shelves (at shop)
1	2.	Install all overlay fillers (on site)
0.15	3.	Fabricate or locate on site the single shallow base unit shelf and install.
1	4.	Install all toekicks
0.15	5.	Install and connect LED lighting in the bottom shelf aluminum channel. (on site)
1	6.	Install hardware (note was a long pull short on the kitchen bar wall and have been using
3.45		

Pantry Hallway

2	1.	Install same hardware as the desk area and in same manner for the upper cabinet, install
0.5	2.	Add one additional shelf per unit, 6 total and locate shelving per Kacie as requested.
1	3.	Install Fascia and Crown (on site)
0.5	4.	Install Toekicks (on site)
3	5.	Install Overlay fillers
7		

Mudroom

1	1.	Fabricate end finishing panels per field dimensions.
1	2.	Install all overlay fillers (on site)
1	3.	Position existing shelving per Kacie in the lockers
0.5	4.	Fabricate Bench angled end panel, finish and install.
0.5	5.	Install 3cm thick bench wood top with angled end (in finishing)
0.5	6.	Install carcass material at top to match overall height of right cabinetry behind the three
1	7.	Install all toekicks.
0.2	8.	Install Bench drawer (drawer body on site drawerhead in finishing)
1	9.	Install Hardware-Verify location with Kacie
6.7		

EXHIBIT C

Guest Bath

- | | | |
|-------|----|---|
| 0.15 | 1. | Install new drawer heads (in finishing) |
| 0.5 | 2. | Install full overlay fillers (on-site) |
| 0.15 | 3. | Install Hardware |
| <hr/> | | |
| 0.8 | | |

Guest Toilet

- | | | |
|-------|----|--|
| 0.5 | 1. | Install shallow guest toilet storage wall unit (on site) |
| 0.5 | 2. | Install doors and overlay fillers (in finishing) |
| 0.1 | 3. | Add two additional shelves to the existing 2 on site. |
| 0.5 | 4. | Install Fascia and Crown |
| 0.2 | 5. | Install Hardware |
| <hr/> | | |
| 1.8 | | |

Laundry

- | | | |
|-------|-----|---|
| 0.2 | 1. | Add/Change – Fabricate deeper sink base end panel 76,8 x 86.7 x 1.84 lacquer panel |
| 0.5 | 2. | Install two finishing panels in sewing kneespace area 63.5 D x 64cm Hx 1.84 lacquer panel |
| 0.3 | 3. | Install D/D Base end panel 63.5 cm x 64cm x 1.94cm (in finishing) |
| 0.3 | 4. | Install D.D Wall end panel 35cm x 124cm x 1.94 cm (in finishing) |
| 0.3 | 5. | Install lacquer open shelf wall unit with clothes hanging cross member to support rod. 78 |
| 1 | 6. | Add/Change suspended lacquer shelving similar to previous laundry to be 146.5 cm long |
| 3 | 7. | Install Fascia and Crown, check toekick |
| 2 | 8. | Install all overlay fillers |
| 0.1 | 9. | Install 49.7 x 123.7 x 1.94 wall unit RH door (in finishing) |
| 3 | 10. | Install LED lighting in underside of wall units and new drop open shelf unit. |
| | 11. | Discuss adding a lacquer finishing panel under wall unit next to tall cabinet. |
| | 12. | Discuss shelving in tall unit. |
| 1 | 13. | Install remaining drawerbodies and heads (on site) |
| 2 | 14. | Install Hardware |
| <hr/> | | |
| 13.7 | | |

Carter Vanity

- | | | |
|-------|----|---|
| 0.5 | 1. | Install right hand drawer body and attached on site drawerhead (missing only side leg rail) |
| 1 | 2. | Install center false drawer head |
| 0.5 | 2. | Install overlay fillers (on site) |
| 0.5 | 3. | Install Hardware. |
| <hr/> | | |
| 2.5 | | |

EXHIBIT C

Game Room

0.2	1.	Install narrow base unit (on site)
0.4	2.	Install chrome pull-out basket to narrow door in items 1 (at shop)
3	3.	Install bifold door systems and the four upper countertop doors (doors on site awaiting F
0.3	4.	Install three finished shelves per unit (in finishing)
2	5.	Install four floating shelving and LED (shelving in finishing LED on site)
1	6.	Fabricate and finish faux build out for existing 27" Sub zero drawer.
2	7.	All front panels are on site.
2	8.	Install the two tall finishing panels (routed to support ends of countertop) (in finishing)
0.5	9.	Retrieve waste bin units (the sent the wrong ones and replace with the single pull-outs.)
0.5	10.	Install pull-outs per plan in far left cabinet.
2	11.	Install Fascia and Crown to match (in finishing)
1	12.	Install Toekicks
14.9		

Master Morning Bar

12	1.	Fabricate the side finishing panels and vertical supports for the hidden hinges. (fabricatin
	2.	Install the two large custom 1-1/2" door using the hidden polished brass finish hinges (dc
	3.	Mount countertop unit and door (on site)
	4.	Install misc fillers. (on site)
	5.	Install finished back in open area and glass shelving (fabricating)
	6.	Fabricate and install upper section with crown.
12		

Master Vanity

3	1.	All upper doors and door design panels were remade and are in finishing.
0.5	2.	Sink base doors are in finishing.
0.5	3.	Slab drawer heads should be on site will verify.
5	4.	Add/Change run fascia and crown to follow outline of upper area and bridge over mirror
2	5.	Install base end panels (in finishing)
1	6.	Cut-in Outlets
1	7.	Install hardware
2	8.	Install toekicks (on site)
15		

EXHIBIT C

Master Closets (all materials are on site / closet rods are stored at my house)

- 8 1. Finish Upper cabinet mount all doors, overlay fillers.
- 8 2. Cut and Fit upper backs
- 4 3. Fit and install Ladder support J-shaped pieces
- 8 4. Fit and install 15 Verticals
- 15 5. Install 50 each Rafx connector shelving units
- 12 6. Install all Drawerbodies and Drawerheads
- 8 7. Install Chrome closet supprts and rods
- 4 8. Install Toekicks
- 8 9. Install Hardware
- 4 10. Misc
- 8 11. Install owner provided ladder system supports and railing

87
Purse area

- 16 1. The three drawer base units are built and drawer heads are in finishing
2. Fabricate panels as required and install (fabrication)
3. Install led lighting (on site)
4. Glass shelving ordered per plan dimensions)

16
Master Toilet

- 0.2 1. Install shallow guest toilet storage wall unit (on site)
- 0.5 2. Install doors and overlay fillers (in finishing)
- 0.1 3. Add two additional shelves to the existing 2 on site.
- 0.5 4. Install Fascia and Crown
- 0.2 5. Install Hardware

1.5
In general

- 8 1. Adjust all doors and drawer
- 4 2. Install custom "fastcaps" to match interior carcass on exposed screw heads.
- 0.5 3. Install 5mm clear bumpers on all doors and drawers (except push to open)
- 3 4. Touch up as necessary
- 2 5. Install the Blum Legra matching trims after adjusting.
- 1 6. Remove pencil marks, leave clean.
- 2 7. Custom bore and mount shelving per Kacie

20.5

257.6 Hours

- 32.2 Days One Man All misc panels or other materials will be delivered
- 16.1 Days Two Men during the three week period unless we run short on
an item which would be isolated from the time line.
Does not include lead time on owners ladder.

The above in a net time to execute and does not take into account any unforeseen issues, or employee personal emergencies that may necessitate time off. Additionally there is the other Shelter project and work on the Sullivan island project. That may require one or both installers to be absent for a day or two.

EXHIBIT D

PROJECT ESTIMATION

ESTIMATION SUBMITTED TO:
SHELTER | HIGHSMITH RESIDENCE

JUNE 2, 2021

KITCHEN

CONSTRUCTION TYPE- 3/4" FRAMELESS PLYWOOD FULL OVERLAY
DOOR STYLE- EXISTING
DRAWER STYLE SHALLOW- EXISTING
DRAWER STYLE DEEP- EXISTING
DRAWER BOX CONSTRUCTION- DOVETAILED WITH SOFT TOUCH SELF-CLOSING GLIDES
WOOD SPECIES/FINISH- MDF WITH PAINT

INVESTMENT: \$ 11,858

- PROVIDE (x4) SUB ZERO WINE COOLER DRAWER PANELS TO MATCH EXISTING (WRONG SIZE-TOO LARGE). REMOVE EXISTING AND REINSTALL REPLACEMENT PANELS
- REMOVE OLD TOEKICKS. PROVIDE NEW TOEKICKS AND REINSTALL (NOT CORRECTLY CUT TO FLOOR, CHATTERED CUT MARKS SHOWING, EXISTING TOEKICK TOO SHORT IN HEIGHT, GAPS VISIBLE)
- REMOVE OLD CROWN. PROVIDE AND INSTALL NEW CROWN MOLDING AT CEILING. PREP FOR ONSITE FINISHING BY OTHERS. (POORLY INSTALLED, GAPS TO CEILING, NEEDS TO BE SCRIBE TO CEILING, OPEN MITERS)

KITCHEN PASS THROUGH

CONSTRUCTION TYPE- 3/4" FRAMELESS PLYWOOD FULL OVERLAY
DOOR STYLE- EXISTING
DRAWER STYLE SHALLOW- EXISTING
DRAWER STYLE DEEP- EXISTING
DRAWER BOX CONSTRUCTION- DOVETAILED WITH SOFT TOUCH SELF-CLOSING GLIDES
WOOD SPECIES/FINISH- MDF WITH PAINT

INVESTMENT: \$ 21,775

- PROVIDE (x2) CUSTOM PASSAGE DOORS, WITH CUSTOM ROUTED HIDDEN HINGED HARDWARE
- PROVIDE (x2) TALL DOOR DESIGN END PANELS AND CEILING FINISHED PANEL
- PROVIDE FRAMING BLOCKING, FLOORING MODIFICATION TO ACCEPT END PANELS
- PROVIDE CROWN ABOVE
- REMOVE OLD WINE COOLER END PANEL ON RIGHT
- INSTALL ABOVE MENTIONED AND CLIENT SUPPLIED PASSAGE HARDWARE

DISH STORAGE

CONSTRUCTION TYPE- 3/4" FRAMELESS PLYWOOD FULL OVERLAY
DOOR STYLE- EXISTING
DRAWER STYLE SHALLOW- EXISTING
DRAWER STYLE DEEP- EXISTING
DRAWER BOX CONSTRUCTION- DOVETAILED WITH SOFT TOUCH SELF-CLOSING GLIDES
WOOD SPECIES/FINISH- MDF WITH PAINT

INVESTMENT: \$ 2,134

- PROVIDE TOP AND BOTTOM "U" SHAPED FASCIA PANELS TO FINISH EXISTING CABINETRY (ELECTRICAL WIRES ARE VISIBLE)

CARTER'S BATH

CONSTRUCTION TYPE- 3/4" FRAMELESS PLYWOOD FULL OVERLAY
DOOR STYLE- EXISTING
DRAWER STYLE SHALLOW- EXISTING
DRAWER STYLE DEEP- EXISTING
DRAWER BOX CONSTRUCTION- DOVETAILED WITH SOFT TOUCH SELF-CLOSING GLIDES
WOOD SPECIES/FINISH- MDF WITH PAINT

INVESTMENT: \$ 1,502

- PROVIDE/INSTALL BASE FULL OVERLAY FILLERS LEFT AND RIGHT SIDE, CUT OUT FOR BASEBOARD (MISSING)
- PROVIDE/INSTALL TOEKICK (MISSING)

EXHIBIT D

LAUNDRY

CONSTRUCTION TYPE- 3/4" FRAMELESS PLYWOOD FULL OVERLAY

DOOR STYLE- EXISTING

DRAWER STYLE SHALLOW- EXISTING

DRAWER STYLE DEEP- EXISTING

DRAWER BOX CONSTRUCTION- DOVETAILED WITH SOFT TOUCH SELF-CLOSING GLIDES

WOOD SPECIES/FINISH- MDF WITH PAINT

INVESTMENT: \$ 14,156

- PROVIDE/INSTALL (X3) DOOR DESIGN BASE END PANELS (MISSING)
- PROVIDE/INSTALL DOOR DESIGN END PANEL FOR TALL WALL OVER W/D (MISSING)
- PROVIDE/INSTALL PLAIN FINISHED END PANEL LEFT OF SINK (MISSING)
- PROVIDE/INSTALL SCRIBE MOLDING/FILLER AT LEFT OF OPEN SHELF RIGHT OF SINK (MISSING/POORLY INSTALLED)
- ADJUST CROWN (POORLY INSTALLED/OPEN MITERS)
- PIN TALL CABINET DOORS TOGETHER (NOT COMPLETED)
- ADJUST CABINET WARPING/TROUBLESHOOT/REPAIR

GUEST BATH WATER CLOSET

CONSTRUCTION TYPE- 3/4" FRAMELESS PLYWOOD FULL OVERLAY

DOOR STYLE- EXISTING

DRAWER STYLE SHALLOW- EXISTING

DRAWER STYLE DEEP- EXISTING

DRAWER BOX CONSTRUCTION- DOVETAILED WITH SOFT TOUCH SELF-CLOSING GLIDES

WOOD SPECIES/FINISH- MDF WITH PAINT

INVESTMENT: \$ 1,599

- PROVIDE AND INSTALL TOP AND BOTTOM FINISHED PANELS (MISSING)

MUDROOM BENCH

CONSTRUCTION TYPE- 3/4" FRAMELESS PLYWOOD FULL OVERLAY

DOOR STYLE- EXISTING

DRAWER STYLE SHALLOW- EXISTING

DRAWER STYLE DEEP- EXISTING

DRAWER BOX CONSTRUCTION- DOVETAILED WITH SOFT TOUCH SELF-CLOSING GLIDES

WOOD SPECIES/FINISH- MDF WITH PAINT

INVESTMENT: \$ 2,119

- PROVIDE/INSTALL DOVETAIL WOOD DRAWER BOX/FULL EXTENSION GLIDES AT BENCH DRAWER BASE (MISSING)
- PROVIDE/INSTALL TOEKICK (MISSING)
-

MUDROOM PANTRY

CONSTRUCTION TYPE- 3/4" FRAMELESS PLYWOOD FULL OVERLAY

DOOR STYLE- EXISTING

DRAWER STYLE SHALLOW- EXISTING

DRAWER STYLE DEEP- EXISTING

DRAWER BOX CONSTRUCTION- DOVETAILED WITH SOFT TOUCH SELF-CLOSING GLIDES

WOOD SPECIES/FINISH- MDF WITH PAINT

INVESTMENT: \$ 5,908

- PROVIDE/INSTALL (X2) MISSING TALL FILLERS (MISSING)
- PROVIDE/INSTALL MISSING DOOR DESIGN END PANEL/SCRIBE TO ANGLED CEILING (MISSING)
- PROVIDE/INSTALL NEW DOOR DESIGN END PANEL (WRONG SIZE-TOO SHORT IN WIDTH)
- PROVIDE/INSTALL NEW TOEKICKS (MISSING)
- PROVIDE/INSTALL NEW TOP CAP FASCIA/SCRIBE TO ANGLED CEILING (MISSING)

MASTER WATER CLOSET

CONSTRUCTION TYPE- 3/4" FRAMELESS PLYWOOD FULL OVERLAY

DOOR STYLE- EXISTING

DRAWER STYLE SHALLOW- EXISTING

DRAWER STYLE DEEP- EXISTING

DRAWER BOX CONSTRUCTION- DOVETAILED WITH SOFT TOUCH SELF-CLOSING GLIDES

WOOD SPECIES/FINISH- MDF WITH PAINT

INVESTMENT: \$ 3,511

- PROVIDE/INSTALL NEW CABINET OVER TOILET APPROX. 28" X 49". (MISSING)
- PROVIDE/INSTALL NEW END PANELS LEFT/RIGHT AND TOP/BOTTOM FASCIA PIECES (MISSING)

EXHIBIT D

GAME ROOM

CONSTRUCTION TYPE- 3/4" FRAMELESS PLYWOOD FULL OVERLAY

DOOR STYLE- EXISTING

DRAWER STYLE SHALLOW- EXISTING

DRAWER STYLE DEEP- EXISTING

DRAWER BOX CONSTRUCTION- DOVETAILED WITH SOFT TOUCH SELF-CLOSING GLIDES

WOOD SPECIES/FINISH- MDF WITH PAINT

INVESTMENT: \$ 10,107

- PROVIDE (x4) 2" FLOATING SHELVES (MISSING)
- RETROFIT EXISTING TALL DOORS/ROUTE FOR STANDARD HINGES/INSTALL (HARDWARE WAS MISSING SO WE RETROFIT)
- PROVIDE PULL OUT BOTTLE STORAGE (MISSING)
- INSTALL EXISTING DOOR ON PULL OUT CABINET (ON SITE)
- PROVIDE/INSTALL (x2) PLAIN FINISHED END PANELS (THEY USED LEFT OVER DOOR DESIGN PANELS AND THEY ARE VISIBLE, NOT CORRECT)
- PROVIDE/INSTALL NEW TRASH PULL OUT (MISSING)
- FABRICATE MISSING SHELVES (x3) (MISSING)
- PROVIDE/INSTALL NEW TOEKICK (MISSING)
- PROVIDE/INSTALL NEW ICE MAKER PANEL (NOT CORRECT SIZE)

PANTRY

CONSTRUCTION TYPE- 3/4" FRAMELESS PLYWOOD FULL OVERLAY

DOOR STYLE- EXISTING

DRAWER STYLE SHALLOW- EXISTING

DRAWER STYLE DEEP- EXISTING

DRAWER BOX CONSTRUCTION- DOVETAILED WITH SOFT TOUCH SELF-CLOSING GLIDES

WOOD SPECIES/FINISH- MDF WITH PAINT

INVESTMENT: \$ 1,974

- PROVIDE/INSTALL SCRIBE MOLDING AT END OF FLOATING SHELVES WHERE THEY MEET WALL (POORLY INSTALLED WITH VISIBLE GAPS)

OFFICE PANTRY

CONSTRUCTION TYPE- 3/4" FRAMELESS PLYWOOD FULL OVERLAY

DOOR STYLE- EXISTING

DRAWER STYLE SHALLOW- EXISTING

DRAWER STYLE DEEP- EXISTING

DRAWER BOX CONSTRUCTION- DOVETAILED WITH SOFT TOUCH SELF-CLOSING GLIDES

WOOD SPECIES/FINISH- MDF WITH PAINT

INVESTMENT: \$ 1,265

- PROVIDE/INSTALL CUSTOM DADO ROUTED TOP FASCIA PIECES TO EXISTING SOFFIT (POORLY INSTALLED WITH VISIBLE GAPS)

HIS MASTER DRESSING

PREMIER CUSTOM BUILT

CONSTRUCTION TYPE- 3/4" FRAMELESS PLYWOOD FULL OVERLAY

DOOR STYLE- EXISTING

DRAWER STYLE SHALLOW- EXISTING

DRAWER STYLE DEEP- EXISTING

DRAWER BOX CONSTRUCTION- DOVETAILED WITH SOFT TOUCH SELF-CLOSING GLIDES

WOOD SPECIES/FINISH- MAPLE/PAINT GRADE WITH PAINT

INVESTMENT: \$ 88,428

HER MASTER DRESSING

PREMIER CUSTOM BUILT

CONSTRUCTION TYPE- 3/4" FRAMELESS PLYWOOD FULL OVERLAY

DOOR STYLE- EXISTING

DRAWER STYLE SHALLOW- EXISTING

DRAWER STYLE DEEP- EXISTING

DRAWER BOX CONSTRUCTION- DOVETAILED WITH SOFT TOUCH SELF-CLOSING GLIDES

WOOD SPECIES/FINISH- MAPLE/PAINT GRADE WITH PAINT

INVESTMENT: \$ 94,400

TOTAL CABINETRY INVESTMENT: \$260,736

EXHIBIT D

RESPECTFULLY SUBMITTED,

BRYAN REISS, CMKBD
PRESIDENT

UPON ACCEPTANCE OF THIS ESTIMATION, FORMAL PLANS AND A WRITTEN AGREEMENT WILL BE GENERATED. UNTIL THEN, ALL DESIGNS ARE THE PROPERTY OF DISTINCTIVE DESIGN. THEY WILL BECOME PROPERTY OF THE CLIENT UPON SIGNING OF THE FORMAL AGREEMENT.

THIS ESTIMATION WILL BE HONORED FOR 30 DAYS AND IS SUBJECT TO CHANGE THEREAFTER.

EXHIBIT E

ESTIMATE

EST0021

Evan heilig

1321 Briarfield ave Charleston sc 29412

8436426777

drakeheilig@iCloud.com

DATE

05/28/2021

TOTAL

USD \$25,017.50

TO

Bryan Reiss

(843) 810-3448

Bryan@distinctivedesignllc.com

DESCRIPTION	RATE	QTY	AMOUNT
Cabinetry finish/refinish at 376 Ralston Creek st	\$25,017.50	1	\$25,017.50
Mud room-\$2345 @ \$30/sqft			
Office-\$3450 @ \$30/sqft			
Kitchen-\$3422.50 @ \$30/sqft			
Kitchen pass through- \$3105 @ \$30/sqft			
Kitchen toe kick-\$400 @ \$5/Lf			
Kitchen crown-\$1080 @\$15/Lf			
Dish storage-\$720 @ \$30/sqft			
Mstr bedroom hideaway bar-\$2570 @ \$30/sqft			
Mstr bath showcase-\$2012.50 @ \$35/sqft			
Mstr water closet-\$630 @ \$30/sqft			
Laundry-\$2025 @ \$30/sqft			
Game room-\$3257.50 @ \$35/sqft			
TOTAL			USD \$25,017.50

EXHIBIT E

A handwritten signature in black ink, appearing to be "E. J. [unclear]", written in a cursive style.

DATE SIGNED

05/28/2021

From: [Walden, Andrew](#)
To: [AAA Jalisa Hardrick](#); [David Glover](#); [Eva Glover](#)
Cc: [Weatherholtz, James](#)
Subject: RE: Shelter, LLC v. Design Gaps, Inc., Eva Glover - Case 01-21-0004-8211
Date: Wednesday, August 25, 2021 9:38:55 AM
Attachments: [image002.png](#)
[image004.png](#)
[image007.png](#)
[image008.png](#)
[image947d5c.PNG](#)
[imagec329d8.PNG](#)
[image38c7c0.PNG](#)
[image7a2303.PNG](#)

Jalisa,

We, likewise, are good with Mr. Coker as the arbitrator.

Best,

Andrew

R. Andrew Walden

Associate
Womble Bond Dickinson (US) LLP

d: 843-720-4634
m: 803-983-4669
e: Andrew.Walden@wbd-us.com

5 Exchange Street
PO Box 999 (29402)
Charleston, SC 29401



womblebond dickinson.com



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From: AAA Jalisa Hardrick <JalisaHardrick@adr.org>
Sent: Wednesday, August 25, 2021 9:02 AM
To: David Glover <david.glover@designgaps.com>; Eva Glover <eva.glover@designgaps.com>; Walden, Andrew <Andrew.Walden@wbd-us.com>
Subject: RE: Shelter, LLC v. Design Gaps, Inc., Eva Glover - Case 01-21-0004-8211

Good morning Mr. Glover,

This will confirm receipt. We await Claimant's response or until September 1 to confirm the Arbitrator.

Many thanks,

/s/ Asheen Patel on behalf of

AAA Jalisa Hardrick

Manager of ADR Services

Commercial-CMC Southeast
T: 678 686 6001 Ext. 5843 E: JalisaHardrick@adr.org
2200 Century Parkway, Suite 300, Atlanta, GA 30345



AAA Jalisa Hardrick
Manager of ADR Services

American Arbitration Association

T: 678 686 6001 Ext. 5843 E: JalisaHardrick@adr.org
 2200 Century Parkway, Suite 300, Atlanta, GA 30345
adr.org | icdr.org | aaamediation.org



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From: David Glover <david.glover@designgaps.com>

Sent: Wednesday, August 25, 2021 8:54 AM

To: AAA Jalisa Hardrick <JalisaHardrick@adr.org>; Eva Glover <eva.glover@designgaps.com>; andrew.walden@wbd-us.com

Subject: RE: Shelter, LLC v. Design Gaps, Inc., Eva Glover - Case 01-21-0004-8211

***** External E-Mail – Use Caution *****

Good morning,

We have reviewed your attachments and our party is fine with Mr. Coker as the arbitrator for this case.

Sincerely,

David A. Glover
 President
 Direct (704) 302-1334

Charlotte's SouthPark location:
 4810 Ashley Park Lane
 Suite G
 Charlotte, NC 28210
 Showroom (704) 965-2400

Charleston Location:
 1804 Crowne Commons Way
 Suite D-1
 Johns Island, SC 29455
 Showroom (843) 408-7600

Design Oriented Licensed General Contractor for NC and SC

dgi logo color



www.DesignGaps.com

Exclusive Representative in NC and SC Downsview Kitchens
 Fine Cabinetry for throughout the home.

Downsview Logo - Colour



www.DownsviewKitchens.com

From: jalisahardrick@adr.org <jalisahardrick@adr.org>

Sent: Wednesday, August 25, 2021 8:45 AM

To: Eva Glover <eva.glover@designngaps.com>; David Glover <david.glover@designngaps.com>; andrew.walden@wbd-us.com

Subject: Shelter, LLC v. Design Gaps, Inc., Eva Glover - Case 01-21-0004-8211

Hello,

Please review the attached correspondence regarding the above-referenced case.

Feel free to contact me with any questions, comments or concerns you have related to this matter.

Thank you.



AAA Jalisa Hardrick
Manager of ADR Services

American Arbitration Association

T: 678 686 6001 Ext. 5843 E: JalisaHardrick@adr.org
2200 Century Parkway, Suite 300, Atlanta, GA 30345
adr.org | icdr.org | aaamediation.org



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AMERICAN ARBITRATION ASSOCIATION

SHELTER, LLC, DR. JASON HIGHSMITH, AND KACIE
HIGHSMITH,

Claimant,

vs. CASE NO. 01-21-0004-8211

DESIGN GAPS, INC.,

Respondent.

DEPOSITION OF: BRYAN M. REISS

DATE: March 10, 2022

TIME: 2:56 p.m.

LOCATION: Law Offices of
WOMBLE BOND DICKINSON
5 Exchange Street
Charleston, South Carolina

TAKEN BY: Counsel for the Respondent

REPORTED BY: Julie L. Bonomo

1 APPEARANCES OF COUNSEL:
ATTORNEYS FOR CLAIMANT
2 SHELTER, LLC, DR. JASON HIGHSMITH, AND KACIE
HIGHSMITH:

3
4 Womble Bond Dickinson
BY: R. ANDREW WALDEN
5 Exchange Street
Charleston, South Carolina 29401
843-720-4634
6 Andrew.walden@wbd-us.com

7 PRO SE FOR RESPONDENT
DESIGN GAPS, INC.:

8
9 BY: DAVID GLOVER
4810 Ashley Park Lane
Suite G
10 Charlotte NC 28210
David.glover@designgaps.com
11 704-965-2400
12
13
14

15 (INDEX AT REAR OF TRANSCRIPT)
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25

1 BRYAN M. REISS

2 being first duly sworn, testified as follows:

3 EXAMINATION

4 BY MR. GLOVER:

5 Q. Okay. Good afternoon, my name is David
6 Glover, I'm representing the respondents in this
7 action. This is American Arbitration proceeding
8 AAA, case No. 012100048211. Pursuant to Rule 30,
9 I'm deposing Mr. Bryan Reiss as the Claimant's
10 expert witness.

11 Okay. I would ask if you would like to
12 look at the slide show for just a moment.

13 A. Sure.

14 MR. WALDEN: And you can get up and
15 walk around to review.

16 MR. GLOVER: I'll show you because I'm
17 probably going to be showing these at the hearing.

18 THE WITNESS: Okay.

19 BY MR. GLOVER:

20 Q. Okay. Recent project Valor.

21 A. Okay.

22 Q. Asheville. So I'm showing a slide show
23 of our finished product that we did on a project.
24 Pretty complicated, so -- up in Asheville, North
25 Carolina on the Fowler residence. Outdoor loggia,

1 Q. These were the approved revised closet
2 designs --

3 A. Okay.

4 Q. -- of Kacie Highsmith, which should be
5 reflective of what was in the field at that time.
6 Does that look something like what you recall?

7 A. It was similar, yes, the bladder was
8 not on -- was not there, if I recall correctly, and
9 the transitional moldings between the cabinets
10 where that was mounted was not there. It looked
11 like just stacks of cabinets, if I remember
12 correctly. Those wall cabinets were stacked on top
13 of these tall cabinets.

14 Q. Yeah, I mean, I have images of the
15 transitional piece that the --

16 A. Letter --

17 Q. -- system with the (inaudible) was in
18 place because it's a major spacer of about three
19 inches, approximately --

20 A. Okay.

21 Q. -- without looking at it. So the
22 latter was never approved and ordered.

23 A. Got you.

24 Q. Okay. So let's go through the floor
25 plan.

1 see that itemization of the parts list. But you
2 can understand how looking at these two documents,
3 they read the same except for, I think maybe --
4 does one denote Premier, one does not? That's
5 right.

6 A. Yeah, this estimate, like I said, was
7 us just coming in to fix what was there, but it was
8 determined that there was doors that all needed to
9 be reordered. Most of the doors on the top section
10 with the wrong size.

11 Q. Uh-huh?

12 A. So that all needed to be reordered.

13 There was an issue with the height, I
14 understand it was a mismeasurement with the height
15 hand how that was accomplished.

16 Q. Uh-huh.

17 A. The ladders weren't there, there was a
18 lot of things that weren't there that we needed to
19 do.

20 So it was determined that the
21 Highsmiths said we don't really want to compromise
22 on the quality or the issues that we're having in
23 the space, we want a nice closet, so we're going to
24 request that you redo it.

25 Q. So they wanted to upgrade, have you put

1 in Premier custom with the face frame?

2 A. No.

3 MR. WALDEN: Object to the form.

4 THE WITNESS: No, they didn't -- they
5 wanted what the original design was, the original
6 detailing in a high quality, but Downsvlew level.
7 So we provided that with them in Premier.

8 BY MR. GLOVER:

9 Q. Okay. Let me submit these two. We
10 could probably move these aside for a moment, this
11 is part of the original complaint that can go back
12 over to her, please.

13 Let me direct your attention to this
14 11-by-17 Net Reflects contract for the Highsmiths
15 and the pricing beside it that was used to
16 determine what the price was.

17 A. Okay.

18 Q. Okay. So currently, Design Gaps
19 utilizes Downsvlew list price. Does that make
20 sense?

21 A. (Nods head affirmatively.)

22 Q. And then they discount it X amount
23 percent to achieve an estimated price for
24 Artigiano.

25 A. Okay.

From: David Glover

Sent: Wednesday, April 13, 2022 10:03 AM

To: Walden, Andrew <Andrew.Walden@wbd-us.com>; AAA Asheen Patel <AsheenPatel@adr.org>; Coker, Tom <tcoker@hsblawfirm.com>

Cc: Eva Glover <eva.glover@designgaps.com>

Subject: RE: Respondent's Counterclaim for the AAA Case No.01-21-0004-8211

Good morning,

The respondents respectfully request to be allowed to respond to Mr. Walden's email response to the Respondents Counterclaim by morning of April 18th as I will be out of the office until this weekend. We understand Mr. Walden would prefer a hearing without the Respondents counterclaims however they did arise from the two contracts between the Parties and fall within the governing laws and statues of the Arbitration agreement and we believe have merit and should be heard at the hearing. Mr. Walden's characterization of our claims and the cause for the actions is not accurate or in the manner they will be presented at the hearing. I was under the impression we were only to list the claims however, we can provide all the supporting documentation, legal cites, merit, and how each applies to this Arbitration hearing. Not allowing the claims will deprive the Respondents of equal justice provided by this Hearing as well as not holding the other parties accountable for their misdeeds.

Please let the Respondents know if additional supporting information is required at this time and if we may have until Monday the 18th to properly respond if necessary to maintain the Respondent's Counterclaims.

Additionally, attached is the copyright registration for the Design Gaps, Inc. cabinet drawings for all of the areas contracted for.

Thank you for your consideration,

David

David A. Glover
President
Direct (704) 302-1334

Charlotte's SouthPark location:
4810 Ashley Park Lane
Suite G
Charlotte, NC 28210
Showroom (704) 965-2400

Charleston Location:
1804 Crowne Commons Way
Suite D-1
Johns Island, SC 29455
Showroom (843) 408-7600

Design Oriented Licensed General Contractor for NC and SC



Exclusive Representative in NC and SC Downsview Kitchens
Fine Cabinetry for throughout the home.



David Glover

From: Library of Congress Catalog <no-reply@loc.gov>
Sent: Wednesday, April 13, 2022 9:45 AM
To: David Glover
Subject: Copyright catalog Left Anchored Title Search for highsmith

Type of Work: Visual Material

Registration Number / Date:
VAu001462768 / 2022-03-30

Application Title: Highsmith Main House Cabinet Drawings and 1 Other
Unpublished Works.

Title: Highsmith Main House Cabinet Drawings and 1 Other
Unpublished Works.

Description: Electronic file (eService)

Copyright Claimant:
Design Gaps, Inc.

Date of Creation: 2020

Authorship on Application:
Design Gaps, Inc, employer for hire; Domicile: United
States; Citizenship: United States. Authorship:
Technical Drawings.

Rights and Permissions:
David Glover, Design Gaps, Inc, 4810 Ashley Park Lane,
Suite G, 4810 Ashley Park Lane, Suite G, Charlotte,
North Carolina, 28210, (740) 604-4558, (740) 604-4558,
david.glover@designgaps.com

Copyright Note: C.O. correspondence.
Regarding group registration: A group of unpublished works
may be registered in the same administrative class under
202.4(c) if the following requirements have been met: 1)
All the works must be unpublished; 2) the group may
include up to ten works; 3) a title must be provided for
each work; 4) all the works must be created by the same
author or the same joint authors; 5) the authorship
claimed in each work must be the same; and 6) the author
and claimant for each work must be the same person or
organization.

Names: Design Gaps, Inc

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The Library of Congress
United States Copyright Office
101 Independence Ave., S.E.
Washington, D.C. 20559-6000
202-707-3000

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
CHARLESTON, SOUTH CAROLINA

AAA Case No.01-21-0004-8211
AMERICAN ARBITRATION ASSOCIATION

SHELTER, LLC, DR. JASON HIGHSMITH,
KACIE HIGHSMITH, JENNY BUTLER,
BRYAN REISS, DISTINCTIVE DESIGNS,
LLC

Claimants,

vs.

DESIGN GAPS, INC., DAVID GLOVER,
EVA GLOVER

Respondents,

BINDING COMMERCIAL
ARBITRATION
RESPONDENTS MEMORANDUM
IN SUPPORT OF COUNTERCLAIMS

Design Gaps, Inc., David Glover in his individual capacity, and Eva Glover in her individual capacity, collectively "Respondents"), by and through David A. Glover as *Pro Se*, complaining of Shelter, LLC, Dr. Jason Highsmith, and Kacie Highsmith, Jenny Butler in her individual capacity, Ryan Butler in his individual capacity, Bryan Reiss, in his individual capacity, and Distinctive Designs, LLC (collectively "Claimants"), allege and say as follows:

NEGLIGENCE

During Ryan Butler's deposition he was asked what if any project management software does Shelter, LLC use. His response was "BuilderTrend". He was then asked how often is the BuilderTrend Schedule updated? Butler's response was "Weekly". Shelter, LLC using their BuilderTrend program generated the initial construction and sub-contractor schedule on or about

June 1st, 2020 based on the initial scope of work for a simple kitchen renovation. Shelter, LLC's initial contract was approximately \$ 444,425.00 per the June 1st, 2020 Construction Contract. Per Ryan Butler's deposition the contract amount increased to approximately \$ 1,400,000 with change order. The Highsmith's substantially increased the scope of work with Shelter, LLC soon after the original contract to almost four times the original amount when BuilderTrend Schedule was generated. That schedule was relied upon by the Highsmith's, Jenny Butler, and Ryan Butler for their planning and communications with Design Gaps, Inc. during the initial design, contract stage and subsequently during the execution stages. Ryan Butler was asked in his deposition how often did the Highsmith's schedule get revised. Butler's response was "never". The BuilderTrend Schedule all work, lead times for products and completion dates was based on the initial schedule that was a fraction of the initial scope of work and dollar value. If Shelter had updated their construction and correctly represented it to the Highsmith's and Design Gaps, Inc. instead of an unrealistic goal given a whole house renovation of over 8,200 sq ft to be moved in before Christmas 2020 then the Highsmith's could have selected their initial 1st choice longer lead time product Downsview Kitchens. It was at the insistence of Jenny Butler in the emails and meetings between Design Gaps, Inc., Jenny Butler, and Kacie Highsmith that what was thought to be a shorter alternative was selected. Shelter, LLC negligently failed to ever revise the BuilderTrend from the first generated schedule resulting in the client and their builder, Shelter, LLC "throwing Design Gaps, Inc. under the bus" for Shelter, LLC's negligent act and inexcusable lack of scheduling resulting in this Arbitration.

According to the Claimants the "Schedule" is largely in part why we are in arbitration as any quality concerns would have rectified during the final punchout by Design Gaps, Inc. as Ryan Butler admitted in his deposition we have always stood by our product and installations in the prior projects. However, Design Gaps was terminated prior to that being able to complete the project

and punchwork. It was the Shelter BuilderTrend Schedule that Jenny Butler, Ryan Butler, Kacie Highsmith, and Dr. Jason Highsmith relied upon to evaluate Design Gaps schedule. Other trades such as Distinctive Design's Bryan Reiss who is currently working on multiple projects for Shelter admitted in his deposition to having online access to Shelter's BuilderTrend. After it was discovered in Ryan Butler's deposition, they used BuilderTrend for their project management software he was asked how often is BuilderTrend updated by Shelter. His response was "*weekly*". Then asked regarding the Highsmith's project his answer was it was never updated since it's creation.

Design Gaps, Inc., Shelter, LLC and the Highsmith's were all signatories to the Main House contract and Shelter LLC and Ryan Butler owed the same duty to Design Gaps, Inc. as he did to the Highsmith to provide correct and accurate information that was relied upon by all parties. Failure to update his own construction schedule with accurate and realistic timelines provided false and misinformation to all the parties involved directly causing the Highsmith's to be angered by the lack of progress on their Whole Project while Shelter LLC used any justifiable delay on Design Gaps behalf as the cause for the whole project delayed status. It was inexcusable and negligent Ryan Butler, per his deposition with a Construction Management degree, did not update BuilderTrend Schedule in a timely manner given the quadrupling of the scope of work. The Highsmith's would have known early on their verbal move in goal of December 2020 with Shelter, LLC was unobtainable. Jenny Butler in her Respondent deposition when asked why she contacted Bryan Reiss stated because you (Design Gaps, Inc.) were a month behind. Bryan Reiss, the person that sold over \$ 250,000 of cabinetry to Shelter for the Highsmith house when shown the Shelter BuilderTrend schedule allotting only two weeks for cabinetry installation if that was a reasonable time frame the answer was of course no.

Below are excerpts from Ryan Butler's deposition regarding his Highsmith BuilderTrend

Schedule and not maintaining or updating it:

18 BY MR. GLOVER:

19 Q. Okay. Then on the schedule, October

20 12th, I believe you had scheduled a cabinet

21 install?

22 A. Yes.

23 Q. And I believe, according to our

24 records, the cabinets were dropped onsite during

25 that week, I think the 13th, 14th, and there are

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30(B)(6)Ryan Butler March 10, 2022

Shelter, LLC Vs. Design Gaps

1 images of the cabinetry installing?

2 MR. WALDEN: Object to form.

3 MR. GLOVER: Okay.

4 BY MR. GLOVER:

5 Q. Do you recall a cabinetry being

6 delivered that week?

7 A. I don't recall.

8 Q. Okay. So on here you have two weeks of

9 installation?

10 A. Uh-huh.

11 Q. So in your Buildertrend, are various

12 tasks dependent on other tasks?

13 A. Yes.

14 Q. For instance, you can't put in the

15 countertops without something to hold them up?

16 A. Correct.

17 Q. Can't install plumbing without

18 countertops?

19 A. Correct.

20 **Q. Did the cabinet install schedule get**

21 **modified of the one I'm looking at?**

22 **A. No.**

23 **Q. Why is that?**

24 **A. The schedule wasn't updated or changed**

25 **on a lot of these activities.**

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30(B)(6)Ryan Butler March 10, 2022

Shelter, LLC Vs. Design Gaps

1 **Q. So I believe you testified earlier that**

2 **weekly, you tried to update it?**

3 **A. Tried to, yeah. This one was not.**

4 **Q. And this is the only schedule for**

5 **Highsmith?**

6 **A. Correct.**

7 Q. Okay. On page No. -- so on November

8 Monday through Friday?

9 A. November. Okay.

10 Q. Finish hardwoods?

11 A. Uh-huh.

12 Q. I believe that's the only place on the

13 schedule I see that; is that correct?

14 A. I believe so, yes.

15 **Q. Do you agree the hardwood floors were**

16 **being finished all the way to January?**

17 **A. Yes.**

18 Q. And then it looks like on the schedule,

19 just moving towards the end of what's noted is on

20 December 15th, that allegedly would have been the

21 end of the exterior doors and windows?

22 A. Uh-huh.

23 Q. Additionally, if we look at that same

24 page, the interior paint, looks like it's ending on

25 Tuesday, the 1st of December?

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30(B)(6)Ryan Butler March 10, 2022

Shelter, LLC Vs. Design Gaps

1 A. Yep.

2 **Q. Okay. Did the painting end on that**

3 **day?**

4 **A. Nope.**

Most construction claims begin with the phrase: The Builder failed to provide adequate supervision of the project. Here we are stating the builder is akin to the conductor and in essence his sheet music is the BuilderTrend Schedule he negligently failed to maintain.

Below the S.C. State Ports Authority is a case regarding the reliance of reports and the duty created to ensure the report is accurate even to a third party, or in the instant case the “Shelter Buildertrend Schedule” as well as the liability that befalls the author of the report when it is relied upon in the decision-making process.

[SC State Ports Auth. v. Booz-Allen & Hamilton, Inc., 346 S.E.2d 324, 289 S.C. 373 \(1986\).](#)

Plaintiffs argue BAH knew or should have known its report, falsely disparaging the Charleston port, would have a direct economic impact on them. Since their injuries were foreseeable, plaintiffs argue BAH owed a duty to them to prevent injury.

Foreseeability of injury, in the absence of a duty to prevent that injury, is an insufficient basis on which to rest liability. Tolar Construction Company v. GAF Corporation, 154 Ga. App. 127, 267 S.E. (2d) 635, rev'd on other grounds, 246 Ga. 411, 271 S.E. (2d) 811 (1980). Foreseeability itself does not give rise to a duty. 65 C.J.S., Negligence, Section 4(2).

A legal duty is that which the law requires to be done or forbore with respect to a particular individual or the public at large. S.C.E. & G. v. Utilities Construction Company, 244 S.C. 79, 135 S.E. (2d) 613 (1964). A tortfeasor's duty arises from his relationship to the injured party. Barker

v. Sauls, 345 S.E. (2d) 244 (1986). This relationship may arise out of the tort-feasor's contractual relationship with a third party. *Id.*

Liability for negligence in preparing reports has been extended to parties other than those to the contract in certain circumstances. 57 Am. Jur. (2d) Negligence, Section 51. Consultants such as BAH may be found liable in negligence to non-contracting parties who have reasonably relied on their reports in taking some action. See, Stagen v. Stewart-West Coast Title Company, 149 Cal. App. (3d) 114, 196 Cal. Rptr. 732 (2d Dist. 1983); Carlotta v. T.R. Stark & Associates, Inc., 57 Md. App. 467, 470 A. (2d) 838 (1984). We hold a duty to use due care, running from a consultant to the commercial competitor who is being critiqued, arises when the consultant undertakes to objectively analyze and compare the attributes of commercial competitors for the purpose of giving one a market advantage over the other.

Under this analysis, BAH owed a duty to the S.C. State Ports Authority to exercise due care to accurately report objective factual data concerning the Charleston port, if it knew or should have known the report was intended to be used by GPA as a marketing device.

As in the S.C. Ports Authority case Butler and Shelter, LLC should have known their BuilderTrend Schedule would be used by all who had access and with certainty, the homeowner Highsmiths.

In the below cite the Respondents are aligning Shelter, LLC with the respondent, *Jordan, Jones & Goulding, Inc.*

Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc., 463 S.E.2d 85, 320 S.C. 49 (1995).

*In the case sub judice, Engineer designed the project specifically for the County of Charleston. Engineer supervised the construction. Engineer had the right, among other rights, to inspect the construction and to halt construction. Under these facts, Engineer owed a duty to the contractor not to negligently design or **negligently supervise the project**. Accordingly, the trial judge erred in finding the doctrine of "economic loss" prohibited the plaintiff from maintaining a suit in tort for purely economic losses.*

*In most instances, a negligence action will not lie when the parties are in privity of contract. When, however, there is a **special relationship between the alleged tortfeasor and the injured party not arising in contract, the breach of that duty of care will support a tort action.** [South Carolina State Ports Auth. v. Booz-Allen & Hamilton, Inc.](#), 289 S.C. 373, 346 S.E.2d 324 (1986); see also [Congregation of the Passion, Holy Cross Province v. Touche Ross & Co.](#), 159 Ill.2d 137, 201 Ill.Dec. 71, 636 N.E.2d 503 (1994) ("special relationship" creates duty of care outside terms of contract). These concepts are not new. See [Kennedy, supra](#); see also note 1 and cases cited therein. Rather, we restate the traditional concepts in modern terms.*

Applying these concepts to professional liability, we have long held lawyers and accountants liable in tort for malpractice. See, e.g., [Lloyd v. Walters](#), 276 S.C. 223, 277 S.E.2d 888 (1981) (attorney liable for economic loss to corporate shareholder when attorney breached duty to corporation); [Georganne Apparel v. Todd](#), 303 S.C. 87, 399 S.E.2d 16 (Ct.App.1991) (accountant malpractice dismissed for failure to prosecute). In many cases, the lawyer or the accountant will be in privity of contract with the plaintiff. These professionals, however, owe a duty to the client and sometimes to third parties which arises separate and distinct from the contract for services. [Congregation of the Passion, Holy Cross Province v. Touche Ross & Co.](#), 159 Ill.2d 137, 201 Ill.Dec. 71, 636 N.E.2d 503 (1994). We see no logical reason to insulate

design professionals from liability when the relationship between the design professional and the plaintiff is such that the design professional owes a professional duty to the plaintiff arising separate and distinct from any contractual duties between the parties or with third parties. See, e.g., [Gilliland v. Elmwood Properties](#), 301 S.C. 295, 391 S.E.2d 577 (1990) (tort action brought by owners against architect); [State Ports Autho. v. Booz-Allen & Hamilton, Inc.](#), 289 S.C. 373, 346 S.E.2d 324 (1986) (tort action maintainable by third party against professional when duty exists). Whether such a duty exists will depend on the facts and circumstances of each case.

MATERIAL BREACH OF CONTRACT

Design Gaps, Inc. entered two contracts with Highsmith's, in August and September 2020, respectively, for cabinetry at the Residence for the sum of \$332,236.94. To date, the Highsmith's and Shelter, LLC have paid \$264,935.77 to Design Gaps, Inc. and through this date the Highsmith's and Shelter, LLC currently owe a balance of \$ 55,588.94 cabinetry and materials delivered to the jobsite due now, and final installation amount of \$ 11,712.23 for a total outstanding balance of \$ 67,301.17 to Design Gaps, Inc.

Design Gaps, Inc. delivered the additional Purse Display items to Trey Benton, Design Gaps, Inc. installer April 30th at 2:00 pm. Trey Benton was on-site at the Residence installing the Purse Display cabinetry and LED lighting Saturday May 1st, 2021. Design Gaps, Inc. previously informed Highsmith's on April 25th of Trey Benton's schedule that he had to return to Asheville to complete his punchout on the prior committed project he was pulled away from to work on Highsmith's and would return as soon as possible to continue the Highsmith project.

Subsequently, Andrew Walden and David Glover of Design Gaps, Inc. had an email exchange beginning May 10th, 2021 8:57 am through Walden's last email dated May 14th, 2021 1:59pm when he effectively terminated Design Gaps, Inc. access to the Residence to continue

any work or inspection of finishes and cabinetry by Glover. In the very prior email also dated May 14th, 2021, 7:45am Walden had agreed to an on-site appointment with Glover to inspect any additional concerns the Highsmith's had. Additionally requesting Design Gaps, Inc. refinish (if necessary) any parts deemed to be the wrong color and be ready for installation by May 31st.

On May 13, 2021 Unbeknownst to Design Gaps, Inc. Bryan Reiss and Kacie Highsmith were emailing each other with Bryan Reiss stating in his email string May 13th 2021 at 3:10pm Reiss: *"Kacie requested we set up a time to review the scope and get final fixes on order. I can meet Monday 17th at noon. Please let me know if that will work for everyone. Thank you! To which Kacie replied "I can do Monday 12-1. I have another meeting and will need to leave the house at 1p. Will that be enough time? Reiss responded: That should be fine. "*

Friday May 14th, 10:28am Glover responded via email to Walden with concerns regarding Walden's proposal. Walden replied at 1:59pm the same day terminating Design Gaps, Inc. access to the residence thereby creating a material breach of the two contracts between Design Gaps, Inc., Highsmith's, and Shelter, LLC. Notably the day following confirmation of the Claimant's meeting with Bryan Reiss of Distinctive Designs to order cabinets and materials.

Design Gaps, Inc. at no time abandoned the Highsmith's project, continually updated the parties regarding installers and materials. Andrew Walden's own cite in his initial contact with Design Gaps, Inc. on March 2nd, 2021 contained the following cite: [General Sprinkler Corp. V. Loris Industrial Developers, Inc. 271 F. Supp 551 – Dist Court, D. South Carolina 1967](#)

The general rule as to the rescission of a contract for failure to perform within a time stipulated is well stated in 17A C.J.S. Contracts § 422(1), at page 520, as follows:

"Delay in performing contract. Where time is of the essence of the contract, failure to perform within the time stipulated is ground for rescission. If time is not of the essence, mere delay in performance is not considered a material breach justifying rescission. Mere delay in the execution of a contract, the terms of which will be satisfied by performance within a reasonable time, does not in itself entitle the other party to rescind, but, to have this effect, the implication arising from non-performance of the contract must be inconsistent with its being still in force. Where it is intended that performance shall be within a reasonable time, one party may not suddenly and in the absence of reasonable notice, terminate the contract while the other is endeavoring in good faith to perform it."

Additionally, within the same case and cite:

The law is also well settled in this state that:

"Breach of a contract, to justify its rescission, must be so substantial and fundamental as to defeat the purpose of the contract. Here the contract specified no precise date upon which appellant was required to pay the balance of the purchase price; by presumption of law, he was required to do so within a reasonable time. In such a case mere delay in performance will not give rise to the right of rescission unless it be such as to warrant the conclusion that the party delaying does not intend to perform". Davis v. Cordell, supra.

Elliott v. Schneider, 246 S.C. 186, [143 S.E.2d 374](#) (1965). See also Smith v. First Provident Corp., 245 S.C. 509, [141 S.E.2d 646](#) (1965) wherein the court reiterated the foregoing rule and stated further:

"The right to rescind or terminate a contract on the ground of failure of performance by the opposite party belongs only to the party who is free from substantial default itself, and a party

who has subsequently broken the contract cannot rescind it on the ground that the other party subsequently refused or failed to perform.'"

As before stated, at the time defendant attempted to rescind the contract plaintiff had not failed in any substantial or fundamental way to endeavor reasonably to undertake its obligations under the contract and was guilty of no conduct which warranted defendant in concluding that it did not intend to proceed with and fully perform its obligations thereunder.

The Court concludes that defendant had no justifiable basis to rescind the contract. Therefore, its unwarranted termination of same and its entering into a new contract with another sprinkler contractor constituted a wrongful and unwarranted breach on its part which entitles plaintiff to recover damages suffered as a result thereof.

No notice was ever provided to Design Gaps, Inc. In fact, the emails leading up to Walden's May 14th, 2021, unjust termination were correspondences with Design Gaps, Inc. to meet and review onsite any additional concerns the Claimants may have had. Effectively extending the Claimant's imposed deadline to May 31st, 2021, although no dates were specified in the Contracts that governed Design Gaps, Inc. role in this project. Shelter, LLC, and Highsmith's had deviated from the Cabinet Contract terms and conditions thereby creating a Breach of the Contract by not adhering to the Terms and Conditions. All cabinet materials contracted for had been delivered to the job site and the delivery balance of \$ 55,588.94 was rightfully due at this time on April 30th, 2021. Additionally, the cabinetry except for the Master Coffee Bar, Upstairs Rec room bar and Kitchen/Guest Entry were installed and fully usable by the Highsmith's with the exception of a few cosmetic parts, decorative end panels, etc. that were on site and awaiting installation.

It was only when Design Gaps, Inc. questioned payment and their attorney stating there should be additional discounts off the two contracts and the Claimants' seeking a "blank check" status on possibly using another installer. Design Gaps, Inc. prudently sought a written agreement on how this may be accomplished. This reply by Design Gaps, Inc. was then responded to by Walden while representing the Claimants unjustifiably terminating access to Design Gaps, Inc. even after just stating they were extending "their" deadline for Design Gaps, Inc. to "begin" installing the refinished pieces May 31st, 2021. Regarding Walden's May 14th, 2021 1:59 PM, Design Gaps, Inc. had no cabinet parts for the Highsmith's project in their possession, they had been all delivered to the Highsmith's job site two weeks prior by April 30th, 2021..” Missing” or non-installed panels were stored at the house as witnessed by Glover when inspecting the house August 2nd, 2021 and detailed in an itemized list.

Had Walden, Shelter, LLC, Highsmith's or Bryan Reiss had actually inventoried the Design Gaps, Inc. cabinet parts on site onsite as of April 30th, 2021 and reviewed the cabinet drawings they would have realized that all of the necessary parts with the exception of 4 each approximately 24" floating shelves for the upper Rec. Room Bar to complete the project were onsite. However, it appears from the emails between the Claimants and Bryan Reiss of Distinctive Designs the new parts orders were in the works well before Design Gaps, Inc. was unjustly terminated.

Design Gaps, Inc. was unaware and uninformed the Claimants beginning January 19th, 2021, using Design Gaps, Inc. copyright protected designs sent by Jenny Butler via her ShelterCustomBuiltLiving.com email address and without written permission by Design Gaps, Inc. to Brian Reiss were already in the process with Brian Reiss of Distinctive Design ordering additional materials at a substantial cost to the project in lieu of using the correctly sized and matching parts on the job site.

Clearly stated on the front page of each Design Gaps, Inc. contract is the following statement:

All designs created remain the sole property of Design Gaps, Inc. and may not be reproduced in whole or in part without the written consent of Design Gaps, Inc.

Prior to Walden terminating Design Gaps, Inc. two cabinet contracts without cause or legal justification. Walden insisted Design Gaps, Inc. continue working and providing parts including the just redesigned Purse Display (redesigned because neither Jenny Butler nor Kacie Highsmith understood the original drawings they approved; however, their expert witness Brian Reiss clearly understood the original designs when asked in his deposition by the Respondent's representative.)

Upon Information and Belief, Walden as the Claimant's legal representative did intentionally misrepresent to Design Gaps, Inc. that delivering the cabinet parts and continuing to provide installation labor would mitigate potential damages and result in payment of the Main House Cabinet Contract when in fact and with full knowledge the Claimants were already working with a competitor, again using Design Gaps, Inc. copyrighted and protected designs to intentionally displace and defraud Design Gaps, Inc. of their ability to complete the project and collect all monies owed.

Ryan Butler, owner of Shelter, LLC during his deposition by the Respondent's representative stated Shelter, LLC did agree to abide by the Terms and Conditions on the reverse side of the Main House cabinet Contract and that Shelter, LLC was effectively a "Buyer" as represented as the following Terms and Conditions on the contract:

16. PROMOTIONAL USE. Any promotional use by others depicting the cabinetry and design will reference Design Gaps, Inc. as the supplier and designer for the said area. Buyer agrees

Design Gaps, Inc. may photograph use the areas of work or materials supplied by Design Gaps, Inc. in promotional material both printed and electronic format. Buyer's name shall remain confidential unless written permission is granted by the Buyer.

Shelter, LLC did in fact Breach the Main House Cabinet Contract between Design Gaps, Inc., Shelter, LLC and the Highsmith's by public publication of the Design Gaps, Inc. provided cabinet and designs for their own promotional use on Shelter, LLC social media site such as the website Houzz without the required reference as *Design Gaps, Inc. as the supplier and designer for the said area.*

As a direct and proximate result of the material breach of the contracts, Design Gaps, Inc. has been damaged in such amounts as may be proven at the arbitration of this matter in the form of actual damages of no less than \$ 67,301.17. Design Gaps, Inc. will also be entitled to recover reasonable attorney's or representation fees and costs under the terms of the contracts.

FRAUDULENT MISREPRESENTATION

Fraudulent Misrepresentation

Under contract law, a plaintiff can recover compensatory damages against a defendant when a court finds that the defendant has committed fraudulent misrepresentation. Courts will typically find that a defendant has committed fraudulent misrepresentation when six factors have been met:

- 1. a representation was made*
- 2. the representation was false*
- 3. that when made, the defendant knew that the representation was false or that the defendant made the statement recklessly without knowledge of its truth*

4. *that the fraudulent misrepresentation was made with the intention that the plaintiff rely on it*
5. *that the plaintiff did rely on the fraudulent misrepresentation*
6. *that the plaintiff suffered harm as a result of the fraudulent misrepresentation*

Mr. Walden in his email string stated:

- i) March 8, 2021 - *Please do not incur any additional costs on cabinets that you cannot guarantee will be installed by March 15th.*
- ii) March 10, 2021 - *Please understand that we will be moving forward with another cabinet contractor/installer starting the 16th IF you are not finished. It is to your benefit to have as much of the cabinets/materials as possible on site come the 16th so that you can mitigate your damages, as the more the second installer/contractor has to work with, the less it will cost us to finalize the project.*
- iii) March 17, 2021 - *In any event, we will agree on the final completion deadline of April 30th, and we will agree to pay the balance of \$47,301.17, if the project is completed to the Highsmith's satisfaction on or before April 30th.*
- iv) May 12, 2021 - *I am writing to inform you of a new issue that we discovered regarding the paint color of all cabinets that Design Gaps delivered to the project at the end of April (guest door system, purse cabinet, master coffee bar, etc.). Upon closer inspection, it is apparent that these cabinets are all the wrong color. We are writing to provide you notice and an opportunity to inspect and agree to replace these cabinets by May 17, 2021. If you are unable or unwilling to agree to replace these cabinets by May 17, 2021, we will be forced to reorder and seek remedy for the same at the end of the project. Although this is a short deadline, due to the delays already incurred and for reasons previously discussed, we need your response post haste. (Please note in*

Mr. Walden's deposition of Katie Schindler, the 3rd party finisher, stated she used the same white color matched paint on all white areas.)

v) May 13th, 2021 - *I spoke with my clients and we are not interested in your proposed walk away at this time. Please let us know if you intend to inspect and reorder the cabinets with the correct color by the Monday, May 17th, deadline.*

vi) May 14, 2021 7:45AM - *Perhaps, with our installer and your product, we can move expeditiously to a resolution. But, we will not be paying any additional money until after we determine the final project costs, at which point we can all sit down and see if we can come to an amicable resolution. Out of the \$100k full payment for the master closet (which included both fabrication and install), the Highsmiths have only received limited value to date. **So, naturally, even with your full production of cabinets for the master, there should be some refund there. Same goes for the remainder of the house.***

vii) May 14, 2021 10:28AM Glover's email response: *I am sure you and probably any arbitrator are aware of the same news we see everyday regarding the current job market and businesses closing due to inadequate help such as even closing the Seabrook Island dining facilities due to lack of help and we are not talking about skilled craftsman even. We are not immune to this same issue nor are our suppliers and contract finisher.*

If you are proposing a credit or deduction off our contracts then we must agree to any deduction in advance that may affect the contract and not at the end of the project. The installers the Highsmith's or Shelter propose to use must have their labor cost approved in advance by us if you wish for us to pay for it or use it to offset your financial liability to Design Gaps, Inc. Using installers who are not contracted by us or employed by us per our contract release us from any liability regarding their work, materials damaged or not installed properly. Just as the

Highsmith's do not want an open ended schedule nor can we allow an open ended charge to our contracts.

While I appreciate the deadlines to work towards and we do strive to do so they are somewhat arbitrary given the interdependencies at work and circumstances beyond our control.

We look forward to receiving a detailed quote from your proposed installers and any proposed financial offset before moving forward otherwise by default we both agree to the terms and amounts of the contracts we both accepted if none is received. Earlier we agreed to a final balance payment it now seems that is not the case. It would not make sense to continue to invest in this project making parts, finishing them, delivery , labor, etc... and at the end there is no payment. Obviously the parts and any finishing are your main objective as the other cabinet guy does not have the ability to replicate. If he did the \$ 67k would have been more than five times enough to complete this project's parts and labor as well as provide a hefty discount to the Highsmith's if they had accepted. We will need an agreed to payment to release the balance of the parts to be made or refinished as well as a release regarding the use of the other installers even though it is well covered in our contract you already agreed to.

I am still on for 3:00 pm Monday May 17th to inspect however we must have your installers proposal as well as assurances of the final balance payment, the trust issue works both ways.

*viii) May 14, 2021 1:59 PM Walden's Response Our offer to cure was an attempt to give you a chance to remedy all of the defects and quality concerns associated with your initial production and install of the cabinets. However, based on your email below, we cannot allow you to remove any cabinets from the house for refinishing or otherwise as it is clear we may not get them back, notwithstanding paying you almost \$270k for the two contracts. **You are not allowed back on this project.** When we pursue legal action, we will be in touch.*

The Fraudulent Misrepresentations are not the action or inaction of the failure of the Claimants to mitigate damages which will be part of the Respondents defenses but were the statements made in Mr. Walden's emails to continue working and delivering materials (without payment although payment was due upon delivery of the materials.) to mitigate possible damage claims by the Claimants' all the while knowing Bryan Reiss and Distinctive Designs had already provided the Claimant's drawings of the Master Closet using Design Gaps, Inc. copyrighted drawings. There was no point of Design Gaps, Inc. delivering all the documented parts necessary to finish the cabinetry as the Claimants had no intention of using them to "Mitigate Damages" thereby making a knowingly false statement you also know the other party is relying on. The other knowingly false statement was March 17th, 2021 stating Design Gaps, Inc. would be paid upon completion as well as the subsequent emails wanting as much done as possible.

The Claimant's obviously had no intention of paying Design Gaps, Inc. another penny as they were already moving forward with Bryan Reiss and Distinctive Designs. This became crystal clear when Glover responded to Walden's email on May 14th requesting to approve any installation estimate by a third-party installer which certainly was prudent and a reasonable statement. In fact, the Claimants already had estimates (not using the delivered Design Gaps parts but new parts from Distinctive) as early as March 16th, 2021 but chose not to share that information with Design Gaps, Inc.

There never was in any of the provided Discovery any estimates of labor only by Distinctive to install the Design Gaps, Inc. parts delivered to the Highsmiths, simply because it would not have been nearly as profitable for Bryan Reiss. For example, the Guest Bedroom entry adjacent to the Kitchen wine bar area, Design Gaps, Inc. contract amount was \$ 6,887.00 plus tax and installation would be \$ 8,257.51 All parts Design Gaps Parts were onsite to execute this. Distinctive's price for the same item \$ 21,775.00 an increase of 263%. The same egregious

pricing is throughout Distinctive Design's estimates, contracts, and invoices. There were no other cabinet company or Millwork company estimates. The only estimate was by Bryan Reiss and Distinctive Designs who in essence was provided a blank check supposedly at the expense of Design Gaps, Inc.

It bears repeating, **the fact there are no labor only cost estimates by Distinctive Designs to install the Design Gaps, Inc. onsite parts is proof the Claimants had no intention of mitigating damages therefore Mr. Walden's statements were knowingly false when he made them and Design Gaps, Inc. did in fact rely upon them and was damaged as such by.**

We present the following cites in support of the Fraudulent Misrepresentation claim.

[KAHN CONST. CO. v. SC NAT'L BK OF CHARLESTON, 271 S.E.2d 414, 275 S.C. 381 \(1980\).](#)

LITTLEJOHN, Justice (dissenting):

*I would hold that the special referees conclusion, agreed to by the circuit judge, erroneously held (1) that the misrepresentation was not material, and (2) that Kahn had no options or rights but to continue work under the contract. Insolvency of the promisor has been held to constitute a breach of contract. 17-A C.J.S. Contracts § 471. Kahn ~~388~~³⁸⁸ might have discontinued the contract and answered to Harborside, or considered the advisability of a mechanics' lien, or attempted some type of settlement negotiations with the developer. **Both fraudulent misrepresentation inducing one to forbear enforcement of some legal right**, 37 C.J.S. Fraud § 41 (d), and misrepresentation of the financial condition of a third party may constitute remediable fraud. 37 C.J.S. Fraud § 48(a).*

Instead of pursuing other options, Kahn relied on the misrepresentations and continued performance of work for which it could not collect, because Harborside was insolvent at that

time. It is apparent that SCN knew of Harborside's insolvency. Clearly, Kahn changed its position by receding from options it had the right to pursue. As a result, SCN benefited because completion of the contract by Kahn enhanced the value of the property over which SCN held a mortgage it subsequently foreclosed and bought in at the sale. **Certainly, there was no duty on Kahn's part to continue construction so as to enhance the financial status of SCN and other creditors.**

[Gilbert v. Mid-South Machinery Co., 227 S.E.2d 189, 267 S.C. 211 \(1976\).](#)

Generally, an action for fraud and deceit must be predicated on misstatements of fact rather than misstatements of opinion. 37 Am. Jur. (2d), *Fraud and Deceit*, § 45 (1968). "The distinction between fact and opinion is broadly indicated by the generalization that what was susceptible of exact knowledge when the statement was 221*221 made is usually considered to be a matter of fact." *Id.* § 46. We think that Coker's statement that the business was profitable constituted under the circumstances a misstatement of fact. Annot., 27 A.L.R. (2d) 14, § 2 (1953).

Although there was no direct proof that Coker knew about the existence of business records, we think the evidence raises the presumption of knowledge. As stated in [Aaron v. Hampton Motors, Inc., supra](#):

"[I]t is not necessary, in order to establish fraud to prove that the person making the allegedly false representation had actual knowledge of its falsity; if he makes it as of his personal knowledge, with reckless disregard of his lack of information as to its truth, his knowledge of its falsity is legally inferable."

TORTIOUS INTERFERENCE

Jenny Butler during her deposition taken by the Respondent's representative was asked "Why did you contact Bryan Reiss of Distinctive Designs on January 19th, 2021, via email?) She answered, "Because you were a month late." Contained in that email from jenny@sheltercustombuiltliving.com was an attachment containing Design Gaps, Inc. copyrighted protected designs for the Highsmith's project. Jenny Butler as stated by Ryan Butler in his deposition is not an owner of Shelter, LLC nor an employee. Therefore, Jenny Butler's role would then be one of an independent agent while also using Shelter, LLC email address in her communication with all parties concerned.

Jenny Butler and Shelter LLC knew at all relevant times a valid Master Closet contract existed between the Highsmith's and Design Gaps, Inc. Also, that neither she, Jenny Butler, nor Shelter, LLC were signatories for that contract specifically between the Highsmith's and Design Gaps, Inc. Shelter, LLC knew at all relevant times a valid Master Closet contract existed between the Highsmith's and Design Gaps, Inc. Also, that Shelter, LLC was not a signatory for that contract specifically between the Highsmith's and Design Gaps, Inc.

Bryan Reiss of Distinctive Designs, LLC with his knowledge of the cabinet industry and communications with Jenny Butler and Shelter knew at all relevant times a valid Master Closet and Main House Cabinet contract existed between the Highsmith's and Design Gaps, Inc. Also, that Distinctive Designs, LLC was not a signatory for that Master Closet contract specifically between the Highsmith's and Design Gaps, Inc.

By engaging Bryan Reiss and Distinctive Designs, LLC in her (Jenny Butler's) January 19th 2021 email and the transmittal and use of Design Gaps, Inc. Copyrighted Protected Designs, continued communications, emails, drawings, order, invoices, and contracts by Bryan Reiss and

Distinctive Designs, LLC; Jenny Butler, Shelter, LLC, Bryan Reiss, and Distinctive Designs, LLC did Tortiously Interfere with the Master Closet Contract between Design Gaps, Inc. and the Highsmith's, did so commit Civil Conspiracy in the act of doing so, Conversion of the Design Gaps, Inc. Copyrighted and Protected Designs, committed Unfair and Deceptive Trade Practices to encourage and persuade the Highsmith's to remove and replace the Master Closet cabinetry at almost twice the cost of the original contract in lieu of using the Design Gaps, Inc. parts onsite to mitigate damages, and a Quasi-Contract by use of the Design Gaps, Inc. Copyrighted Protected Designs for their own financial gain.

There were delays by all parties, any delays by Design Gaps, Inc. will be thoroughly explained and are covered under the terms and conditions within the executed Design Gaps, Inc. contracts and current law by the Respondents in the brief and at the hearing. I personally have yet to find legal justification for Torturous Interference when all of the elements have been met as stated below. The Claimants were not simply exploring their options as Mr. Walden would have us believe, they were already fully engaged with Distinctive Designs months before the Claimants without legal justification terminated the Design Gaps, Inc. contracts. There could not be a better defined and clearer example of a Torturous Interference claim than the following:

- 1) A contract existed between the Highsmiths and Design Gaps, Inc. at the time Distinctive Designs was brought into the project.
- 2) Shelter, LLC, Jenny Butler, Ryan Butler, Bryan Reiss and Distinctive Designs had knowledge of the existence of the contract.
- 3) Jenny Butler and Shelter sent Design Gaps, Inc. copyrighted drawings to Bryan Reiss and Distinctive Designs which he then did use without written consent. Jenny Butler, Ryan Butler, Shelter, LLC Bryan Reiss, and Distinctive Designs. Those parties then intentionally and

unjustifiably induced the Highsmiths to breach the existing contract between Design Gaps, Inc. and the Highsmiths.

4) Thereby causing the Highsmiths to then terminate Design Gaps, Inc.

5) Causing financial damage to Design Gaps, Inc.

We present the following cite in support of the Tortious Interference claim.

Williams v. Chittenden Trust Co., 484 A.2d 911, 145 Vt. 76 (1984).

Intent to interfere with a contractual relationship exists if "the actor acts for the primary purpose of interfering with the performance of the contract, and also if he [or she] desires to interfere, even though he [or she] acts for some other purpose in addition." Restatement (Second) of Torts § 766 comment j (1979). Intent also exists if the actor does not act with the desire to interfere with the contract but knows that interference will be substantially certain to occur as a result of his or her action. Id.

At the first meeting between the defendant and the owner in this case, the defendant was told that the plaintiff was the designer of the project. The defendant was also given copies of the plaintiff's drawings before the defendant began its own drawings. Thus, the evidence showed that, before it began its drawings, the defendant either knew or had reason to know of the existence of the contract between the plaintiff and the owner. Knowledge of the existence of the contract is a prerequisite to being found liable for interfering with that contract. See Restatement (Second) of Torts § 766 comment i ("To be subject to liability under the rule stated in this Section, the actor must have knowledge of the contract with which he [or she] is interfering [T]he actor does not induce or otherwise intentionally cause [the failure of another to perform under a contract] if he [or she] has no knowledge of the contract.") (emphasis added). Knowledge of the existence of the contract is not automatically the equivalent of intent to interfere with the contract.

However, from the evidence produced in this case, a reasonable jury could conclude that the defendant knew its actions would interfere with the plaintiff's contract, since by preparing detailed plans and drawings, the defendant was providing the same services as those the plaintiff was to provide under the contract. The jury could also find intent from the fact that the defendant knew the project was experiencing financial difficulties, and the defendant's services were being offered at a cheaper cost than the plaintiff's services were to be provided under the terms of the contract.

The plaintiff also presented sufficient evidence for the jury to find that the defendant "induced or otherwise caused" the owner not to perform under its contract with the plaintiff. Although it was the owner and not the defendant who initiated their first contact, the owner had not yet decided, at that time, to terminate its contract with the plaintiff. The defendant then offered to perform architectural services for the owner at a price substantially below that charged by the plaintiff, and at a time when the owner's project was suffering from serious financial difficulties. The inducement required for the tort of interference with a contract need not rise to the level of coercion, threats, or compulsion. See Restatement (Second) of Torts § 766 comments h, m. The jury may find that inducement exists if the defendant's acts caused the owner not to perform its contract with the plaintiff. [Mitchell v. Aldrich, supra](#) (Court found that evidence of defendant's offer to purchase goods at a higher price than that called for under the plaintiff's contract to purchase the goods was sufficient to send question of defendant's inducement of seller not to sell to plaintiff to the jury.)

Finally, we think the plaintiff presented sufficient evidence to convince the jury that the defendant's actions were "improper." The defendant argues that the contract between the owner and the plaintiff was terminable at will, and that, under § 768(1) of the Restatement (Second) of Torts,^[3] the defendant's interference with the contract was allowed competition and not improper

interference. This Court has held, however, that "[p]rotection is appropriate against unjustified interference with reasonable expectancies of profit though the contract is terminable at will or unenforceable against the promisor in an adversary proceeding." Mitchell v. Aldrich, supra, 122 Vt. at 23, 163 A.2d at 836. In addition, "there is no legal right ... knowingly [to] invade the contract relation of others solely to promote the intervenor's financial interest." *Id.* at 25, 163 A.2d at 837. On the basis of our statements in Mitchell v. Aldrich, we reject the defendant's argument.

The defendant also argues that its interference was not improper because it merely rendered "honest advice" to the owner, which, it argues, is allowed under § 772 of the Restatement (Second) of Torts.^[4] We think, however, that the plaintiff presented sufficient evidence for the jury to find that the defendant's actions went beyond mere "advice," and instead constituted architectural services. The defendant prepared sketches, plans and detailed drawings for the project. Therefore, we reject the defendant's argument.

COPYRIGHT INFRINGEMENT

First, not understanding where Mr. Walden is getting his Copyright Law Information from, but *Fair Use* is very limited when it comes to copyrighted material, i.e. teacher's use for education, etc. and non-existent when it comes to architectural drawings. Secondly, emails by their nature are also copyrighted upon their creation and their distribution or re-distribution is subject to the permission of the original creator/author. Separately, any attachment sent via email that is copyright protected would be treated with the same legal respect as handing a person the original copyrighted documents which brings us back to the executed contracts Design Gaps, Inc. is the sole owner of the designs and written permission is required. The moment Shelter, LLC, Jenny Butler, and or Ryan Butler sent the drawings to Bryan Reiss they were in violation of the Copyright

Act. When Bryan Reiss used the drawings to create virtually an identical floor plan and elevations with very minor tweaks such as open shelving above in lieu of closed door cabinetry. At that time Reiss also violated the Copyright Act. (If Reiss had accurate field dimensions as discussed in his deposition due the fact the Design Gaps system was furred off the wall an additional $\frac{3}{4}$ " the drawings would have been a perfect overlay.) Upon presentation to the Highsmiths and the Highsmith's termination of Design Gaps, Inc. the Torturous Interference, Civil Conspiracy, Conversion, Unfair and Deceptive Trade Practices all became actionable torts. **See Attached "Drawing" exhibit** comparing Design Gaps, Inc. original and copyrighted drawings in green overlaying the Copyright infringing Distinctive Designs Master Closet Drawings in black.

Contrary to Mr. Walden's concerns regarding 17 USC Code 412 the Respondents acknowledge even though the Cabinet drawings are registered that Statutory Damages and Attorney's fees may not be recoverable due to the registration date. However, our claim is under 504 (a) (1) the copyright owner's actual damages and any additional profits of the infringer, as provided by subsection (b) Actual Damages and Profits.—The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work. Given the combination of torts and UDTP as presented at the end of this memorandum the damages should be trebled if the arbitrator so judges.

§504. Remedies for infringement: Damages and profits

(a) In General.—Except as otherwise provided by this title, an infringer of copyright is liable for either—

(1) the copyright owner's actual damages and any additional profits of the infringer, as provided by subsection (b); or

(2) statutory damages, as provided by subsection (c).

*(b) Actual Damages and Profits.—The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the **infringer's gross revenue**, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.*

Separately, if a plaintiff can prove each of the aforementioned Civil Conspiracy **four elements**, they will succeed in their civil conspiracy claim. Any conspirator to the civil conspiracy may be held liable for the plaintiff's damages.

A conspirator is any person who agreed to the underlying unlawful scheme to commit a tort or tortious activity. Not every conspirator needs to have committed an act in furtherance of the conspiracy to be held liable for a civil conspiracy claim.

If the conspirator agreed to the scheme to commit a tort, but a co-conspirator committed the unlawful acts, the conspirator will be held liable for those acts as though they committed them personally.

After the conspiracy is formed, all members of the conspiracy are **jointly and severally liable** for acts of *co-conspirators done in furtherance of the conspiracy*.

To prove that a defendant is a co-conspirator, a plaintiff must show that the defendant had:

- Knowledge of the unlawful objective of the agreement (i.e. to commit a tort); and
- Intended to aid in achieving that objective

Therefore, upon succeeding on the Copyright Infringement claim and Conspiracy claim then Shelter, LLC and its officer(s) in addition to Bryan Reiss, Distinctive Designs LLC and Jenny Butler are jointly and severally liable for the damages as stated above.

We present the following cite in support of the Copyright Infringement claim:

[Johnson v. Jones, 149 F.3d 494 \(6th Cir. 1998\).](#)

*The plaintiff in Effects, on the other hand, had always intended that the footage would be incorporated into the movie, and distributed therewith. The dispute in that case arose not from the manner in which the copyrighted material was used, but from the amount paid for the material. Tosch argues that the same is true of the present case. We disagree. The current dispute concerns more than the lack of compensation paid to Johnson; it also involves the way in which Johnson's drawings were used. **It is one thing for an architect to allow the owner to hire someone else to build a house from the architect's plans. It is quite another for the architect to allow a competitor***

to come in and claim the architect's work as his own. Put simply, Johnson's drawings were used in a way he never intended-i.e., a rival architect claimed them as his own work and completed the Jones house without Johnson's involvement.

Moreover, Johnson did not deliver his drawings and site plan to Tosch. Rather, Tosch obtained some of the drawings from Jones, and others from the city inspector. Having acquired the drawings from other sources, Tosch cannot argue that his acquisition created an implied license. Indeed, the evidence demonstrates that Johnson was not even aware that his plans were being used until January 1994, when he stopped by the Jones house job site.

[MacMillan Co. v. IVOW CORP., 495 F. Supp. 1134 \(D. Vt. 1980\).](#)

*When the plans prepared by the plaintiff (Plaintiff's Exhibit 7, 11) are compared with those prepared by Crandell Associates (Plaintiff's Exhibit 12), it is apparent that drawing A-2 of the Crandell plan is a virtual reproduction of drawing number 4 in the MacMillan plans. See note 9, supra. The similarities in the arrangement and substance of the two drawings compel the conclusion that Crandell drawing A-2 was a copy. Moreover, the remaining Crandell drawings exhibit other similarities to the MacMillan plans in design and detail. **To establish a copyright infringement**^[13] **it is not necessary that the whole or even a large part of the MacMillan plans were copied. It is sufficient if a material and substantial part were copied even though it constitutes only a small part of the entire package of drawings.** [Nucor Corp. v. Tennessee Forging Steel Service, Inc., 476 F.2d 386, 391 \(8th Cir. 1973\); Nikanov v. Simon & Schuster, Inc., 246 F.2d 501, 504 \(2d Cir. 1957\).](#)*

Although the principals of I.V. O.W. did not personally copy the MacMillan drawings, the defendant is nonetheless liable for any infringement which may have occurred. Since common

law copyright infringement is wrongful, concepts of tort liability are relevant in fixing the scope of the remedy. The basic common law doctrine that one who knowingly participates in, or furthers a tortious act, is jointly and severally liable with the prime tortfeasor, is applicable to the present case. See [Screen Gems-Columbia Music, Inc. v. Mark Fi Records, Inc.](#), 256 F.Supp. 399, 403 (S.D.N.Y. 1966); W. Prosser, Law of Torts, § 46 at 291-92 (4th ed. 1971). Consequently, anyone "who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer."^[14] [Gershwin Publishing Corp. v. Columbia Artists Management, Inc.](#), 443 F.2d 1159, 1162 (2d Cir. 1971). See [Kalem Co. v. Harper Brothers](#), 222 U.S. 55, 63, 32 S.Ct. 20, 22, 56 L.Ed. 92 (1911); 18 Am. Jur.2d "Copyright and Literary Property" § 124 at 411.

I.V.O.W. could have had the addition to its shopping center designed and constructed without the use of the plaintiff's plans. Nonetheless, the defendant did allow Etbro Construction Company and Crandell Associates to use MacMillan's plans in preparing the final plans used in construction. The appropriation of the fruits of MacMillan's labor by the defendant, in order to facilitate the preparation of comparable plans without the expenditure of the time and effort required for independently arrived at results, is copyright infringement. [Orgel v. Clark Boardman Co.](#), 301 F.2d 119, 120 (2d Cir. 1962).

The facts that establish that I.V. O.W. infringed MacMillan's common law copyright also support liability on a conversion theory. The essence of an action of conversion in Vermont is that "[c]onversion consists in . . . appropriating property to one's own use and beneficial enjoyment, . . . exercising dominion over it to the exclusion of owner's rights" [Redd Distributing Co. v. Bruckner](#), 128 Vt. 635, 639, 270 A.2d 580, 583 (1970). See Restatement (Second) of Torts, § 228 (1965); 1 F. Harper & F. James, The Law of Torts, § 2.24 (1956).

*Under the circumstances of the delivery of the plans by Allan McAnney to I.V.O.W., the defendant was implicitly authorized to use MacMillan's plans only in connection with MacMillan's bid for the construction contract. **After MacMillan was rejected as the builder, the defendant's appropriation of the plans to its own use exceeded that authorization. Accordingly, I.V.O.W. is subject to liability for conversion to the plaintiff, whose right to the exclusive use of the plans was violated.***^[15]

The plans were prepared at considerable expense to the plaintiff. By the misappropriation, MacMillan has sustained damage. Under the particular circumstances of this case, the most equitable measure of the plaintiff's damage is the reasonable value to I.V.O.W. of its use of the MacMillan plans. See [Read v. Turner, 239 Cal. App.2d 504, 48 Cal.Rptr. 919, 40 A.L.R.3d 237, 245 \(1966\)](#); 18 Am.Jur.2d "Copyright and Literary Property" § 136 at 423-24.

An action for civil conspiracy may exist even though respondents committed no unlawful act and no unlawful means were used. [Charles v. Texas Co., supra](#); [Lee v. Chesterfield General Hospital, Inc., supra](#). Specifically, it is not necessary for a plaintiff asserting a civil conspiracy cause of action to allege an unlawful act in order to state a cause of action, although a civil conspiracy may be furthered by an unlawful act. I.e. Copyright Infringement.

CIVIL CONSPIRACY

The timeline beginning as early as January 19th, 2021, documents and evidence clearly show that there were all the elements of civil conspiracy as well as all the essential elements of Torturous Interference.

1) Bryan Reiss, Distinctive Designs, Jenny Butler, Ryan Butler, and Shelter, LLC are the parties.

2) Emails, drawings dated March 21st, 2020, and estimates from Reiss and Distinctive Designs solidify there was an agreement. Reiss's email reflects "padding" the estimate. Reiss's estimates increase while the scope of work remains the same.

3) Their intention was clear to replace Design Gaps, Inc. on the Highsmith project while Design Gaps, Inc. was still on the project and had two valid existing contracts.

4) Design Gaps, inc. has suffered considerable loses in non-payment from this project and loss of economic opportunity while defending an outrageous highly inflated damage claim and material breach of contract instigated by the Claimants as well as the Copyright Infringement.

The above well establishes Civil Conspiracy either pre-*Todd* or post -*Todd* rulings as cited below. We present the below cites in support of the Civil Conspiracy claims:

[LaMotte v. Punch Line of Columbia, Inc., 370 S.E.2d 711, 296 S.C. 66 \(1988\).](#)

An action for civil conspiracy may exist even though respondents committed no unlawful act and no unlawful means were used. [Charles v. Texas Co., supra](#); [Lee v. Chesterfield General Hospital, Inc., supra](#). Specifically, it is not necessary for a plaintiff asserting a civil conspiracy cause of action to allege an unlawful act in order to state a cause of action, although a civil conspiracy may be furthered by an unlawful act. [Lee v. Chesterfield General Hospital, Inc., 344 S.E. \(2d\) at 382](#). Thus, lawful acts may become actionable as a civil conspiracy when the "object is to ruin or damage the business of another." [Charles v. Texas, 199 S.C. 156, 170, 18 S.E. \(2d\) 719, 724 \(1942\)](#) (quoting 11 Am. Jur., at 578). Appellants allege that respondents combined forces to injure them by preventing the opening of their restaurant, and thereby caused appellants to suffer special damages. We find appellants' assertions^[1] to be disputable issues of fact and conclude that the circuit court erred in granting summary judgment for respondents on appellants' conspiracy cause of action. Accordingly, we reverse the circuit court's ruling.

[Paradis v. CHARLESTON COUNTY SCHOOL, 861 S.E.2d 774, 433 S.C. 562 \(2021\).](#)

JUSTICE FEW:

*As an independent tort, however, the undefined theory of civil conspiracy leaves courts and juries free to determine civil liability—both of the alleged tortfeasor and the supposed conspirator—not based on the law, but by using the individual judge or juror's sense of fairness or responsibility. Imagine in a fraud case that the dispute arose out of business competition between the plaintiff and the defendant. The defendant intentionally made a false statement to the plaintiff for the purpose of gaining competitive advantage. Imagine further the plaintiff's fraud cause of action fails because the court or the jury finds—applying the law—the plaintiff had no right to rely on 580*580 the false statements. The defendant's conduct might have been unfair or irresponsible, but the plaintiff loses on the fraud claim—rightfully—because the law does not support the claim.*

If, however, the plaintiff's lawyer thought to add a cause of action for civil conspiracy, the plaintiff might nevertheless prevail because the independent tort of civil conspiracy has no specific requirements, elements, or standards to guide the court and jury. Civil conspiracy—as the majority "return[s]... to our historical roots"—permits the court and jury to impose liability for lawful, non-tortious conduct.

The essential principle Todd intended to address was the need to plead an overt act in furtherance of the agreement, not special damages. As a result, we overrule Todd and cases relying on Todd or other precedent, such as Lee, to the extent they impose or appear to impose a requirement of pleading (and proving) special damages. South Carolina's position in this regard was an outlier, as our research indicates South Carolina was the only state to require the pleading of special damages.

*In light of our decision today, we are returning to our long-standing precedent pre-Todd and for clarification specifically state a plaintiff asserting a civil conspiracy claim must establish (1) the combination or agreement of two or more persons, (2) to commit an unlawful act or a lawful act by unlawful means, (3) together with the commission of an overt act in furtherance of the agreement, and (4) damages proximately resulting to the plaintiff.^[9] See [Charles II, 199 S.C. at 575*575 176, 18 S.E.2d at 727; Charles I, 192 S.C. at 101, 5 S.E.2d at 472](#); see also 16 Am. Jur. 2d Conspiracy § 53 (2020) (enumerating the prevailing elements of a claim for civil conspiracy recognized in most jurisdictions); 15A C.J.S. Conspiracy § 4 (2012) (same). By doing so, we are returning not only to our historical roots, but also to the traditional elements of a civil conspiracy claim as they have been similarly defined by the majority of jurisdiction*

If a plaintiff can prove each of the aforementioned **four elements**, they will succeed in their civil conspiracy claim. Any conspirator to the civil conspiracy may be held liable for the plaintiff's damages.

A conspirator is any person who agreed to the underlying unlawful scheme to commit a tort or tortious activity. Not every conspirator needs to have committed an act in furtherance of the conspiracy to be held liable for a civil conspiracy claim.

If the conspirator agreed to the scheme to commit a tort, but a co-conspirator committed the unlawful acts, the conspirator will be held liable for those acts as though they committed them personally.

After the conspiracy is formed, all members of the conspiracy are jointly and severally liable for acts of *co-conspirators done in furtherance of the conspiracy*.

To prove that a defendant is a co-conspirator, a plaintiff must show that the defendant had:

- o Knowledge of the unlawful objective of the agreement (i.e. to commit a tort); and
- o Intended to aid in achieving that objective

A conspirator and co-conspirator may be both or individually liable for the plaintiff's injuries. This is true, even if one of the conspirators did not commit the act that hurt the plaintiff.

This means a co-conspirator can be held liable for injuries inflicted on a plaintiff even if the co-conspirator *did not actively engage in the acts which caused the injury*.

Like most other torts, the tortious or wrongful acts taken *as part of the conspiracy must have proximately caused the damage suffered by the plaintiff*. Another similarity to other torts is that legal relief for a civil conspiracy cause of action comes in the form of **monetary damages**.

If a defendant is found to be liable for civil conspiracy, then they may be required to pay for all foreseeable injuries to the plaintiff, including punitive damages. Punitive damages are not commonly awarded, and usually only come into play as punishment for a defendant that acted with egregious or malicious behavior when committing an unlawful act. Punitive damages are also awarded to deter defendants from engaging in unlawful conduct.

Even if a plaintiff fails to prove the elements of their civil conspiracy claim, they may still be entitled to damages as a result of the underlying tort committed against them. For instance, say a plaintiff fails to prove the defendants had an agreement to defraud the plaintiff. If the plaintiff can still prove all the elements of fraud existed as applied to at least one defendant, the plaintiff can still recover damages for the fraud claim.

CONVERSION

If the Copyright Infringement is found to be actionable which we believe it will be based on the actual evidence, then it stands that the Conversion claim is also actionable as it goes hand in hand with the Infringer converting the Copyrighted Drawings to their own use and profiting from that.

Again, citing MacMillan in support of the Conversion Claim

[MacMillan Co. v. IVOW CORP.](#), 495 F. Supp. 1134 (D. Vt. 1980).

The facts that establish that I.V. O.W. infringed MacMillan's common law copyright also support liability on a conversion theory. The essence of an action of conversion in Vermont is that "[c]onversion consists in . . . appropriating property to one's own use and beneficial enjoyment, . . . exercising dominion over it to the exclusion of owner's rights . . ." [Redd Distributing Co. v. Bruckner](#), 128 Vt. 635, 639, 270 A.2d 580, 583 (1970). See Restatement (Second) of Torts, § 228 (1965); 1 F. Harper & F. James, *The Law of Torts*, § 2.24 (1956).

QUASI-CONTRACT

If the Copyright Infringement is found to be actionable which we believe it will be based on the actual evidence, then it stands that the Quasi-Contract claim is also actionable as it goes hand in hand with the Infringer converting the Copyrighted Drawings to their own use and profiting from that.

[Forest Park Pictures v. Universal Television](#), 683 F.3d 424 (2d Cir. 2012).

Theories of implied-in-law contract, quasi-contract, or unjust enrichment differ significantly from breach of contract because the plaintiff need not allege the existence of an actual agreement

between the parties. See 1-1 Corbin on Contracts § 1.20 ("A contract `implied in law' is a fictitious contract.... A contract `implied in fact' is a true contract that arises from the tacit agreement of the parties."). ***Under these quasi-contractual theories, the plaintiff need only prove that the defendant was unjustly enriched through the use of her idea or work. Such a claim is not materially different from a claim for copyright infringement that requires a plaintiff to prove that the defendant used, reproduced, copied, or displayed a copyrighted work.*** See [*Briarpatch*, 373 F.3d at 306](#) (finding no extra element in an unjust enrichment claim); see also [*Wrench*, 256 F.3d at 459](#) (noting that there is "a crucial difference" between implied-in-fact contracts and implied-in-law contracts because the latter "depend[] on nothing more than the unauthorized use of the work"); 4 Nimmer §§ 19D.03[B][6], [7] (unjust enrichment and quasi-contract preempted).

UNFAIR AND DECEPTIVE TRADE PRACTICES

Copyright Infringement is a serious business and trade offence. Bryan Reiss, Distinctive Designs LLC, Ryan Butler, Jenny Butler, and Shelter, LLC given they use and handle architectural drawings daily should know better than to transmit or copy another's original work without permission. Because they are in the business and trade their actions fall squarely under the South Carolina Code of Laws 39-5-10 (b) "*Trade*" and "*commerce*" shall include advertising, offering for sale, sale or distribution of any services and property, tangible or intangible, real personal or mixed, and any other article, commodity or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State. To not apply the South Carolina Unfair Trade Practices Act would allow the offender to go forward continuing to use other's work for their own benefit and personal gain with no repercussion or lesson learned.

This the 18th day of April 2022

David A. Glover
4810 Ashley Park Lane
Suite G
(704) 604-4558 primary
(877) 337-1020 fax
david.glover@DesignGaps.com

By: David A. Glover

David A. Glover
Representative for the Respondents

AMERICAN ARBITRATION ASSOCIATION

AAA Case No. 01-21-0004-8211

Shelter, LLC; Dr. Jason Highsmith, Kacie
Highsmith,

Claimants,

vs.

Design Gaps, Inc.; David Glover; and, Eva
Glover,

Respondents.

**INTERIM ORDER ON MOTION TO
JOIN ADDITIONAL THIRD-PARTY
RESPONDENTS AND MOTION TO
AMEND RESPONDENTS'
COUNTERCLAIM**

This matter is before me upon the Motions of Design Gaps, Inc. (“Design Gaps”) and David Glover and Eva Glover (“the Glovers”) to add third-party respondents and amend its counterclaim to assert additional claims.

MOTION TO JOIN THIRD-PARTY RESPONDENTS

Design Gaps seeks to add as third-party respondents Jenny Butler in her individual capacity (“Butler”), Bryan Reiss in his individual capacity (“Reiss”), and Distinctive Designs, LLC (“Distinctive Designs”). None of these proposed parties are a part of any contract containing a mandatory arbitration agreement with the Claimants or others now parties to this arbitration. Neither Butler, Reiss, nor Distinctive Designs have any contract with Design Gap which calls for any dispute with them to be arbitrated. An arbitrator’s sole authority comes from a binding arbitration agreement with parties to such an agreement. Further, neither Shelter, LLC nor the Highsmiths consent to the joinder of these parties to this arbitration proceeding. Therefore, I do not have the authority to order arbitration with the parties who have not agreed to arbitration. Further, neither Shelter, LLC nor the Highsmiths agree to arbitrate with those that they do not have a binding arbitration agreement. Therefore, this Motion of the Respondents is denied.

MOTION TO AMEND COUNTERCLAIM

Respondent seeks to amend its Counterclaim to include claims for the following:

- i. Negligence
- ii. Material Breach of Contract
- iii. Fraudulent Misrepresentation
- iv. Failure to Mitigate Damages
- v. Tortious Interference
- vi. Civil Conspiracy
- vii. Unfair and Deceptive Trade Practices
- viii. Violation of Copyright Act
- ix. Conversion

Arbitration is appropriate to this dispute as is provided in § 17 of the Agreement. It provides in pertinent part:

ARBITRATION. All disputes arising out of or in connection with this Agreement or any transaction hereunder shall be finally settled under the Commercial Arbitration Rules of the American Arbitration Association then in effect by an arbitrator appointed in accordance with such Rules.

Here, the Claimants agree that the arbitrator has jurisdiction over the claims arising under the contract. By submitting the issue of arbitrability to the arbitrator, Claimants admit the arbitrator has jurisdiction over the questions of arbitrability of Respondents' claims. The arbitration agreement in this case is not restrictive. It provides that "[a]ll disputes arising out of or in connection with this Agreement or any transaction hereunder shall be finally settled under Commercial Arbitration Rules...". Since the Agreement requires arbitration of all disputes arising out of the contract or transactions thereunder, I find that the Agreement requires that any claims arising out of or in connection with the Agreement or any transaction hereunder shall be subject to arbitration. There is clearly a significant relationship between the counterclaims and the contract to require that these claims be decided in arbitration. I therefore find that Respondents' claims for the following are properly arbitrable:

- i. Negligence

- ii. Material Breach of Contract
- iii. Fraudulent Misrepresentation
- iv. Failure to Mitigate Damages
- v. Tortious Interference
- vi. Civil Conspiracy
- vii. Unfair and Deceptive Trade Practices
- viii. Violation of Copyright Act
- ix. Conversion.

The very purpose of an arbitration claims is to ensure all claims arising under a contract are resolved in the arbitration forum. Indeed,

“the heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration.” *Peoples Sec. Life Ins. Co. v. Monumental Life In. Co.*, 867 F.2d 809, 812 (4th Cir. 1989). Thus, we may not deny a party’s request to arbitrate an issue “unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.” *Warrior & Gulf Navigation Co.*, 363 U.S. at 582-83, 80 S.Ct. at 1353. *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 92 (4th Cir. 1996).

An arbitration clause is not limited to the adjudication of breach of contract claims alone, and an arbitration clause need not specifically identify each and every cause of action that may arise in any given dispute.

The broad description of matters to be arbitrated requires that the associated claims now asserted are subject to the arbitration agreement.

This Interim Order shall not be construed as an opinion on the merits of the claims but only to address the issue of arbitrability. *See* 9 U.S.C. § 2; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 626-28 (1985); *see also Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273-77 (1995).

THEREFORE, the amended claims shall be allowed and are deemed to be arbitrable under the arbitration agreement between the parties.

IT IS SO ORDERED.

April 20, 2022
Greenville, South Carolina


s/Thomas H. Coker, Jr.
Thomas H. Coker, Jr., Arbitrator
HAYNSWORTH SINKLER BOYD, P.A.
P.O. Box 2048 (29602)
ONE North Main, 2nd Floor
Greenville, SC 29601-2772
Telephone: 864.240.3200
Facsimile: 864.240.3300

Attorneys for Condemnor

From: [Walden, Andrew](#)
To: [David Glover](#); [Tom Coker](#); [AAA Asheen Patel](#); [Eva Glover](#)
Bcc: {F13828630}.Womble@DCHWCSE01.WCSR.COM
Subject: RE: Respondents Closing Arguments with Damages Request, Linked Exhibits, and Respondents Arbitration Order
Date: Monday, June 20, 2022 6:33:36 AM
Attachments: [image230809.PNG](#)
[image44db99.PNG](#)
[imagec66da7.PNG](#)
[image9d3802.PNG](#)

Mr. Coker,

From my brief review of Mr. Glover's 82 page submission, I note various references to exhibits and excerpts from depositions that are not in evidence. Claimants request that you only consider the evidence that was admitted at the hearing.

Best,

Andrew

R. Andrew Walden

Associate
Womble Bond Dickinson (US) LLP

d: 843-720-4634

m: 803-983-4669

e: Andrew.Walden@wbd-us.com

5 Exchange Street

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From: David Glover <david.glover@designgaps.com>

Sent: Friday, June 17, 2022 11:46 PM

To: Tom Coker <tcoker@hsblawfirm.com>; Walden, Andrew <Andrew.Walden@wbd-us.com>; AAA Asheen Patel <AsheenPatel@adr.org>; Eva Glover <eva.glover@designgaps.com>

Subject: Fwd: Respondents Closing Arguments with Damages Request, Linked Exhibits, and Respondents Arbitration Order

External (david.glover@designgaps.com)

[Report This Email](#) [FAQ](#)

Good evening,

I'm having to forward my information from my iPhone due to power outage in our area. I apologize in advance for the lengthy closing arguments however it should be well organized with linked exhibits.

I will cross check tomorrow when we have power to verify all exhibits were indeed submitted during the hearing if any were not I will note to all to disregard any that may have been included.

The first closing argument and order I have ever have written. Is contained below in the DropBox link.

Have a great weekend!

David

David A. Glover
President
Direct (704) 302-1334

Charlotte's SouthPark location:
4810 Ashley Park Lane
Suite G
Charlotte, NC 28210
Showroom (704) 965-2400

Charleston Location:
1804 Crowne Commons Way
Suite D-1
Johns Island, SC 29455
Showroom (843) 408-7600

Design Oriented Licensed General Contractor for NC and SC
www.DesignGaps.com

Exclusive Representative in NC and SC Downsview Kitchens
Fine Cabinetry for throughout the home.
www.DownsviewKitchens.com

Begin forwarded message:

From: David Glover <david.glover@designngaps.com>

Date: June 17, 2022 at 11:04:15 PM EDT

To: David Glover <david.glover@designngaps.com>

Cc: Eva Glover <eva.glover@designngaps.com>

Subject: Respondents Closing Arguments with Damages Request, Linked Exhibits, and Respondents Arbitration Order

Good evening,

The Respondents lost power around 9:30pm on June 17th. Fortunately, all the above information is on our Dropbox except for the Respondents Arbitration Costs and Expenses. We will send in the Cost and Expense report hopefully in the morning once we have power back on since I was working off my desktop.

This is our Drop Box Link to the Respondents Closing Arguments folder containing the above items. Mr. Coker should receive before 10:30 Monday June 20th a tabbed binder missing Respondents Ex 58 which is contained in the Drop Box folder.

<https://www.dropbox.com/sh/x9h2lt0x9sc2tve/AADf-F-1iwUrs2w7pKyxcNVHa?dl=0>

Have a good evening,

David

ProSe representative for the Respondents

David A. Glover

President

Direct (704) 302-1334

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**AMERICAN ARBITRATION ASSOCIATION
COMMERCIAL ARBITRATION TRIBUNAL**

Shelter, LLC, Dr. Jason Highsmith,
and Kacie Highsmith,

Claimants,

v.

Design Gaps, Inc., Eva Glover, and
David Glover,

Respondents.

AAA Case # 01-21-0004-8211

INTERIM AWARD OF ARBITRATOR

I, Thomas H. Coker Jr., THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into between the above-name parties, having been duly sworn, and having duly heard the proofs and allegations of the Parties, do hereby issue this INTERIM AWARD, as follows:

This dispute arises from the renovation of 376 Ralston Creek Street, Daniel Island, South Carolina (“Residence”). In August and September 2020, under two contracts, Claimants hired Respondent Design Gaps, Inc. (“Design Gaps”) to design and to install various cabinet systems and the master closets at the Residence. The first contract, dated August 18, 2020, was for \$234,602.35 for cabinets in the kitchen, pantry, office, mudroom, various vanities, laundry and game room bar. Respondents’ Exhibit 5. The second contract was for \$97,634.59, was dated August 18, 2020, and signed September 6, 2020, for his-and-her closets. The Claimants’ expressed goal for the time of completion of the project was approximately four to eight weeks from contract signing. Claimants’ Exhibit 4. At the time of contracting Respondents indicated that this time frame was achievable. When the project was not completed by May 2021, Claimants terminated both Design Gaps contracts on May 14, 2021. The Claimants then hired Distinctive Design, LLC

(“Distinctive Design”) to finish the project. Claimants filed a demand for arbitration for breach of contract, promissory estoppel, fraud, and piercing the corporate veil. Respondent Design Gaps counterclaimed for negligence, breach of contract, fraudulent misrepresentation, failure to mitigate damages, tortious interference, civil conspiracy, conversion, unfair and deceptive trade practices, quasi-contract, and violation of the copyright act.

The merits hearing was conducted on May 26, 27 and June 2, 2022. Claimants were represented by R. Andrew Walden of Womble Bond Dickinson (US) LLP and Respondents were represented *pro se*¹ by David Glover. Claimants called as witnesses Dr. Jason Highsmith, Kacie Highsmith, Ryan Butler, Jenny Butler, Peter Zahorsky, Bryan Reiss, CMKBD, and Evan Heilig. Claimants also entered into evidence the *de bene esse* deposition transcript of Katie Schindler and called Patti Wilbourne as a rebuttal witness. Respondents called David Glover as their only witness. Both sides submitted substantial documentation to support their respective positions. At the conclusion of that testimony, as arbitrator, I asked each side if they had an adequate opportunity to present in full the evidence which they thought was relevant and important for me to consider in rendering my Award. Each side advised that they had adequate opportunity to present their case with all relevant testimony and exhibits. Therefore, the merits hearing was closed and the parties afforded an opportunity to present post-hearing briefs and proposed orders. Each side provided a proposed order on June 17, 2022 and the hearing was closed by the American Arbitration

¹ Prior to arbitration, David Glover obtained an opinion from Mr. John Nichols of the South Carolina Supreme Court’s Office of Disciplinary Counsel (“ODC”) regarding his representation of Respondents. Mr. Nichols noted that the ODC would not construe Mr. Glover’s representation of Respondents as the unauthorized practice of law because the arbitration is a non-judicial hearing between private parties. I also inquired with the South Carolina Bar and they declined to issue an opinion on the matter. Claimants did not object and therefore Mr. Glover was allowed to continue with Respondents’ representation.

Association on June 20, 2022. I have reviewed the testimony and exhibits presented by each party.

I now make this Interim Award based upon that evidence.

During the construction process, Design Gaps communicated about completion dates for the installation of the cabinets at the project. These communications started in June and July 2020.

It offered the following completion dates to Shelter LLC (“Shelter”) and the Highsmiths:

July 12, 2020	Design Gaps advised: Cabinets on site in six weeks. Lacquered panels a few weeks late Claimants’ Exhibit 5
August 2020	Design Gaps said cabinet delivery October 1, 2020 and October 5, 2020. Claimants’ Exhibits 7-8
August 18, 2020	Cabinet contract executed. Claimants’ Exhibit 9
August 18, 2020	Closet contract lead time eight weeks Claimants’ Exhibit 13
September 4, 2020	Master closets 5 weeks lead time. Claimants’ Exhibit 11
October 18, 2020	Design Gaps begins delivery. Delivery not complete as of December 2020. Testimony and Claimants’ Exhibits 16-25
January 21, 2021	Design Gaps estimates completion within 32.2 man-days. Claimants’ Exhibit 27
January 22, 2021	Design Gaps provides completion date of March 1, 2021. Claimants’ Exhibit 28
March 2, 2021	Owners extend project completion date to March 15, 2021. Claimants’ Exhibit 32

March 16, 2021 Design Gaps commits to completion by end of April 2021.
Claimants' Exhibit 32

May 15, 2021 Design Gaps work not completed.

May 15, 2021 Design Gaps contracts terminated.

At the time of termination, Claimants had paid Design Gaps \$265,236.94 on the two contracts. This left a contract balance on the two contracts of \$67,892.28. In order to complete the project, the Highsmiths retained Distinctive Design to provide completion services. *See* Claimants' Exhibit 36. The price for completion was set at \$260,736.00. During Distinctive Design's work, its contract price was escalated to \$274,647.00. It was paid this amount. Distinctive Design's representative testified that this price included upgraded cabinet quality from that provided in the Design Gaps contract and that the total charges should not be assigned to Design Gaps. Claimants also paid \$41,256.75 for refinishing the cabinets. Therefore, the total paid by Claimants to complete the cabinetry was \$564,122.09 spent as follows.

Paid to Design Gaps	\$265,236.94
Paid to Distinctive Design	\$274,647.00
Less betterment associated with Premier Custom Cabinetry	(\$17,018.60)
Paid to Evan Heilig for refinishing	\$41,256.75
Total paid to complete Design Gaps contract	<u>\$564,122.09</u>
Less Design Gaps contract	<u>\$332,236.94</u>
Claimants' cost in excess of Design Gaps contract	<u>\$231,885.15</u>

The most significant increase in Claimants' cost was associated with the cabinets for the his-and-hers closets. The price with Design Gaps for that work was \$97,634.59. On May 25, 2021, Distinctive Design's proposed price to complete the his-and-her master dressing closets was \$61,543.00. Respondents' Exhibit 47. On June 2, 2021, the Distinctive Design price increased to \$182,828.00 using Premier Custom-Built Cabinets. Respondents' Exhibit 48. Distinctive Design had obviously examined the installation by Design Gaps to provide the May 25 price. Claimants recognize that the Premier Custom-Built Cabinetry was betterment and allowed \$17,018.60. Examining Distinctive Design pricing, I find that the Claimants' cost attributable to Design Gaps should be the original repair and completion cost of \$61,643.00. It therefore appears that this should be the appropriate cost attributed to Design Gaps. I, therefore, find that the cost to be charged to Design Gaps to be \$274,647.00, less \$121,763.00 for a balance of \$152,884.00. This accounts for the upgraded costs.

While the contracts did not contain specified completion dates, Design Gaps did provide a series of completion dates, which it did not meet. During the hearing, Design Gaps set out a number of reasons for the delays which it argued were beyond its control. However, it continued to provide unreliable completion dates to the Claimants. The repeated failure to meet the many dates promised for completion justifies the termination of the contracts.

Claimants also claim that they lost the use of their home for the month of December 2020. The evidence presented at the hearing does not establish that the cost of the loss of use of the house was caused by the failure of Design Gaps to complete its work. The photographs and testimony shows that the house was not ready to be occupied in December 2020. Therefore, I deny this claim.

I therefore find that Claimants are entitled to recover \$152,884.00 from Respondents.

I also find that Respondents are entitled to take nothing under their counterclaims. First, Respondents conceded they had not completed its work by May 2021. I find that this arbitration involves contract claims. The parties rights are all set out in the contracts. Design Gaps has received an offset against Claimants' completion costs for its contract balance. That is all it is entitled to receive.

Respondents did not prove any false or reckless representation made by Claimants which caused it any damage; therefore, it is not entitled to anything on these claims. Respondents did not establish any tortious interference in its contract by any party. It further did not establish that there was a civil conspiracy between and among the Claimants, Distinctive Design or any other party. While Claimants did meet with Distinctive Design as early as January 2021 to review Respondents' performance, the Claimants were advised by Distinctive Design to continue working with Design Gaps to achieve completion. When completion had not been accomplished by May 2021, only then did Claimants terminate the contract. Respondents did not establish that Claimants' conduct was unfair or deceptive and therefore cannot sustain an unfair trade practices act claim. Respondents did not establish that the conduct it complains of was repetitive or in violation of the public interest. Finally, since the parties entered a written contract, there cannot be a separate "quasi" contract recovery.

Respondents gave to the Claimants their drawings for the cabinets. Obviously, this was for Claimants' review, approval, and use during the construction process. Claimants were free to use the drawings to measure the compliance of Design Gaps with these drawings and its obligation to install the designed cabinets in accordance with its contractual obligation. Respondents failed to enter into evidence a valid copyright registration; however, even if they had, Claimants certainly established fair use of the design work, especially considering that Shelter did not profit from the

design. The sharing of a pdf of the design did not materially impair the marketability of the design. Respondents failed to prove that Claimants or anyone else converted its designs for this project. Bryan Reiss of Distinctive Design confirmed that he did not use Design Gaps' designs for the cabinets. I am convinced by Reiss's testimony and the exhibits provided that any similarity in the designs is due to the limitations of the space and the client's desired layout. Therefore, there has been no violation of any copyright which Respondent may have had.

The arbitration provisions in the contracts expressly provide that the "prevailing party ... shall recover its costs of the arbitration and reasonable attorneys' fees from the other party." "Prevailing party" is not defined. Now that this interim award is entered, the parties are directed to advise me as to which party is deemed to have prevailed and set out a proposed amount for reasonable attorneys' fees and arbitration costs for the prevailing party. The parties are directed to provide this information within 15 days of this order.

Award

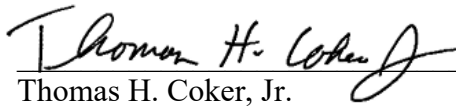
Claimants are entitled to recover \$152,884.00 for all claims asserted in this proceeding² and the prevailing party shall be entitled to allowable fees and costs to be set out in a Final Award.

AND IT IS SO ORDERED.

This Award shall remain in full force and effect until such time as a final Award is rendered.

I, Thomas H. Coker, Jr., do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.

Date: July 19, 2022


Thomas H. Coker, Jr.

² I hold in abeyance the piercing the veil claim because Design Gaps represented its ability to pay any award at the hearing. Additionally, Claimants did not perform discovery on this cause of action prior to the hearing based on a mutual agreement between the parties to only pursue competing breach of contract claims.

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
CHARLESTON, SOUTH CAROLINA

SHELTER, LLC, DR. JASON
HIGHSMITH, KACIE HIGHSMITH
Claimants,
vs.
DESIGN GAPS, INC., DAVID GLOVER,
EVA GLOVER
Respondents,

AAA Case No.01-21-0004-8211
AMERICAN ARBITRATION ASSOCIATION

BINDING COMMERCIAL ARBITRATION
RESPONDENTS MOTION TO
RECONSIDER AND REQUEST FOR
REASONED AWARD

The Respondents in the above matter are in receipt of the Arbitrator, Mr. Thomas H Coker Jr.'s Interim Award and have the following comments.

At the start of this Arbitration the Respondents were placed in the unique and uncomfortable position of having to defend what they knew to be their right to represent themselves and corporation with the appointed Arbitrator, Mr. Coker. Under the American Arbitration Association rules for Design Gaps, Inc. president, David A. Glover, a non-attorney stated to be prose on behalf of the Respondents, to represent all the Respondent parties one of which a North Carolina Corporation. The Respondents should not have been placed in this position to defend their right and the AAA, or ADR, and Mr. Coker as one of the Arbitrators listed on the ADR list should have known knowledge of who or who cannot represent parties in an Arbitration especially in the states or areas they list themselves as an Arbitrator. All the case cites Mr. Coker presented to illustrate anyone representing a corporation or separate entity was in a South Carolina court that clearly was a non-attorney in fact practicing law which is against the laws of South Carolina. After multiple rounds of the Respondents representative acknowledging those cases cited by Mr. Coker were of a person practicing law as a non-attorney however, Respondents also pointed out none were Arbitration hearings. It was only after the Respondents reached out to Mr. John Nichols, Disciplinary Counsel at South Carolina Supreme Court Office of Disciplinary Counsel and his

favorable statement that Arbitration is a private matter and not judicial that Mr. Coker conceded to allow the Respondents to continue Prose. Given the pushback the Respondents encountered to represent themselves it is evident Mr. Coker had not been an Arbitrator for a prose non-attorney representation of a corporation. As such the Respondents believe there to be bias on behalf of Mr. Coker against a non-attorney representation of a corporation 1) because the Respondents found a higher authority that provided confirmation, 2) the fact none of the Respondents defenses were addressed in the Interim Reasoned Award by Mr. Coker and all Counterclaims dismissed without reasoning given the supporting argument and cases. Mr. Coker was always polite and professional acting at all times we communicated and during the hearing. With the exception of during the Respondents presentation was texting or emailing on his phone as we understood as an attorney he was in the middle of his own cases we felt our presentation was critical and did not see the same during the Claimant Attorney presentation. For this reason, the Respondents did provide a lengthy summation and chronological timeline of the case as his notes may not have reflected what the Respondents presented. He did allow all evidence and testimony to be submitted from both parties, historically Arbitrators allow most all testimony and evidence to avoid the appearance of bias. However, allowing it and not giving the Prose representation the same due diligence, weight and equal scrutiny as afforded the opposing attorney would be considered bias. It is the Respondents belief the information, that the fact legal cites and supporting claims or arguments contained in the Respondents Closing Arguments and Damages Request, and Memorandum in Support of Counterclaims were submitted, does not guarantee it was reviewed or considered. Mr. Coker during the closing of the Hearing commented to the effect *"If you want to make sure the judge doesn't read your brief, make it long"*. The Respondents took this to be in jest while the Claimant's counsel chuckled and nodded in agreement, however it appears to ring true as the Respondents Defenses were not addressed only the Claimant's claim of project delay. That said the Interim Award by Mr.

Coker leaves the Respondents to believe there was no validity or weight given to their Defenses or Counterclaims based on the lack of reasoning in the Interim Award. It appears Mr. Coker relied only on his handwritten notes and not taking into consideration detailed summation and supporting case law by the Respondents. The Respondents provided substantial argument and legal cites to support each Defense and Counterclaims. The respondents believe Coker was biased against a non-attorney providing corporate representation which was reflected in his award statements by complete dismissal of our counterclaims and more importantly Respondents itemized Defenses without justification or comment. The Defenses and Counterclaims were well covered in the Respondents hearing summation and Memorandum with decided case law to the appellant level.

The Claimants' expressed goal for the time of completion of the project was approximately four to eight weeks from contract signing. Claimants' Exhibit 4. At the time of contracting Respondents indicated that this time frame was achievable.

The most significant increase in Claimants' cost was associated with the cabinets for the his-and-hers closets. The price with Design Gaps for that work was \$97,634.59. On May 25, 2021, Distinctive Design's proposed price to complete the his-and-her master dressing closets was \$61,543.00. Respondents' Exhibit 47. On June 2, 2021, the Distinctive Design price increased to \$182,828.00 using Premier Custom-Built Cabinets. Respondents' Exhibit 48. Distinctive Design had obviously examined the installation by Design Gaps to provide the May 25 price. Claimants recognize that the Premier Custom-Built Cabinetry was betterment and allowed \$17,018.60. The \$ 182,828.00 was more than a betterment it was almost twice the price of the Design Gaps, Inc. Artigiano line of cabinetry at \$ 97,634.59. An \$ 85,193.41 dollar betterment to be exact. Se believe Mr. Coker confused the conversation of the Claimant's attorney claiming that the Premier Custom -Built Cabinets were a 10% betterment over Downsview Kitchens cabinetry which Design Gaps, Inc. represents but the Claimants did not contract for. They receiverd exactly what

they approved and contracted for at \$ 97,634.59. Therefore this is an accounting error on behalf of Mr. Coker. Separately, there were four end panels to be applied and minor touch up to complete the Artigiano closets contracted for not \$ 61,643.00, all of the parts were onsite. *Examining Distinctive Design pricing, I find that the Claimants' cost attributable to Design Gaps should be the original repair and completion cost of \$61,643.00.*

I also find that Respondents are entitled to take nothing under their counterclaims. First, Respondents conceded they had not completed its work by May 2021. I find that this arbitration involves contract claims. The parties rights are all set out in the contracts. Design Gaps has received an offset against Claimants' completion costs for its contract balance. That is all it is entitled to receive.

The Respondents submitted evidence, timeline, and testimony as to what and who caused delays beyond its control which is covered and protected in the two contracts the Parties agreed to. We agree the Parties rights are all set out in the contracts, the Terms and Conditions item states: 7. PERFORMANCE. The Seller shall not be responsible for damage by others, delays, or inability to complete contract resulting from acts of God, strikes, fires, accidents, storms, defaults of carrier, **inability to obtain materials, or other causes beyond its control. The Respondents provided detail testimony as well as emails verifying there were multiple supplier issues preventing Design Gaps, Inc. from making deliveries necessary to complete the project for any non-contract stated dates.** As stated by Mr. Coker failure to meet any of the verbal or written completion dates, most set by the Claimants were attributed to the finishing supplier issues. Prior to the Claimants' termination all necessary materials were onsite except four small painted shelves. However as Mr. Coker pointed out there were NO COMPLETION dates contained in the contracts. If a completion date was paramount or Time was of the Essence to the Claimants, they could and should have requested a contractual completion date, but they did not. Neither Shelter,

LLC or Distinctive Designs, LLC contracts contained a completion date. However they both contained the standard Delays beyond our control as in the Design Gaps, Inc. contract. Yet a delay is the sole reason Mr. Coker is ignoring any of the Respondent defenses and failing to adequately research the law or cases provided by the Respondents supporting the Respondents Counterclaims and defenses. The Respondents provided area by area comparison reflecting Distinctive Designs charges to “repair” a given area with the total cost of cabinetry to that given area illustrating highly inflated pricing for the amount of work provided and not using the Design Gaps, Inc. materials on site. The Claimant’s provided a very generic and incorrect scope of work that did not align with the materials or work provided by Distinctive Designs, LLC with lump sum pricing per area with no itemization, material cost, packing list, labor reports, or any documentation work had been executed during the hearing. The Respondents questions each area, received no detailed response. Mr. Coker asked if they had time sheets or more description, Reiss answered in the affirmative but produced no evidence.

While the contracts did not contain specified completion dates, Design Gaps did provide a series of completion dates, which it did not meet. During the hearing, Design Gaps set out a number of reasons for the delays which it argued were beyond its control. However, it continued to provide unreliable completion dates to the Claimants. The repeated failure to meet the many dates promised for completion justifies the termination of the contracts.

Respondents failed to enter into evidence a valid copyright registration; however, even if they had, Claimants certainly established fair use of the design work, especially considering that Shelter did not profit from the design. The sharing of a pdf of the design did not materially impair the marketability of the design. Respondents failed to prove that Claimants or anyone else converted its designs for this project. Numerous settled cases are provided below contradicting Mr. Coker’s above statements. The Respondents submitted during the hearing a detailed overlay of their

copyrighted original work drawings on top of Bryan Reiss's Cad drawing of the same closet area. The components alignment and floor plan footprint could not have been coincidental. Additionally, drawings of the previous closet company, Closet Case, were provided to illustrate that each designer will develop their own original design. Design Gaps, Inc. Highsmith Closet design was totally unique and original compared to Closet Case's design, elevations, footprint, and configuration. However, Bryan Reiss's cad floor plan, elevations, and configuration perfectly aligned with the Design Gaps, Inc. drawings. Any design professional consulted would be of the same opinion the Design Gaps, Inc. drawings and designs were in fact copied. Bryan Reiss, the same person that convinced the Highsmith's to demo the Design Gaps, Inc. closet of \$97,634.59 that was 99% completed requiring only four end panels (on site ready to be installed) and touch up to change out their closet for his \$182,828.00 closet. *Bryan Reiss of Distinctive Design confirmed that he did not use Design Gaps' designs for the cabinets. I am convinced by Reiss's testimony and the exhibits provided that any similarity in the designs is due to the limitations of the space and the client's desired layout. Therefore, there has been no violation of any copyright which Respondent may have had.* Mr. Reiss was asked by Mr. Coker during the hearing if he used the Design Gaps, Inc. drawings for his design to which he replied to no. There was no testimony or explanation enhancing his answer. However, there was testimony by David Glover the Respondents expert witness and the original designer that explained in great detail how Reiss's cad drawings used Design Gaps, Inc. drawings provided by Shelter, LLC without the permission of Design Gaps Inc. and how Reiss's designs mimic Design Gaps, Inc. to a T but no resemblance to the Closet Case designs fully illustrating there are several design options to any given space. If Mr. Reiss's testimony is believed to be truthful by Mr. Coker then he would have to agree the Respondents were Substantially Complete as testified by Mr. Reiss at the Claimant's attorney interruption during the Respondents cross examination, this was critical statement overlooked by Mr. Coker. It means

the Claimants owed the balance of the delivery deposits per the contract terms or that the Claimants breached the contracts before the Respondents were terminated with failure to pay in accordance with the agreed to contract terms. Therefore, the Claimants would have uncleaned hands.

TORTIOUS INTERFERENCE

[Ross v. Holton, 640 S.W.2d 166 \(Mo. Ct. App. 1982\).](#)

[SEA ISLAND FOOD GROUP, LLC v. YASCHIK DEVELOPMENT COMPANY, Opinion No. 5794 \(S.C. Ct. App. Jan. 27, 2021\).](#)

Jenny Butler during her deposition taken by the Respondent's representative was asked "Why did you contact Bryan Reiss of Distinctive Designs on January 19th, 2021, via email?) She answered, "Because you were a month late." Contained in that email from jenny@sheltercustombuiltliving.com was an attachment containing Design Gaps, Inc. copyrighted protected designs for the Highsmith's project. Jenny Butler as stated by Ryan Butler in his deposition is not an owner of Shelter, LLC nor an employee. Therefore, Jenny Butler's role would then be one of an independent agent while also using Shelter, LLC email address in her communication with all parties concerned.

Jenny Butler and Shelter LLC knew at all relevant times a valid Master Closet contract existed between the Highsmith's and Design Gaps, Inc. Also, that neither she, Jenny Butler, nor Shelter, LLC were signatories for that contract specifically between the Highsmith's and Design Gaps, Inc. Shelter, LLC knew at all relevant times a valid Master Closet contract existed between the Highsmith's and Design Gaps, Inc. Also, that Shelter, LLC was not a signatory for that contract specifically between the Highsmith's and Design Gaps, Inc.

Bryan Reiss of Distinctive Designs, LLC with his knowledge of the cabinet industry and communications with Jenny Butler and Shelter knew at all relevant times a valid Master Closet and Main House Cabinet contract existed between the Highsmith's and Design Gaps, Inc. Also, that Distinctive Designs, LLC was not a signatory for that Master Closet contract specifically between the Highsmith's and Design Gaps, Inc.

By engaging Bryan Reiss and Distinctive Designs, LLC in her (Jenny Butler's) January 19th 2021 email and the transmittal and use of Design Gaps, Inc. Copyrighted Protected Designs, continued communications, emails, drawings, order, invoices, and contracts by Bryan Reiss and Distinctive Designs, LLC; Jenny Butler, Shelter, LLC, Bryan Reiss, and Distinctive Designs, LLC did Tortiously Interfere with the Master Closet Contract between Design Gaps, Inc. and the Highsmith's, did so commit Civil Conspiracy in the act of doing so, Conversion of the Design Gaps, Inc. Copyrighted and Protected Designs, committed Unfair and Deceptive Trade Practices to encourage and persuade the Highsmith's to remove and replace the Master Closet cabinetry at almost twice the cost of the original contract in lieu of using the Design Gaps, Inc. parts onsite to mitigate damages, and a Quasi-Contract by use of the Design Gaps, Inc. Copyrighted Protected Designs for their own financial gain.

There were delays by all parties, any delays by Design Gaps, Inc. will be thoroughly explained and are covered under the terms and conditions within the executed Design Gaps, Inc. contracts and current law by the Respondents in the brief and at the hearing. I personally have yet to find legal justification for Torturous Interference when all of the elements have been met as stated below. The Claimants were not simply exploring their options as Mr. Walden would have us believe, they were already fully engaged with Distinctive Designs months before the Claimants without legal justification terminated the Design Gaps, Inc. contracts. There could not be a better defined and clearer example of a Torturous Interference claim than the following:

- 1) A contract existed between the Highsmiths and Design Gaps, Inc. at the time Distinctive Designs was brought into the project.
- 2) Shelter, LLC, Jenny Butler, Ryan Butler, Bryan Reiss and Distinctive Designs had knowledge of the existence of the contract.
- 3) Jenny Butler and Shelter sent Design Gaps, Inc. copyrighted drawings to Bryan Reiss and Distinctive Designs which he then did use without written consent. Jenny Butler, Ryan Butler, Shelter, LLC Bryan Reiss, and Distinctive Designs. Those parties then intentionally and unjustifiably induced the Highsmiths to breach the existing contract between Design Gaps, Inc. and the Highsmiths.

- 4) Thereby causing the Highsmiths to then terminate Design Gaps, Inc.
- 5) Causing financial damage to Design Gaps, Inc.

We present the following cite in support of the Tortious Interference claim.

[Williams v. Chittenden Trust Co., 484 A.2d 911, 145 Vt. 76 \(1984\).](#)

Intent to interfere with a contractual relationship exists if "the actor acts for the primary purpose of interfering with the performance of the contract, and also if he [or she] desires to interfere, even though he [or she] acts for some other purpose in addition." Restatement (Second) of Torts § 766 comment j (1979). Intent also exists if the actor does not act with the desire to interfere with the contract but knows that interference will be substantially certain to occur as a result of his or her action. Id.

At the first meeting between the defendant and the owner in this case, the defendant was told that the plaintiff was the designer of the project. The defendant was also given copies of the plaintiff's drawings before the defendant began its own drawings. Thus, the evidence showed that, before it began its drawings, the defendant either knew or had reason to know of the existence of the contract between the plaintiff and the owner. Knowledge of the existence of the contract is a prerequisite to being found liable for interfering with that contract. See Restatement (Second) of Torts § 766 comment i ("To be subject to liability under the rule stated in this Section, the actor must have knowledge of the contract with which he [or she] is interfering [T]he actor does not induce or otherwise intentionally cause [the failure of another to perform under a contract] if he [or she] has no knowledge of the contract.") (emphasis added). Knowledge of the existence of the contract is not automatically the equivalent of intent to interfere with the contract. However, from the evidence produced in this case, a reasonable jury could conclude that the defendant knew its actions would interfere with the plaintiff's contract, since by preparing detailed plans and drawings, the defendant was providing the same services as those the plaintiff was to provide under the contract. The jury could also find intent from the fact that the defendant knew the project was experiencing financial difficulties, and the defendant's services were being offered at a cheaper cost than the plaintiff's services were to be provided under the terms of the contract.

The plaintiff also presented sufficient evidence for the jury to find that the defendant "induced or otherwise caused" the owner not to perform under its contract with the plaintiff. Although it was the owner and not the defendant who initiated their first contact, the owner had not yet decided, at that time, to terminate its contract with the plaintiff. The defendant then offered to perform architectural services for the owner at a price substantially below that charged by the plaintiff, and at a time when the owner's project was suffering from serious financial difficulties. The inducement required for the tort of interference with a contract need not rise to the level of coercion, threats, or compulsion. See Restatement (Second) of Torts § 766 comments h, m. The jury may find that inducement exists if the defendant's acts caused the owner not to perform its contract with the plaintiff. [Mitchell v. Aldrich, supra](#) (Court found that evidence of defendant's offer to purchase goods at a higher price than that called for under the plaintiff's contract to purchase the goods was sufficient to send question of defendant's inducement of seller not to sell to plaintiff to the jury.)

*Finally, we think the plaintiff presented sufficient evidence to convince the jury that the defendant's actions were "improper." The defendant argues that the contract between the owner and the plaintiff was terminable at will, and that, under § 768(1) of the Restatement (Second) of Torts,^[3] the defendant's interference with the contract was allowed competition and not improper interference. This Court has held, however, that "[p]rotection is appropriate against unjustified interference with reasonable expectancies of profit though the contract is terminable at will or unenforceable against the promisor in an adversary proceeding." [Mitchell v. Aldrich, supra, 122 Vt. at 23, 163 A.2d at 836](#). In addition, "there is no legal right ... knowingly [to] invade the contract relation of others solely to promote the intervenor's financial interest." *Id.* at 25, 163 A.2d at 837. On the basis of our statements in [Mitchell v. Aldrich](#), we reject the defendant's argument.*

The defendant also argues that its interference was not improper because it merely rendered "honest advice" to the owner, which, it argues, is allowed under § 772 of the Restatement (Second) of Torts.^[4] We think, however, that the plaintiff presented sufficient evidence for the jury to find that the defendant's actions went beyond mere "advice," and instead constituted architectural services. The defendant prepared sketches, plans and detailed drawings for the project. Therefore, we reject the defendant's

argument.

COPYRIGHT INFRINGEMENT

First, not understanding where Mr. Walden is getting his Copyright Law Information from, but *Fair Use* is very limited when it comes to copyrighted material, i.e. teacher's use for education, etc. and non-existent when it comes to architectural drawings. Secondly, emails by their nature are also copyrighted upon their creation and their distribution or re-distribution is subject to the permission of the original creator/author. Separately, any attachment sent via email that is copyright protected would be treated with the same legal respect as handing a person the original copyrighted documents which brings us back to the executed contracts Design Gaps, Inc. is the sole owner of the designs and written permission is required. The moment Shelter, LLC, Jenny Butler, and or Ryan Butler sent the drawings to Bryan Reiss they were in violation of the Copyright Act. When Bryan Reiss used the drawings to create virtually an identical floor plan and elevations with very minor tweaks such as open shelving above in lieu of closed door cabinetry. At that time Reiss also violated the Copyright Act. (If Reiss had accurate field dimensions as discussed in his deposition due the fact the Design Gaps system was furred off the wall an additional $\frac{3}{4}$ " the drawings would have been a perfect overlay.) Upon presentation to the Highsmiths and the Highsmith's termination of Design Gaps, Inc. the Torturous Interference, Civil Conspiracy, Conversion, Unfair and Deceptive Trade Practices all became actionable torts. **See Attached "Drawing" exhibit** comparing Design Gaps, Inc. original and copyrighted drawings in green overlaying the Copyright infringing Distinctive Designs Master Closet Drawings in black.

Contrary to Mr. Walden's concerns regarding 17 USC Code 412 the Respondents acknowledge even though the Cabinet drawings are registered that Statutory Damages and

Attorney's fees may not be recoverable due to the registration date. However, our claim is under 504 (a) (1) the copyright owner's actual damages and any additional profits of the infringer, as provided by subsection (b) Actual Damages and Profits.—The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work. Given the combination of torts and UDTP as presented at the end of this memorandum the damages should be trebled if the arbitrator so judges.

§504. Remedies for infringement: Damages and profits

(a) In General.—Except as otherwise provided by this title, an infringer of copyright is liable for either—

(1) the copyright owner's actual damages and any additional profits of the infringer, as provided by subsection (b); or

(2) statutory damages, as provided by subsection (c).

(b) Actual Damages and Profits.—The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

Separately, if a plaintiff can prove each of the aforementioned Civil Conspiracy **four elements**, they will succeed in their civil conspiracy claim. Any conspirator to the civil conspiracy may be held liable for the plaintiff's damages.

A conspirator is any person who agreed to the underlying unlawful scheme to commit a tort or tortious activity. Not every conspirator needs to have committed an act in furtherance of the conspiracy to be held liable for a civil conspiracy claim.

If the conspirator agreed to the scheme to commit a tort, but a co-conspirator committed the unlawful acts, the conspirator will be held liable for those acts as though they committed them personally.

After the conspiracy is formed, all members of the conspiracy are **jointly and severally liable** for acts of *co-conspirators done in furtherance of the conspiracy.* ¹¹

To prove that a defendant is a co-conspirator, a plaintiff must show that the defendant had:

- Knowledge of the unlawful objective of the agreement (i.e. to commit a tort); and
- Intended to aid in achieving that objective

Therefore, upon succeeding on the Copyright Infringement claim and Conspiracy claim then Shelter, LLC and its officer(s) in addition to Bryan Reiss, Distinctive Designs LLC and Jenny Butler are jointly and severally liable for the damages as stated above.

We present the following cite in support of the Copyright Infringement claim:

[Johnson v. Jones, 149 F.3d 494 \(6th Cir. 1998\).](#)

The plaintiff in *Effects*, on the other hand, had always intended that the footage would be incorporated into the movie, and distributed therewith. The dispute in that case arose not from the manner in which the copyrighted material was used, but from the amount paid for the material. Tosch argues that the same is true of the present case. We disagree. The current dispute concerns more than the lack of compensation paid to Johnson; it also involves the way in which Johnson's drawings were used. **It is one thing for an architect to allow the owner to hire someone else to build a house from the architect's plans. It is quite another for the architect to allow a competitor to come in and claim the architect's work as his own. Put simply, Johnson's drawings were used in a way he never intended-i.e., a rival architect claimed them as his own work and completed the Jones house without Johnson's involvement.**

Moreover, Johnson did not deliver his drawings and site plan to Tosch. Rather, Tosch obtained some of the drawings from Jones, and others from the city inspector. Having acquired the drawings from other sources, Tosch cannot argue that his acquisition created an implied license. Indeed, the evidence demonstrates that Johnson was not even aware that his plans were being used until January 1994, when he stopped by the Jones house job site.

[MacMillan Co. v. IVOW CORP., 495 F. Supp. 1134 \(D. Vt. 1980\).](#)

When the plans prepared by the plaintiff (Plaintiff's Exhibit 7, 11) are compared with those prepared by Crandell Associates (Plaintiff's Exhibit 12), it is apparent that drawing A-2 of the Crandell plan is a virtual reproduction of drawing number 4 in the MacMillan plans. See note 9, *supra*. The similarities in the arrangement and substance of the two drawings compel the conclusion that Crandell drawing A-2 was a copy. Moreover, the remaining Crandell drawings exhibit other similarities to the MacMillan plans in design and detail. **To establish a copyright infringement^[13] it is not necessary that the whole or even a large part of the MacMillan plans**

were copied. It is sufficient if a material and substantial part were copied even though it constitutes only a small part of the entire package of drawings. Nucor Corp. v. Tennessee Forging Steel Service, Inc., 476 F.2d 386, 391 (8th Cir. 1973); Nikanov v. Simon & Schuster, Inc., 246 F.2d 501, 504 (2d Cir. 1957).

Although the principals of I.V. O.W. did not personally copy the MacMillan drawings, the defendant is nonetheless liable for any infringement which may have occurred. Since common law copyright infringement is wrongful, concepts of tort liability are relevant in fixing the scope of the remedy. The basic common law doctrine that one who knowingly participates in, or furthers a tortious act, is jointly and severally liable with the prime tortfeasor, is applicable to the present case. See Screen Gems-Columbia Music, Inc. v. Mark Fi Records, Inc., 256 F.Supp. 399, 403 (S.D.N.Y. 1966); W. Prosser, *Law of Torts*, § 46 at 291-92 (4th ed. 1971). Consequently, anyone "who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer."^[14] Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, 1162 (2d Cir. 1971). See Kalem Co. v. Harper Brothers, 222 U.S. 55, 63, 32 S.Ct. 20, 22, 56 L.Ed. 92 (1911); 18 Am. Jur.2d "Copyright and Literary Property" § 124 at 411.

I.V.O.W. could have had the addition to its shopping center designed and constructed without the use of the plaintiff's plans. Nonetheless, the defendant did allow Etbro Construction Company and Crandell Associates to use MacMillan's plans in preparing the final plans used in construction. The appropriation of the fruits of MacMillan's labor by the defendant, in order to facilitate the preparation of comparable plans without the expenditure of the time and effort required for independently arrived at results, is copyright infringement. Orgel v. Clark Boardman Co., 301 F.2d 119, 120 (2d Cir. 1962).

The facts that establish that I.V. O.W. infringed MacMillan's common law copyright also support liability on a conversion theory. The essence of an action of conversion in Vermont is that "[c]onversion consists in . . . appropriating property to one's own use and beneficial enjoyment, . . . exercising dominion over it to the exclusion of owner's rights" [Redd Distributing Co. v. Bruckner, 128 Vt. 635, 639, 270 A.2d 580, 583 \(1970\)](#). See Restatement (Second) of Torts, § 228 (1965); 1 F. Harper & F. James, *The Law of Torts*, § 2.24 (1956).

Under the circumstances of the delivery of the plans by Allan McAnney to I.V.O.W., the defendant was implicitly authorized to use MacMillan's plans only in connection with MacMillan's bid for the construction contract. **After MacMillan was rejected as the builder, the defendant's appropriation of the plans to its own use exceeded that authorization. Accordingly, I.V.O.W. is subject to liability for conversion to the plaintiff, whose right to the exclusive use of the plans was violated.**^[15]

The plans were prepared at considerable expense to the plaintiff. By the misappropriation, MacMillan has sustained damage. Under the particular circumstances of this case, the most equitable measure of the plaintiff's damage is the reasonable value to I.V.O.W. of its use of the MacMillan plans. See [Read v. Turner, 239 Cal. App.2d 504, 48 Cal.Rptr. 919, 40 A.L.R.3d 237, 245 \(1966\)](#); 18 Am.Jur.2d "Copyright and Literary Property" § 136 at 423-24.

An action for civil conspiracy may exist even though respondents committed no unlawful act and no unlawful means were used. [Charles v. Texas Co., supra](#); [Lee v. Chesterfield General Hospital, Inc., supra](#). Specifically, it is not necessary for a plaintiff asserting a civil conspiracy cause of action to allege an unlawful act in order to state a cause of action, although a civil conspiracy may be furthered by an unlawful act. I.e. Copyright Infringement.

CIVIL CONSPIRACY

The timeline beginning as early as January 19th, 2021, documents and evidence clearly show that there were all the elements of civil conspiracy as well as all the essential elements of Torturous Interference.

- 1) Bryan Reiss, Distinctive Designs, Jenny Butler, Ryan Butler, and Shelter, LLC are the parties.
- 2) Emails, drawings dated March 21st, 2020, and estimates from Reiss and Distinctive Designs solidify there was an agreement. Reiss's email reflects "padding" the estimate. Reiss's estimates increase while the scope of work remains the same.
- 3) Their intention was clear to replace Design Gaps, Inc. on the Highsmith project while Design Gaps, Inc. was still on the project and had two valid existing contracts.
- 4) Design Gaps, inc. has suffered considerable loses in non-payment from this project and loss of economic opportunity while defending an outrageous highly inflated damage claim and material breach of contract instigated by the Claimants as well as the Copyright Infringement.

The above well establishes Civil Conspiracy either pre-*Todd* or post -*Todd* rulings as cited below.

We present the below cites in support of the Civil Conspiracy claims:

[LaMotte v. Punch Line of Columbia, Inc., 370 S.E.2d 711, 296 S.C. 66 \(1988\).](#)

An action for civil conspiracy may exist even though respondents committed no unlawful act and no unlawful means were used. [Charles v. Texas Co., supra](#); [Lee v. Chesterfield General Hospital, Inc., supra](#). Specifically, it is not necessary for a plaintiff asserting a civil conspiracy cause of action to allege an unlawful act in order to state a cause of action, although a civil conspiracy may be furthered by an unlawful act. [Lee v. Chesterfield General Hospital, Inc., 344 S.E. \(2d\) at 382](#). Thus, lawful acts may become actionable as a civil conspiracy when the "object is to ruin or damage the business of another." [Charles v. Texas, 199 S.C. 156, 170, 18 S.E. \(2d\) 719, 724 \(1942\)](#) (quoting 11 Am. Jur., at 578). Appellants allege that respondents combined forces to injure

them by preventing the opening of their restaurant, and thereby caused appellants to suffer special

damages. We find appellants' assertions^[1] to be disputable issues of fact and conclude that the circuit court erred in granting summary judgment for respondents on appellants' conspiracy cause of action. Accordingly, we reverse the circuit court's ruling.

[Paradis v. CHARLESTON COUNTY SCHOOL, 861 S.E.2d 774, 433 S.C. 562 \(2021\).](#)

JUSTICE FEW:

*As an independent tort, however, the undefined theory of civil conspiracy leaves courts and juries free to determine civil liability—both of the alleged tortfeasor and the supposed conspirator—not based on the law, but by using the individual judge or juror's sense of fairness or responsibility. Imagine in a fraud case that the dispute arose out of business competition between the plaintiff and the defendant. The defendant intentionally made a false statement to the plaintiff for the purpose of gaining competitive advantage. Imagine further the plaintiff's fraud cause of action fails because the court or the jury finds—applying the law—the plaintiff had no right to rely on 580*580 the false statements. The defendant's conduct might have been unfair or irresponsible, but the plaintiff loses on the fraud claim—rightfully—because the law does not support the claim.*

If, however, the plaintiff's lawyer thought to add a cause of action for civil conspiracy, the plaintiff might nevertheless prevail because the independent tort of civil conspiracy has no specific requirements, elements, or standards to guide the court and jury. Civil conspiracy—as the majority "return[s]... to our historical roots"—permits the court and jury to impose liability for lawful, non-tortious conduct.

The essential principle Todd intended to address was the need to plead an overt act in furtherance of the agreement, not special damages. As a result, we overrule Todd and cases relying on Todd or other precedent, such as Lee, to the extent they impose or appear to impose a requirement of

pleading (and proving) special damages. South Carolina's position in this regard was an outlier, as our research indicates South Carolina was the only state to require the pleading of special damages.

*In light of our decision today, we are returning to our long-standing precedent pre-Todd and for clarification specifically state a plaintiff asserting a civil conspiracy claim must establish (1) the combination or agreement of two or more persons, (2) to commit an unlawful act or a lawful act by unlawful means, (3) together with the commission of an overt act in furtherance of the agreement, and (4) damages proximately resulting to the plaintiff.^[9] See [Charles II, 199 S.C. at 575*575 176, 18 S.E.2d at 727](#); [Charles I, 192 S.C. at 101, 5 S.E.2d at 472](#); see also 16 Am. Jur. 2d Conspiracy § 53 (2020) (enumerating the prevailing elements of a claim for civil conspiracy recognized in most jurisdictions); 15A C.J.S. Conspiracy § 4 (2012) (same). By doing so, we are returning not only to our historical roots, but also to the traditional elements of a civil conspiracy claim as they have been similarly defined by the majority of jurisdiction*

If a plaintiff can prove each of the aforementioned **four elements**, they will succeed in their civil conspiracy claim. Any conspirator to the civil conspiracy may be held liable for the plaintiff's damages.

A conspirator is any person who agreed to the underlying unlawful scheme to commit a tort or tortious activity. Not every conspirator needs to have committed an act in furtherance of the conspiracy to be held liable for a civil conspiracy claim.

If the conspirator agreed to the scheme to commit a tort, but a co-conspirator committed the unlawful acts, the conspirator will be held liable for those acts as though they committed them personally.

After the conspiracy is formed, all members of the conspiracy are jointly and severally liable for acts of *co-conspirators done in furtherance of the conspiracy*.

To prove that a defendant is a co-conspirator, a plaintiff must show that the defendant had:

- o Knowledge of the unlawful objective of the agreement (i.e. to commit a tort); and
- o Intended to aid in achieving that objective

A conspirator and co-conspirator may be both or individually liable for the plaintiff's injuries. This is true, even if one of the conspirators did not commit the act that hurt the plaintiff.

This means a co-conspirator can be held liable for injuries inflicted on a plaintiff even if the co-conspirator *did not actively engage in the acts which caused the injury*.

Like most other torts, the tortious or wrongful acts taken *as part of the conspiracy must have proximately caused the damage suffered by the plaintiff*. Another similarity to other torts is that legal relief for a civil conspiracy cause of action comes in the form of monetary damages.

If a defendant is found to be liable for civil conspiracy, then they may be required to pay for all foreseeable injuries to the plaintiff, including punitive damages. Punitive damages are not commonly awarded, and usually only come into play as punishment for a defendant that acted with egregious or malicious behavior when committing an unlawful act. Punitive damages are also awarded to deter defendants from engaging in unlawful conduct.

Even if a plaintiff fails to prove the elements of their civil conspiracy claim, they may still be entitled to damages as a result of the underlying tort committed against them. For instance, say a plaintiff fails to prove the defendants had an agreement to defraud the plaintiff. If the plaintiff can still prove all the elements of fraud existed as applied to at least one defendant, the plaintiff can

still recover damages for the fraud claim.

CONVERSION

If the Copyright Infringement is found to be actionable which we believe it will be based on the actual evidence, then it stands that the Conversion claim is also actionable as it goes hand in hand with the Infringer converting the Copyrighted Drawings to their own use and profiting from that.

Again, citing MacMillan in support of the Conversion Claim

[MacMillan Co. v. IVOW CORP., 495 F. Supp. 1134 \(D. Vt. 1980\).](#)

*The facts that establish that I.V. O.W. infringed MacMillan's common law copyright also support liability on a conversion theory. The essence of an action of conversion in Vermont is that "[c]onversion consists in . . . appropriating property to one's own use and beneficial enjoyment, . . . exercising dominion over it to the exclusion of owner's rights" [Redd Distributing Co. v. Bruckner](#), 128 Vt. 635, 639, 270 A.2d 580, 583 (1970). See Restatement (Second) of Torts, § 228 (1965); 1 F. Harper & F. James, *The Law of Torts*, § 2.24 (1956).*

QUASI-CONTRACT

If the Copyright Infringement is found to be actionable which we believe it will be based on the actual evidence, then it stands that the Quasi-Contract claim is also actionable as it goes hand in hand with the Infringer converting the Copyrighted Drawings to their own use and profiting from that.

[Forest Park Pictures v. Universal Television](#), 683 F.3d 424 (2d Cir. 2012).

Theories of implied-in-law contract, quasi-contract, or unjust enrichment differ significantly from breach of contract because the plaintiff need not allege the existence of an actual agreement between the parties. See 1-1 Corbin on Contracts § 1.20 ("A contract `implied in law' is a fictitious contract.... A contract `implied in fact' is a true contract that arises from the tacit agreement of the parties."). **Under these quasi-contractual theories, the plaintiff need only prove that the defendant was unjustly enriched through the use of her idea or work. Such a claim is not materially different from a claim for copyright infringement that requires a plaintiff to prove that the defendant used, reproduced, copied, or displayed a copyrighted work.** See [Briarpatch, 373 F.3d at 306](#) (finding no extra element in an unjust enrichment claim); see also [Wrench, 256 F.3d at 459](#) (noting that there is "a crucial difference" between implied-in-fact contracts and implied-in-law contracts because the latter "depend[] on nothing more than the unauthorized use of the work"); 4 Nimmer §§ 19D.03[B][6], [7] (unjust enrichment and quasi-contract preempted).

We believe there to be error in the below statement:

*“The Claimants’ expressed goal for the **time of completion** of the project was approximately four to eight weeks from contract signing. Claimants’ Exhibit 4.” At the time of contracting Respondents indicated that this time frame was achievable. The Respondents believe it was well established during the hearing and supported by the Claimant’s Expert Witness any quoted delivery dates were estimated lead times to deliver to cabinets to the job site and not representative of installation and completion dates. Design Gaps, Inc. achieved the Main House contract deliver dates of carcasses only per their verbal agreement with the builder and their countertop ready installation per the builder’s timeline.*

The Claimants and Respondents requested and contracted with the AAA/ADR for a Reasoned Award to be issued with the Arbitrator’s finding and determination. The Respondents do not

believe the statements and reasoning by Mr. Coker rise to the level or definition of a Reasoned Award contracted for in this Arbitration case and defined in the rulings of the Court system.

Below are writings regarding Reasoned Awards and Findings of Fact:

But, where the parties have requested - in their arbitration clause or Submission Agreement - a "reasoned award" or "Findings of Fact and Conclusions of Law", or some other type of explained decision - and the arbitrators issue an Award in which there is no discussion of the facts and the evidence and/or no reasoned or logical explanation for the relation or connection between the evidence and the decision or relief reached or ordered by the arbitrators, it should be possible to seek vacation of the Award on this basis, as the arbitrators have effectively "exceeded their powers" by failing to do what the parties contractually required them to do: logically explain how they reached their decision.

"Section 10(a)(4) of the FAA provides that a court may vacate an award "where the arbitrators exceeded their powers." 9 U.S.C. § 10(a)(4). Arbitrators exceed their powers when they express a "manifest disregard of law," or when they issue an award that is "completely irrational." Comedy Club II, 553 F.3d at 1290 (citing Kyocera, 341 F.3d at 997). . . ."

"However, "[a]n arbitrator is not free to ignore or abandon the plain language of the parties' agreement." Gas Aggregation Servs., Inc. v. Howard Avista Energy, LLC, 319 F.3d 1060, 1065 (8th Cir. 2003); see Keebler Co. v. Milk Drivers & Dairy Employees Union, Local No. 471, 80 F.3d 284, 288 n.4 (8th Cir. 1996)." (Emphasis added)

"[T]he contract must not be "susceptible of the arbitrator's interpretation." Local 970 v. B.F. Nelson Folding Cartons, Inc., 151 F.3d 748, 750 (8th Cir. 1998) (quotation omitted)." (Emphasis added)

Hoffman v. Cargill, Inc. (8th Cir. 2001) 236 F.3d 458, 462.

“We follow the Supreme Court's oft-quoted guidance that 'if the arbitrator's award 'draws its essence from the . . . agreement,' and is not merely the arbitrator's 'own brand of industrial justice,' the award is legitimate.' Beacon Journal Pub., 114 F.3d at 599 (quoting United Steelworkers of Am. v. Enter. Wheel & Car Co., 363 U.S. 593, 597, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960)). And we have said that: An arbitrator's award fails to draw its essence from the agreement when: (1) it conflicts with express terms of the agreement; (2) it imposes additional requirements not expressly provided for in the agreement; (3) it is not rationally supported by or derived from the agreement; or (4) it is based on 'general considerations of fairness and equity' instead of the exact terms of the agreement. Beacon Journal Pub., 114 F.3d at 600 (citations omitted). n4”

“'[T]he arbitrator is not free merely to dispense his own brand of [] justice.'"); Subsurfco, 914 F.2d at 1075 ("[Even where] the arbitrator's authority is broad, it is not unlimited. The arbitrator . . . [may not] disregard or modify unambiguous contract provisions.") (internal citations and quotation marks omitted); Inter-City Gas, 845 F.2d at 187 ("[I]f the arbitrator interprets unambiguous language in any way different from its plain meaning, [the arbitrator] amends or alters the agreement and acts without authority.") (internal citations and quotation marks omitted).” (Emphasis added)

We respectfully request Mr. Coker address the individual Defenses set forth by the Respondents in their Respondent’s Closing Argument and Damages Requests submitted June 17th, 2022 and Memorandum in Support of Counterclaims that may clarify the actual application of the Respondents Counterclaims which is different than Mr. Coker’s interpretation. (i.e. QUASI-

CONTRACT. The Respondents Counterclaim is against the Claimant's under the Claim of Copyright Infringement, Conversion, and/or Civil Conspiracy for the benefit bestowed onto them as in Unjust Enrichment for using the Design Gaps, Inc. closet designs via Distinctive Designs, LLC and not related to the two executed contracts to which they may be a party to.)

Respondents are not seeking to rehear this case, however, believe they are entitled to a proper reasoning as to the dismissal of each of the defenses and their supporting arguments as well as possible reconsideration as to the final determination. Below is a list of the submitted Defenses, their supporting arguments, and legal cases provided in the Respondent's Closing Argument and Damages Requests.

1. David Glover and Eva Glover are Non-Signatories to the Arbitration Agreement – As David Glover and Eva Glover are Non-Signatories, the Respondents move they should be removed from the Claimants complaint. Details provided in the Respondent's Closing Argument and Damages Requests.
2. Legal Standing - Dr. Jason Highsmith and Kacie Highsmith have no legal standing in this Arbitration as they sold their interest in the subject property as well as all improvements to Kacie M. Highsmith, trustee of the Kacie M. Highsmith Trust executed January 14th, 2021. Details provided in the Respondent's Closing Argument and Damages Requests.
3. Inexcusable Delay - Design Gaps, Inc. Contract Terms and Conditions. Details provided in the Respondent's Closing Argument and Damages Requests.
4. Breach of Contract - The Claimants failed to provide evidence or direct testimony Design Gaps, Inc. breached either of the two cabinet contracts. The Respondents provided a detailed timeline of the construction of the 376 Ralston Creek project with irrefutable photographic images depicting all of the countertop areas were ready for

countertops no later than 10/23/2020, the date in the BuilderTrend schedule. Details provided in the Respondent's Closing Argument and Damages Requests.

5. Piercing the Corporate Veil / Amalgamation – Details provided in the Respondent's Closing Argument and Damages Requests. This was a frivolous, unsupported argument by the Claimants in an attempt to incorporate David and Eva Glover into the Arbitration.
6. The Claimants failed to pay in accordance with the Design Gaps, Inc. Main House cabinet contract terms thereby breaching the contract. – Based on Claimant's Expert Witness the Respondents were Substantially Complete and failed to pay in accordance with the Terms and Conditions. Details provided in the Respondent's Closing Argument and Damages Requests.
7. Respondents did not abandon the Highsmith Contracts- Details provided in the Respondent's Closing Argument and Damages Requests.
8. Claimants Failure to Mitigate Damages – Respondents provided testimony, documented parts list, and photographic evidence the materials were onsite to complete the agreed to Punchlist by Shelter, LLC and Design Gaps, Inc. **Respondents Ex 200 Highsmith punchlist 02-19-21.** No value or offset was provided for those items such as a labor only costs. All of Distinctive Designs parts were painted by the finisher in the finisher pricing. Design Gaps, Inc. offered in writing to assist with any questions or parts placement in prior emails.
9. Value received – Details provided in the Respondent's Closing Argument and Damages Requests.
10. Claimant's Promissory Estoppel claim - Details provided in the Respondent's Closing

Argument and Damages Requests.

11. Regarding the Master Closet Contract - Details provided in the Respondent's Closing Argument and Damages Requests.

12. Main House punch list - Details provided in the Respondent's Closing Argument and Damages Requests.

Specifically, most of Mr. Coker's comments are on the various dates most verbal and some in various communications. Excluding the Respondent's Counterclaims, the only comment by Mr. Coker regarding any defense by the Respondents the "reason" the Claimants won was: *"While the contracts did not contain specified completion dates, Design Gaps did provide a series of completion dates, which it did not meet. During the hearing, Design Gaps set out a number of reasons for the delays which it argued were beyond its control. However, it continued to provide unreliable completion dates to the Claimants. The repeated failure to meet the many dates promised for completion justifies the termination of the contracts."*

One of the Defenses by the Respondents is the actual agreed to Design Gaps, Inc. Contract **Terms and Conditions** of the two executed contracts by the parties. Design Gaps, Inc. , the contracting party of the Respondents, provided frequent communication to the Claimants in an ongoing basis. The information provided was based solely on information provided to Design Gaps, Inc. from its third-party suppliers which Design Gaps, Inc. did not have control over. Immediately upon learning of delays by those suppliers Design Gaps, Inc. acted diligently to aid its suppliers in improving the situation such as with Fine Grit failing to deliver on their March schedule, picking up the materials and finding another finisher. Design Gaps, Inc. Contract **Terms and Conditions** item 7. PERFORMANCE. The Seller shall not be responsible for damage by others, delays, or inability to complete contract resulting from acts of God, strikes, fires, accidents, storms, defaults of carrier, inability to obtain materials, or other causes beyond

its control. Failure to meet any of the verbal or written completion dates, most set by the Claimants were attributed to the finishing supplier issues. Prior to the Claimants' termination all necessary materials were onsite except four small painted shelves.

The Respondents pray and ask the Arbitrator that:

1. Review the above and reconsider the above claims and defenses.
2. Provide a Reasoned Award expanding on decisions for Claims, Defenses, or Counterclaims by the Parties.
3. The cost and expenses of this action be taxed against the Claimants.
4. The Respondents have and recover such other and further relief as the Arbitration Arbitrator may deem just and proper.

This the 19th day of August 2022

David A. Glover
4810 Ashley Park Lane Suite G
(704) 604-4558
david.glover@DesignGaps.com

By: s/r David A. Glover
David A. Glover
Representative for the Respondents

**AMERICAN ARBITRATION ASSOCIATION
COMMERCIAL ARBITRATION TRIBUNAL**

Shelter, LLC, Dr. Jason Highsmith,
and Kacie Highsmith,

Claimants,

v.

Design Gaps, Inc., Eva Glover, and
David Glover,

Respondents.

AAA Case # 01-21-0004-8211

ARBITRATOR'S FINAL AWARD

I, Thomas H. Coker Jr., THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into between the above-named parties, and having been duly sworn, and having duly heard the proofs and allegations of the Parties, hereby AWARD as follows:

This dispute arises from the renovation of 376 Ralston Creek Street, Daniel Island, South Carolina ("Residence"). In August and September 2020, under two contracts, Claimants hired Respondent Design Gaps, Inc. ("Design Gaps") to design and to install various cabinet systems and the master closets at the Residence. The first contract, dated August 18, 2020, was for \$234,602.35 for cabinets in the kitchen, pantry, office, mudroom, various vanities, laundry and game room bar. Respondents' Exhibit 5. The second contract was for \$97,634.59, was dated August 18, 2020, and signed September 6, 2020, for his-and-her closets. The Claimants' expressed goal for the time of completion of the project was approximately four to eight weeks from contract signing. Claimants' Exhibit 4. At the time of contracting Respondents indicated that this time frame was achievable. When the project was not completed by May 2021, Claimants terminated both Design Gaps contracts on May 14, 2021. The Claimants then hired Distinctive Design, LLC ("Distinctive Design") to finish the project. Claimants filed a demand for arbitration for breach of contract,

promissory estoppel, fraud, and piercing the corporate veil. The parties agreed that this Arbitration was to address only the claims against Design Gaps and not Eva Glover or David Glover. Those claims were specifically reserved for another forum. Respondent Design Gaps counterclaimed for negligence, breach of contract, fraudulent misrepresentation, failure to mitigate damages, tortious interference, civil conspiracy, conversion, unfair and deceptive trade practices, quasi-contract, and violation of the copyright act.

The merits hearing was conducted on May 26, 27 and June 2, 2022. Claimants were represented by R. Andrew Walden of Womble Bond Dickinson (US) LLP and Respondents were represented *pro se*¹ by David Glover. Claimants called as witnesses Dr. Jason Highsmith, Kacie Highsmith, Ryan Butler, Jenny Butler, Peter Zahorsky, Bryan Reiss, CMKBD, and Evan Heilig. Claimants also entered into evidence the *de bene esse* deposition transcript of Katie Schindler and called Patti Wilbourne as a rebuttal witness. Respondents called David Glover as their only witness. Both sides submitted substantial documentation to support their respective positions. At the conclusion of that testimony, as arbitrator, I asked each side if they had an adequate opportunity to present in full the evidence which they thought was relevant and important for me to consider in rendering my Award. Each side advised that they had adequate opportunity to present their case with all relevant testimony and exhibits. Therefore, the merits hearing was closed and the parties afforded an opportunity to present post-hearing briefs and proposed orders. Each side provided a proposed order on June 17, 2022 and the hearing was closed by the American Arbitration

¹ Prior to arbitration, David Glover obtained an opinion from Mr. John Nichols of the South Carolina Supreme Court's Office of Disciplinary Counsel ("ODC") regarding his representation of Respondents. Mr. Nichols noted that the ODC would not construe Mr. Glover's representation of Respondents as the unauthorized practice of law because the arbitration is a non-judicial hearing between private parties. I also inquired with the South Carolina Bar and they declined to issue an opinion on the matter. Claimants did not object and therefore Mr. Glover was allowed to continue with Respondents' representation.

Association on June 20, 2022. I have reviewed the testimony and exhibits presented by each party. I now make this Interim Award based upon that evidence.

During the construction process, Design Gaps communicated about completion dates for the installation of the cabinets at the project. These communications started in June and July 2020. It offered the following completion dates to Shelter LLC (“Shelter”) and the Highsmiths:

July 12, 2020	Design Gaps advised: Cabinets on site in six weeks. Lacquered panels a few weeks late Claimants’ Exhibit 5
August 2020	Design Gaps said cabinet delivery October 1, 2020 and October 5, 2020. Claimants’ Exhibits 7-8
August 18, 2020	Cabinet contract executed. Claimants’ Exhibit 9
August 18, 2020	Closet contract lead time eight weeks Claimants’ Exhibit 13
September 4, 2020	Master closets 5 weeks lead time. Claimants’ Exhibit 11
October 18, 2020	Design Gaps begins delivery. Delivery not complete as of December 2020. Testimony and Claimants’ Exhibits 16- 25
January 21, 2021	Design Gaps estimates completion within 32.2 man-days. Claimants’ Exhibit 27
January 22, 2021	Design Gaps provides completion date of March 1, 2021. Claimants’ Exhibit 28
March 2, 2021	Owners extend project completion date to March 15, 2021. Claimants’ Exhibit 32

March 16, 2021 Design Gaps commits to completion by end of April 2021.
 Claimants' Exhibit 32

May 15, 2021 Design Gaps work not completed.

May 15, 2021 Design Gaps contracts terminated.

At the time of termination, Claimants had paid Design Gaps \$265,236.94 on the two contracts. This left a contract balance on the two contracts of \$67,892.28. In order to complete the project, the Highsmiths retained Distinctive Design to provide completion services. *See* Claimants' Exhibit 36. The price for completion was set at \$260,736.00. During Distinctive Design's work, its contract price was escalated to \$274,647.00. It was paid this amount. Distinctive Design's representative testified that this price included upgraded cabinet quality from that provided in the Design Gaps contract and that the total charges should not be assigned to Design Gaps. Claimants also paid \$41,256.75 for refinishing the cabinets. Therefore, the total paid by Claimants to complete the cabinetry was \$564,122.09 spent as follows.

Paid to Design Gaps	\$265,236.94
Paid to Distinctive Design	\$274,647.00
Less betterment associated with Premier Custom Cabinetry	(\$17,018.60)
Paid to Evan Heilig for refinishing	\$41,256.75
Total paid to complete Design Gaps contract	<u>\$564,122.09</u>
Less Design Gaps contract	<u>\$332,236.94</u>
Claimants' cost in excess of Design Gaps contract	<u>\$231,885.15</u>

The most significant increase in Claimants' cost was associated with the cabinets for the his-and-hers closets. The price with Design Gaps for that work was \$97,634.59. On May 25, 2021, Distinctive Design's proposed price to complete the his-and-her master dressing closets was \$61,543.00. Respondents' Exhibit 47. On June 2, 2021, the Distinctive Design price increased to \$182,828.00 using Premier Custom-Built Cabinets. Respondents' Exhibit 48. Distinctive Design had obviously examined the installation by Design Gaps to provide the May 25 price. Claimants recognize that the Premier Custom-Built Cabinetry was betterment and allowed \$17,018.60. Examining Distinctive Design pricing, I find that the Claimants' cost attributable to Design Gaps should be the original repair and completion cost of \$61,643.00. It therefore appears that this should be the appropriate cost attributed to Design Gaps. I, therefore, find that the cost to be charged to Design Gaps to be \$274,647.00, less \$121,763.00 for a balance of \$152,884.00. This accounts for the upgraded costs.

While the contracts did not contain specified completion dates, Design Gaps did provide a series of completion dates, which it did not meet. During the hearing, Design Gaps set out a number of reasons for the delays which it argued were beyond its control. However, it continued to provide unreliable completion dates to the Claimants. The repeated failure to meet the many dates promised for completion justifies the termination of the contracts.

Claimants also claim that they lost the use of their home for the month of December 2020. The evidence presented at the hearing does not establish that the cost of the loss of use of the house was caused by the failure of Design Gaps to complete its work. The photographs and testimony shows that the house was not ready to be occupied in December 2020. Therefore, I deny this claim.

I therefore find that Claimants are entitled to recover \$152,884.00 from Respondents.

I also find that Respondents are entitled to take nothing under their counterclaims. First, Respondents conceded they had not completed its work by May 2021. I find that this arbitration involves contract claims. The parties rights are all set out in the contracts. Design Gaps has received an offset against Claimants' completion costs for its contract balance. That is all it is entitled to receive.

Respondents did not prove any false or reckless representation made by Claimants which caused it any damage; therefore, it is not entitled to anything on these claims. Respondents did not establish any tortious interference in its contract by any party. It further did not establish that there was a civil conspiracy between and among the Claimants, Distinctive Design or any other party. While Claimants did meet with Distinctive Design as early as January 2021 to review Respondents' performance, the Claimants were advised by Distinctive Design to continue working with Design Gaps to achieve completion. When completion had not been accomplished by May 2021, only then did Claimants terminate the contract. Respondents did not establish that Claimants' conduct was unfair or deceptive and therefore cannot sustain an unfair trade practices act claim. Respondents did not establish that the conduct it complains of was repetitive or in violation of the public interest. Finally, since the parties entered a written contract, there cannot be a separate "quasi" contract recovery.

Respondents gave to the Claimants their drawings for the cabinets. Obviously, this was for Claimants' review, approval, and use during the construction process. Claimants were free to use the drawings to measure the compliance of Design Gaps with these drawings and its obligation to install the designed cabinets in accordance with its contractual obligation. Respondents failed to enter into evidence a valid copyright registration; however, even if they had, Claimants certainly established fair use of the design work, especially considering that Shelter did not profit from the

design. The sharing of a pdf of the design did not materially impair the marketability of the design. Respondents failed to prove that Claimants or anyone else converted its designs for this project. Bryan Reiss of Distinctive Design confirmed that he did not use Design Gaps' designs for the cabinets. I am convinced by Reiss's testimony and the exhibits provided that any similarity in the designs is due to the limitations of the space and the client's desired layout. Therefore, there has been no violation of any copyright which Respondent may have had.

Having reviewed all of the testimony, exhibits, arguments of the parties, pleadings and post-hearing, I find that the Claimants are entitled to an award of \$152,884.00 upon their claims.

Attorney's Fees and Costs

The arbitration provision in each contract expressly provides that the "prevailing party ... shall recover its costs of the arbitration and reasonable attorneys' fees from the other party." "Prevailing party" is not defined. When the interim award was entered, the parties were directed to advise me as to which party is deemed to have prevailed and set out a proposed amount for reasonable attorneys' fees and arbitration costs for the prevailing party. They did this.

The parties have submitted their positions with respect to the award of attorney's fees and costs. The contracts in question each contain a provision for the award of costs of the arbitration and reasonable attorney's fees from the other party. Specifically, Article 17 of the Contracts Agreements provide:

17. ARBITRATION...the arbitration shall include (1) a provision that the prevailing party in such arbitration shall recover its costs of the arbitration and reasonable attorney's fees from the other party or parties, and (2) the amount of such fees and costs.

Counsel for Shelter, LLC, Dr. Jason Highsmith and Kacie Highsmith, Andrew Walden has submitted his affidavit in support of an award of attorney's fees and costs of \$158,832.64 consisting of attorney's fees, and paralegal charges of \$130,856.00; and incurred costs of \$24,224.13.

First, I find that the Claimants are the prevailing party. Their initial filing was for an amount up to \$350,000.00. Prior to the hearing, their claim was reduced to \$256,716.15. The Respondents asserted a counterclaim seeking stated damages of \$67,301.17. Respondent also made claims for tortious interference with contract, violations of various copyright laws, civil conspiracy, conversion, and quasi contract. While Respondents did not define the damages sought for these claims, the damages may have exceeded \$67,301.17. The Claimants were required to defend against claims which were significant and may have been in excess of the \$67,301.17. While the Claimants are the prevailing party under the standard mechanic's lien definition, their defense costs were increased by their defense of multiple other claims. This means that more effort was required than would be required in a traditional breach of contract arbitration. Here, the counsel for Claimant has submitted its affidavit setting out the hours which it charged. I find that the attorney's fees recoverable are as follows:

Andrew Walden	289.9 hrs @ \$388.58/hr	=	\$112,649.34
Andrea McDonald	25.6 hrs @ \$300.00/hr	=	\$7,680.00
James Weatherholz	1.8 hrs @ \$580/hr	=	\$1,044.00
Carol Casey*	31.6 hrs @ \$150/hr	=	<u>\$4,740.00</u>
Total:			\$126,113.34

** I find the hourly rate of \$300 per hour for a paralegal exceeds the amount which is reasonable for a matter of this type.*

With respect to the award of expenses, I find that the costs of the arbitration are recoverable. The arbitration costs as presented by Mr. Walden were:

Arbitration Filing Fee:	\$4,400.00
Arbitration Fee (3/24):	\$9,550.00

Arbitration Fee (6/17): \$3,501.83

Total: \$17,451.83

The contract does not provide for recovery of expenses beyond these amounts. While deposition costs and travel expenses would normally be recoverable in a civil action in court, the contract provision allowing recovery says the costs of the arbitration may be awarded. The deposition costs are not a cost of the arbitration or an attorney's fee. Therefore, I find that these costs are not awardable. Further, the expert fees of Evan Heilig and Distinctive Design and Construction, LLC are expert fees, not costs of an arbitration or an attorney's fee. Therefore, those costs are not recoverable.

I therefore issue an award against Design Gaps, Inc. in the amount of \$152,884.00, the "costs of the arbitration" of \$17,411.83, and the reasonable attorney's fees of \$126,113.34 for a total award in favor of the Claimants against Design Gaps, LLC only in the amount of \$296,409.17.

Award

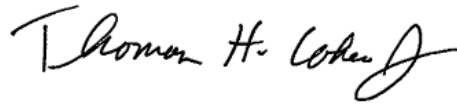
Claimants are entitled to recover \$152,884.00 for all claims asserted against Design Gaps, Inc. in this proceeding² and the prevailing party shall be entitled to allowable fees and costs in the amount of \$143,525.17 for a total award of \$296,409.17

This Award is in full settlement of all claims and counterclaims submitted to this Arbitration. All claims not expressly granted herein are hereby denied.

I, Thomas H. Coker Jr., do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument which is my Award.

AND IT IS SO ORDERED.

² I make no finding and no award upon any claim of personal liability of David Glover and Eva Glover. The parties agreed to reserve any such claims until a later date in another forum.

A handwritten signature in black ink, reading "Thomas H. Coker, Jr." in a cursive script. The signature is positioned above a horizontal line.

Thomas H. Coker, Jr.

October 7, 2022

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

DESIGN GAPS, INC., DAVID GLOVER, and EVA GLOVER	)	Civil Action No. _____
	)	
	)	
Petitioners	)	
	)	
vs.	)	PETITION FOR VACATUR OF
	)	ARBITRATION AWARD
SHELTER, LLC, DR. JASON HIGHSMITH, and KACIE M. HIGHSMITH	)	
	)	
	)	
Respondents.	)	
_____	)	

Above-named Petitioners Design Gaps, Inc. (hereinafter “Design Gaps”), David Glover (hereinafter “Petitioner David Glover”), and Eva Glover (hereinafter “Petitioner Eva Glover”) (wherein all Petitioners are collectively referred to as “Petitioners”), hereby petition for an order pursuant to the Federal Arbitration Act (“FAA”) under 9 U.S.C. § 10 vacating an arbitration award issued on October 7, 2022 (the “Award”) by Thomas H. Coker, Jr. (“Arbitrator”), an arbitrator appointed by the American Arbitration Association (“AAA”) in Case No. 01-21-0004-8211 (“Arbitration”). Petitioners were the Respondents in the subject Arbitration. Respondents Shelter, LLC (hereinafter “Shelter”), Dr. Jason Highsmith (hereinafter “Respondent Jason Highsmith”), and Kacie M. Highsmith (hereinafter “Respondent Kacie Highsmith” both Respondent Jason Highsmith and Respondent Kacie Highsmith collectively referred to herein as “Respondent Highsmiths”) were the Claimants in the subject Arbitration.

JURISDICTION AND VENUE

1. This Court has subject-matter jurisdiction under 28 U.S.C. §1331 and pursuant to 9 U.S.C. §§ 1-16.

2. Venue is proper in this District for the reason that the arbitration award was made pursuant to an arbitration hearing held in Charleston, South Carolina and 9 U.S.C. § 10 of the FAA requires the United States court in the district where the award was made to make an order vacating the award upon application of any party to the arbitration.

3. The Court has personal jurisdiction over Respondents, who are citizens and residents of South Carolina or who conduct substantial business, and have their principal place of business, in South Carolina.

THE PARTIES

4. Design Gaps, Inc. (hereinafter “Design Gaps”), Respondent in the Arbitration, is a North Carolina corporation registered as a foreign corporation in South Carolina with a principal place of business located at 1804 Crowne Commons Way, Suite D-1, Johns Island, South Carolina 29455.

5. Petitioner David Glover, a Respondent in the Arbitration, in his capacity as an Officer of Design Gaps, Inc. has a place of business located at 1804 Crowne Commons Way, Suite D-1, Johns Island, South Carolina 29455.

6. Petitioner Eva Glover, a Respondent in the Arbitration, in her capacity as an Officer of Design Gaps, Inc. has a place of business located at 1804 Crowne Commons Way, Suite D-1, Johns Island, South Carolina 29455.

7. Respondent Shelter, LLC d/b/a Shelter Custom-Built Living, a Claimant in the Arbitration, is a South Carolina limited liability company having a place of business located at 895 Island Park Drive, Suite 203, Daniel Island, South Carolina 29492.

8. Respondent Jason Highsmith, a Claimant in the Arbitration, in his individual capacity having an address at 376 Ralston Creek Street, Daniel Island, South Carolina 29492.

9. Respondent Kacie Highsmith, a Claimant in the Arbitration, in her individual capacity having an address at 376 Ralston Creek Street, Daniel Island, South Carolina 29492.

THE AWARD

10. Respondents as Claimants in the Arbitration filed an AAA arbitration demand against Petitioners for breach of contract, promissory estoppel, and piercing the corporate veil. (A true and correct copy is attached hereto as Exhibit A.) Petitioners counterclaimed for negligence, breach of contract, fraudulent misrepresentation, failure to mitigate damages, tortious interference, civil conspiracy, conversion, unfair and deceptive trade practices, quasi-contract, and violation of the copyright act. (A true and correct copy is attached hereto as Exhibit B.)

11. Respondents entered two contracts in August and September 2020 with Design Gaps to design and install various cabinet systems and the master closets (“Contracts”) at Respondents’ residence located at 376 Ralston Creek Street, Daniel Island, South Carolina (“Residence”). The first contract, dated August 18, 2020, was for \$234,602.35 and was executed between Respondent Highsmiths, Shelter and Design Gaps to provide cabinets in the kitchen, pantry, office, mudroom, various vanities, laundry, and game room bar of Residence. (A true and correct copy is attached hereto as Exhibit C.) The second contract, dated August 18, 2020, and signed September 6, 2020, was for \$97,634.59 and was executed only between Respondent Highsmiths and Design Gaps to provide his-and-her master closets. (A true and correct copy is attached hereto as Exhibit D.) The Contracts were silent with respect to any completion date.

12. The Respondent Highsmiths originally contracted with A Closet Case in Daniel Island to design and install the his-and-her master closets sometime in July 2020. Unhappy with the A Closet Case quality soon after the A Closet Case installation, Respondent Highsmiths contacted Design Gaps who had installed Downsview Kitchens cabinetry for the master bath and

closets in Respondent Highsmiths' previous home a few years prior to this installation. (A true and correct copy is attached hereto as Exhibit E.)

13. Respondent Highsmiths chose Design Gaps' lower price line of cabinetry instead of the higher end Downsvew Kitchens line offered by Design Gaps. Similarly, Respondent Highsmiths had selected the lower price line for the earlier contract for the Main House cabinetry at the urging of Jenny Butler, Respondent Shelter's product coordinator. Respondent Highsmiths paid Design Gaps on September 6, 2020, in the amount of \$97,634.59 to redesign and provide all new cabinetry for the his-and-her master closets.

14. When Design Gaps was substantially complete with installation of the his-and-her master closet at the Residence and had arranged for the delivery of all cabinetries at the Residence, Design Gaps reiterated its request for payment for the materials pursuant the terms and conditions of the Contracts. Instead of paying in accordance with the contract terms, the Respondent Highsmiths terminated Design Gaps through an email sent by their attorney within a few days following the request for payment on May 14, 2021. Upon information and belief, the Respondents realized that they had already committed to order Distinctive Design's Master closet cabinetry from drawings dated March 21, 2021. The Respondent Highsmiths used the \$97,634.59 completed Design Gaps Master Closet cabinetry while living in the home until the third set of closet cabinets provided by Distinctive Design in the amount of \$182,828.00 came in the following January 2022.

15. Shelter and Respondent Kacie Highsmith have acknowledged that the designs that were to be placed in the Residence were provided by Design Gaps and remained the property of Design Gaps.¹ Nonetheless, Shelter confirmed that Brian Reiss of Distinctive Design who was

¹ Kacie Highsmith Dep. 20:14-23, Mar. 9, 2022 (cited portion of transcript included as Exhibit F).

doing several projects for Shelter and cabinetry for a garage addition at the Residence² allowed Brian Reiss to have access to Design Gaps' designs when forwarded without permission via email by Jenny Butler of Shelter on January 19, 2021.³

16. The merits hearing on the claims and counterclaims was held on May 26-27 and June 2, 2022. In the Interim Award of the Arbitrator issued on July 19, 2022, the Arbitrator determined that Respondents were entitled to recover \$152,884.00 from Design Gaps alleging Respondents had paid \$274,647.00 to Distinctive Design that would then be reduced by \$121,763.00 allegedly for increased costs due to a different selection of materials and improvements authorized by the Respondents. (A true and correct copy is attached hereto as Exhibit G.) Respondents timely filed a Motion to Reconsider and Request for Reasoned Award on August 19, 2022. (A true and correct copy is attached hereto as Exhibit H.)

17. In the Arbitrator's Final Award issued on August 19, 2022, in addition to the \$152,884.00 award included in the Interim Award of the Arbitrator, the Arbitrator also awarded Respondents \$143,525.17 for reasonable attorneys' fees and costs associated with the arbitration. (A true and correct copy is attached hereto as Exhibit I.) The Arbitrator's total award to Respondents was \$296,409.17 without addressing any of the arguments provided by Respondents in their Motion to Reconsider and Request for Reasoned Award.

18. Without determining whether the finished product had directly been copied from and/or bears substantial similarity to Petitioners' copyrighted work, a prerequisite according to the Fourth Circuit Court of Appeals, the Arbitrator merely asserted that Respondents had established fair use of the design work as supported by an unprecedented determination that Shelter did not

² *Id.* at p. 30, ll. 3-8.

³ *Id.* at p. 32, l. 11 to p. 33, l. 4.

profit from the design and further alleging that sharing of a pdf of the design did not impair the marketability of the design.

GROUND FOR VACATUR

A. Evident Partiality in the Arbitrator

19. Pursuant to 9 U.S.C. § 10(a)(2), an order vacating the award may be made “where there was evident partiality or corruption in the arbitrators.” As demonstrated herein, the Arbitrator exhibited partiality that was in favor of the Respondents and against the Petitioners in this Arbitration.

20. The Arbitrator consistently took actions and made statements opposing Petitioner David Glover as a *pro se* Respondent in not only the representation of himself but also in the representation of Design Gaps and Petitioner Eva Glover as Respondents in the Arbitration.

21. The Arbitrator vigorously objected to Petitioner David Glover’s representation of Design Gaps and Petitioner Eva Glover in the Arbitration. The Arbitrator’s incessance with Petitioner David Glover acting not only in a *pro se* capacity for himself but also on behalf of Design Gaps and Petitioner Eva Glover was demonstrated in the questionnaire that he submitted to the parties seeking a response on why this arrangement was not appropriate. The questionnaire along with Petitioner David Glover’s responses have been included as Exhibit J.

22. The Arbitrator raised the following issues in the questionnaire he submitted. (Notably, Respondents chose not to respond to the Arbitrator’s questionnaire.)

(1) The Arbitrator stated that *Renaissance* makes clear that the only judicial proceeding where a corporation can represent itself is before a magistrate court.⁴

The Arbitrator argued that the jurisdictional limit of a magistrate court is \$7,500 where the amount in controversy in the Arbitration is in excess of \$200,000 from Claimant’s perspective and \$120,000 from Respondent’s perspective. The parties

⁴ *Renaissance Enterprises, Inc. v. Summit Teleservice, Inc.*, 515 S.E.2d 257 (S.C. 1999).

to this matter are “ongoing corporate entities.”

“[A] South Carolina court would apply *Renaissance* to arbitrations.”

“I find no opinion from a South Carolina court authorizing a corporation to proceed pro se in an arbitration and I cannot find any persuasive opinion in any other jurisdiction supporting that conclusion.”

(2) “[T]he South Carolina Supreme Court has made clear that public policy does not support the unauthorized practice of law. Public policy was significant to the state Supreme Court in reaching its holding in *Renaissance* and it rejects the minority of courts that allow *pro se* representation in court.”

(3) the Supreme Court ... rejected the ability of a non-lawyer personal representative of an estate to serve as an advocate for the estate. In *Coe*, the court notes that non-lawyers cannot negotiate criminal pleas and reiterates the public policy in this state seeking to protect the public from “severe economic and emotional consequences” flowing from legal advice “given by persons untrained in the law.”⁵ (Quotations provide by Arbitrator.)

(4) The Arbitrator stated that he recognized “that this proceeding is not a judicial proceeding, but it is a *quasi* judicial proceeding that will ultimately become a judicial proceeding when the final award/order in this matter is sought to be confirmed.” The Arbitrator continued that “it is but a matter of time before counsel will be required on behalf of Respondent” and admitted “this technical legal issue could be argued to a judge in the future confirmation process in an effort to overturn my decision in this matter — whatever it may be — for which one party or the other could be dissatisfied.”

(5) The Arbitrator noted another case where it was determined the “practice of law was not confined to litigation but extends to activities in other fields which entail specialized legal knowledge and ability.”⁶

The Arbitrator further cited a non-judicial case where it was determined that “what constitutes the practice of law must be decided on the facts and in the context of each individual case.”⁷

23. Clearly, the Arbitrator was focused upon the representation of a corporation in a judicial proceeding and not in an arbitration setting.

24. The Arbitrator finally concluded”

In light of the totality of the circumstances, I do not agree with Respondent's

⁵ *Brown v. Coe*, 616 S.E.2d 705 (S.C. 2005).

⁶ *Roberts v. LaConey*, 650 S.E.2d 474 (S.C. 2007).

⁷ *Nisha, LLC v. TriBuilt Constr. Group, LLC*, 388 S.W.3d 444 (Ark. 2012).

arguments in favor of pro se corporate representation in light of Renaissance and Coe and cannot trump public policy or the law. Given the foregoing, and the fact that a South Carolina court has not directly ruled on this issue, the undersigned is placed in the unenviable position of having to predict South Carolina law on this subject. I conclude that a South Carolina Court is more likely than not to hold under the facts presented and the character of the services sought to be provided ... lead to the conclusion that a corporate Respondent must be represented by counsel in an arbitration.

To that end, and in the spirit of Coe, Respondent shall have 30 days to retain counsel in this matter and must do so on or before _____ and that counsel shall file a notice of appearance with the AAA on or before the deadline.

25. Petitioner David Glover sought the opinion of Mr. John Nichols, the lawyer charged by the Supreme Court of South Carolina to receive, screen, investigate, and, as necessary, prosecute the complaints made against both judges and lawyers, with the Office of Disciplinary Counsel of the South Carolina Supreme Court. Mr. Nichols determined that it is not considered practicing law when a *pro se* party represents another individual or corporation in an arbitration, which is non-judicial in nature and between private parties. Petitioner David Glover provided this information in an email responding to a lengthy questionnaire sent by the Arbitrator where, as demonstrated above, cited several court cases in support of his position that Petitioner David Glover could not represent the other Petitioners.⁸

26. The Arbitrator did not inform Petitioner David Glover of his decision to allow Petitioner David Glover to represent Design Gaps and Petitioner Eva Glover in the Arbitration until five months after submission of the questionnaire. Asheen Patel of AAA provided a message from the Arbitrator which stated the following:

With respect to the questions about Mr. Glover's acting as attorney for Design Gaps, I have received the following information from Nichole Davis o the South Carolina Bar:

"The Committee discussed your inquiry on Friday and declined to issue an opinion.

⁸ David Glover email correspondence to AAA Jalisa Hardrick, Andrew Walden and Eve Glover, "FW: Shelter, LLC v. Design Gaps, Inc., Eva Glover - Case 01-21-0004-8211", Sep. 28, 2021 (included in Exhibit J).

The members came to the conclusion that your inquiry falls outside of their scope of authority.”

I also have Mr. Glover’s email correspondence with the South Carolina Bar concerning this matter. It appears that the Bar has no objection to Mr. Glover continuing in his current role on this case. It further appears that the parties and arbitrator have satisfied any ethical concerns regarding this matter. It therefore appears that Mr. Glover may continue.

27. The attorney for the Respondents only agreed to an extension of time for the Arbitration proceeding if the Arbitrator determined that Respondents needed to seek counsel for the representation of Design Gaps and perhaps Petitioner Eva Glover.⁹

28. The Arbitrator’s five-month delay in reporting his decision that Petitioner David Glover could represent the other Petitioners led. Petitioner David Glover’s uncertainty of whether he could act on behalf of the other Petitioners in the Arbitration significantly jeopardized his ability to effectively continue with discovery and prepare for the Arbitration. Notwithstanding the Arbitrator was the primary delay in arriving at this decision, the Arbitrator did not grant Petitioners additional time to prepare their case, clearly a decision that favored Respondents who were represented by counsel.

29. The Arbitrator did subsequently grant an extension-of-time but only in response to Petitioners’ Motion of Continuance to allow Petitioners additional time to receive additional discovery documents requested from attorney from Respondents that had not yet been received.

30. Over the course of Petitioners’ defense presentation, it was observed that the Arbitrator was texting or dealing with emails on this mobile phone while he was sitting behind his laptop even when he otherwise used a legal pad for notetaking over the course of Respondents’ case in chief.

⁹ Andrew Walden email correspondence to AAA Jalisa Hardrick, David Glover and Eve Glover, “RE: Shelter, LLC v. Design Gaps, Inc., Eva Glover - Case 01-21-0004-8211”, Sep. 29, 2021 (included in Exhibit J).

31. As further discussed herein, the Arbitrator failed to provide a reasoned award with respect to the defenses and counterclaims submitted by Petitioners.

32. Upon review of the eighty-two (82) pages of Petitioner's closing arguments and the Arbitrator's Interim and Final Awards shows the Arbitrator chose not to use any of the arguments provided by the Petitioners.

33. Additionally, in response to the Arbitrator's Interim Award, Petitioners prepared a concise Motion to Reconsider and Request for Reasoned Award upon recognition that the Arbitrator showed a manifest disregard of the law and failed to provide a reasoned award as agreed to by the parties. The Arbitrator chose not to provide an express ruling on the Petitioner's motion.

34. It has become more than clear that the approach taken by the Arbitrator over the course of the Arbitration demonstrated partiality in favor of the Respondents that were represented by counsel over the Petitioners that were represented by an individual acting in a *pro se* capacity. The favoritism demonstrated by the Arbitrator over the course of arguing that person acting in a *pro se* capacity could not represent the other Petitioners in the Arbitration. Such partiality is proscribed by § 10(a)(2) of the FAA.

B. Arbitrator's Manifest Disregard for the Law

35. "Manifest disregard is ... an old yet enigmatic ground for overturning arbitral awards."¹⁰ The manifest disregard standard requires "a showing that the arbitrators knew of the relevant [legal] principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it."¹¹ "[M]anifest disregard exists either as an independent ground for review or as a judicial gloss on the enumerated

¹⁰ *Wachovia Sec., LLC v. Brand*, 33 IER Cases 679, 671 F.3d 472 (4th Cir. 2012)

¹¹ *Id.* at 483.

grounds for vacatur set forth at 9 U.S.C. § 10.”¹²

36. A court may vacate an award based on an arbitrator's manifest disregard of the law when “(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrator refused to heed that legal principle.”¹³ As further demonstrated herein, the Arbitrator has manifestly disregarded the law and ignored established precedent with respect to Petitioners’ Copyrighted materials, and materially prejudiced Petitioners’ rights in the same, and Petitioners’ substantial completion of the work embodied in the Contracts.

1. Overview of Arbitrator’s Knowledge and Experience

37. The Arbitrator was admitted to the South Carolina Bar in 1976 and has been practicing with Haynsworth Sinkler Boyd, P.A. (“Law Firm”) as well as a predecessor firm since that time.

38. The Arbitrator indicates his experience includes the representation of “contractors and architects in arbitration proceedings[; arbitration of] disputes involving owners, architect, general contractors, subcontractors and contractors[; and mediation of] medical facilities, suppliers, asbestos, property damage and mechanical disputes.”

39. The Law Firm has over one hundred attorneys with some having experience in Copyright Law and some having experience in Contracts & Procurement. Clearly, the Arbitrator has access to attorneys at the Law Firm if he needs additional information concerning these subject areas.

2. Arbitrator’s Failure to Heed that Providing Petitioners’ Copyrighted Architectural Drawings by Shelter and Respondent Highsmiths to Distinctive Design was not Protected by the Fair Use Doctrine is a Manifest Disregard of Well-Established Statutory and Judicial Precedent Concerning the Legal Principle

¹² *Animalfeeds* at 699, n. 3.

¹³ *Long John Silver's Restaurants, Inc. v. Cole*, 514 F.3d 345, 349 (4th Cir. 2008).

40. Design Gaps registered the cabinet and closet systems drawings representing the architectural works used at Respondent Highsmiths' Residence under Registration Number VAu001462768 with the United States Copyright Office.

41. The Respondent Highsmiths argued that they were involved in the design of the cabinet and closet systems but did not provide evidence of authorship of any original work they contributed to the cabinet and closet systems.

42. The Respondent Highsmiths continued by arguing that since they were provided with copies of the designs that did not indicate copyright ownership, they had a good faith belief that they had rights to use the design. However, the front page of each of the Contracts indicated that "[a]ll designs created remain the sole property of Design Gaps, Inc. and may not be reproduced in whole or in part without the written consent of Design Gaps, Inc." Respondent Highsmiths were aware of who provided the design and who put the design together. It is not mandatory that the work be registered at the time of publication of the work. But, in this case, the copyright owners subsequently registered the work with the United States Copyright Office.

43. Contrary to Respondent Highsmiths' arguments, the designs provide more than measurement information, they provide architectural drawings showing the overall form as well as the arrangement and composition of spaces and elements in the design. Such elements, according to the Copyright Laws of the United States, are subject to copyright protection.¹⁴

44. As Respondent Highsmiths' acknowledge, the statutory requirements used in determining whether the doctrine of fair use applies are: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation

¹⁴ 17 U.S. Code § 102(a)(8).

to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.¹⁵ The fair use doctrine is to prevent a finding of copyright infringement “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.”¹⁶

45. Shelter and, upon information and belief, at the direction of Respondent Highsmiths admit that their use was “merely” providing a PDF of the copyrighted works to Distinctive Design alluding that there was no copyright infringement. Generally, copyright infringement is a strict liability offense, in which a violation does not require a culpable state of mind.¹⁷ However, “knowledge of, or willful blindness to, specific instances of infringement” supports a finding of contributory infringement.¹⁸ Thus, Respondents’ willful blindness to the fact that the Petitioners possessed copyright protection in the architectural works is itself an infringement of Petitioners’ rights.

46. Bryan Reiss, the owner of Distinctive Design admitted that what was installed in the field were similar to the closet designs.¹⁹ There were only minor changes to the elevation from the floor plan that was provided by Design Gaps.²⁰

47. Indeed, Respondent Highsmiths admit that their use was not at all transformative in any way. Indeed, the Supreme Court has determined that a “transformative” use “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message,” none of which are applicable here.²¹ Certainly, the arbitrator did not

¹⁵ 17 U.S. Code § 107.

¹⁶ *Id.*

¹⁷ *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 549 (4th Cir. 2004).

¹⁸ *BMG Rights Mgmt. (US) LLC v. Cox Commc’ns, Inc.*, 881 F.3d 293, 312 (4th Cir. 2018).

¹⁹ Reiss Dep. 104:1–13, Mar. 10, 2022 (cited portions of transcript included as Exhibit K).

²⁰ *Id.* at 105:2–20.

²¹ *Campbell v. Acuff–Rose Music, Inc.*, 510 U.S. 569, 579, 114 S.Ct. 1164, 127 L.Ed.2d 500 (1994).

consider the transformative nature of Respondent Highsmiths' use when determining their use was subject to the fair use doctrine.

48. If a use is not transformative, then there must be a showing that the second and third factors weigh in favor of fair use.²² In assessing the second factor, courts must determine the “thickness” or “thinness” of the author’s exclusive rights.²³ The thickness of the rights in visual materials, where architectural works are embodied, typically turn on the extent of creative choices embodied in the work.²⁴ The Arbitrator failed to provide such reasoned assessment in determining that Respondent Highsmiths’ use was subject to the fair use doctrine.

49. The third factor addresses whether “no more was taken than necessary” to accomplish the user’s purpose.²⁵ In the instant situation, all aspects of the architectural design were taken to accomplish Respondent Highsmiths’ purpose. But, again, the Arbitrator did not address this in a reasoned assessment in his determination that Respondent Highsmiths’ use was subject to the fair use doctrine.

50. With respect to the fourth factor, a showing that the architectural work is more than minimally commercial especially without a finding that the use is not transformative in nature, the use that exists in this instance, supports a finding that the potential mark for the value of the copyrighted work is affected.²⁶

51. Clearly, each of the factors of the statutory test as further defined by court precedence for fair use fails to support a finding of fair use, and the Arbitrator has ignored this well-established legal principle in finding that Respondent Highsmiths’ infringing use is subject

²² *Bouchat v. Balt. Ravens Ltd.*, 737 F.3d 932, 936 (4th Cir. 2014).

²³ *Brammer v. Violent Hues Prods., LLC*, 922 F.3d 255, 266 (4th Cir. 2019).

²⁴ *Id.* at 267.

²⁵ *Campbell*, 510 U.S. at 589, 114 S.Ct. 1164.

²⁶ *Bouchat*, 737 F.3d at 936.

to the fair use doctrine.

52. The materials and pleadings filed by the parties fully informed the Arbitrator of the applicable law in the matters to be considered. The Arbitrator either was aware of or had access to attorneys who have knowledge of Copyright Law, and the Arbitrator willfully flouted the governing law by refusing to apply it. Therefore, the Arbitrator has manifestly disregarded this clearly defined legal principle in Copyright Law that is not subject to reasonable debate.

3. Arbitrator's Failure to Heed that Petitioners' Performance Under the Contracts and Find Respondents in Material Breach of the Contracts is a Manifest Disregard of Well-Established Black Letter Law Concerning the Legal Principle

53. Design Gaps had entered the Contracts with Respondent Highsmiths for cabinetry at the Residence that totaled \$332,236.94. Respondent Highsmiths only paid \$264,935.77 to Design Gaps leaving them with a balance of \$55,588.94 for cabinetry and materials and a balance for final installation in the amount of \$11,712.23 or a total amount owed to Design Gaps in the amount of \$67,301.17.

54. Petitioner David Glover received emails from Andrew Walden, counsel for Respondent Highsmiths around May 14, 2021, terminating Design Gaps access to the Residence. The Contracts did not include any provision concerning completion date for the materials to be delivered and work to be performed.

55. Petitioners had ordered all materials and had a contractor on site to complete installation of same. Therefore, Petitioners substantially performed in good faith the provision of the materials as they were proceeding to installation under the Contracts whereby such purchases were in compliance with the Contracts.

56. Rather, it was Respondent Highsmiths that decided they wanted to upgrade the materials over those specified in the Contracts and they breached the Contracts with Petitioners so

that they could engage Distinctive Design to use the layout provided by Design Gaps but provide what Respondent Highsmiths considered were high quality materials.²⁷

57. The Contracts provided that the right of possession to, and ownership of all goods and merchandise furnished under the Contracts remains the property of Design Gaps until all payments required to be made under the Contracts is made by the Buyer.

58. It is a well-established premise of South Carolina law that if subsequent to the execution of the contract, the purchaser breaches the contract, the seller shall have the right to declare this contract null and void and retain from the earnest money its actual damages caused by purchaser but shall not be precluded from pursuing any other rights the seller might have at law or in equity.²⁸ Indeed, the Supreme Court has stated that it is not necessary that the plaintiff have fully and completely performed every item specified in the contract between the parties, but it is sufficient if there has been substantial performance, not necessarily full performance, so long as the substantial performance was in good faith and in compliance with the contract.²⁹

59. Respondent Highsmiths failure to pay the Contracts in full to Petitioners, according to the terms of the Contracts resulted in a material breach of the Contracts by Respondent Highsmiths. Pursuant to well-settled South Carolina law, Petitioners as sellers were left with the right to declare the Contracts null and void and retain from the earnest money its actual damages caused by Respondent Highsmiths' breach.

60. The Arbitrator failed to consider and provide a reasoned assessment that the refusal of Respondent Highsmiths' to continue to pay Design Gaps was itself a breach that would have allowed Petitioners to declare the Contracts null and void and retain from the earnest money their

²⁷ Reiss Dep. 120:1–121:8.

²⁸ *Richman Enterprises, Ltd. v. Pamplin*, 79 F.3d 1141 (4th Cir. 1995).

²⁹ *Salve Regina College v. Russell*, 499 U.S. 225, 229, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991)

actual damages caused by Respondent Highsmiths' breach.

61. Furthermore, the Arbitrator failed to consider that on January 14, 2021, the Respondent Highsmiths transferred their interest in the Residence to the Kacie M Highsmith Trust dated December 18th, 2020. Respondent Kacie Highsmith was the Trustee of the said Trust. With Respondent Highsmiths loss in ownership of the Residence, their standing to even bring the arbitration was called into question by Petitioners. However, the Arbitrator chose not to even make a reasoned assessment on this rule of law.

62. The materials and pleadings filed by the parties fully informed the Arbitrator of the applicable law in the matters to be considered. The Arbitrator admits that he is aware of or had access to attorneys who have knowledge of Construction Contracts & Procurement Law, and the Arbitrator willfully flouted the governing law by refusing to apply it. This is a well-established principle that is clearly defined and not subject to reasonable debate, and the Arbitrator's refusal to heed that legal principle in Construction Contracts & Procurement Law demonstrates a manifest disregard of the law.

C. Arbitrator Imperfectly Executed His Powers Such That a Mutual, Final, and Definite Award Upon the Subject Matter Submitted was not Made

63. Pursuant to 9 U.S.C. § 10(a)(4), an order vacating the award may be made "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." As further demonstrated herein, the Arbitrator has failed to provide a reasoned award as agreed to by the parties prior to the start of the arbitration as reported in the Report of Preliminary Hearing and Scheduling Order signed by the Arbitrator on September 30, 2021.

64. In enforcing an agreement to arbitrate or construing an arbitration clause, courts

and arbitrators must give effect to the contractual rights and expectations of the parties.³⁰

65. An arbitrator's decision may be vacated under § 10(a)(4) of the FAA on the ground that the arbitrator "exceeded [his] powers" when an arbitrator strays from interpretation and application of the agreement and effectively dispenses his own brand of industrial justice.³¹

66. As discussed in the previous section, the Arbitrator failed to provide a legal assessment concerning the four-factor test for determining fair use. Instead, the Arbitrator arbitrarily decided that Respondents providing Petitioners' architectural design to Distinctive Design was subject to the fair use doctrine. However, as demonstrated above, such a determination is exaggerated, incorrect and manifestly deprives Petitioners of copyright legal protections in their works. The failure of the Arbitrator to provide the reasoned assessment and award demonstrates that a mutual, final, and definite award upon the subject matter submitted was not made and is clearly proscribed by § 10(a)(4) of the FAA.

67. Furthermore, the Arbitrator failed to assess and recognize the Respondent Highsmiths breached the Contracts they entered with Design Gaps. Such contracts did not provide a time for when installation was to be complete. Indeed, as argued above, Petitioners had substantially performed most of the work through the design they provided to Respondents and the materials that they ordered to complete the installation. The Respondents' Expert Witness testified at the hearing the Petitioners were Substantially Complete with the cabinet installation and cabinet contracts prior to Petitioners being terminated on May 14th, 2021. Installation was under review and to commence at the time that Respondent Highsmiths decided to breach the Contracts. Again, the Arbitrator's failure to provide a concise written breakdown for the award

³⁰ *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 559 U.S. 662, 682, 130 S.Ct. 1758, 1774, 176 L.Ed.2d 605 (2010).

³¹ *Id.* at 1767.

that addresses the disposition of Respondent Highsmiths' claim that Petitioners had breached the Contracts further demonstrates the Arbitrator's failure to provide a reasoned award for all claims at issue.

68. Section R-48(b) of the American Arbitration Association's Commercial Arbitration Rules and Mediation Procedures provides that a reasoned award must be provided when "the parties request such an award in writing prior to appointment of the arbitrator." A reasoned award requires the arbitrator to provide a concise written breakdown for the award that addresses the disposition of all the claims and counterclaims submitted.³² A reasoned award is something short of findings and conclusions but more than a simple result.³³ The parties decided that the Arbitrator was to provide a reasoned award.

69. As provided herein, the Arbitrator failed to provide a reasoned award concerning the Petitioners' affirmative defenses, at least one of Respondents' claims and at least two of Petitioners' counterclaims. Such failures demonstrate that the Arbitrator did not give effect to the contractual rights and expectations of the parties, which is proscribed by 9 U.S.C. § 10(a)(4)

CONCLUSION

70. Upon the showing that the Arbitrator demonstrated evident partiality in favor of Respondents and against Petitioners, a manifest disregard of the law with respect to Petitioners' counterclaims of copyright infringement and Respondents' breach of the Contracts, and imperfect execution such that a mutual, final, and definite award upon the subject matter submitted was not made, Petitioners herein respectfully request the Arbitrator's award be vacated.

³² *U.S. for the Use v. P. Browne & Associates Inc.*, 771 F.Supp.2d 576, 582 (D. S.C. 2010).

³³ *American Insurance Managers, Inc. v. Guarantee Ins. Co.*, C/A No. 1:07-CV-1615-MBS (D. S.C. 2011).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this Court enter judgment in its favor on each and every claim for relief set forth herein and award Plaintiffs relief for the following:

a) That the October 7, 2022 Award be vacated for the reason that the Arbitrator exhibited partiality against the Petitioners in the Arbitration in violation of 9 U.S.C. § 10(a)(1).

b) That the October 7, 2022 Award be vacated, namely, by determining that the arbitrator failed to hear relevant and pertinent evidence on the four factors needed to show application of the Fair Use Doctrine, and that the arbitrator manifestly disregarded the law governing Copyrights and imperfectly executed his powers in construing the parties' Contracts as proscribed by judicial precedent.

c) The Arbitrator imperfectly executed his powers such that a mutual, final, and definite award upon the subject matter as otherwise agreed to by the parties in violation of 9 U.S.C. § 10(a)(4).

d) That the parties' dispute be remanded to the AAA for the administration of a new hearing with a new arbitrator that includes receipt of Plaintiffs' expert testimony and application of controlling Federal law on Copyrights and infringement of such; and

e) That the Court award such other relief as it deems just and proper.

This 29th day of December, 2022.

Respectfully Submitted,

Design Gaps, Inc., David Glover and Eva
Glover

By counsel

By: s/Todd M. Hess

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Attorney for Petitioners

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 29, 2022, Petitioners caused to be served Petitioners' Petition for Vacatur of Arbitration Award on counsel of record during the arbitration proceedings for Respondents via email and United States mail, with due and proper postage affixed thereto, and addressed as follows:

R. Andrew Walden
Womble Bond Dickison (US) LLP
5 Exchange Street
Charleston, SC 29401
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This the 29th day of December, 2022

HESS LAW, PLLC

By: /s/ Todd M. Hess

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Attorney for Petitioners

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

DESIGN GAPS, INC., DAVID GLOVER and	)	Civil Action No. 2:22-CV-04698-RMG
EVA GLOVER,	)	
	)	
Petitioners,	)	
	)	RESPONDENTS' MOTION TO DISMISS
vs.	)	PETITIONERS' PETITION FOR
	)	VACATUR OF ARBITRATION AWARD
SHELTER, LLC, DR. JASON HIGHSMITH,	)	
AND KACIE M. HIGHSMITH,	)	
	)	
Respondents.	)	
	)	
	)	

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Respondents Shelter, LLC, Dr. Jason Highsmith, and Kacie M. Highsmith respectfully request that the Court enter an Order dismissing, with prejudice, Petitioners' Petition for Vacatur of Arbitration Award on the grounds that it fails to state any claim upon which relief can be granted. A supporting Memorandum of Law is being filed contemporaneously herewith.

Respectfully submitted,

WOMBLE BOND DICKINSON (US) LLP

s/R. Andrew Walden

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February 27, 2023

Attorneys for Respondents

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

DESIGN GAPS, INC., DAVID GLOVER and)	Civil Action No. 2:22-CV-04698-RMG
EVA GLOVER,)	
)	
Petitioners,)	
)	
vs.)	MEMORANDUM IN SUPPORT OF
)	MOTION TO DISMISS PETITION FOR
)	VACATUR OF ARBITRATION AWARD
SHELTER, LLC, DR. JASON HIGHSMITH,)	
AND KACIE M. HIGHSMITH,)	
)	
Respondents.)	
)	
)	

Respondents Shelter, LLC, Dr. Jason Highsmith, and Kacie M. Highsmith (collectively, Respondents) submit the following memorandum in support of their Motion to Dismiss the Petition for Vacatur of the Arbitration Award (Petition), pursuant to Federal Rule of Civil Procedure 12(b)(6).

INTRODUCTION

This dispute arises from the renovation of the Highsmith residence at 376 Ralston Cree Street, Daniel Island, South Carolina (Residence). (Arbitrator’s Final Award, ECF No. 1-10.) In August and September 2020, under two contracts, Respondents separately hired Petitioner Design Gaps, Inc. (Design Gaps) to design and install cabinet systems in various rooms and in the master closets at the Residence. *Id.* The Highsmiths hired Design Gaps directly for some of the work and Shelter, LLC (Shelter) contracted with Design Gaps for the remainder. Respondents requested completion of the cabinet project approximately four to eight weeks from contract signing, or October and November of 2020, respectively. *Id.* Petitioners indicated that this time frame was achievable. *Id.* When the project was not completed by May 2021, after multiple communications

and attempts to salvage the relationship, Respondents terminated both contracts on May 14, 2021. *Id.* Respondents then hired Distinctive Design, LLC to finish the project. *Id.* Respondents filed for arbitration and Petitioners counterclaimed, each party asserting various causes of action. *Id.* The merits hearing was conducted before Thomas H. Co er, Jr. (hereinafter, the Arbitrator), on May 26, 27 and June 2, 2022, at the Arbitrator’s law firm of Haynsworth Sinner Boyd, P.A. in Charleston, South Carolina. *Id.* On October 7, 2022, following testimony, the submission of evidence, and extensive briefing by both parties, the Arbitrator awarded damages, expenses, and attorneys’ fees to Respondents totaling 296,409.17. *Id.* Petitioners now seek vacatur under 9 U.S.C. 10 of the Federal Arbitration Act. (Pet., ECF No. 1.)

PROCEDURAL HISTORY

On July 20, 2021, Respondents filed for arbitration with the American Arbitration Association (AAA) pursuant to the two separate contracts with Design Gaps. (Pet. Ex. C, ECF No. 1-4 Ex. D, ECF No. 1-5.) The Arbitration was conducted using the AAA’s Commercial Arbitration Rules. In the Arbitration Demand, Respondents asserted claims for breach of contract, promissory estoppel, fraud, and piercing the corporate veil. (Ex. A, Arbitration Demand.) Petitioners filed their Answer on August 6, 2021, and informed AAA that a counterclaim was forthcoming. (Ex. B, Arbitration Answering Statement.)

The Parties discussed and mutually agreed to select Thomas H. Co er, Jr. as the Arbitrator. The Arbitrator held a preliminary hearing on September 16, 2021. On September 22, 2021, the Arbitrator requested a response from Petitioners to the following question:

... during the preliminary hearing the Respondents, Design Gaps, Inc. and Eva Glover appear to be represented by David Glover. David Glover does not appear to be an attorney licensed to practice law in South Carolina. This raises concerns about whether Mr. Glover may be engaged in the unauthorized practice of law in South Carolina. Rule 404(1) addresses the rule governing the practice of law in South Carolina. To quote an arbitrator in another case before the AAA: “A review

of these Rules will reveal that non-South Carolina licensed attorneys may represent parties in arbitration in South Carolina on certain conditions which are imposed by the South Carolina Supreme Court as set forth in Rule 404(1). To the extent Mr. ... has not already complied with these requirements, he is instructed to do so with copy to counsel for Claimant as contemplated by the Rule. A failure to comply with those Rules may constitute unauthorized practice of law in South Carolina.” I ask that the AAA inquire about Mr. Glover’s status as a lawyer authorized to practice in South Carolina.

(Ex. C, Emails dated Sept. 22, 2021.) (Italics in original).

Petitioner David Glover (Glover) responded the same day to the Arbitrator’s request in a lengthy brief on *pro se* representation. *Id.* Glover insisted that he be allowed to represent Petitioners in the arbitration. On September 27, 2021, the Arbitrator provided another Order on *pro se* representation and requested additional comment. (Ex. D, Email dated Sept. 27, 2021.) On September 28, 2021, Glover responded to the Arbitrator with additional briefing. (Ex. E, Email dated Sept. 28, 2021.) On September 29, 2021, Glover requested an extension to the scheduling order to file Respondents’ Counterclaims, which the Arbitrator granted. (Ex. F, Email chain discussing extension.) On September 30, 2021, the Arbitrator issued the Report of Preliminary Hearing and Scheduling Order. (Ex. G, Scheduling Order).

Arbitration proceeded and Glover continued to represent Petitioners. On November 1, 2021, Petitioners filed counterclaims for breach of contract, tortious interference, libel, defamation, intentional infliction of emotional distress, violation of section 43(a) of the Lanham Act, and unfair and deceptive trade practices. (Ex. H, Counterclaims.) The same day, Petitioners served extensive discovery requests. (Ex. I, Discovery Requests.) On November 15, 2021, Petitioners submitted their witness list per the scheduling order and responded to Respondents’ discovery requests. (Ex. J, Witness List and Discovery Responses.) Petitioners also requested that the merits hearing be scheduled for three or four days, instead of two. *Id.*

On November 15, 2021, Respondents provided their witness list and filed a Partial Motion to

Dismiss Petitioners' counterclaims. (Ex. K, Witness List and Partial Motion to Dismiss.) Petitioners then filed revised counterclaims, wherein they removed certain parties and withdrew the libel and defamation claims. (Ex. L, Revised Counterclaims.) In response, the Arbitrator scheduled a status call for November 30, 2021, in which Respondents proposed simplifying the case to competing breach of contract claims. Petitioners agreed, (Ex. M, Email Agreement), and the Parties proceeded with discovery, with each side issuing subpoenas, taking depositions, and providing discovery documents. Petitioners were relentless with their requests for additional documents and discovery. On February 24, 2022, three months prior to the merits hearing, the Arbitrator issued his Order allowing Glover to proceed with representing Petitioners *pro se*. (Ex. N, Order.)

After the Arbitrator's Order and prior to the merits hearing, Petitioners took four depositions, filed various motions, and, on March 31, 2022, revised their counterclaims. (Ex. O, Second Revised Counterclaims.) With the revised counterclaims, Petitioners reneged on the prior agreement to simplify the arbitration to competing breach of contract claims and asserted claims for negligence, material breach of contract, fraudulent misrepresentation, failure to mitigate damages, tortious interference, civil conspiracy, unfair and deceptive trade practices, violation of the Copyright Act, conversion, and quasi-contract. *Id.*

In response, the Arbitrator scheduled another status call for April 6, 2022, to determine if Glover could amend his counterclaims. The Parties briefed this issue, and the Arbitrator issued an Order on April 20, 2022, allowing the claims to be included:

The arbitration agreement in this case is not restrictive. It provides that all disputes arising out of or in connection with this Agreement or any transaction hereunder shall be finally settled under Commercial Arbitration Rules Since the Agreement requires arbitration of all disputes arising out of the contract or transactions thereunder, I find that the Agreement requires that any claims arising out of or in connection with the Agreement or any transaction hereunder shall be subject to arbitration. There is clearly a significant relationship between the counterclaims and the contract to require that these claims be decided in arbitration.

(Ex. P, Interim Order.)

On May 2, 2022, the Parties provided their final witness lists and Petitioners listed Glover as the only witness to support their case. (Ex. , Final Witness List.) On May 20, 2022, Respondents filed a Motion for Summary Judgment as to all of Petitioners' claims except for the breach of contract claim. (Ex. R, Motion for Summary Judgment.) The Arbitrator denied the motion on May 25, 2022. (Ex. S, Order Denying Motion for Summary Judgment.) Petitioners filed a motion to include a last-minute witness that had not been previously disclosed. (Ex. T, Motion to Include Witness.) The Arbitrator granted the motion at the hearing, but Petitioners never called a second witness.

The three-day merits hearing occurred on May 26, 27 and June 2, 2022. Throughout the hearing, the Arbitrator treated all parties and witnesses with the utmost respect, took diligent notes, and allowed all documents, exhibits and testimony that were properly presented to be admitted into evidence. Importantly, the Arbitrator expressly did not allow deposition transcripts of any testifying witness to be admitted into evidence, as both parties had the opportunity to thoroughly direct or cross-examine each witness. During the hearing, Glover zealously represented Petitioners, conducting lengthy cross-examinations of Respondents' witnesses and filing a Motion to Dismiss at the close of Respondents' case. At the end of the merits hearing, the Arbitrator asked if the parties had presented all evidence they wanted to present in support of their claims, and all parties answered in the affirmative. (Arbitrator's Final Award 6-7, ECF No. 1-10.)

The Arbitrator requested proposed awards from both parties by June 17, 2022. Notwithstanding the position that Petitioners now take regarding the lack of a reasoned award, Petitioners submitted a three-page proposed award that contained no reasoning and provided blanks for the Arbitrator's input. (Ex. U, Proposed Order.) Petitioners further provided a closing

statement that was eighty-two (82) pages in length, not including exhibits. (Ex. V, Closing Statement.) In response to this submission, which contained excerpts from deposition transcripts that had not been admitted into evidence, the undersigned requested that the Arbitrator only consider evidence that had been admitted at the hearing. (Ex. W, Email Regarding Evidence.)

THE INTERIM AND FINAL AWARDS

On July 20, 2022, the Arbitrator issued an Interim Award containing seven pages of reasoned findings. (Ex. , Interim Award.) After having considered the evidence admitted, the Arbitrator found as follows relating to all of Petitioners' claims:

I also find that Respondents are entitled to take nothing under their counterclaims. First, Respondents conceded they had not completed its work by May 2021. I find that this arbitration involves contract claims. The parties' rights are all set out in the contracts. Design Gaps has received an offset against Claimants' completion costs for its contract balance. That is all it is entitled to receive.

Respondents did not prove any false or reckless representation made by Claimants which caused it any damage therefore, it is not entitled to anything on these claims. Respondents did not establish any tortious interference in its contract by any party. It further did not establish that there was a civil conspiracy between and among the Claimants, Distinctive Design or any other party. While Claimants did meet with Distinctive Design as early as January 2021 to review Respondents' performance, the Claimants were advised by Distinctive Design to continue working with Design Gaps to achieve completion. When completion had not been accomplished by May 2021, only then did Claimants terminate the contract. Respondents did not establish that Claimants' conduct was unfair or deceptive and therefore cannot sustain an unfair trade practices act claim. Respondents did not establish that the conduct it complains of was repetitive or in violation of the public interest. Finally, since the parties entered a written contract, there cannot be a separate quasi contract recovery.

Respondents gave to the Claimants their drawings for the cabinets. Obviously, this was for Claimants' review, approval, and use during the construction process. Claimants were free to use the drawings to measure the compliance of Design Gaps with these drawings and its obligation to install the designed cabinets in accordance with its contractual obligation. Respondents failed to enter into evidence a valid copyright registration however, even if they had, Claimants certainly established fair use of the design work, especially considering that Shelter did not profit from the design. The sharing of a pdf of the design did not materially impair the marketability of the design.

Respondents failed to prove that Claimants or anyone else converted its designs for this project. Bryan Reiss of Distinctive Design confirmed that he did not use Design Gaps' designs for the cabinets. I am convinced by Reiss's testimony and the exhibits provided that any similarity in the designs is due to the limitations of the space and the client's desired layout. Therefore, there has been no violation of any copyright which Respondent may have had.

Id.

The Arbitrator then requested briefing within fifteen days on who should be awarded attorney fees under the prevailing party provision of the contracts, as that term was not defined. Respondents submitted their briefing timely, on August 2, 2022, but the Arbitrator gave Petitioners until August 19, 2022, to respond. On August 19, 2022, Petitioners filed a twenty-eight (28) page brief challenging the Interim Award, and mainly, Mr. Co er as the Arbitrator. (Motion to Reconsider and Request for Reasoned Award, ECF No. 1-9.) Petitioners then hired local attorney Alan Belcher, of Hall Booth Smith, P.C., to contest Respondents' fee submission, which required additional briefing. On October 7, 2022, the Arbitrator issued the Arbitrator's Final Award, which was ten pages in length and provided a reasoned decision as to the claims and award of fees and expenses. (Arbitrator's Final Award 6-7, ECF No. 1-10.) Petitioners did not file any further motions or other challenges to the Arbitrator's Final Award.

STANDARD FOR LEGAL REVIEW

The scope of judicial review for an arbitrator's decision is among the narrowest known at law because to allow full scrutiny of such awards would frustrate the purpose of having arbitration at all—the quick resolution of disputes and the avoidance of the expense and delay associated with litigation.' *Three S Delaware, Inc. v. DataQuick Info. Sys., Inc.*, 492 F.3d 520, 527 (4th Cir.2007) (quoting *Apex Plumbing Supply, Inc. v. U.S. Supply Co., Inc.*, 142 F.3d 188, 193 (4th Cir.1998)). The Federal Arbitration Act allows vacatur only where (1) the award was procured by corruption, fraud or undue influence, (2) there was evident partiality or corruption in the arbitrators, (3) the

arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or (4) the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. 9 U.S.C. 10(a). In addition, an arbitration award may be set aside if it reflects a manifest disregard of applicable law. *Gallus Inv., L.P. v. Pudgie's Famous Chicken, Ltd.*, 134 F.3d 231, 233-34 (4th Cir.1998).

ARGUMENT

Petitioners are unable satisfy any of the FAA's requirements for vacatur of the Final Award. The Petition is based on speculation, unsupported argument, and information not submitted into evidence. Petitioners fail to provide any evidence that the Arbitrator was partial, or that he disregarded the law or exceeded his powers.

First, Petitioners allege that the Arbitrator exhibited partiality, and that his request for briefing as to whether a corporation could be represented *pro se* in arbitration is evidence of such partiality. (Pet. 6-10, ECF No. 1.) Second, Petitioners introduce new evidence in an effort to say that the Arbitrator manifestly disregarded the law. (Pet. 10-15, ECF No. 1.) Third, Petitioners allege that the Arbitrator exceeded his powers by failing to issue a reasoned award. (Pet. 17- 19, ECF No. 1.) All three of Petitioners' arguments are without merit: the Arbitrator was not impartial, and there is no credible evidence that he was he applied the law to the evidence admitted, and Petitioners are barred from introducing new evidence and he did issue a reasoned award, but even if he had not, that would not be grounds for vacatur because there was no requirement that the award be in that form.

I. PETITIONERS' PARTIALITY ALLEGATIONS ARE LEGALLY INSUFFICIENT, NON-SENSICAL AND UNSUPPORTED

The Fourth Circuit analyzes four factors to determine if an arbitrator has demonstrated evident partiality: (1) the extent and character of the personal interest, pecuniary or otherwise, of the arbitrator in the proceeding (2) the directness of the relationship between the arbitrator and the party he is alleged to favor (3) the connection of that relationship to the arbitration and (4) the proximity in time between the relationship and the arbitration proceeding. *ANR Coal Co., Inc. v. Cogentrix of N. Carolina, Inc.*, 173 F.3d 493, 500 (4th Cir. 1999) (citing *Consol. Coal Co. v. Loc. 1643, United Mine Workers of Am.*, 48 F.3d 125, 130 (4th Cir. 1995)). When considering each factor, the court should determine whether the asserted bias is 'direct, definite and capable of demonstration rather than remote, uncertain or speculative' *Id.* (quoting *Consolidation Coal*, 48 F.3d at 129). Further, a party seeking vacatur must put forward facts that objectively demonstrate such a degree of partiality that a reasonable person could assume that the arbitrator had improper motives. *Id.* at 501 *Atlantic Shores Resort Jt. Venture v. Martin*, 731 F. Supp. 1279, 1282–83 (D.S.C. 1990). This is a heavy burden. See *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141, 146 (4th Cir. 1993).

Petitioners have not presented evidence to support any of the factors required to prove partiality. Petitioners fail to allege that the Arbitrator had a personal or pecuniary interest in the outcome of the arbitration or that the Arbitrator had a personal relationship with any of the parties or counsel involved. The Court's inquiry should end here, and Rule 12(b)(6) should be used to dismiss the Petition.

In the event the Court disagrees, Respondents will address the arguments Petitioners did make in support of vacatur. Petitioners allege that the Arbitrator was so opposed to Design Gaps, Inc. being represented *pro se* that it destroyed Petitioners' right to a fundamentally fair arbitration.

(Pet. 6-9, ECF No. 1.) Petitioners make a series of speculative leaps and mischaracterizations in support of their position.

For instance, what Petitioners characterize as a questionnaire from the Arbitrator is not a questionnaire at all. (Pet. 6-7, ECF No. 1.) The Arbitrator provided, through the AAA, an Order from another case discussing *pro se* representation and simply asked for comments. (Ex. C, Emails dated Sept. 22, 2021.) The Arbitrator sought to satisfy himself that it was appropriate for Glover to appear on behalf of Petitioners to argue that those efforts were partial against Petitioners is nonsensical.

Petitioners state that the Arbitrator finally concluded that he disagreed with the *pro se* representation. (Pet. 7-8, ECF No. 1.) This is false. The color copy of the email from the Arbitrator clearly shows that the language in blue font were not his words or conclusions and that he was merely seeing additional comment on another prior Order that was relevant to his decision. (Ex. D, Email dated Sept. 27, 2021.) This is no different than when a judge requests briefing for the court's consideration.

Petitioners also allege that the Arbitrator's delay in deciding the *pro se* representation issue was prejudicial to their ability to effectively continue with discovery and prepare for Arbitration. (Pet. 9, ECF No. 1.) Based on the procedural history above, this allegation is simply not true. Between September 2021 and February 2022, Petitioners issued numerous subpoenas, participated in a deposition, filed numerous motions, and sought extensive discovery. Between February 2022 and the merits hearing in May and June 2022, Petitioners took four depositions, file various motions and revised their counterclaims. (Ex. O, Second Revised Counterclaims.) The insinuation of prejudice at this stage of the case, when it has never been raised before, is absurd. Additionally, Petitioners never requested a time extension on this basis, and Petitioners' allegation stating otherwise is

misleading.

Petitioners next allege that the Arbitrator's conduct during the hearing is evidence of partiality. (Pet. 9, ECF No. 1.) The Arbitrator was highly deferential to Petitioners throughout the arbitration and there is no evidence to suggest otherwise. Objectively, the Arbitrator was courteous, gave each party equal attention, consistently took notes, and admitted all testimony and documents into evidence that were properly submitted. On the third day of the arbitration, the Arbitrator did pause the proceeding for approximately 30 minutes to address another matter outside of arbitration, but that is to be expected of judges, arbitrators, and attorneys, as urgent matters arise. This break in the hearing is not evidence of bias.

Finally, Petitioners note that the Arbitrator failed to respond to their Motion to Reconsider and Request for a Reasoned Award. This issue is moot because the Arbitrator subsequently issued a Final Award that the Petitioners did not challenge.

Petitioners fail to meet any of the requirements to show partiality and the arguments they do present are not credible. There are no facts that demonstrate evident partiality, or even an appearance of impropriety, which, by itself would not even be sufficient to vacate the award.

II. PETITIONERS' MANIFEST DISREGARD ALLEGATIONS RELY ON EVIDENCE THAT WAS NOT BEFORE THE ARBITRATOR

Petitioners allege that the Arbitrator manifestly disregarded the law in denying Petitioners' claims for copyright violation and material breach of contract. The Arbitrator's Final Award, which discussed both claims and the lack of evidence submitted to support them, shows that he did not.

The manifest disregard standard is not an invitation to review the merits of the underlying arbitration, or to establish that the arbitrator misconstrued or misinterpreted the applicable law. *Jones v. Dancel*, 792 F.3d 395, 402 (4th Cir. 2015) (quoting *Wachovia Sec., LLC v. Brand*, 671 F.3d 472, 478 n. 5 (4th Cir. 2012)). The standard only allows the Court to determine whether the

arbitrator did his job—not whether he did it well, correctly, or reasonably, but simply whether he did it. *Long John Silver's Restaurants, Inc. v. Cole*, 514 F.3d 345, 349 (4th Cir. 2008) (quoting *Mountaineer Gas Co. v. Oil, Chem. & Atomic Workers Int'l Union*, 76 F.3d 606, 608 (4th Cir.1996).

As long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision. *Id.* (quoting *United Paperworkers Int'l Union, AFL–CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987)) *U.S. ex rel. Coastal Roofing Co., Inc. v. P. Browne & Associates, Inc.*, 771 F. Supp. 2d 576, 584–85 (D.S.C. 2010) (A federal court cannot vacate an arbitral award merely because it is convinced that the arbitrator made the wrong call on the law. On the contrary, the award should be enforced, despite a court's disagreement with it on the merits, if there is a barely colorable justification for the outcome reached.). The Fourth Circuit permits vacatur based on an arbitrator's manifest disregard of the law when (1) the applicable legal principle is clearly defined and not subject to reasonable debate and (2) the arbitrator refused to heed that legal principle. *Cole*, 514 F.3d at 349.

Petitioners allege that the Arbitrator manifestly disregarded the law in denying their claim for violation of copyright. (Pet. 12-14, ECF No. 1.) The record is clear, however, that Petitioners failed to submit evidence at the hearing to prove their claims, and that, even if they had, any alleged use would not have been a violation of copyright. The Arbitrator's Final Award states:

Respondents failed to enter into evidence a valid copyright registration however, even if they had, Claimants certainly established fair use of the design work, especially considering that Shelter did not profit from the design. The sharing of a pdf of the design did not materially impair the marketability of the design.

Respondents failed to prove that Claimants or anyone else converted its designs for this project. Bryan Reiss of Distinctive Design confirmed that he did not use Design Gaps' designs for the cabinets. I am convinced by Reiss's testimony and the exhibits provided that any similarity in the designs is due to the limitations of the space and the client's desired layout. Therefore, there has been no violation of any copyright

which Respondent may have had.

In discussing marketability and profit and fair use, it is apparent that the Arbitrator reconciled the evidence presented at the hearing with the applicable law on the matter. The Arbitrator did his job.

Petitioners' second claim for manifest disregard of the law involves the Arbitrator's dismissal of the material breach of contract claim. The Final Award provides detailed reasoning as to the Arbitrator's determination of the competing breach of contract claims and there is no evidence, or even argument, that he disregarded the law in relation to the evidence admitted and considered. What Petitioners seek is to have this Court review the merits, which by itself is improper, but also to review the merits based on evidence never admitted or considered by the Arbitrator. The Petition relies exclusively on documents, depositions transcripts, arguments of counsel, and alleged admissions that were never admitted as evidence.

The Arbitrator's Final Award plainly addresses the evidence admitted, as well as the evidence not submitted or admitted, in support of the award. The Arbitrator ruled against Petitioners on their claims for copyright violation and breach of contract because they did not submit sufficient evidence to support them, and because the claims were without merit, not because he disregarded any applicable law. Petitioners fail to meet the standard on review and their reliance on evidence not admitted at the hearing should be rejected.

III. PETITIONERS' ALLEGATIONS THAT THE ARBITRATOR IMPERFECTLY EXECUTED HIS POWERS ARE WITHOUT MERIT

Petitioners allege that the Arbitrator imperfectly executed, and therefore exceeded, his powers in failing to issue a reasoned award. There is no basis or support for this argument. As an initial matter, the Arbitrator was under no obligation to provide a reasoned award. Under AAA Commercial Rule 48(b), the arbitrator need not render a reasoned award unless the parties request

such an award in writing prior to appointment of the arbitrator or unless the arbitrator decides that a reasoned award is appropriate. American Arbitration Association, Commercial Arbitration Rules, https://www.adr.org/sites/default/files/Commercial_Rules-Web.pdf (last visited Feb. 7, 2023). Here, neither party requested a reasoned award in writing prior to appointment of the arbitrator, so none was mandated. *See Coastal Roofing Co., Inc.*, 771 F. Supp. 2d at 582 (finding that the Arbitrator was under no obligation to provide a reasoned award under the AAA rules, even though requested by both parties, because they failed to request a reasoned award prior to the appointment of the arbitrator per the rule). The Arbitrator, therefore, was only required to set forth his ultimate conclusion and need not have included any underlying analysis. *Am. Ins. Managers, Inc. v. Guarantee Ins. Co.*, 1:07-CV-1615-MBS, 2011 WL 1162374, at 4 (D.S.C. Mar. 29, 2011) (citing *Holden v. Deloitte & Touche LLP*, 390 F.Supp.2d 752, 780 (N.D. Ill. 2005)).

Even though not required, the Arbitrator did issue a reasoned award. A reasoned award is something short of findings and conclusions but more than a simple result. *Id.* at 4 (footnote 6). The ten-page Arbitrator's Final Award clearly meets that definition.

Petitioners allege that the Arbitrator failed to provide a legal assessment of the four-factor fair use test, but the Arbitrator addressed each factor in his award. Evaluating the first factor, the purpose and character of use of the design, the Arbitrator stated that Claimants were free to use the drawings to measure the compliance of Design Gaps with these drawings and its obligation to install the designed cabinets in accordance with its contractual obligation. (Arbitrator's Final Award 6, ECF No. 1-10.) As to the second factor, the nature of the copyrighted work, the Arbitrator stated that the drawings were provided by Petitioners for the Respondents' review, approval, and use during the construction process. *Id.* For the third factor, the amount and substantiality of the portion used, the Arbitrator stated that Bryan Reiss of Distinctive Design confirmed that he did not

use Design Gaps' designs for the cabinets and that he was convinced by Reiss's testimony and the exhibits provided that any similarity in the designs is due to the limitations of the space and the client's desired layout. *Id.* at 7. Regarding the fourth factor, the effect of the use upon the potential market for the value of the copyrighted work, the Arbitrator stated that the sharing of a pdf of the design did not materially impair the marketability of the design. *Id.* Contrary to Petitioners' assertions, the Arbitrator expressly addressed each of the four factors related to fair use and it is wrong to suggest otherwise.

Petitioners also allege that the Arbitrator failed to address Petitioners' breach of contract claim for lack of payment. The Final Award addressed the competing breach of contract claims together. Regarding the contract balance owed to Design Gaps, the Arbitrator stated: Design Gaps has received an offset against Claimants' completion costs for its contract balance. That is all it is entitled to receive. Contrary to Petitioners' assertions, the Arbitrator did address the claim for payment.

Finally, even if the Court finds that the Arbitrator was required to issue a reasoned award and failed to do so, that failure does not always merit vacatur. *MCI Constructors, Inc. v. Hazen & Sawyer, P.C.*, No. 1:02CV396, 2009 WL 632930, at 7 (M.D.N.C. Mar. 9, 2009) (An award being unreasoned is not a basis for vacatur under 10(a)(4), as awards are generally vacated under 10(a)(4) only where the arbitrators failed to resolve an issue presented to them or the award is ambiguous or unclear. (citations omitted)) *see also Coastal Roofing Co.*, 771 F.Supp.2d at 583. In *Coastal Roofing Co.*, the Court found that an award being unreasoned is not a basis for vacatur under 10(a)(4), as awards are generally vacated under 10(a)(4) only where the arbitrators failed to resolve an issue presented to them or the award is ambiguous or unclear. *Coastal Roofing*, 771 F. Supp. 2d 576, 583. Here, the award was not ambiguous and the arbitrator disposed of all claims

asserted.

CONCLUSION

Petitioners make no credible arguments in support of their effort to vacate the Final Award. In most respects, the Petition is frivolous, which is not an assertion Respondents make lightly. As has been the case throughout this arbitration proceeding, Petitioners are doing things that unnecessarily drive up the cost of the dispute for Respondents. Although Petitioners are ostensibly now paying fees to an attorney for these filings, they did not before, and their ability to drive up costs on their opponents without suffering the same fate should end here. Respectfully, Respondents believe this Petition was filed to delay payment of the award in Respondents' favor while Petitioners effectively see a second merits hearing in a subsequent action filed in this Court. *See* Civil Action No. 2:23-CV-00197-RMG. For the reasons stated herein, the Court should dismiss the Petition and award the costs and fees of this proceeding to Respondents, as required by the fee provisions in the agreements.

Respectfully submitted,

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February 27, 2023

Attorneys for Respondents

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

DESIGN GAPS, INC., DAVID GLOVER and	)	Civil Action No. 2:22-CV-04698-RMG
EVA GLOVER,	)	
	)	
Petitioners,	)	
	)	APPLICATION FOR CONFIRMATION
vs.	)	OF ARBITRATION AWARD
	)	
SHELTER, LLC, DR. JASON HIGHSMITH,	)	
AND KACIE M. HIGHSMITH,	)	
	)	
Respondents.	)	
	)	
	)	

Respondents Shelter, LLC, Dr. Jason Highsmith, and Kacie M. Highsmith
(Respondents) hereby petition the Court pursuant to Section 9 of the Federal Arbitration Act, 9
U.S.C. 9 to confirm the Arbitrator's Final Award dated October 7, 2022.

The grounds for this Application, as set forth more fully in the Memorandum of Law filed herewith, are that this dispute was arbitrated on May 26, 27 and June 2, 2022, before Thomas H. Co er, Jr., the arbitrator appointed by the American Arbitration Association (AAA). The Arbitrator issued a Final Award in favor of Respondents on October 7, 2022. (Arbitrator’s Final Award, ECF No. 1-10.) Petitioners did not appeal the award before the AAA but have filed a Petition for Vacatur of Arbitration Award (Petition) in this Court. (Pet., ECF No. 1.) Upon dismissal of the Petition, Respondents are entitled to a judgment confirming the aforesaid award.

This Application is supported by the Arbitrator's Final Award, previously filed in this action as ECF No. 1-10, by the aforementioned Memorandum of Law, and by the pleadings, orders and other papers already on file in this case.

Respectfully submitted,

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February 28, 2023

Attorneys for Respondents

terminated both contracts on May 14, 2021. Respondents then hired Distinctive Design, LLC to finish the project. Respondents filed for arbitration and Petitioners counterclaimed, each party asserting various causes of action. The merits hearing was conducted before Arbitrator Thomas H. Co er, Jr., on May 26, 27 and June 2, 2022, at the Arbitrator's law firm of Haynsworth Sin ler Boyd, P.A. in Charleston, South Carolina. On October 7, 2022, following testimony, the submission of evidence, and extensive briefing by both parties, the Arbitrator awarded damages, expenses, and attorneys' fees to Respondents totaling 296,409.17. (Arbitrator's Final Award, ECF No. 1-10.)

ARGUMENT

Pursuant to the Federal Arbitration Act (FAA), the Court must confirm the award upon disposition of Petitioners' Petition for Vacatur of Arbitration Award. (Pet., ECF No. 1.) Section 9 of the FAA provides in pertinent part that

at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court *st* grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. (emphasis added).

Confirmation under Section 9 of the FAA is intended to be summary. *aylor . elson*, 788 F.2d 220, 225 (4th Cir. 1986) *see also R ard . r dent al ns ran e o.*, 307 F. 3d 1277, 1288 (11th Cir. 2002) (confirmation of arbitration award is usually routine and summary). Unless there is some ground for modifying or vacating the award, the court will simply enter a confirmatory judgment . . . which is then doc eted and given the same effect as a judgment in an ordinary civil case. *All ed r e er ne o pan es n . . o son*, 513 U.S. 265, 290-291 (1995) (Scalia, J., dissenting).

As this Court has noted, the FAA sets forth extremely narrow grounds for a district court to refuse to confirm arbitral decisions. *Booth v. Bank of America*, 39 F.Supp.2d 582, 609 (D.S.C. 1998). In general, the FAA allows an award to be vacated only for corruption, misconduct and the like, and modified only to correct clerical or mathematical errors. *See* 9 U.S.C. §§ 10, 11. Exceptions to confirmation are limited so as to avoid frustrating the fundamental purpose of arbitration, *i.e.* quick dispute resolution and avoidance of expense and delay of court proceedings. *In re American Express*, 800 F. Supp. 312, 317 (D. Md. 1992). There is a heavy presumption in favor of confirming arbitration awards. *Reed v. Bank of America*, 307 F.3d at 1288 (*Bank of America v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 146 F.3d 1309, 1312 (11th Cir. 1998)). If there is even a barely colorable justification for the outcome reached, the court must confirm the arbitration award. *Willen v. American Express*, 103 F.3d 9 (2nd Cir. 1997), *cert. denied*, 529 U.S. 1070 (2000). *Matter of Andros Corp. v. American Express*, 579 F.2d 691, 704 (2d Cir. 1978).

In this case, the Arbitrator issued his award after a three-day hearing attended by all parties. Having received three days of testimony, the submission of evidence, and extensive briefing by both parties, the Arbitrator concluded that Respondents were entitled to recover damages and attorneys' fees as more fully stated in the award. (Arbitrator's Final Award, ECF No. 1-10.) Petitioners timely filed a Petition for Vacatur of Arbitration Award on December 28, 2022. (Pet., ECF No. 1.) However, as more fully briefed in Respondents' Motion to Dismiss, filed contemporaneously herewith, there are no grounds for vacatur. Upon denying vacatur, the Court must confirm the Arbitrator's Final Award.

CONCLUSION

Based on the foregoing, Respondents request that the Arbitrator's Final Award be confirmed by the Court, and that said confirmation take the form of a judgment in favor of Respondents.

Respectfully submitted,

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February 28, 2023

Attorneys for Respondents

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

DESIGN GAPS, INC., DAVID GLOVER and)	Civil Action No. 2:22-CV-04698-RMG
EVA GLOVER,	)
	)
Petitioners,	)
	)
vs.	) FILING IN ACCORDANCE WITH 9 U.S.C.
	) 13
	)
SHELTER, LLC, DR. JASON HIGHSMITH,)	
AND KACIE M. HIGHSMITH,	)
	)
Respondents.	)
	)
_____	)

TO THE HONORABLE CLERK OF COURT

Respondents Shelter, LLC, Dr. Jason Highsmith, and Kacie M. Highsmith (collectively, Respondents) file this paper as evidence of compliance with the requirements of 9 U.S.C. 13, which Section requires the party moving for confirmation of an arbitration award to file certain papers with the Clerk of Court at the same time as the requested order for entry of judgment on the award, and says as follows:

1. As to the requirements of 9 U.S.C. 13(a), the applicable arbitration agreement is already on file in this case and appears in Article 17 of the Terms and Conditions in Petitioner Design Gaps, Inc.'s contracts (ECF No. 1-4 ECF No. 1-5.)
2. As to the requirements of 9 U.S.C. 13(b), the Arbitrator's Final Award is already on file in this case as an attachment to the Petitioners Motion for Vacatur of Arbitration Award (ECF No. 1-10.)
3. As to the requirements of 9 U.S.C. 13(c), Respondents refer to the case file in this matter for all other relevant documents related to this arbitration.

Respectfully submitted,

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February 28, 2023

Attorneys for Respondents

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

DESIGN GAPS, INC., DAVID GLOVER, and	)	Civil Action No. 2:22-cv-04698-RMG
EVA GLOVER	)	
	)	
Petitioners	)	PETITIONERS' MEMORANDUM IN
	)	OPPOSITION TO RESPONDENTS'
vs.	)	MOTION TO DISMISS AND MOTION
	)	FOR AWARD OF ATTORNEYS' FEES
SHELTER, LLC, DR. JASON HIGHSMITH,	)	
and KACIE M. HIGHSMITH	)	
	)	
Respondents.	)	
	)	

Petitioners Design Gaps, Inc., David Glover, and Eva Glover (individually “Design Gaps,” “Petitioner David Glover,” and “Petitioner Eva Glover” and collectively “Petitioners”), by and through their undersigned counsel, hereby file this Memorandum in Opposition to Respondents’ (individually “Shelter,” “Respondent Jason Highsmith,” “Respondent Kacie Highsmith,” the Highsmiths collectively “Respondent Highsmiths” and all collectively “Respondents”) Motion to Dismiss (ECF No. 8) and Respondents’ Motion for Award of Attorneys’ Fees (ECF No. 9).

RELEVANT FACTUAL BACKGROUND

This civil action arises from a commercial arbitration (“Arbitration”) with the merits hearing on the claims and counterclaims being held in Charleston on May 26-27 and June 2, 2022, by Thomas H. Coker, Jr. (“Arbitrator”). Respondents’ claims in the underlying arbitration involved breach of contract, promissory estoppel, and piercing the corporate veil based upon two commercial contracts (“Contracts”)—the first entered into between Design Gaps and the Respondents for the design and installation of various cabinets and the other entered into between Design Gaps and Respondent Highsmiths—at Respondent Highsmiths’ residence (“Residence”). Petitioners counterclaimed for negligence, breach of contract, fraudulent misrepresentation, failure to mitigate damages, tortious interference, civil conspiracy, conversion, unfair and deceptive trade practices, quasi-contract, legal standing, and violation of the copyright act. The Contracts included

an arbitration clause requiring *et al.* all disputes arising out of or in connection with the agreement or any transaction under the contract to finally be settled under the Commercial Arbitration Rules (“Rules”) of the American Arbitration Association (“AAA”) and the prevailing party to recover its costs of the arbitration as well as reasonable attorneys’ fees. (ECF Nos. 1-4 and 1-5, Exhibits C and D, p. 3 ¶ 17). The Contracts did not include any provisions concerning completion date.

Notwithstanding that Shelter and Respondent Kacie Highsmith have acknowledged that the designs of the cabinets that were to be placed in the Residence were provided by Design Gaps and remained the property of Design Gaps¹, Shelter confirmed that Bryan Reiss of Distinctive Designs, who was doing several projects for Shelter and cabinetry for a garage addition at the Residence,² allowed Bryan Reiss to have access to Design Gaps’ designs when forwarded without permission via email by Jenny Butler of Shelter on January 19, 2021.³

After Design Gaps was substantially complete with installation of the his-and-her master closet and had arranged for the delivery of the materials for all cabinetries at the Residence, Design Gaps reiterated its request for payment to Respondent Highsmiths pursuant the terms and conditions of the Contracts. Instead of paying in accordance with the contract terms, Respondent Highsmiths terminated Design Gaps through an email sent by their attorney within a few days following the request for payment on May 14, 2021.

The Interim Award of the Arbitrator issued on July 19, 2022, found that the Respondents were entitled to recover \$152,884.00 from Design Gaps alleging Respondents had paid \$274,647.00 to Distinctive Designs that would then be reduced by \$121,763.00 allegedly for increased costs due to a different selection of materials and improvements authorized by the Respondents. (ECF No. 1-8, Exhibit G.) The Arbitrator dismissed all of Petitioners’ counterclaims.

¹ Kacie Highsmith Dep. 20:14–23, Mar. 9, 2022 (cited portion of transcript included in ECF No.1-7, Exhibit F).

² *Id.* at p. 30, ll. 3-8.

³ *Id.* at p. 32, l. 11 to p. 33, l. 4.

Petitioners timely filed a Motion to Reconsider and Request for Reasoned Award on August 19, 2022. (ECF No. 1-9, Exhibit H.)

In the Arbitrator's Final Award issued on October 7, 2022, in addition to the \$152,884.00 award included in the Interim Award of the Arbitrator, the Arbitrator awarded Respondents \$143,525.17 for reasonable attorneys' fees and costs associated with the arbitration. (ECF No. 1-10, Exhibit I.) The Arbitrator awarded \$296,409.17 to Respondents but did not address any of the arguments provided by Petitioners in their Motion to Reconsider and Request for Reasoned Award.

DISCUSSION

Respondents present three arguments in support of their Motion to Dismiss. First, they argue that Petitioners' partiality allegations by the Arbitrator are legally insufficient, non-sensical, and unsupported. Second, they argue that the manifest disregard for the law allegations by the Arbitrator rely upon evidence not before the Arbitrator. Finally, they maintain that the allegation that the Arbitrator imperfectly executed his powers are without merit. Each of Respondents' arguments rest upon facts that are squarely contradicted by the record or fail as a matter of law. For these reasons and the reasons more fully discussed below, Respondents' motion to dismiss should be denied.

I. A REASONABLE PERSON WOULD CONCLUDE THAT THE ARBITRATOR WAS PARTIAL TO THE RESPONDENTS IN THE ARBITRATION

The factors the Fourth Circuit uses in determining that such partiality exists are: (1) the extent and character of the personal interest, pecuniary or otherwise, of the arbitrator in the proceedings; (2) the directness of the relationship between the arbitrator and the party he is alleged to favor; (3) the connection of that relationship to the arbitrator; and (4) the proximity in time between the relationship and the arbitration proceeding. *Three S Delaware v. Dataquick Information Systems*, 492 F.3d 520, 530 (4th Cir. 2007) (citing *ANR Coal Co., Inc. v. Cogentrix of N.C., Inc.*, 173 F.3d 493, 500 (4th Cir.1999)). Furthermore, "[w]hen considering each factor, the

court should determine whether the asserted bias is direct, definite and capable of demonstration rather than remote, uncertain or speculative and whether the facts are sufficient to indicate improper motives on the part of the arbitrator.” *Id.*

Petitioners have alleged that the Arbitrator consistently took actions and made statements opposing Petitioner David Glover as a *pro se* respondent in not only representing himself but also in the representation of Design Gaps and Petitioner Eva Glover as respondents in the Arbitration. The Arbitrator has been a practicing attorney since his graduation from law school in 1976. While it is not entirely clear how long he has been performing arbitrations, it seems clear he has never been faced with a situation where one of the parties in an arbitration where he was an arbitrator had wanted to represent themselves as well as all parties in that arbitration.

The Arbitrator vigorously objected to Petitioner David Glover’s *pro se* representation of Design Gaps and Petitioner Eva Glover in the Arbitration. The Arbitrator’s incessance with Petitioner David Glover acting not only in a *pro se* capacity for himself but also on behalf of Design Gaps and Petitioner Eva Glover was demonstrated in the email that he submitted to the parties seeking comments on why the *pro se* arrangement was not appropriate. Petitioner David Glover provided his comments to the email. (ECF No. 1-11, Exhibit J.) Notably, Respondents chose not to provide their comments to the Arbitrator.

The Arbitrator argued that (i) *Renaissance Enterprises, Inc. v. Summit Teleservice, Inc.*, 515 S.E.2d 257 (S.C. 1999) makes clear that the only judicial proceeding where a corporation can represent itself is before a magistrate court (emphasis provided by Arbitrator) and that the Arbitrator could find no opinion from a South Carolina court authorizing a corporation to proceed *pro se* in an arbitration and he could not find any persuasive opinion in any other jurisdiction supporting that conclusion; (ii) the South Carolina Supreme Court has made clear that public policy does not support the unauthorized practice of law and public policy was significant to the

state Supreme Court in reaching its holding in *Renaissance* rejecting the minority of courts that allow *pro se* representation in court; (iii) in *Coe*, the court notes that non-lawyers cannot negotiate criminal pleas and reiterates the public policy in this state seeking to protect the public from “severe economic and emotional consequences” flowing from legal advice “given by persons untrained in the law” (quotations provided by Arbitrator); (iv) while “this proceeding is not a judicial proceeding ... it is a quasi judicial proceeding that will ultimately become a judicial proceeding when the final award/order in this matter is sought to be confirmed” and admitted “this technical legal issue could be argued to a judge in the future confirmation process in an effort to overturn my decision in this matter — whatever it may be — for which one party or the other could be dissatisfied”; and (v) according to *Roberts v. LaConey*, 650 S.E.2d 474 (S.C. 2007), the “practice of law was not confined to litigation but extends to activities in other fields which entail specialized legal knowledge and ability.” The Arbitrator promulgated positions that appeared to support his position including:

In light of the totality of the circumstances, I do not agree with Respondent's arguments in favor of pro se corporate representation in light of Renaissance and Coe and cannot trump public policy or the law. Given the foregoing, and the fact that a South Carolina court has not directly ruled on this issue, the undersigned is placed in the unenviable position of having to predict South Carolina law on this subject. I conclude that a South Carolina Court is more likely than not to hold under the facts presented and the character of the services sought to be provided ... lead to the conclusion that a corporate Respondent must be represented by counsel in an arbitration ... To that end, and in the spirit of Coe, Respondent shall have 30 days to retain counsel in this matter and must do so on or before _____ and that counsel shall file a notice of appearance with the AAA on or before the deadline.

The statements and positions the Arbitrator set forth show the extent and character of the personal interest, pecuniary or otherwise, that the Arbitrator is not in support of Petitioners’ *pro se* representation in the proceedings.

To overcome the Arbitrator’s position of partiality against Petitioners’ *pro se* representation in the arbitration, Petitioner David Glover sought the opinion of Mr. John Nichols,

the lawyer charged by the Supreme Court of South Carolina to receive, screen, investigate, and, as necessary, prosecute the complaints made against judges and lawyers, with the Office of Disciplinary Counsel of the South Carolina Supreme Court. Mr. Nichols determined that it is not considered practicing law when a *pro se* party represents another individual or corporation in an arbitration, which is non-judicial in nature and between private parties. Petitioner David Glover provided this information in an email responding to a lengthy email on the subject sent by the Arbitrator where he had cited several court cases in support of his position that Petitioner David Glover could not represent the other Petitioners.⁴

The attorney for the Respondents only agreed to an extension of time for the Arbitration proceeding if the Arbitrator determined that Respondents needed to seek counsel for the representation of Design Gaps and perhaps Petitioner Eva Glover.⁵ The Arbitrator demonstrates the directness of his relationship with the Respondents who are represented by counsel and the connection of counsel for Respondents' relationship to the Arbitrator by delaying his decision to allow Petitioner David Glover to continue with representation of the Petitioners' by five months following the submission of their comments to his arguments. The following opinion was released by the Arbitrator at that time:

With respect to the questions about Mr. Glover's acting as attorney for Design Gaps, I have received the following information from Nichole Davis of the South Carolina Bar:

"The Committee discussed your inquiry on Friday and declined to issue an opinion. The members came to the conclusion that your inquiry falls outside of their scope of authority."

I also have Mr. Glover's email correspondence with the South Carolina Bar concerning this matter. It appears that the Bar has no objection to Mr. Glover continuing in his current role on this case. It further appears that the parties and arbitrator have satisfied any ethical concerns regarding this matter. It therefore

⁴ ECF No. 1-11, Exhibit J (David Glover email correspondence to AAA Jalisa Hardrick, Andrew Walden and Eve Glover, "FW: Shelter, LLC v. Design Gaps, Inc., Eva Glover - Case 01-21-0004-8211", Sep. 28, 2021).

⁵ *Id.* (Andrew Walden email correspondence to AAA Jalisa Hardrick, David Glover and Eve Glover, "RE: Shelter, LLC v. Design Gaps, Inc., Eva Glover - Case 01-21-0004-8211", Sep. 29, 2021).

appears that Mr. Glover may continue.

The proximity of time between the relationship and the arbitration proceeding is uncertain since it appears that the Arbitrator perhaps never had to address the *pro se* representation at issue in this case; however, it at least began at the start of this arbitration and appears to have continued through the end of the arbitration where the Arbitrator chose to rule in Respondents favor while dismissing each of the counterclaims raised by the Petitioners.

While Respondents argue otherwise, the *ANR Coal* factors support Petitioners' argument that the Arbitrator did have partiality in allowing a *pro se* party represent the Petitioners in the arbitration and, based upon the facts provided above, a reasonable person would conclude that that the Arbitrator was partial to Respondents in this arbitration since they were represented by counsel and did not have the *pro se* issues raised by Petitioners.

II. THE EVIDENCE IN SUPPORT OF PETITIONERS' ALLEGATIONS OF ARBITRATOR'S MANIFEST DISREGARD OF THE LAW WERE FULLY IN THE ARBITRATION RECORD AND BEFORE THE ARBITRATOR

The Fourth Circuit has determined that notwithstanding an arbitration record contains over 50,000 pages of documentary evidence, five days of hearings, and two rounds of briefing, and includes the Arbitrator's preliminary ruling and a 123-page final award, a record that is quite a bit larger than that at hand, in order to determine whether the proper facts are being applied a review of the entire arbitration record is required. *Penske Logistics LLC v. Freight Drivers & Helpers Local Union No. 557 Pension Fund* (4th Cir. 2018). The Fourth Circuit does not appear to support Respondents' contention that there is some evidence that is admissible while there is other evidence that is not in an arbitration proceeding. Indeed, Petitioners have not been able to find any case in the Fourth Circuit that addresses only admissible evidence versus inadmissible evidence with respect to an arbitration. Rather, the Fourth Circuit generally refers to all evidence as the "arbitration record." See, e.g., *Id.*, *Westinghouse Elec. Corp. Aerospace Div. v. International Broth. of Elec. Workers, AFL-CIO*, 561 F.2d 521 (4th Cir. 1977); *Three S Delaware*, 492 F.3d at

520; and *Wachovia Sec., LLC v. Brand*, 33 IER Cases 679, 671 F.3d 472 (4th Cir. 2012). Indeed, the Court in the *Wachovia* case provides that under the manifest disregard theory for vacatur, “the arbitration record must show that ‘(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrator[] refused to heed that legal principle.’” *Id.* at 481 (quoting *Long John Silver's Rests., Inc. v. Cole*, 514 F.3d 345, 349–50 (4th Cir.2008)). *I.e.*, the complete arbitration record, not admissible parts versus the non-admissible parts as the Respondents allege, must be used to make this showing.

Furthermore, as identified earlier pursuant to the Contracts, the Arbitration was to be settled under the AAA Commercial Arbitration Rules (“Rules”). Said Rules provide a Checklist for Preliminary Hearing Procedures that states, *inter alia*, “the parties will exchange pre-hearing submissions, including exhibits.” (Rules, P-2(a)(xiv)(c).) The Rules acknowledge the submission of not only exhibits but other “pre-hearing submissions” as well. Petitioners chose to provide such a submission to the attorney for Respondents and the Arbitrator in an email sent on April 13, 2022, that had the Copyright Registration information received from the Library of Congress attached. (A true and correct copy of the email and Copyright Registration information is in Petitioners’ Exhibit L included herewith.) Therefore, the arbitration record had the certificate in the record prior to the time of the merits hearing, but the Arbitrator, contrary to the Rules, still refused to acknowledge the existence of the Copyright Registration in his interim and final decisions.

Excluding certain evidence that is clearly part of the arbitration record only serves to damage Petitioners’ support for their case. For example, Respondents contend that the Arbitrator chose not to consider copyright infringement for the reason that “Respondents failed to enter into evidence a valid copyright registration” even when the copyright registration was part of the arbitration record through an email that Petitioner David Glover sent to the Arbitrator.

While “no civil action for infringement of the copyright in any United States work shall be

instituted until ... registration of the copyright claim has been made in accordance with this title,”⁶ Petitioners registration date for the copyright in their plans was March 30, 2022, which was in advance of the merits hearing in this arbitration. Furthermore, the registration certificate was included as part of the arbitration record. Therefore, Petitioners were fully eligible to bring a civil action even in this quasi-judicial proceeding pursuant to Supreme Court precedent. *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S.Ct. 881, 892 (2019). Thus, this applicable legal principle has been well-defined by the Supreme Court and is not subject to reasonable debate, but the Arbitrator failed to heed this legal principal when he refused to consider Petitioners’ eligibility to bring a civil action against the Respondents based upon copyright infringement of the design plans. This decision by the Arbitrator demonstrates his manifest disregard of the law.

The Respondents argue that merely “discussing ‘marketability’ and ‘profit’ and ‘fair use’ it is apparent that the Arbitrator reconciled the evidence presented at the hearing with the applicable law on the matter.” However, the Arbitrator’s use of the word “marketability” was when he stated that Shelter’s sharing of the design plans did not materially impair the marketability of the design. But this is not a requisite factor in determining whether the design had been infringed or not. A *prima facie* case of copyright infringement requires proof that the plaintiff owns a valid copyright and that the defendant copied the original elements of the copyrighted work. While Petitioners had secured registration of its design, which the Arbitrator refused to acknowledge, the registration number for the works does establish Petitioners’ ownership in the works. Courts presume copying of the work upon showing that the alleged copier had access to the work and that the original work and the alleged copy are substantially similar. *Hennon v. Kirkland's Inc.*, 64 F.3d 657 (4th Cir. 1995) (citing *Keeler Brass Co. v. Continental Brass Co.*, 862 F.2d 1063, 1065 (4th Cir.1988)). The facts in the arbitration record show that Shelter would have contributed to any

⁶ 17 U.S.C. § 411(a)

copyright infringement by providing the design plans to Bryan Reiss, the direct infringer of the copyright. Bryan Reiss testified that there were similarities, but these were due to “limitations of space and the client’s desired layout.” Therefore, both access to the design and the similarities between the original work and the alleged copy allows copying of the Petitioners’ work by Bryan Reiss to be presumed, but the Arbitrator chose not to do so.

Based upon these facts, it can be shown that Bryan Reiss committed direct infringement of the copyright Petitioners have in their designs, Shelter knew or should have known that such infringing activity was to occur, and Shelter induced such infringing activity by turning over the drawings to Bryan Reiss. Shelter is a vicarious and contributory copyright infringer. *See BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, Inc.*, 881 F.3d 293, 300 (4th Cir. 2018).

The references above demonstrate the applicable legal principle for copyright infringement and vicarious/contributory copyright infringement have been well-defined by the Fourth Circuit and they are not subject to reasonable debate, but the Arbitrator failed to yield to this legal principal in determining whether Shelter and even Respondent Kacie Highsmith contributed to the direct copyright infringement of Petitioners’ designs that indeed had occurred.

A showing of fair use is a defense to copyright infringement that is well established by the Fourth Circuit that is not subject to reasonable debate. The test for fair use requires these four factors to be considered: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. *Brammer v. Violent Hues Prods., LLC*, 922 F.3d 255, 262 (4th Cir. 2019). Indeed, this test has been codified in 17 U.S.C. § 107. Of the fair use test, the Arbitrator’s review of the factors was not at all consistent with the standards set forth by Fourth Circuit precedent.

In the case at hand, the purpose and character of the use was purely for commercial purposes without any educational purpose whatsoever. 17 U.S.C. § 107(1). Moreover, any infringer stood to profit from the infringing use of the works. Indeed, Bryan Reiss profited by being paid for the work that the Respondent Highsmiths wanted performed on the closet. The Arbitrator recognized this in his final award when he indicated that Bryan Reiss' company Distinctive Design was hired to complete the work. (ECF No. 1-10, Exhibit I, p. 2, ll. 15-16.)

The "nature of the copyrighted work" requires a court to determine the level of protection the copyright merits. 17 U.S.C. § 107(2). The Arbitrator indicated that the drawings were provided by Petitioners for the Respondents "review, approval and use during the construction process." While this may be so, the Respondent Highsmiths terminated Petitioners from the construction process upon their breach of the Contracts with the Petitioners. Any indication that Respondents were allowed to continue to use the copyrighted plans upon such breach only supports the conclusion that the copyrighted plans were a work made for hire. However, the Contracts made no mention that any plans developed were a work made for hire and a review of the agency principles does not allow one to conclude that Petitioners were employees of the Respondents. *Community For Creative v. Reid*, 490 U.S. 730, 109 S.Ct. 2166 (1989). This has also been codified in 17 U.S.C. § 101. Even though both law and precedent enable the work made for hire provisions to be clearly defined and not subject to reasonable debate, the Arbitrator decidedly ignored such provisions in maintaining that Respondents should still have access to Petitioners' copyrighted plans even though such plans were not a work made for hire.

The third statutory factor, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, addresses the amount and substantiality of the portion copied by the alleged infringer in relation to the copyrighted work as a whole. 17 U.S.C. § 107(3). "[T]his factor calls for thought not only about the quantity of the materials used, but about their quality

and importance, too.” *Sundeman v. Seajay Society, Inc.*, 142 F.3d 194, 205 (4th Cir. 1998) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580, 114 S.Ct. 1164, 1175 (1994)). Bryan Reiss only testified to the similarities of use of certain portions of Petitioners’ copyrighted work and did not testify to the quality and importance of the infringing elements that were in use. Therefore, the Arbitrator’s conclusion on this point is incomplete and cannot be considered as accurate.

The fourth statutory factor of the fair use analysis contemplates “the effect of the use upon the potential market for or value of the copyrighted work.” 17 U.S.C. § 107(4). This factor requires “not only the extent of market harm caused by the particular actions of the alleged infringer” to be considered, “but also whether unrestricted and widespread conduct of the sort engaged in by the defendant would result in a substantially adverse impact on the potential market for the original.” *Brammer*, 922 F.3d at 268 (quoting *Campbell*, 510 U.S. at 590, 114 S.Ct. 1164). The Arbitrator indicated that “sharing of a pdf of the design did not materially impair the marketability of the design.” However, the Arbitrator did not consider the effect that allowing unrestricted and widespread access to the types of designs authored by Petitioners in this case would impact the potential market for the originals from all of those who provide design and installation services that Petitioners provide. Certainly, it can be envisioned, that if all those in Respondents’ position were allowed to merely cancel their development contracts and still be allowed to use the plans that have been developed for these projects, the marketability of such plans would be extremely impacted. Again, the Arbitrator narrowly limited his analysis in support of his findings in favor of the Respondents.

The applicable legal principle for a finding of fair use is codified in 17 U.S.C. § 107 and clearly defined by the Fourth Circuit, and when the limited fair use defense applies is not subject to reasonable debate, but the Arbitrator failed to follow that legal principle when he determined that Respondents use of Petitioners’ copyrighted plans was fair use.

Contrary to the Respondents assertion that Petitioners seek this Court to review the merits, Petitioners have identified the Arbitrator's failure to recognize Petitioners' performance under the contracts and find Respondents in Material Breach of the Contracts. Such a finding would show the Arbitrator knew of the relevant legal principle, appreciated that this principle controlled the outcome of the disputed issue, but nonetheless willfully flouted the governing law by refusing to apply it. Petitioners fully recognize that a finding of manifest disregard of the law by the Arbitrator would allow this arbitration to be remanded for consideration. Such a remand would allow all evidence in the arbitration record to fully be considered and Petitioners' claim for copyright infringement by Shelter and Respondent Kacie Highsmith to be adequately considered.

III. THE ARBITRATOR'S IMPERFECT EXECUTION OF HIS POWERS PREVENTED A MUTUAL, FINAL, AND DEFINITE AWARD UPON THE SUBJECT MATTER FROM BEING ISSUED

A reasoned award addresses the disposition of all the claims and counterclaims submitted to the arbitrator for review. *MCI Constructors, LLC v. City of Greensboro*, 610 F.3d 849, 854 (4th Cir. 2010). The Arbitrator was appointed on August 25, 2021, and in what appears to be his first official duty, he presided over the Preliminary Hearing held on September 30, 2021. Following the preliminary hearing, the Arbitrator signed and issued the Report of Preliminary Hearing and Scheduling Order ("Report"). (ECF No. 8-8.) In the Report, the Arbitrator identified that the Form of the Award would be a Reasoned Award. Therefore, upon signing the Report, apparently the Arbitrator had the belief that the parties agreed to a Reasoned Award prior to his appointment or otherwise mutually agreed to a Reasoned Award at the preliminary hearing. Other than the Motion to Dismiss, Petitioners are not in possession of any documents where Respondents objected to this entry in the Report. Therefore, given their failure to timely object to this entry for Form of Award in the Report, Respondents should be denied to object to a Reasoned Award.

Petitioners' counterclaims were for negligence alleging Shelter's inexcusable lack of

scheduling caused this matter to proceed to arbitration; material breach of contract was based upon Shelter's and Respondent Highsmiths' breach of the Contracts that were entered into with Design Gaps; fraudulent misrepresentation arose when counsel for Respondent Highsmiths emphasized to Petitioners that they should continue working and delivering materials even though Petitioners were not being paid pursuant to the terms of the Contracts even though such representations by counsel for Respondent Highsmiths were made even after Bryan Reiss and Distinctive Designs had already been given Petitioners' drawings; tortious interference alleges Jenny Butler, on behalf of Shelter, provided Petitioners' drawings to Bryan Reiss, which interfered with Petitioners' completion of its Contracts with Respondent Highsmiths; copyright infringement, as already identified herein, were based upon Respondents provision of Petitioners' copyrighted design drawings to Bryan Reiss and Distinctive Designs; legal standing challenges Respondent Kacie Highsmith's authority to make decisions under the contracts when the Resident was transferred to the Kacie M. Highsmith Trust; civil conspiracy alleges that Respondents worked in tandem with Bryan Reiss to replace Design Gaps as the provider of materials and services under the Contracts; conversion alleges Respondents' converted Petitioners' designs having copyright protection for their own use and profit; quasi-contract counterclaim alleges implied-in-law contract, quasi-contract, or unjust enrichment implied-in-law contract, quasi-contract, or unjust enrichment surrounding Respondents unjust enrichment pursuant to their dealings with Petitioners; and Unfair and Deceptive Trade Practices counterclaim based upon South Carolina law focuses upon Respondents delivery of Petitioners' original works to others for their use in South Carolina.

Pursuant to the analysis of the legal basis of certain decisions of the Arbitrator that have been discussed earlier in this response, a mutual, final, and definite award upon the subject matter was not made by the Arbitrator. Additionally, the Arbitrator summarily rejected each of Petitioners' counterclaims without providing a reasoned determination concerning why the

Arbitrator denied Petitioners' bases for each of the counterclaims.

Petitioners argue that the Arbitrator failed to at least resolve the material breach of contract claim by Respondents, the tortious interference claim against Jenny Butler on behalf of Shelter, the legal standing issue arising from the transfer of the Residence to the Kacie M. Highsmith Trust, and the copyright infringement claim against the Respondents making the Arbitrator's award in favor of the respondents ambiguous and unclear. Inasmuch, Plaintiffs maintain that the Arbitrator's failure to provide a reasoned award should be vacated. *See, e.g.,* U.S. ex rel. Coastal Roofing Co., Inc. v. P. Browne & Associates, Inc., 771 F. Supp. 2d 576, 583 (D.S.C. 2010); *MCI Constructors, Inc. v. Hazen & Sawyer, P.C.*, No. 1:02CV396, 2009 WL 632930, at *7 (M.D.N.C. Mar. 9, 2009).

CONCLUSION

The purpose of having an arbitration is for the quick resolution of disputes and the avoidance of the expense and delay associated with litigation. *MCI Constructors*, 610 F.3d at 857. Arbitration awards that are irrational and evidence a manifest disregard for the law must be set aside. *Upshur Coals Corp. v. United Mine Workers of America*, Dist. 31, 933 F.2d 225, 229 (4th Cir.1991). Petitioners believe that the arbitration award in this case arises to that level. As admitted by the Respondents, the arbitration award is based upon a collection of evidence the Arbitrator decided to use and, while other evidence is clearly part of the arbitration record, the Arbitrator chose not to use it; the Arbitrator's decisions in the arbitration award demonstrate a manifest disregard of the law; the Arbitrator failed to provide a reasoned award as agreed to by the parties and instead issued an arbitration award that was ambiguous and unclear including with respect to Petitioners' counterclaims; and an environment of partiality to the Respondents and against the Petitioners that appears to arise from their *pro se* representation capacity. Based upon this evidence, attorneys' fees are not in order given the basis for vacatur provided herein. *See, e.g., Wachovia Sec.*, 671 F.3d at 472.

This 13th day of March, 2023.

Respectfully Submitted,

Design Gaps, Inc., David Glover and Eva
Glover

By counsel

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Attorney for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2023, the foregoing PETITIONERS' MEMORANDUM IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS was electronically filed with the Clerk of Court using the CM/ECF system, which will send notification to all counsel of record who have consented to accept service by electronic means.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

DESIGN GAPS, INC., DAVID GLOVER, and EVA GLOVER	)	Civil Action No. 2:22-cv-04698-RMG
	)	
	)	
Petitioners	)	PETITIONERS' MEMORANDUM IN
	)	OPPOSITION TO RESPONDENTS'
vs.	)	APPLICATION FOR CONFIRMATION
	)	OF ARBITRATION AWARD
SHELTER, LLC, DR. JASON HIGHSMITH, and KACIE M. HIGHSMITH	)	
	)	
	)	
Respondents.	)	
_____	)	

Petitioners Design Gaps, Inc., David Glover, and Eva Glover (individually “Design Gaps,” “Petitioner David Glover,” and “Petitioner Eva Glover” and collectively “Petitioners”), by and through their undersigned counsel, hereby file this Memorandum in Opposition to Respondents’ (individually “Shelter,” “Respondent Jason Highsmith,” “Respondent Kacie Highsmith,” the Highsmiths collectively “Respondent Highsmiths” and all collectively “Respondents”) Application for Confirmation of Arbitration Award (ECF No. 10).

RELEVANT FACTUAL BACKGROUND

This civil action arises from a commercial arbitration (“Arbitration”) with the merits hearing on the claims and counterclaims being held in Charleston on May 26-27 and June 2, 2022 by Thomas H. Coker, Jr. (“Arbitrator”). Respondents’ claims in the underlying arbitration involved breach of contract, promissory estoppel, and piercing the corporate veil based upon two commercial contracts (“Contracts”)—the first entered into between Design Gaps and the Respondents for the design and installation of various cabinets and the other entered into between Design Gaps and Respondent Highsmiths at Respondent Highsmiths’ residence (“Residence”).

Petitioners counterclaimed for negligence, breach of contract, fraudulent misrepresentation, failure to mitigate damages, tortious interference, civil conspiracy, conversion, unfair and deceptive trade practices, quasi-contract, legal standing, and violation of the copyright act. The Contracts included an arbitration clause requiring *et al.* all disputes arising out of or in connection with the agreement or any transaction under the contract to finally be settled under the Commercial Arbitration Rules of the American Arbitration Association (“AAA”) and the prevailing party to recover its costs of the arbitration as well as reasonable attorneys’ fees. (ECF No. 1, Exhibits C and D, p. 3 ¶ 17). The Contracts did not include any provisions concerning completion date.

There is a copending Petition for Vacatur (“Petition”) of the Arbitration award that is being considered by this Court under the same caption. (ECF No. 1.) For that reason, Petitioners have limited their arguments herein since they are reflected in the Petition and all supplemental documents filed therewith.

DISCUSSION

Petitioners have the following three grounds for vacatur in the Petition: (1) evident partiality in the Arbitrator, (2) Arbitrator’s manifest disregard for the law; and (3) Arbitrator imperfectly executed his powers such that a mutual, final, and definite award upon the subject matter submitted was not made. In response, the Respondents moved for dismissal arguing: (1) Petitioners’ partiality allegations by the Arbitrator are legally insufficient, non-sensical, and unsupported; (2) the manifest disregard for the law allegations by the Arbitrator rely upon evidence not before the Arbitrator; and (3) the allegation that the Arbitrator imperfectly executed his powers are without merit. In Petitioners’ Memorandum in Opposition to Respondents’ Motion to Dismiss (ECF No. 11), Petitioners’ argue that Respondents’ Motion to Dismiss rests upon facts that are squarely contradicted by the record or fail as a matter of law. For instance (1) a reasonable person would conclude that the Arbitrator was partial to the respondents in the Arbitration; (2) the

evidence in support of Petitioners' allegations of Arbitrator's manifest disregard of the law were fully in the arbitration record and before the Arbitrator; and (3) the Arbitrator's imperfect execution of his powers prevented a mutual, final, and definite award upon the subject matter from being issued. For these reasons and the reasons more fully discussed in the Petition and Petitioners' Memorandum in Opposition to Respondents Motion to Dismiss Petition, the arbitration award should be vacated, and Respondents' Application for Confirmation of the Arbitration Award should be denied.

CONCLUSION

The purpose of having an arbitration is for the quick resolution of disputes and the avoidance of the expense and delay associated with litigation. *MCI Constructors*, 610 F.3d 849, 854 (4th Cir. 2010). Arbitration awards that are irrational and evidence a manifest disregard for the law must be set aside. *Upshur Coals Corp. v. United Mine Workers of America*, Dist. 31, 933 F.2d 225, 229 (4th Cir.1991). Petitioners believe that the arbitration award in this case arises to that level. As admitted by the Respondents, the arbitration award is based upon a collection of evidence the Arbitrator decided to use and, while other evidence is clearly part of the arbitration record, the Arbitrator chose not to use it; the Arbitrator's decisions in the arbitration award demonstrate a manifest disregard of the law; the Arbitrator failed to provide a reasoned award as agreed to by the parties and instead issued an arbitration award that was ambiguous and unclear including with respect to Petitioners' counterclaims; and an environment of partiality to the Respondents and against the Petitioners that appears to arise from their *pro se* representation capacity. The Court should deny Respondents' Application for Confirmation of the Arbitration Award.

This 13th day of March, 2023.

Respectfully Submitted,

Design Gaps, Inc., David Glover and Eva
Glover

By counsel

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CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2023, the foregoing PETITIONERS' MEMORANDUM IN OPPOSITION TO RESPONDENTS' APPLICATION FOR CONFIRMATION OF ARBITRATION AWARD was electronically filed with the Clerk of Court using the CM/ECF system, which will send notification to all counsel of record who have consented to accept service by electronic means.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

DESIGN GAPS, INC., DAVID GLOVER and)	Civil Action No. 2:22-CV-04698-RMG
EVA GLOVER,)	
)	
Petitioners,)	
)	
vs.)	REPLY MEMORANDUM IN SUPPORT OF
)	MOTION TO DISMISS PETITION FOR
)	VACATUR OF ARBITRATION AWARD
SHELTER, LLC, DR. JASON HIGHSMITH,)	
AND KACIE M. HIGHSMITH,)	
)	
Respondents.)	
)	

Respondents Shelter, LLC, Dr. Jason Highsmith, and Kacie M. Highsmith (collectively, “Respondents”) respectfully submit this Reply Memorandum in Support of Motion to Dismiss the Petition for Vacatur of the Arbitration Award (“Reply”). In accordance with Local Civil Rule 7.07 and in the interest of brevity, Respondents will address only certain arguments herein and will defer to their Memorandum in Support of Motion to Dismiss Petition for Vacatur of Arbitration Award, ECF No. 8-1 (“Memorandum”) on all other arguments raised by Petitioners as they have been previously addressed.

ARGUMENT

I. PETITIONERS' SPECULATIVE AND MISLEADING ALLEGATIONS ARE INSUFFICIENT TO SUPPORT VACATUR FOR EVIDENT PARTIALITY.

Petitioners argue that the Arbitrator’s request for comments on whether David Glover could represent Design Gaps, Inc. (“Design Gaps”) pro se in arbitration is evidence of partiality. Petitioners misrepresent to the Court that the Arbitrator “vigorously objected,” “argued” and “promulgated positions” adverse to David Glover representing Design Gaps. This is simply not true. As evidenced in the email referenced by Petitioners (ECF No. 8-5), the Arbitrator provided an excerpt of an Order from another arbitration and asked for comments. He did not take any positions

or make any conclusions. In fact, the only conclusion that the Arbitrator ever made on this issue was to allow David Glover to proceed with the representation.

Further, Petitioners argue that the Arbitrator's delay in issuing a decision on pro se representation is evidence of partiality. The Arbitrator's decision, quoted in Petitioners' briefing, clearly indicates that he was waiting on the South Carolina Bar to issue an opinion before making his decision. Thus, any delay was associated with the South Carolina Bar committee meeting schedule and not due to a direct relationship between the Arbitrator and Respondents, of which there was and is none. As briefed more fully in Respondents' Memorandum, this alleged delay did not hinder or prejudice David Glover from zealously proceeding with his representation of Petitioners in this case.

II. THE ARBITRATOR DID NOT MANIFESTLY DISREGARD THE LAW IN DENYING PETITIONERS' COPYRIGHT CLAIM.

Petitioners argue that the Arbitrator manifestly disregarded the law by failing to consider their copyright registration as evidence in his Award. (Arbitrator's Final Award 6, ECF No. 1-10 ("Respondents failed to enter into evidence a valid copyright registration.")) In this case, the Arbitrator informed the parties—and the parties agreed—that he would only be considering the exhibits and testimony that were introduced into evidence at the hearing. He memorialized the same in his award:

At the conclusion of that testimony, as arbitrator, I asked each side if they had an adequate opportunity to present in full the evidence which they thought was relevant and important for me to consider in rendering my Award. Each side advised that they had adequate opportunity to present their case with all relevant testimony and exhibits.

(Arbitrator's Final Award 2, ECF No. 1-10.) Accordingly, Petitioners' argument that the Arbitrator must consider all documents submitted throughout the entire arbitration process is fundamentally unreasonable.

Although Petitioners failed to enter the registration as evidence during the hearing and the Arbitrator did not consider it to be part of the record, their argument to vacate the entire award based on this is without merit. Petitioners argue that the Arbitrator somehow exhibited manifest disregard of the Copyright Act by noting that a copyright certificate had not been entered into evidence. (Petitioners’ Response 8–9.¹) Their argument is meritless on its face. The allegedly disregarded provision, 17 U.S.C.A. § 411(a), prohibits the initiation of civil actions prior to “registration of the copyright claim.” Under Section 411(a) of the Copyright Act, the Arbitrator could have, and should have, procedurally dismissed the copyright infringement claim for lack of registration if he believed there to be none. However, he did not do so; rather, he noted Petitioners’ failure to enter any registration into evidence and proceeded to address the copyright infringement claim on its merits. (Arbitrator’s Final Award 6–7, ECF No. 1-10.) Thus, Petitioners cannot show that the Arbitrator refused to apply a well-defined legal principle. The fact that he considered the copyright infringement claim at all demonstrates that he did not base his Award on Petitioners’ failure to admit their registration into the record. Any alleged “error”—which is not even sufficient to show manifest disregard—under Section 411(a) was immaterial and worked to Petitioners’ favor, not to their detriment.

Petitioners cannot use their failure to introduce evidence at the hearing as grounds for vacatur, especially since the Arbitrator considered their claim despite the procedural error on Petitioners’ part. There was no prejudice to Petitioners and no manifest disregard of the law. This argument is untenable and cannot stand.

III. THE REASONED AWARD UNAMBIGUOUSLY DISPOSED OF ALL

¹ The case relied upon by Petitioners simply reaffirms the requirements of Section 411(a). *See Fourth Est. Pub. Benefit Corp. v. Wall-street.com, LLC*, 139 S. Ct. 881, 891 (2019) (“[A plaintiff must] apply for registration and receive the Copyright Office’s decision on her application before instituting suit.”).

CLAIMS ASSERTED.

Despite what Petitioners argue in their response, Respondents did not object to a reasoned award. Indeed, Respondents assert that is exactly what the arbitrator provided – an award steeped in reasoning. However, to the extent that the Court finds the award was not reasoned, the Petition for Vacatur should still be dismissed based on the case law and AAA rules. *See U.S. ex rel. Coastal Roofing Co., Inc. v. P. Browne & Assocs., Inc.*, 771 F. Supp. 2d 576, 582 (D.S.C. 2010) (finding that that the Arbitrator was under no obligation to provide a “reasoned award” under the AAA rules, even though requested by both parties, because they failed to request a reasoned award prior to the appointment of the arbitrator per the rule); AAA Commercial Rule 48(b), Arbitration Association, Commercial Arbitration Rules, https://www.adr.org/sites/default/files/Commercial_Rules-Web.pdf (last visited Feb. 7, 2023) (“The arbitrator need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator decides that a reasoned award is appropriate.”).

CONCLUSION

For the reasons stated herein and in Respondents’ Memorandum, the Court should dismiss the Petition and award the costs and fees of this proceeding to Respondents.

Respectfully submitted,

WOMBLE BOND DICKINSON (US) LLP

Charleston, SC
March 20, 2023

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**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

Design Gaps, Inc., David Glover, and Eva
Glover,

Petitioners,

v.

Shelter, LLC, Jason Highsmith, and Kacie
M. Highsmith,

Respondents.

Case No. 2:22-cv-04698-RMG

ORDER AND OPINION

This matter is before the Court on Petitioners’ motion to vacate an arbitration award. (Dkt. No. 1). Respondents moved to dismiss Petitioners’ motion for vacatur (Dkt. No. 8-1) and moved to confirm the arbitration award. (Dkt. No. 10). Petitioners opposed the motion to dismiss (Dkt. No. 11) and the motion to confirm the arbitration award. (Dkt. No. 13). For the reasons set forth below, the Court **DENIES** Petitioners’ motion to vacate the arbitration award and **GRANTS** Respondents’ motion to confirm the award.

I. Background

This dispute arises from the renovation of Jason Highsmith and Kacie Highsmith’s (the “Highsmiths”) home in Daniel Island, South Carolina.¹ In August and September 2020, the Highsmiths entered into two contracts with Design Gaps, Inc. (“Design Gaps”) to design and to install cabinets and closets in their home. The Highsmiths expressed that they wanted the renovations to be completed within approximately four to eight weeks after contract signing. Design Gaps indicated that this time frame was achievable. In May 2021, the renovations were

¹ The facts are drawn from Arbitrator’s Final Award. (Dkt. No. 1-10). This is appropriate as this Court’s task is to “determine only whether the arbitrator did his job-not whether he did it well, correctly, or reasonably, but simply whether he did it.” *Mountaineer Gas Co. v. Oil, Chem. & Atomic Workers Int’l Union*, 76 F.3d 606, 608 (4th Cir. 1996). Accordingly, the Court must review the Arbitrator’s findings.

still not complete. Consequently, the Highsmiths terminated the August 2020 and September 2020 contracts.

The Highsmiths hired Distinctive Design, LLC (“Distinctive Design”) to finish the renovations. Design Gaps originally provided drawings for the cabinets and closets, which were for the Highsmiths’ review, approval, and use during the construction process. When the Highsmiths hired Distinctive Design to complete the renovations, they shared Design Gaps’ drawings with Distinctive Design.

Thereafter, the Highsmiths filed a demand for arbitration. The parties agreed that the arbitration would only address the Highsmiths’ claims against Design Gaps, not Eva Glover and David Glover, officers of Design Gaps. Design Gaps counterclaimed for negligence, breach of contract, fraudulent misrepresentation, failure to mitigate damages, tortious interference, civil conspiracy, conversion, unfair and deceptive trade practices, quasi-contract, and violation of the copyright act.

The merits hearing was conducted on May 26, May 27, and June 2, 2022. At the conclusion of the hearings, the Arbitrator asked both parties whether they had an adequate opportunity to present in full the evidence which they thought was relevant. Both parties confirmed that they had.

In his nine-page final award, the Arbitrator outlined the factual and procedural history, findings of fact, conclusions of law, and damages. The most important causes of action relevant to Design Gaps’ petition for vacatur is the breach of contract and the copyright claim. In relation to the breach of contract claim, based on facts drawn from nearly twenty exhibits, the Arbitrator concluded:

While the contracts did not contain specified completion dates, Design Gaps did provide a series of completion dates, which it did

not meet. During the hearing, Design Gaps set out a number of reasons for the delays which it argued were beyond its control. However, it continued to provide unreliable completion dates to the Claimants. The repeated failure to meet the many dates promised for completion justifies the termination of the contracts.

In relation to the copyright claim, based on testimony and exhibits, the Arbitrator concluded:

Respondents failed to enter into evidence a valid copyright registration; however, even if they had, Claimants certainly established fair use of the design work, especially considering that Shelter did not profit from the design. The sharing of a pdf of the design did not materially impair the marketability of the design. Respondents failed to prove that Claimants or anyone else converted its designs for this project. Bryan Reiss of Distinctive Design confirmed that he did not use Design Gaps' designs for the cabinets. I am convinced by Reiss's testimony and the exhibits provided that any similarity in the designs is due to the limitations of the space and the client's desired layout. Therefore, there has been no violation of any copyright which Respondent may have had.

"Having reviewed all of the testimony, exhibits, arguments of the parties, pleadings and post-hearing," the Arbitrator issued an award against Design Gaps for \$152,884.00, the costs of the arbitration of \$17,411.83, and the reasonable attorney's fees of \$126,113.34 for a total award in favor of the Highsmiths against Design Gaps for \$296,409.17. (Dkt. No. 1-10 at 7, 9).

II. Legal Standard

It is well settled that a court's review of an arbitration award "is among the narrowest known to the law." *U.S. Postal Serv. v. Am. Postal Workers Union, AFL-CIO*, 204 F.3d 523, 527 (4th Cir. 2000) (internal quotation marks omitted). "A court sits to 'determine only whether the arbitrator did his job-not whether he did it well, correctly, or reasonably, but simply whether he did it.'" *Id.* (quoting *Mountaineer Gas Co. v. Oil, Chem. & Atomic Workers Int'l Union*, 76 F.3d 606, 608 (4th Cir. 1996)). "[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious

error does not suffice to overturn his decision.” *United Paper-Workers Int’l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987). The Fourth Circuit has emphasized the limited scope of judicial review because “[a] policy favoring arbitration would mean little, of course, if arbitration were merely the prologue to prolonged litigation . . . Opening up arbitral awards to myriad legal challenges would eventually reduce arbitral proceedings to the status of preliminary hearings.” *Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 146 (4th Cir. 1994). Therefore, “[a] confirmation proceeding under 9 U.S.C. § 9 is intended to be summary: confirmation can only be denied if an award has been corrected, vacated, or modified in accordance with the Federal Arbitration Act.” *Taylor v. Nelson*, 788 F.2d 220, 225 (4th Cir. 1986); *see also Ottley v. Schwartzberg*, 819 F.2d 373, 376 (2d Cir. 1987) (“Absent a statutory basis for modification or vacatur, the district court’s task [is] to confirm the arbitrator’s final award as mandated by section 9 of the Act.”).

III. Discussion

Design Gap argues that the “[1] Arbitrator demonstrated evident partiality in favor of [the Highsmiths] and against [Design Gaps], [2] a manifest disregard of the law with respect to [Design Gaps’] counterclaims of copyright infringement and [Highsmiths’] breach of the Contracts, and [3] imperfect execution such that a mutual, final, and definite award upon the subject matter submitted was not made.” (Dkt. No. 1 at ¶ 70). Thus, Design Gaps argues that the arbitration award must be vacated. The Court rejects all Design Gaps arguments.

A. Design Gaps Fails to Prove the Arbitrator was Evidently Partial.

The Court finds that Design Gaps has not met its burden of proving the Arbitrator’s “evident partiality.” The party seeking vacatur of an arbitration award “must put forward facts that *objectively* demonstrate such a degree of partiality that a reasonable person could assume that the arbitrator had improper motives.” *ANR Coal Co., Inc. v. Cogentrix of N.C., Inc.*, 173 F.3d 493,

501 (4th Cir. 1999). “In determining whether a party has demonstrated evident partiality, a court should evaluate the facts” in light of four factors:

(1) the extent and character of the personal interest, pecuniary or otherwise, of the arbitrator in the proceeding; (2) the directness of the relationship between the arbitrator and the party he is alleged to favor; (3) the connection of that relationship to the arbitration; and (4) the proximity in time between the relationship and the arbitration proceeding.

Id. at 500. Furthermore, as a court considers each factor, the court should determine “whether the asserted bias is ‘direct, definite and capable of demonstration rather than remote, uncertain or speculative.’” *Id.* (quoting *Consolidation Coal Co. v. Local 1643, United Mine Workers of America*, 48 F.3d 125, 129 (4th Cir. 1995)).

At the outset, the Court rejects Design Gaps claims because it does not even allege any of the *ANR Coal* factors. Even if the Court makes the necessary inferences for Design Gaps, Design Gaps still cannot demonstrate evident partiality. As to the first factor, Design Gaps does not allege that Arbitrator had a personal, pecuniary, or other interest in the proceeding. The Arbitrator had no personal or pecuniary interest. Design Gaps’ motion for vacatur instead details its disagreement with the Arbitrator on a legal issue.² From this, Design Gaps alleges that the Arbitrator had “favoritism.” (Dkt. No. 1 at ¶ 34). This allegation does not even begin to approach a showing of

² During the arbitration, Petitioner David Glover sought to represent himself, Eva Glover, and Design Gaps pro se. The Arbitrator questioned whether pro se corporate representation was appropriate in an arbitration under South Carolina law. The issue appears to be unsettled. The Arbitrator conducted research and asked the parties to brief the issue. Petitioner David Glover explained that “Design Gaps, Inc. chose to incorporate the Arbitration Clause into their contracts to allow its officer to represent the company as an efficient and cost-effective means to resolve disputes.” (Dkt. No. 8-5 at 2). Of course, the reasons Design Gaps chose the Arbitration Clause bore no weight on the lawfulness of the Clause under South Carolina law, and the Arbitrator continued to investigate. The Arbitrator ultimately concluded that Petitioner David Glover could represent all the Petitioners.

personal interest, much less the “heavy” and “onerous” burden to prove evident partiality. *ANR Coal*, 173 F.3d at 501 (internal citations omitted).

The Court finds that the asserted bias of ‘favoritism’ on the ground that the Arbitrator questioned whether it was appropriate for Glover to proceed pro se in the arbitration is “uncertain” and “speculative.” *Consolidation Coal Co.*, 48 F.3d 129. “Contrary to [Design Gaps’] apparent belief, bias is not established merely because an arbitrator ruled against the complaining party.” *Choice Hotels Intern., Inc. v. Patel*, 2004 WL 57658 at *6 (D. Md. Jan. 13, 2004). Simply put, the fact that Design Gaps disagreed with the Arbitrator on a legal issue does not objectively demonstrate that the Arbitrator had improper motives.

The Court finds that the second, third, and fourth *ANR Coal* factors are irrelevant here. Design Gaps did not allege any relationship between the Arbitrator and the Highsmiths. Being without any factual support that objectively demonstrate partiality, even if Design Gaps properly alleged the *ANR Coal* factors, the Court finds that this claim fails.

B. Manifest Disregard

“Convincing a federal court to vacate an arbitral award is a herculean task.” *Warfield v. Icon Admisers, Inc.*, 26 F.4th 666, 669 (4th Cir. 2022). There are a few circumstances, however, where vacating an arbitration award is appropriate. One such basis is where the award rests upon a “manifest disregard” of the law. *Wachovia Secs., LLC v. Brand*, 671 F.3d 472, 483 (4th Cir. 2012). A court may vacate an arbitration award on this basis on when the movant has established that “(1) the disputed legal principle is clearly defined and is not subject to reasonable debate; and (2) the arbitrator refused to apply that legal principle.” *Jones v. Dancel*, 792 F.3d 395, 402 (4th Cir. 2015).

1. *Copyright Claim*

The Copyright Act, 17 U.S.C. § 106, “confers a bundle of exclusive rights to the owner of the copyright.” *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 547 (1985). Fair use, however, “is a complete defense to infringement.” *Bouchat v. Baltimore Ravens Ltd. P’ship*, 619 F.3d 301, 307 (4th Cir. 2010). “The fair use doctrine thus “permits [and requires] courts to avoid rigid application of the copyright statute.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)). “The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.” *Id.* Under the Copyright Act, 17 U.S.C. § 107, the factors to be considering when determining whether the use of a work is fair use are:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

The Court finds that Design Gaps fails to show that the Arbitrator manifestly disregarded the law. Reduced to its essence, Design Gaps essentially argues that it would have weighed the factors differently—as it happens, in its favor. The Arbitrator concluded that the Highsmiths “certainly established fair use of the design work . . . Therefore, there has been no violation of any copyright which Respondent may have had.” (Dkt. No. 1-10 at 6-7). This Court “cannot say that the arbitrator’s interpretation fell beyond the scope of reasonable debate.” *Jones*, 792 F.3d at 403. This is especially true since the nature of this balancing test precludes bright-line rules. *Campbell*, 510 U.S. at 577. The Arbitrator weighed the evidence, balanced the statutory factors, and concluded that the Highsmiths’ use constituted fair use under the Copyright Act. The district court must “determine only whether the arbitrator did his job—not whether he did it well, correctly, or reasonably, but simply whether he did it.” *Mountaineer Gas Co. v. Oil, Chem. & Atomic Workers*

Int'l Union, 76 F.3d 606, 608 (4th Cir.1996). The Court finds that there was no binding precedent that militated against the Arbitrator's finding. Accordingly, the Court finds that this claim fails.

2. *Breach of Contract Claim*

Design Gaps argues that the Arbitrator ignored a “well-established principle that is clearly defined and not subject to reasonable debate” when the Arbitrator determined that Design Gaps, and not the Highsmiths, materially breached the contract. (Dkt. No. 1 at ¶ 62). It is black-letter law that “[t]he materiality of a contractual breach is a question of fact reserved for the jury.” 62B AM. JUR. 2d § 220.

“The parties to an arbitration have bargained for the arbitrator's, rather than the [jury's] decision.” *Cyber Imaging Sys., Inc. v. Eyelation, Inc.*, 2015 WL 12851390, at *1 (E.D.N.C. Nov. 4, 2015). “[T]he reviewing court's task is to enforce the bargained-for decision of the arbitrator and not to evaluate the arbitrator's factual findings or legal analysis.” *Richmond, Fredericksburg & Potomac R.R. Co. v. Transp. Commc'ns Int'l Union*, 973 F.2d 276, 281 (4th Cir. 1992). After the Arbitrator “duly heard the proofs and allegation of the Parties,” he determined that Glover's “repeated failure to meet the many dates promised for completion justified the termination of the contracts.” (Dkt. No. 1-10 at 1, 5). The Arbitrator also determined that Petitioners “are entitled to take nothing under their counterclaims.” (*Id.* at 6). In his Final Award, the Arbitrator outlined the facts he found relevant and credible, and then he found that Design Gaps, not the Highsmiths, was in material breach. Glover can point to no binding precedent that required the Arbitrator to determine otherwise. Accordingly, the Court finds that this claim fails.

C. Imperfectly Executed Powers

Lastly, Design Gaps seeks vacatur of the arbitration award pursuant to 9 U.S.C. § 10(a)(4), which permits a district court to vacate an award “[w]here the arbitrators exceeded their powers,

or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.” Design Gaps contends that the Arbitrator imperfectly executed his power in failing to issue a reasoned award. (Dkt. No. 1 at ¶ 17).

The Court finds that the Arbitrator did issue a reasoned award. A “reasoned award” is “something short of findings and conclusions but more than a simple result.” *Holden v. Deloitte & Touche LLP*, 390 F.Supp.2d 752, 780 (N.D.Ill.2005) (internal citations omitted). “An arbitration is not a federal court lawsuit, and the resulting award is not a judicial opinion.” *Astanza Design, LLC v. Giemme Stile, S.p.A.*, 220 F. Supp. 3d 641, 648 (M.D.N.C. 2016). Accordingly, “[a] reasoned award requirement does not obligate the arbitrator to discuss every single piece of evidence or “to show how every single proposition [he] adopted could be derived from first principles.” *Carmody Bldg. Corp. v. Richter & Ratner Contracting Corp.*, 2013 WL 4437213, at *4 (S.D.N.Y. Aug. 19, 2013).

Design Gaps essentially reargues that the Arbitrator manifestly disregarded the law in support of his argument that the Arbitrator did not issue a reasoned award. (Dkt. No. 1 at ¶¶ 66-67) (reasoning that the Arbitrator imperfectly executed his powers because “the Arbitrator failed to provide a legal assessment concerning the four-factor test for determining fair use” and that “the Arbitrator failed to assess and recognize the Respondent Highsmiths breached the Contracts they entered with Design Gaps.”) Design Gaps further claims that “[a] reasoned award requires the arbitrator to provide a concise written breakdown for the award that addresses the disposition of all the claims and counterclaims submitted.” (*Id.* at ¶ 68).

Across nine pages, the Arbitrator described the factual history and procedural history, the relevant facts, his conclusions of law, and a breakdown of the damages award. The Arbitrator “rendered more than a standard award, which would be a mere announcement of his decision.”

Rain CII Carbon, LLC v. ConocoPhillips Co., 674 F.3d 469, 474 (5th Cir. 2012) (affirming denial of vacatur where eight-page decision “laid out the facts, described the contentions of the parties, and decided which of the two proposals should prevail”). Even if the Court were to find that the Arbitrator did not issue a reasoned award, “courts have not recognized a failure to do so as a ground for vacating an arbitrator’s award.” *U.S. ex rel. Coastal Roofing Co. v. P. Browne & Assocs., Inc.*, 771 F. Supp. 2d 576, 583 (D.S.C. 2010). Accordingly, the Court finds that this claim fails.

There being no “statutory basis for modification or vacatur, the district court’s task [is] to confirm the arbitrator’s final award as mandated by section 9 of the Act.” *Ottley v. Schwartzberg*, 819 F.2d 373, 376 (2d Cir. 1987). Accordingly, the Court confirms the Arbitrator’s final award.

IV. Conclusion

For the reasons set forth above, the Court denies Petitioners’ motion for vacatur (Dkt. No. 1) and denies Respondents’ motion to dismiss as moot. (Dkt. No. 8). The Court grants Respondents application for confirmation of the arbitration award. (Dkt. No. 10).

AND IT IS SO ORDERED.

s/ Richard Mark Gergel
Richard Mark Gergel
United States District Judge

May 19, 2023
Charleston, South Carolina

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

Design Gaps, Inc., David Glover, and Eva
Glover,

Petitioners,

v.

Shelter, LLC, Jason Highsmith, and Kacie
M. Highsmith,

Respondents.

Case No. 2:22-cv-04698-RMG

ORDER AND OPINION

This matter is before the Court on Respondents’ motion for attorneys’ fees for time expended in enforcing the arbitrator’s award before the district court. (Dkt. No. 9). Petitioners oppose the motion. (Dkt. No. 11). For the reasons set forth below, the Court grants Respondents’ motion for attorneys’ fees.

I. Background

This dispute arises from the renovation of Jason Highsmith and Kacie Highsmith’s (the “Highsmiths”) home in Daniel Island, South Carolina. (Dkt. No. 14 at 1). In August and September 2020, the Highsmiths entered into two contracts with Design Gaps, Inc. (“Design Gaps”) to design and install cabinets and closets for their home. (*Id.*). Both contracts included a mandatory arbitration clause. (Dkt. Nos. 1-4, 1-5). When a dispute arose, the Highsmiths terminated the contracts and filed a demand for arbitration. (Dkt. No. 14 at 2). The Arbitrator ultimately found for the Highsmiths and awarded \$152,884.00 in damages, \$17,411.83 in “costs of the arbitration,” and \$126,113.34 in attorneys’ fees. (Dkt. No. 1-10 at 10).

Petitioners thereafter filed an action in this Court to vacate the arbitration award, arguing that the Arbitrator was evidently partial, manifestly disregarded the law, and imperfectly executed his duties. (Dkt. No. 1). On May 19, 2023, the Court denied Design Gaps’ motion for vacatur and

granted the Highsmiths' application to confirm the arbitration award. (Dkt. No. 14). The Highsmiths' now seek the attorneys' fees they incurred in enforcing the arbitration award in the district court. (Dkt. No. 9).

II. Legal Standard and Discussion

"The recovery of attorney's fees is governed by the American Rule: Each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise." *SIB Dev. & Consulting, Inc. v. Save Mart Supermarkets*, 271 F. Supp. 3d 832, 833 (D.S.C. 2017) (internal quotations and citations omitted).

"Arbitration is 'a matter of contract,' and courts 'must rigorously enforce arbitration agreements according to their terms.'" *Weckesser v. Knight Enters. S.E., LLC*, 735 F. App'x 816, 819 (4th Cir. 2018) (*quoting Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013)). "Under South Carolina law, courts must, to whatever extent possible, enforce a contract as written." *Id.* "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language . . . If the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." *Schulmeyer v. State Farm Fire and Cas. Co.*, 353 S.C. 491, 579 (2003).

The contracts between Design Gaps and the Highsmiths provide:

17. ARBITRATION. All disputes arising out of or in connection with this Agreement or any transaction thereunder shall be finally settled under the Commercial Arbitration Rules of the American Arbitration Association . . . by an arbitrator appointed in accord with these Rules. The arbitrator's award shall be final and binding. Judgment upon the award rendered may be entered in any court having jurisdiction over the party against which the award is rendered. The parties expressly consent to the jurisdiction of the federal and state courts situated in Charleston, South Carolina for the purpose of enforcing any arbitration award . . . The arbitration shall include (i) a provision that the prevailing party in such arbitration shall recover its costs of the arbitration and reasonable attorneys' fees from the other party or parties . . .

The plain language of the contract describes the arbitration process to include any proceeding before an arbitrator as well as any court proceeding to enforce the arbitrator's award. The contract further provides for the prevailing party to be awarded reasonable attorney fees against the opposing party or parties. Courts have widely held that similar attorney fee provisions in arbitration contracts apply both to attorney fees incurred by the prevailing party in the proceeding before the arbitrator as well as any subsequent court proceeding to enforce the arbitrator's award. *E.g., Star Dev. Grp., LLC v. Darwin Nat'l Ins. Co.*, 813 Fed. Appx. 76, 89 (4th Cir. 2020) ("Maryland courts have broadly interpreted the [Maryland Uniform Arbitration Act] to permit awards of attorneys' fees for all actions necessary to enforce an arbitration award."); *SCIE LLC v. XL Reinsurance Am., Inc.*, 397 Fed. Appx. 348, 351 (9th Cir. 2010) ("The district court did not err in awarding plaintiffs the attorney's fees and expense incurred in arbitrating against producers [and] confirming the arbitration award . . ."); *James Montgomery Scott LLC v. Tobin*, 571 F.3d 162, 165 (1st Cir. 2009) ([W]e think that the Massachusetts courts would allow attorneys' fees to be awarded to a party who successfully defends a petition to vacate a chapter 93A arbitration award at the trial court level.").

Moreover, even if a court were to view the language of the contract as ambiguous, the "basic contract law principle *contra proferentem* counsels that we construe any ambiguities in the contract against its draftsman." *Maersk Line, Ltd. v. United States*, 513 F.3d 418, 423 (4th Cir. 2008). "Ambiguity imposes costs on the parties to a contract: one party may rely on an errant interpretation, or find its original intent flouted if a dispute arises. *Contra proferentem* shifts the cost of ambiguity to the party best positioned to avoid and bear it." *Carolina Care Plan Inc. v. McKenzie*, 467 F.3d 383, 389 (4th Cir. 2006), *overruled on other grounds by Carden v. Aetna Life Ins. Co.*, 559 F.3d 256 (4th Cir. 2009). Here, to the extent a court were to read any ambiguity into

the contractual language regarding the award of attorney fees for court proceedings to enforce an arbitration award (which this Court does not), any ambiguity must be construed against Design Gaps, the drafter of the mandatory arbitration clause with its attorneys' fee provision.

On May 19, 2023, the Court denied Design Gaps' motion for vacatur and granted the Highsmiths' application to confirm the arbitration award. (Dkt. No. 14). Thus, the Court finds that the Highsmiths are the prevailing party in this federal court proceeding and finds that they are entitled to a reasonable amount for their attorneys' fees in this action for their work in enforcing the arbitrator's award.

III. Conclusion

For the reasons set forth above, the Court grants Respondents' motion for attorneys' fees. (Dkt. No. 9). The Court orders Respondents to provide documentation and evidence supporting their claim for attorneys' fees within 10 days of this order, and Petitioners may file a response if they so desire concerning the fee award requested within 10 days thereafter.

AND IT IS SO ORDERED.

s/ Richard Mark Gergel
Richard Mark Gergel
United States District Judge

June 9, 2023
Charleston, South Carolina

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

DESIGN GAPS, INC., DAVID GLOVER, and EVA GLOVER	)	Civil Action No. 2:22-cv-04698-RMG
	)	
	)	
Petitioners	)	
	)	
vs.	)	NOTICE OF APPEAL
	)	
SHELTER, LLC, DR. JASON HIGHSMITH, and KACIE M. HIGHSMITH	)	
	)	
	)	
Respondents.	)	
_____	)	

Pursuant to Federal Rule of Appellate Procedure 3, Petitioners Design Gaps, Inc., David Glover, and Eva Glover appeal to the United States Court of Appeals for the Fourth Circuit from the final Orders entered on May 19, 2023 (Dkt. No. 14) and June 7, 2023 (Dkt. No. 15).

This 7th day of July, 2023.

Respectfully Submitted,

By: s/Todd M. Hess
Todd M. Hess (Federal ID No. 12925)

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CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2023, the foregoing NOTICE OF APPEAL was electronically filed with the Clerk of Court using the CM/ECF system, which will send notification to all counsel of record who have consented to accept service by electronic means.

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-1729

DESIGN GAPS, INC.; DAVID GLOVER; EVA GLOVER,

Petitioners - Appellants,

v.

SHELTER, LLC; DR. JASON HIGHSMITH; KACIE M. HIGHSMITH,

Respondents - Appellees.

Appeal from the United States District Court for the District of South Carolina, at Charleston. Richard Mark Gergel, District Judge. (2:22-cv-04698-RMG)

Argued: September 26, 2024

Decided: March 3, 2025

Before GREGORY and QUATTLEBAUM, Circuit Judges, and Terrence W. BOYLE, United States District Judge for the Eastern District of North Carolina, sitting by designation.

Dismissed by published opinion. Judge Quattlebaum wrote the opinion, in which Judge Gregory and Judge Boyle joined.

ARGUED: Todd Maurice Hess, HESS LAW, PLLC, Wesley Chapel, North Carolina, for Appellants. Robert Andrew Walden, WOMBLE BOND DICKINSON (US) LLP, Charleston, South Carolina, for Appellees. **ON BRIEF:** James E. Weatherholtz, Andrea L. McDonald, WOMBLE BOND DICKINSON (US) LLP, Charleston, South Carolina, for Appellee.

QUATTLEBAUM, Circuit Judge:

This appeal involves a bevy of challenges to an arbitration award. Traditionally, such challenges would confront what our recently retired colleague Judge Motz¹ described as “a herculean task.” *Warfield v. Icon Advisers, Inc.*, 26 F.4th 666, 669 (4th Cir. 2022). But we must first answer an antecedent question—do federal courts have jurisdiction to consider these challenges? Under our recent decision in *Friedler v. Stifel, Nicolaus, & Co.*, 108 F.4th 241 (4th Cir. 2024), the answer is no. Accordingly, we dismiss.

I.

Jason and Kacie Highsmith hired Shelter, LLC—owned by Ryan and Jenny Butler—to manage a home renovation project.² Then, on August 18, 2020, the Highsmiths contracted with Design Gaps, Inc.—owned by Eva and David Glover—to design and install cabinets and closets.³ They signed separate contracts for the cabinets and closets, but both mandated that disputes be resolved through arbitration.

The contracts did not contain an explicit completion date. But when the Highsmiths said they wanted the project completed within four to eight weeks, Design Gaps said they

¹ Judge Motz served our Court with distinction for over 28 years. Among her many virtues, Judge Motz displayed a keen intellect, a gift for elegant writing and a warm personality. We will miss her greatly but are indebted to her distinguished service to our Court, our profession and our country.

² Shelter is an appellee along with the Highsmiths. For convenience, we refer to the appellees as “the Highsmiths.”

³ Likewise, the Glovers are appellants along with Design Gaps. For the same reason, we refer to the appellants only as “Design Gaps.”

could do it. They did not. As delays mounted, Design Gaps continued to offer excuses and new deadlines that were never met. When the project was still unfinished more than eight months later, the Highsmiths decided to find someone else. They terminated both contracts with Design Gaps and hired Distinctive Design, LLC to finish the project. But before officially hiring Distinctive Design, the Highsmiths met with its employee, Bryan Reiss, and shared with him copyrighted drawings for cabinets and closets that Design Gaps had created for the Highsmiths' renovation.

After the Highsmiths hired Distinctive Design, they filed a demand for arbitration against Design Gaps alleging breach of contract, promissory estoppel, fraud and piercing the corporate veil. Design Gaps counterclaimed for negligence, breach of contract, fraudulent misrepresentation, failure to mitigate damages, tortious interference, civil conspiracy, conversion, unfair and deceptive trade practices, quasi-contract and violation of the Copyright Act.

The arbitrator held a three-day merits hearing. The Highsmiths called ten witnesses, including themselves, the Butlers and Bryan Reiss. Design Gaps' roster was shorter. Its only witness was David Glover. Before the hearing ended, the arbitrator asked the parties if they had an adequate opportunity to fully present their relevant evidence. Both parties answered yes.

Afterward, the arbitrator issued a nine-page award outlining the factual and procedural history, findings of fact, conclusions of law and damages. The two most important causes of action for purposes of this appeal are the breach of contract claim and the copyright claim. Regarding the breach of contract claim, the arbitrator explained:

While the contracts did not contain specified completion dates, Design Gaps did provide a series of completion dates, which it did not meet. During the hearing, Design Gaps set out a number of reasons for the delays which it argued were beyond its control. However, it continued to provide unreliable completion dates to the Claimants. The repeated failure to meet the many dates promised for completion justifies the termination of the contracts.

J.A. 124. Regarding the copyright claim, he added:

Respondents gave to the Claimants their drawings for the cabinets. Obviously, this was for Claimants' review, approval, and use during the construction process. Claimants were free to use the drawings to measure the compliance of Design Gaps with these drawings and its obligation to install the designed cabinets in accordance with its contractual obligation. Respondents failed to enter into evidence a valid copyright registration; however, even if they had, Claimants certainly established fair use of the design work, especially considering that Shelter did not profit from the design. The sharing of a pdf of the design did not materially impair the marketability of the design. Respondents failed to prove that Claimants or anyone else converted its designs for this project. Bryan Reiss of Distinctive Design confirmed that he did not use Design Gaps' designs for the cabinets. I am convinced by Reiss's testimony and the exhibits provided that any similarity in the designs is due to the limitations of the space and the client's desired layout. Therefore, there has been no violation of any copyright which Respondent may have had.

J.A. 125–26. Ultimately, the arbitrator denied relief on Design Gaps' counterclaims and declared the Highsmiths the prevailing party, awarding them \$152,884 in damages plus \$17,411.83 in arbitration costs and \$126,113.34 in attorney's fees.

Design Gaps petitioned the district court to vacate the arbitration award, alleging that the arbitrator manifestly disregarded the law and failed to issue a reasoned award. The Highsmiths moved to confirm the award. The district court issued a single-document opinion and order denying the petition to vacate the arbitration award and granting the Highsmiths' motion to confirm the arbitration award. Later, the court issued an opinion

and order granting the Highsmiths' motion for attorney's fees. A month later, Design Gaps noticed an appeal of both orders.

On appeal, Design Gaps advances two reasons the district court should have vacated the arbitration award. First, it argues that the arbitrator did not issue a "reasoned award." Second, Design Gaps argues that the arbitrator manifestly disregarded the law by (1) failing to consider a copyright registration of the plans created by Design Gaps; (2) ignoring basic copyright law; (3) failing to join Distinctive Design, Bryan Reiss and Jenny Butler in the arbitration despite their interest in the copyright question; and (4) imposing contractual deadlines upon Design Gaps that were outside the contract.

The Highsmiths moved to dismiss, arguing the appeal of the attorney's fees order was premature while the appeal of the award confirmation was too late and thus untimely. We granted the motion as to the attorney's fees order because there was no appealable final decision until the amount of the fee award was fixed. But as for the motion on the arbitration award confirmation, the district court did not set out its judgment in a separate document as required by Federal Rule of Civil Procedure 58(a). Thus, by rule, the 30-day appeal period had not begun to run. Accordingly, we denied the motion to dismiss the arbitration confirmation order because the notice of appeal was in fact timely.

But that determination does not mean we can proceed to the merits of Design Gaps' appeal. That's because, after the parties' briefing, we issued *Friedler*. That case altered the way we assess federal jurisdiction over motions to vacate arbitration awards. So, we ordered the parties to brief the question of whether there is federal jurisdiction here considering *Friedler*. Neither party has persuaded us there is.

II.

We have an independent obligation to determine our jurisdiction. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006). And *Friedler* established a new standard for how we assess our jurisdiction over motions to vacate arbitration awards. 108 F.4th at 250.

In *Friedler*, customers brought an arbitration claim against stockbrokers alleging various state and federal causes of action relating to mismanagement of their brokerage accounts. *Id.* at 244. The arbitrator ruled for the brokers. *Id.* After that, the customers filed an action in federal court seeking to vacate the award. They argued the arbitrator manifestly disregarded the law, especially federal securities law. *Id.* After the district court denied the petition, the customers appealed. *Id.* at 245. In assessing our jurisdiction, we noted that previously, we “looked through” such petitions to see if there was federal jurisdiction over the underlying dispute. *Id.* at 244. Under that approach, the fact that the underlying dispute involved federal securities law, over which federal courts have exclusive jurisdiction, would have meant that federal jurisdiction extended over the petition to vacate.

But we said that the Supreme Court’s recent decision in *Badgerow v. Walters*, 596 U.S. 1, 9 (2022) abrogated that look-through approach. In *Badgerow*, the Court held that the Federal Arbitration Act’s text indicated that the look-through approach to jurisdiction applies only to motions to compel arbitration awards, not motions to vacate or confirm. *Id.*

at 11.⁴ For such motions, the Court explained, jurisdiction depends on whether the petition implicates federal jurisdiction beyond the FAA. *Id.* at 8. In other words, was there an independent basis for federal jurisdiction such as diversity of citizenship or a federal question? Without that, the Court said a motion to vacate an arbitration award is really just a contract dispute, which typically involves state law. *Id.* at 9.

Thus, following *Badgerow*, we held in *Friedler* that there was no federal jurisdiction over the customers' petition to vacate the arbitration award. 108 F.4th at 250. We held that it was, at its core, "no more than a contractual resolution of the parties' dispute." *Id.* at 246 (quoting *Badgerow*, 596 U.S. at 9). The face of the petition to vacate, we explained, did

⁴ Section 4, which governs motions to compel, states:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, *save for such agreement*, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.

9 U.S.C. § 4 (emphasis added). The Supreme Court has emphasized that Sections 9 and 10, which control motions to vacate and confirm, lack this "save for" language. It has justified treating such motions differently based upon this different language. "The phrase save for the arbitration agreement indicates that the district court should assume the absence of the arbitration agreement and determine whether the court would have jurisdiction without it." *Badgerow*, 596 U.S. at 10 (cleaned up) (citing *Vaden v. Discover Bank*, 556 U.S. 49, 62 (2009)).

not implicate the merits of the federal questions, nor did it otherwise assert an independent basis for jurisdiction. *Id.*⁵

According to the parties, we have federal jurisdiction over this case despite *Friedler*. That's because they read *Friedler* to say that if the petition to vacate involves copyright infringement claims, the Copyright Act's exclusive jurisdiction over civil actions arising under that Act provides an independent basis for federal jurisdiction. Both parties argue that this case requires a determination of copyright infringement and a fair use defense, both of which district courts enjoy exclusive original jurisdiction over. *See* 28 U.S.C. § 1338(a).

But *Friedler* forecloses these arguments. While discussing how a federal statute might provide jurisdiction for a petition to vacate an arbitration award, we stated,

Badgerow suggests that there may be federal statutes beyond the FAA itself that would “entitle[] the applicant to relief” and thus support jurisdiction. 596 U.S. at 9. The Sixth Circuit, for example, has held that the Labor Management Relations Act (LMRA) is such a statute. *Greenhouse Holdings, LLC v. Int’l Union of Painters and Allied Trades Dist. Council 91*, 43 F.4th 628, 631 (6th Cir. 2022). But it reached that conclusion because the LMRA confers jurisdiction over “suits for violation[s] of contracts between an employer and a labor organization,” *id.* (citing 29 U.S.C. § 185(a)), and it was “well-established that the LMRA authorizes courts to enforce or vacate labor arbitration awards,” *id.* (cleaned up).

⁵ *Friedler* discussed only motions to vacate. Here, the district court denied Design Gaps’ motion to vacate, which brings this case under *Friedler*. But even if we were to ignore the motion to vacate and look instead to the Highsmiths’ motion to confirm that the district court granted, *Badgerow* compels the same result. “The question presented here is whether that same ‘look-through’ approach to jurisdiction applies to requests to confirm or vacate arbitral awards under the FAA’s Sections 9 and 10. We hold it does not.” *Badgerow*, 596 U.S. at 5.

We're aware of no such grant of jurisdiction in the SEC Act, and the parties don't argue otherwise. Although the Act grants federal courts exclusive jurisdiction over "violations" of the Act and "all suits in equity and actions at law brought to enforce any liability or duty created by" the Act, 15 U.S.C. § 78aa(a), it doesn't authorize vacatur of an award that the parties agreed to have settled by an arbitrator.

Thus, even assuming the petition adequately alleged that Devlin and Stifel violated the Act, the Act itself wouldn't "entitle[] the applicant to relief," *Badgerow*, 596 U.S. at 9—here, vacatur of the arbitration award.

Friedler, 108 F.4th at 247–48.

That means the fact that the petition to vacate involves federal copyright law is beside the point. The petition to vacate in *Friedler* involved federal securities law. But that was not enough. Likewise, the fact that the Copyright Act provides for exclusive federal jurisdiction over alleged violations of that Act doesn't matter either. The SEC Act grants federal courts the same exclusivity, but that was no ground for federal jurisdiction in *Friedler*. We see no way to distinguish the Copyright Act from the SEC Act, and the parties do not identify one. Thus, *Friedler* compels a holding of no subject matter jurisdiction.⁶

⁶ After *Friedler*, what suffices to "entitle[] the applicant to relief" and support jurisdiction? See *Badgerow*, 596 U.S. at 9. Stating that § 1331 is not "a dead letter as a basis for jurisdiction over petitions to vacate arbitration awards," *Friedler* identified two aspects of *Greenhouse Holdings*, 43 F.4th at 631, that justified jurisdiction over that petition to vacate an arbitration award involving the LMRA: (1) the LMRA confers jurisdiction over "suits for violation[s] of contracts between an employer and a labor organization," and (2) it was "well-established that the LMRA authorizes courts to enforce or vacate labor arbitration awards." 108 F.4th at 247–48.

Presumably, it is the fact that the LMRA specifies contracts—and contracts are where arbitration agreements are made—that provides potential jurisdiction for motions to vacate involving the LMRA. If not, the LMRA does not seem materially different from other federal statutes that grant specific subject matter jurisdiction. After all, like the Copyright Act and the SEC Act, the text of the LMRA "doesn't authorize vacatur of an

III.

Friedler altered the way we assess federal jurisdiction over petitions to vacate and confirm arbitration awards. And it controls here. Thus, for the reasons explained above, Design Gaps’ appeal is,

DISMISSED.

award that the parties agreed to have settled by an arbitrator.” *Id.* at 248. The second aspect of *Friedler*’s reasoning is that it is “well-established that the LMRA authorizes courts to enforce or vacate labor arbitration awards.” *Id.* at 247–48. *Greenhouse* cited *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 451 (1957), which held that “the agreement to arbitrate grievance disputes, contained in this collective bargaining agreement, should be specifically enforced.” Is that a separate factor that must be met or just an observation related to the fact that the LRA specifies contracts? If so, does that mean that, post-*Friedler*, the Supreme Court must specifically say that a statute authorizes the enforcement of arbitration awards? Or is circuit case law sufficient? If circuit case law is the answer, we have not located any saying as much regarding the Copyright Act. The contours of what supports federal jurisdiction for petitions to vacate will have to be defined in future cases. But for this one, *Friedler* requires that we dismiss for lack of jurisdiction.

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

Design Gaps, Inc. *et al.*,

Petitioners,

v.

Shelter, LLC *et al.*,

Respondents.

Case No. 2:22-cv-4698-RMG

ORDER

This matter comes before the Court on Petitioners' motion to dismiss this action for lack of federal jurisdiction. (Dkt. No. 25). Petitioners rely on a recent decision of the Fourth Circuit Court of Appeals in this case which held that a federal court does not have subject matter jurisdiction to confirm or vacate an arbitration award without an independent basis for federal jurisdiction beyond the Federal Arbitration Act. *Design Gaps, Inc. v Shelter, LLC*, 130 F.4th 143 (4th Cir. 2025). Any enforcement of the Respondents' arbitration award must necessarily occur in state court since the Fourth Circuit found that the parties do not otherwise have independent federal jurisdiction. (Dkt. No. 23 at 9). Consequently, the Court vacates its prior orders in this matter (Dkt. Nos. 14, 15) and dismisses this action without prejudice for lack of federal jurisdiction.

AND IT IS SO ORDERED.

s/ Richard Mark Gergel
Richard Mark Gergel
United States District Judge

April 2, 2025
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	
SHELTER, LLC, JASON HIGHSMITH,	)	
and KACIE HIGHSMITH,	)	C/A No.: 2025-CP-_____
	)	
Petitioners,	)	
	)	
vs.	)	PETITION FOR ORDER
	)	CONFIRMING ARBITRATION
	)	AWARD
DESIGN GAPS, INC., DAVID GLOVER,	)	
and EVA GLOVER,	)	
	)	
Respondents.	)	

Pursuant to the Federal Arbitration Act, 9 U.S.C. § 9 and, to the extent applicable, South Carolina's Uniform Arbitration Act, S.C. Code § 15-48-120, Petitioners Shelter, LLC, Kacie Highsmith, and Jason Highsmith, by and through counsel, hereby request that this Court confirm the arbitration award issued in favor of Petitioners and enter judgment against Respondents Design Gaps, Inc., David Glover, and Eva Glover, in accordance therewith.

PARTIES

1. Petitioners Kacie Highsmith, and Jason Highsmith are residents of Daniel Island, South Carolina, and citizens of the State of South Carolina.
2. Petitioner Shelter, LLC is a limited liability company formed under the laws of South Carolina, with a principal place of business located in Daniel Island, South Carolina.
3. Upon information and belief, Respondents David Glover and Eva Glover are residents in or near Lancaster, South Carolina, and are citizens of the State of South Carolina.
4. Upon information and belief, Respondent Design Gaps, Inc. is a corporation that is incorporated in North Carolina and has a principal place of business at 1804 Crowne Commons

Way, Suite D-1, Johns Island, South Carolina 29455. Design Gaps, Inc. is registered to conduct business in the State of South Carolina.

JURISDICTION & VENUE

5. This Court has jurisdiction over this action pursuant to Federal Arbitration Act, 9 U.S.C. § 9 because this is a civil action seeking confirmation of an Award issued in an arbitration conducted in Charleston, South Carolina.

6. Venue is proper in Charleston County because the parties' arbitration agreement specified Charleston, South Carolina as the proper venue for enforcement of the award.

7. The parties expressly consented to the jurisdiction of this Court for purposes of enforcing any arbitration award rendered pursuant to the parties' arbitration agreement.

FACTS

8. Petitioners Shelter, LLC ("Shelter") and Kacie and Jason Highsmith (the "Highsmiths") entered contracts with Respondents for certain cabinetry work at their residence (the "Contracts"). True and accurate copies of the Contracts are attached hereto as **Exhibit A** and **Exhibit B**.

9. The parties' Contracts included the following arbitration clause:

All disputes arising out of or in connection with this Agreement or any transaction hereunder shall be finally settled under the Commercial Arbitration Rules of the American Arbitration Association then in effect by an arbitrator appointed in accordance with such Rules. The arbitrator's award shall be final and binding. Judgment upon the award rendered may be entered in any court having jurisdiction over the party against which the award is rendered. The parties expressly consent to the jurisdiction of the federal and state courts situated in Charleston, South Carolina for the purpose of enforcing any arbitration award rendered pursuant to this Section 15. The The [sic] arbitration shall take place in Charleston, South Carolina or such other place as the parties may agree. The arbitration shall include (i) a provision that the prevailing, party in such arbitration shall recover its costs of the arbitration and reasonable attorneys' fees from the other party or parties, and (ii) the amount of such fees and costs. The arbitrators shall be bound to enforce any applicable statute of limitations.

10. Pursuant to the arbitration clause, and as a result of numerous issues with Respondents' performance of the Contracts, Petitioners filed a claim in arbitration, AAA Case Number 01-21-0004-8211 (the "Arbitration").

11. Following a three-days merits hearing, the submission of evidence, and extensive briefing, the Arbitrator awarded damages, expenses, and attorneys' fees to Petitioners in the amount of \$296,409.17. Attached hereto as **Exhibit C** is a true and correct copy of the arbitration award (the "Award").

12. On December 29, 2022, Respondents filed an action in U.S. District Court for the District of South Carolina, Charleston Division, to vacate the Award. Petitioners responded by filing a motion to confirm the Award in the same action.

13. The District Court denied Respondents' petition to vacate and confirmed the Award on May 19, 2023. The District Court also awarded attorneys' fees to Petitioners for their efforts to enforce the Award.

14. Respondents appealed the District Court's decision to the U.S. Court of Appeals for the Fourth Circuit.

15. Following oral argument, the Fourth Circuit Court of Appeals unilaterally, and over the parties' objections, dismissed the appeal for lack of federal subject matter jurisdiction.

16. On April 2, 2025, the District Court dismissed the case for lack of federal jurisdiction.

COUNT ONE
(Confirmation of Arbitration Award)

17. Petitioners repeat and reallege the allegations contained in the preceding paragraphs as if fully set forth herein.

18. The parties agreed that any disputes arising out of or in connection with the Contracts were to be finally settled through arbitration and that the arbitrator's award was to be final and binding.

19. The parties further agreed that attorneys' fees in connection with the arbitration should be awarded to the prevailing party.

20. The Award was issued in accordance with the parties' agreement as set forth in the Contracts.

21. The Award has not been set aside or suspended by a competent authority.

PRAYER FOR RELIEF

WHEREFORE, Petitioners respectfully request that this Court grants its petition to confirm the Award and:

- a. Issue an order pursuant to 9 U.S.C. § 9 confirming the Award;
- b. Enter judgment thereon pursuant to 9 U.S.C. § 13;
- c. Award pre- and post-judgement interest;
- d. Award Petitioners their reasonable attorneys' fees and costs pursuant to the parties' arbitration agreement; and
- e. Award Petitioners such other and further relief as this Court deems just and proper.

[Signature on following page]

WOMBLE BOND DICKINSON (US) LLP

s/ Andrea L. McDonald

R. Andrew Walden (SC Bar No. 101004)

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*Attorneys for Petitioners Shelter, LLC, Jason
Highsmith, and Kacie Highsmith*

April 2, 2025
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	C.A. No. 2025CP1001835
	)	
SHELTER, LLC, DR. JASON HIGHSMITH,	)	
and KACIE M. HIGHSMITH	)	
	)	
Petitioners,	)	
	)	
vs.	)	RESPONDENTS' NOTICE AND
	)	MOTION FOR VACATUR OF
	)	ARBITRATION AWARD
	)	
DESIGN GAPS, INC., DAVID GLOVER and	)	
EVA GLOVER	)	
	)	
Respondents.	)	
_____	)	

In Opposition to Count I of Petitioner’s Petitioner for Order Confirming Arbitration Award filed on April 2, 2025, above-named Respondents Design Gaps, Inc. (hereinafter “Design Gaps”), David Glover (hereinafter “Respondent David Glover”), and Eva Glover (hereinafter “Respondent Eva Glover”) (wherein all Respondents are collectively referred to as “Respondents”), hereby motion for an order pursuant to the South Carolina Uniform Arbitration Act (“UAA”) under S.C. Code Ann. § 15-48-130(a) and the precedential basis for manifest disregard of the law to vacate an arbitration award issued on October 7, 2022 (the “Award”) by Thomas H. Coker, Jr. (“Arbitrator”), an arbitrator appointed by the American Arbitration Association (“AAA”) in Case No. 01-21-0004-8211 (“Arbitration”). Respondents were the Respondents in the subject Arbitration. Petitioners Shelter, LLC (hereinafter “Shelter”), Dr. Jason Highsmith (hereinafter “Petitioner Jason Highsmith”), and Kacie M. Highsmith (hereinafter “Petitioner Kacie Highsmith” both Petitioner Jason Highsmith and Petitioner Kacie Highsmith collectively referred to herein as

“Petitioner Highsmiths”) were the Claimants in the subject Arbitration. Respondents also note that they have not been formally served the Petition in the captioned matter.

This action was first brought in the United States District Court for the District of South Carolina, Charleston Division on December 29, 2022, which was within 90 days of receipt of the arbitration award, and was eventually dismissed on April 2, 2025, for lack of subject matter jurisdiction. The refiling of this application for vacatur on April 9, 2025, with the South Carolina State Court having venue, considering the tolling of the time the action was in Federal Court, still falls within the requisite 90-day period.

JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction under S.C. Code Ann. § 15-48-20.
2. Venue is proper in this District for the reason that the arbitration award was made pursuant to an arbitration hearing held in Charleston, South Carolina and is subject to S.C. Code Ann. § 15-48-190.
3. The Court has personal jurisdiction over Petitioners and Respondents, who are citizens and residents of South Carolina or who conduct substantial business, and have their principal place of business, in South Carolina.

THE PARTIES

4. Design Gaps, Inc. (hereinafter “Design Gaps”), Respondent in the Arbitration, is a North Carolina corporation registered as a foreign corporation in South Carolina with a principal place of business located at 1804 Crowne Commons Way, Suite D-1, Johns Island, South Carolina 29455.

5. Respondent David Glover, a Respondent in the Arbitration, in his capacity as an Officer of Design Gaps, Inc. has a place of business located at 1804 Crowne Commons Way, Suite D-1, Johns Island, South Carolina 29455.

6. Respondent Eva Glover, a Respondent in the Arbitration, in her capacity as an Officer of Design Gaps, Inc. has a place of business located at 1804 Crowne Commons Way, Suite D-1, Johns Island, South Carolina 29455.

7. Petitioner Shelter, LLC d/b/a Shelter Custom-Built Living, a Claimant in the Arbitration, is a South Carolina limited liability company having a place of business located at 895 Island Park Drive, Suite 203, Daniel Island, South Carolina 29492.

8. Petitioner Jason Highsmith, a Claimant in the Arbitration, in his individual capacity having an address at 376 Ralston Creek Street, Daniel Island, South Carolina 29492.

9. Petitioner Kacie Highsmith, a Claimant in the Arbitration, in her individual capacity having an address at 376 Ralston Creek Street, Daniel Island, South Carolina 29492.

THE AWARD

10. Petitioners as Claimants in the Arbitration filed an AAA arbitration demand against Respondents for breach of contract, promissory estoppel, and piercing the corporate veil. (A true and correct copy is attached hereto as Exhibit A.) Respondents counterclaimed for negligence, breach of contract, fraudulent misrepresentation, failure to mitigate damages, tortious interference, civil conspiracy, conversion, unfair and deceptive trade practices, quasi-contract, and violation of the copyright act. (A true and correct copy is attached hereto as Exhibit B.)

11. Petitioners entered into two contracts in August and September 2020 with Design Gaps to design and install various cabinet systems and the master closets (“Contracts”) at Petitioner Highsmiths’ residence located at 376 Ralston Creek Street, Daniel Island, South

Carolina (“Residence”). The first contract, dated August 18, 2020, was for \$234,602.35 and was executed between Petitioner Highsmiths, Shelter and Design Gaps to provide cabinets in the kitchen, pantry, office, mudroom, various vanities, laundry, and game room bar of Residence. (A true and correct copy is attached hereto as Exhibit C.) The second contract, dated August 18, 2020, and signed September 6, 2020, was for \$97,634.59 and was executed only between Petitioner Highsmiths and Design Gaps to provide his-and-her master closets. (A true and correct copy is attached hereto as Exhibit D.) The Contracts were silent with respect to any completion date.

12. Petitioner Highsmiths originally contracted with A Closet Case in Daniel Island to design and install the his-and-her master closets sometime in July 2020. Unhappy with the A Closet Case quality soon after the A Closet Case installation, Petitioner Highsmiths contacted Design Gaps who had installed Downsview Kitchens cabinetry for the master bath and closets in Petitioner Highsmiths’ previous home a few years prior to this installation. (A true and correct copy is attached hereto as Exhibit E.)

13. Petitioner Highsmiths chose Design Gaps’ lower price line of cabinetry instead of the higher end Downsview Kitchens line offered by Design Gaps. Similarly, Petitioner Highsmiths had selected the lower price line for the earlier contract for the Main House cabinetry at the urging of Jenny Butler, Shelter’s product coordinator. Petitioner Highsmiths paid Design Gaps on September 6, 2020, in the amount of \$97,634.59 to redesign and provide all new cabinetry for the his-and-her master closets.

14. When Design Gaps was substantially complete with installation of the his-and-her master closet at the Residence and had arranged for the delivery of all cabinetries at the Residence, Design Gaps reiterated its request for payment for the materials pursuant the terms and conditions of the Contracts. Instead of paying in accordance with the contract terms, the Petitioner Highsmiths

terminated Design Gaps through an email sent by their attorney within a few days following the request for payment on May 14, 2021. Upon information and belief, the Petitioners realized that they had already committed to order Distinctive Design's Master closet cabinetry from drawings dated March 21, 2021. The Petitioner Highsmiths used the \$97,634.59 completed Design Gaps Master Closet cabinetry while living in the home until the third set of closet cabinets provided by Distinctive Design in the amount of \$182,828.00 came in the following January 2022.

15. Shelter and Petitioner Kacie Highsmith have acknowledged that the designs that were to be placed in the Residence were provided by Design Gaps and remained the property of Design Gaps. Nonetheless, Shelter confirmed that Bryan Reiss of Distinctive Design who was doing several projects for Shelter and cabinetry for a garage addition at the Residence allowed Bryan Reiss to have access to Design Gaps' designs when forwarded without permission via email by Jenny Butler of Shelter on January 19, 2021.

16. The merits hearing on the claims and counterclaims was held on May 26-27 and June 2, 2022. In the Interim Award of the Arbitrator issued on July 19, 2022, the Arbitrator determined that Petitioners were entitled to recover \$152,884.00 from Design Gaps alleging Petitioners had paid \$274,647.00 to Distinctive Design that would then be reduced by \$121,763.00 allegedly for increased costs due to a different selection of materials and improvements authorized by the Petitioners. (A true and correct copy is attached hereto as Exhibit F.) Petitioners timely filed a Motion to Reconsider and Request for Reasoned Award on August 19, 2022. (A true and correct copy is attached hereto as Exhibit G.)

17. In the Arbitrator's Final Award issued on August 19, 2022, in addition to the \$152,884.00 award included in the Interim Award of the Arbitrator, the Arbitrator also awarded Petitioners \$143,525.17 for reasonable attorneys' fees and costs associated with the arbitration. (A

true and correct copy is attached hereto as Exhibit H.) The Arbitrator's total award to Petitioners was \$296,409.17 without addressing any of the arguments provided by Respondents in their Motion to Reconsider and Request for Reasoned Award.

18. Without determining whether the finished product had directly been copied from and/or bears substantial similarity to Respondents' copyrighted work, a prerequisite according to the Fourth Circuit Court of Appeals, the Arbitrator merely asserted that Petitioners had established fair use of the design work as supported by an unprecedented determination that Shelter did not profit from the design and further alleging that sharing of a pdf of the design did not impair the marketability of the design.

I. GROUNDS FOR VACATUR

A. Arbitrator Exceeded His Powers

19. An arbitration panel that is deemed to exceed its powers subjects the arbitration award provided by the panel to being vacated. S.C. Code Ann. § 15-48-130(a)(3).

1. The Arbitrator Imposed Deadlines not Identified in the Contracts

20. Arbitration is a favored method of settling disputes in South Carolina. *Batten v. Howell*, 300 S.C. 545, 389 S.E.2d 170 (Ct.App.1990); *see also Trident Tech. College v. Lucas & Stubbs, Ltd.*, 286 S.C. 98, 333 S.E.2d 781 (1985). When a dispute is submitted to arbitration, the arbitrators determine questions of both law and fact. S.C. Code Ann. § 15-48-180. While, generally, an arbitration award is conclusive and courts refuse to review the merits of an award, an award can be vacated under narrow, limited circumstances. *Pittman Mortgage Company, Inc. v. Edwards*, 327 S.C. 72, 488 S.E.2d 335 (1997). The question of whether arbitrators have exceeded their powers relates to the arbitrability of the issue they have attempted to resolve. *Id.* (citing *Batten, supra*). Arbitrators exceed their powers only if the issue resolved by them is not

within the scope of the agreement to arbitrate. *Id.*

21. According to the South Carolina Supreme Court, the arbitration agreement that was included in the Contracts represents the pleadings at issue in this case. Absent an amendment to these Contracts or implied consent to consider something not specified in the Contracts, the Arbitrator can only consider the issues contained within the Contracts in awarding the parties the relief being requested. *Id.* (citing 61 Am.Jur.2d, Pleading § 383 (1981); see also Rule 15(b), SCRCPP; *Parker Peanut Co. v. Felder*, 207 S.C. 63, 34 S.E.2d 488 (1945); *Ball v. Canadian American Express Co.*, 314 S.C. 272, 442 S.E.2d 620 (Ct.App.1994)).

22. In the present case, the Arbitrator imposed deadlines on the Respondents that were neither identified in the Contracts nor agreed upon by the parties pursuant to the terms of the Contracts.

23. The Arbitrator admitted that the Contracts did not contain “specified completion dates.” (Arbitrator’s Final Award, p. 5 (October 7, 2022).) Yet, the Arbitrator chose to impose completion dates on Design Gaps in the Arbitration award. (*Id.*)

24. The Contracts provide that any modification to the agreements between the parties “shall be reflected by written change orders signed and dated by all parties and specifically stating the changes and increase or decrease in contract price.” (Design Gaps and Shelter Custom Living/Kacie Highsmith Contract, ¶ 4 (August 18, 2020); Design Gaps and Shelter Custom Living/Jason and Kacie Highsmith Contract, ¶4 (September 6, 2020).) However, none of the completion dates identified by the Arbitrator resulted from written change orders signed and dated by all parties. Therefore, the Arbitration award imposes terms on the Respondents that did not have any support in the Arbitration record.

25. With respect to the dates of the Contracts, the Arbitration award conflicts with or

contradicts the plain language of the Contracts and so far departs from the terms of the agreements that it is not even arguably derived from the contract. *See Norfolk and Western Ry. Co. v. Transp. Communications Int'l Union*, 17 F.3d 696, 700 (4th Cir. 1994) (“an award that ignores the plain and unambiguous language of the arbitration contract does not ‘draw its essence’ from the agreement”). *See also United Paperworkers*, 484 U.S. at 38 (“The arbitrator may not ignore the plain language of the contract ...”); *Choice Hotels Int’l, Inc. v. SM Prop. Mgmt., LLC*, 519 F.3d 200, 207 (4th Cir. 2008) (“The permissible common law grounds for vacating such an award ... include those circumstances where an award fails to draw its essence from the contract, or the award evidences a manifest disregard of the law We have held that an arbitration award fails to draw its essence from the agreement at issue when an arbitrator has disregarded or modified unambiguous contract provisions or based an award upon his own personal notions of right and wrong.”); *Patten v. Signator Ins. Agency, Inc.*, 441 F.3d 230, 234 (4th Cir. 2006) (“The permissible common law grounds for vacating such an award, which constitute the essential premises of this appeal, include those circumstances where an award fails to draw its essence from the contract, or the award evidences a manifest disregard of the law.”); *Id.* at 235 (“In this case, as explained below, the arbitrator disregarded the plain and unambiguous language of the governing arbitration agreement when he concluded that it included an implied one-year limitations period. In so doing, the arbitrator acted in manifest disregard of the law and failed to draw his award from the essence of the agreement.”); *Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 222 (2d Cir. 2002) (“[V]acatur for manifest disregard of a commercial contract is appropriate only if the arbitral award contradicts an express and unambiguous term of the contract or if the award so far departs from the terms of the agreement that it is not even arguably derived from the contract.”); *Star Tribune Co. v. Minn. Newspaper Guild Typographical Union*, 450 F.3d 345, 348 (8th Cir. 2006) (“We will

only vacate an award if the arbitrator ignored or disregarded the plain language of an unambiguous contract or nullified a provision of the contract.”).

26. “The permissible common law grounds for vacating such an award ... include those circumstances where an award fails to draw its essence from the contract, or the award evidences a manifest disregard of the law.” *Patten*, 441 F.3d at 234. An arbitration award fails to draw its essence from the agreement at issue “when an arbitrator has disregarded or modified unambiguous contract provisions or based an award upon his own personal notions of right and wrong.” *Three S Delaware, Inc. v. DataQuick Info. Sys., Inc.*, 492 F.3d 520, 528 (4th Cir. 2007). However, an arbitration award “does not fail to draw its essence from the agreement merely because a court concluded that an arbitrator has misread the contract.” *Id.* “[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.” *U.S. Postal Serv. v. Am. Postal Workers Union, AFL-CIO*, 204 F.3d 523, 527 (4th Cir. 2000) (citation and internal quotation marks omitted).

27. The Arbitrator imposed contractual deadlines that did not have any support whatsoever from the Contracts. Based upon the use of these non-existent deadlines upon which the Arbitration Award is based demonstrates the Arbitrator failed to draw his decision from the essence of these Contracts. Since the deadlines the Arbitrator used to base his Arbitration Award upon are not within the scope of the Contracts at issue, the Arbitrator exceeded his powers related to the arbitrability of the issues that the parties attempted to resolve through arbitration. The imposition of such non-existent deadlines by the Arbitrator demonstrates the Arbitrator exceeded his powers and the award should be vacated. See *Pittman Mortgage, supra*; *Batten, supra*; and *Trident Tech. College, supra*.

2. **Arbitrator Failed to Provide a “Reasoned Award” Pursuant to the Agreement Reached by the Parties**

28. While arbitrators generally need not specify their reasoning or the basis of the award as long as the factual inferences and legal conclusions supporting the award are “barely colorable,” an amendment to the arbitration provisions or implied consent agreed upon by the parties for certain provisions must be carried out by the arbitrator. *Pittman Mortgage, supra*.

29. Pursuant to the requirements imposed by the Commercial Arbitration Rules of the American Arbitration Association under which the parties were bound to follow based upon terms of the Contracts, the Preliminary Hearing and Scheduling Order issued by the Arbitrator directed that the Form of Award would be by “Reasoned Award” as opposed to Standard Award or Finding of facts or conclusions of law, which were the other two choices. (Report of Preliminary Hearing and Scheduling Order, pp 2-3 (September 30, 2021).)

30. While the term “reasoned award” has not been defined in the Federal Arbitration Act where this term appears, a host of several Circuit Courts have adopted a standard that (i) decides if a reasoned award has been agreed upon by the parties, (ii) identifies the issues addressed within the arbitrator’s award that are subject to a reasoned award, (iii) imposes requirements to meet the reasoned award standard in an arbitration award, and (iv) when the failure of an arbitration award to arise to the level needed to meet the reasoned award standard constitutes vacatur. See, e.g., *Rain CII Carbon, LLC v. ConocoPhillips Co.*, 674 F.3d 469, 473 (5th Cir. 2012).

31. The Second Circuit agrees with a standard that appears to be evolving into an accepted definition of reasoned award as “something short of findings and conclusions but more than a simple result.” *Leeward Constr. Co. v. Am. Univ. of Antigua - College of Med.*, 826 F.3d 634, 640 (2d Cir 2016) (quoting *Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836, 843 (11th Cir. 2011)).

32. The Arbitrator's bases for denying Respondents' ten counterclaims includes "Respondents did not prove any false or reckless representation made by Claimants which caused it any damage;" "Respondents did not establish any tortious interference in its contract by any party;" "... did not establish that there was a civil conspiracy between and among the Claimants, Distinctive Design or any other party;" "Respondents did not establish that Claimants' conduct was unfair or deceptive;" "Respondents did not establish that the conduct it complains of was repetitive or in violation of any public interest;" "since the parties entered a written contract, there can be no "quasi" contract;" and "Respondents gave to the Claimants their drawings for the cabinets ... Claimants were free to use the drawings to measure the compliance of Design Gaps with these drawings and its obligation to install the designed cabinets in accordance with its contractual obligation." (Interim Award of Arbitrator, p. 6 (July 19, 2022).)

33. According to the guidance provided by *Leeward Constr.* a decision needs to be made concerning whether the issues to be decided upon are the central issue or issues raised before the arbitration panel before a reasoned award is made. *Leeward Constr.*, 826 F.3d at 640. Respondents' defenses directly addressed the central claims identified by the Claimants, hence, under the guidance provided in *Leeward Constr.*, Respondents' defenses should have been subject to a determination using a reasoned award.

34. Additionally, in the Arbitrator's Interim Order, the Arbitrator determined that the amended claims of negligence, material breach of contract, fraudulent misrepresentation, failure to mitigate damages, tortious interference, civil conspiracy, unfair and deceptive trade practices, violation of the copyright act, and conversion "shall be allowed and are deemed to be arbitrable under the arbitration agreement between the parties." (Interim Order on Motion to Join Additional Third-Party Respondents and Motion to Amend Respondents' Counterclaim, pp. 2-3 (April 20,

2022).)

35. Pursuant to the reasoning provided in *Leeward Constr.*, the counterclaims were identified by the Arbitrator as issues raised before the Arbitrator, and, pursuant to the guidance provided in *Leeward Constr.*, are subject to a reasoned award. *Leeward Constr.*, 826 F.3d at 640.

36. Given that Respondents' defenses and counterclaims are subject to a decision using a reasoned award, based upon the guidance provided in *Leeward Constr.*, the Second Circuit provided that such central issues and issues raised before the arbitrator in the arbitration do not require "a detailed rationale for each and every line of damages awarded," but it does need to "set forth the relevant facts, as well as the key factual findings supporting its conclusions." *Id.* A "reasoned award" requires "something more than a line or two of unexplained conclusions, but something less than full findings of fact and conclusions of law on each issue raised before the panel." *Leeward Const.*, 826 F.3d at 640.

37. The arbitration award has merely provided a decision on the issues and claims before the Arbitrator, but without providing the relevant facts and factual findings supporting the apparent conclusion that the Respondents' arguments against those issues and claims were not applicable. Even while the Arbitrator decided Respondents' counterclaims were issues to be considered, the Arbitration award does not arise to the level of reasoned award provided by the Second Circuit in *Leeward Constr.* with the award's failure to set forth the relevant facts and the key factual findings supporting the Arbitrator's conclusions. *I.e.*, for the most part, the Arbitrator's arguments against the counterclaims do not provide "something more than a line or two of unexplained conclusions," which according to the evidence submitted is not what the Arbitrator provided. (Arbitrator's Final Award, p. 6, (October 7, 2022).) By Respondents count, the Arbitrator dismissed Petitioners' ten counterclaims using just less than twelve lines of text in his

Final Award.

38. Respondents argue that, according to the agreement between the parties, the Arbitrator was supposed to provide a reasoned award as a basis for his decisions in the Award. His failure to do so with respect to the counterclaims raised by the Respondents does not arise to be considered a “barely colorable” decision on the outcomes of these counterclaims. According to the guidance provided in *Pittman Mortgage*, the Arbitration Award should be vacated based upon the Arbitrator exceeding his powers pursuant to S.C. Code Ann. § 15-48-130(a)(3).

B. Arbitrator Refused to Hear Evidence to the Controversy or Otherwise So Conducted the Hearing, Contrary to the Provisions of S.C. Code Ann. § 15-48-50, as to Prejudice Substantially the rights of Petitioners

39. An arbitrator’s refusal to hear evidence material to the controversy or otherwise so conducts the hearing, contrary to the provisions of § 15-48-50, as to prejudice substantially the rights of a party warrants vacatur of the award. S.C. Code Ann. § 15-48-130(a)(4). In the pertinent part, each of the parties are entitled to be heard and to present evidence material to the controversy. S.C. Code Ann. § 15-48-50(b).

40. “Arbitration is a matter of contract and controlled by contract law.” *S.C. Pub. Serv. Auth. v. Great W. Coal (Kentucky), Inc.*, 312 S.C. 559, 563, 437 S.E.2d 22, 25 (1993) (citation omitted). “[A]n arbitration clause is separable from the contract in which it is embedded and the issue of its validity is distinct from the substantive validity of the contract as a whole.” *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 540, 542 S.E.2d 360, 364 (2001) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967)).

41. In the arbitration at hand, the Arbitrator chose to make rulings on parties that the Arbitrator had earlier excluded from the Arbitration proceeding resulting in a substantial prejudice to the rights of Respondents to present such evidence at the Arbitration proceeding against these

earlier excluded parties.

42. Respondents had requested that Jenny Butler, Bryan Reiss, and Distinctive Designs, LLC be added as third-party respondents to the Arbitration. The Arbitrator made an Interim Ruling on April 20, 2022, denying the entry of Distinctive Design, Bryan Reiss, and Jenny Butler as third-party respondents in the Arbitration. (Interim Order on Motion to Join Additional Third-Party Respondents and Motion to Amend Respondents' Counterclaim, p 1, (April 20, 2022).) Therefore, based upon the Arbitrator's Order, Distinctive Design, Bryan Reiss, and Jenny Butler were non-parties to the Arbitration. However, the Arbitrator included rulings in the Final Award finding Bryan Reiss working on behalf of Distinctive Design did not infringe Petitioners' Copyright Works. (Arbitrator's Final Award, pp. 6-7.) Such a finding against direct copyright infringement would have prevented finding of vicarious copyright infringement against Jenny Butler even though she had provided the Copyrighted designs to Bryan Reiss.

43. Respondents did not have a full and fair opportunity to litigate the direct and vicarious copyright infringement claims against Bryan Reiss, Distinctive Design, and Jenny Butler because the Arbitrator had denied them from being named in the Arbitration as third-party respondents.

44. A certificate of registration issued by the Copyright Office is "prima facie evidence of the validity of the copyright and of the facts stated in the certificate," such as ownership. *Universal Furniture Int'l, Inc. v. Collezione Europa USA, Inc.*, 618 F.3d 417, 428 (4th Cir. 2010) (citing 17 U.S.C. § 410(c)).

45. The Petitioners argued that the Arbitrator should not consider this as evidence in his Final Award. (Andrew Walden to Arbitrator Email (June 20, 2022).) Notwithstanding that the Petitioners did not want the Arbitrator to consider the registration as evidence, it did exist, and it

was provided to the Arbitrator as part of the Arbitration record. (David Glover to Arbitrator Email with Copyright Registration (April 13, 2022).) Once the certificate is shown to exist, the burden shifts to the defendant to prove that the claimed copyrights are invalid. *M. Kramer Mfg. Co. v. Andrews*, 783 F.2d 421, 434 (4th Cir. 1986). The Arbitrator capitulated to the request of the Petitioners and ruled that the Respondents “failed to enter into evidence a valid copyright registration.” (Arbitrator’s Final Award, p. 6.)

46. Without a determination that the Copyrighted work is valid, as shown by Respondents’ certificate of registration, apparently the Arbitrator chose not to consider Bryan Reiss’ access to the Copyrighted work and the substantial similarities of the work in his determination of whether there had been copyright infringement or not. *Bldg. Graphics, Inc. v. Lennar Corp.*, 708 F.3d 573, 577 (4th Cir. 2013) (“A copyright infringement claim ... requires a showing that the defendant copied the plaintiff’s work and that the defendant’s work is ‘substantially similar’ to the protectable elements of the plaintiff’s work. Because direct evidence of copying is hard to come by ... a plaintiff may establish an inference of copying by showing access to the allegedly infringed work as well as substantial similarity between the works at issue.”)

47. The Arbitrator chose to rule against finding copyright infringement by Bryan Reiss even though, through his own Interim Order, Bryan Reiss was not a respondent to this action. This ruling came notwithstanding that a finding of the email exchange of the Copyrighted designs had been made and there was substantial similarity between what Bryan Reiss had performed and what the Copyrighted designs showed. (*Id.* at pp. 6-7.)

48. While the Arbitrator admitted to the similarities between the Copyrighted designs and the installation performed by Bryan Reiss, he indicated that the resemblance was necessary “due to the limitations of the space and the client’s desired layout.” (*Id.* at p. 7.)

49. The Arbitrator did not allow the differences between aesthetic copyrighted elements and functional elements to be considered with respect to Bryan Reiss' copyright infringement. See *Ashley Furniture Indus. v. Sangiacomo N.A.*, 187 F.3d 363 (4th Cir. 1999).

50. Also, as the Arbitrator stated, Bryan Reiss implemented the "client's desired layout," which was reflected in the Copyrighted design provided by Respondents, but the Arbitrator chose not to allow for a reduction in the award based upon Petitioners' alleged purchase and ownership of the Copyrighted design.

51. Finally, the Arbitrator chose to relieve Bryan Reiss and Distinctive Design of any copyright infringement liability by applying a fair use defense. However, fair use is generally reserved for criticism, comment, news reporting, teaching, scholarship, or research, none of which are applicable here. *Bouchat v. Baltimore Ravens Ltd. P'ship*, 619 F.3d 301, 308 (4th Cir. 2010). Petitioners' and Bryan Reiss' use of Respondents' Copyrighted works was willful and commercial in nature. Petitioners' and Bryan Reiss' use of Respondents' Copyrighted works encompassed the entire use of the aesthetic elements of Respondents' plans. Any changes were functional in nature, which were non-transformative of the plans.

52. Had Bryan Reiss, Distinctive Design, and Jenny Butler been named as third-party respondents to the Arbitration, then Respondents would have had the opportunity to raise these arguments to the Arbitrator.

53. The Arbitrator's refusal to admit Distinctive Design, LLC, Bryan Reiss, and Jenny Butler as third-party respondents in the arbitration prevented Respondents from presenting evidence that the Arbitrator, based upon his Interim and Final Awards ended up making material to the controversy. The Arbitrator's choice to conduct the hearing contrary to the provisions of § 15-48-50 resulting in substantial prejudice to the rights of Respondents, Respondents argue the

award should be vacated pursuant to S.C. Code Ann. § 15-48-130(a)(4).

C. Arbitrator Knew of Well-Defined, Explicit, and Clearly Applicable Controlling Law Yet Still Refused to Apply It

54. An arbitrator is considered to have manifestly disregarded or perversely misconstrued the law governing the dispute, when the arbitrator fails to follow controlling law and the arbitrator knew of well-defined, explicit, and clearly applicable controlling law, yet still refused to apply it. *C-Sculptures, LLC v. Brown*, 403 S.C. 53, 56, 742 S.E.2d 359, 360 (2013); *Gissel v. Hart*, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009). The standard is met when the award is the product of an intentional or reckless flouting of the law, and not a mere error in interpreting it. *Gissel*, 382 S.C. at 241, 676 S.E.2d at 323.

55. The stated approach is considered to complement the rule that the form of the award need not necessarily be accompanied by any reasons as long as the award can be reconciled with factual inferences and legal conclusions that are at least “barely colorable.” *Trident Tech.*, 286 S.C. at 111, 333 S.E.2d at 789 (quoting *In the Matter of Andros Compania Maritima, S.A. and Marc Rich & Co., A.G.*, 579 F.2d 691, 704 (2d. Cir. 1978)).

1. Overview of Arbitrator’s Knowledge and Experience

56. The Arbitrator was admitted to the South Carolina Bar in 1976 and has been practicing with Haynsworth Sinkler Boyd, P.A. (“Law Firm”) as well as a predecessor firm since that time.

57. The Arbitrator indicates his experience includes the representation of “contractors and architects in arbitration proceedings[; arbitration of] disputes involving owners, architect, general contractors, subcontractors and contractors[; and mediation of] medical facilities, suppliers, asbestos, property damage and mechanical disputes.”

58. The Law Firm has over one hundred attorneys with some having experience in

Copyright Law and some having experience in Contracts & Procurement. Clearly, the Arbitrator has access to attorneys at the Law Firm if he needs additional information concerning these subject areas.

2. **Arbitrator's Application of the Fair Use Doctrine to Overcome Copyright Infringement is a Reckless Disregard of Well-Established Statutory and Judicial Precedent Concerning the Legal Principle**

59. Design Gaps registered the cabinet and closet systems drawings representing the architectural works used at Petitioner Highsmiths' Residence under Registration Number VAu001462768 with the United States Copyright Office.

60. The Petitioner Highsmiths argued that they were involved in the design of the cabinet and closet systems but did not provide evidence of authorship of any original work they contributed to the cabinet and closet systems.

61. The Petitioner Highsmiths continued by arguing that since they were provided with copies of the designs that did not indicate copyright ownership, they had a good faith belief that they had rights to use the design. However, the front page of each of the Contracts indicated that "[a]ll designs created remain the sole property of Design Gaps, Inc. and may not be reproduced in whole or in part without the written consent of Design Gaps, Inc." Petitioner Highsmiths were aware of who provided the design and who put the design together. It is not mandatory that the work be registered at the time of publication of the work. But, in this case, the copyright owners subsequently registered the work with the United States Copyright Office.

62. Contrary to Petitioner Highsmiths' arguments, the designs provide more than measurement information, they provide architectural drawings showing the overall form as well as the arrangement and composition of spaces and elements in the design. Such elements, according to the Copyright Laws of the United States, are subject to copyright protection.

63. As Petitioner Highsmiths' acknowledge, the statutory requirements used in determining whether the doctrine of fair use applies are: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. The fair use doctrine is to prevent a finding of copyright infringement "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."

64. Shelter and, upon information and belief, at the direction of Petitioner Highsmiths admit that their use was "merely" providing a PDF of the copyrighted works to Distinctive Design alluding that there was no copyright infringement. Generally, copyright infringement is a strict liability offense, in which a violation does not require a culpable state of mind. However, "knowledge of, or willful blindness to, specific instances of infringement" supports a finding of contributory infringement. Thus, Petitioners' willful blindness to the fact that the Respondents possessed copyright protection in the architectural works is itself an infringement of Respondents' rights.

65. Bryan Reiss, the owner of Distinctive Design admitted that what was installed in the field were similar to the closet designs. There were only minor changes to the elevation from the floor plan that was provided by Design Gaps.

66. Indeed, Petitioner Highsmiths admit that their use was not at all transformative in any way. Indeed, the Supreme Court has determined that a "transformative" use "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message," none of which are applicable here. Certainly, the arbitrator did not consider the

transformative nature of Petitioner Highsmiths' use when determining their use was subject to the fair use doctrine.

67. If a use is not transformative, then there must be a showing that the second and third factors weigh in favor of fair use. In assessing the second factor, courts must determine the "thickness" or "thinness" of the author's exclusive rights. The thickness of the rights in visual materials, where architectural works are embodied, typically turn on the extent of creative choices embodied in the work. The Arbitrator failed to provide such reasoned assessment in determining that Petitioner Highsmiths' use was subject to the fair use doctrine.

68. The third factor addresses whether "no more was taken than necessary" to accomplish the user's purpose. In the instant situation, all aspects of the architectural design were taken to accomplish Petitioner Highsmiths' purpose. But, again, the Arbitrator did not address this in a reasoned assessment in his determination that Petitioner Highsmiths' use was subject to the fair use doctrine.

69. With respect to the fourth factor, a showing that the architectural work is more than minimally commercial especially without a finding that the use is not transformative in nature, the use that exists in this instance, supports a finding that the potential mark for the value of the copyrighted work is affected.

70. Clearly, each of the factors of the statutory test as further defined by court precedent for fair use fails to support a finding of fair use, and the Arbitrator has ignored this well-established legal principle in finding that Petitioner Highsmiths' infringing use is subject to the fair use doctrine.

71. The materials and pleadings filed by the parties fully informed the Arbitrator of the applicable law in the matters to be considered. The Arbitrator either was aware of or had access to

attorneys who have knowledge of Copyright Law, and the Arbitrator willfully flouted the governing law by refusing to apply it. Therefore, the Arbitrator has manifestly disregarded this clearly defined legal principle in Copyright Law that is not subject to reasonable debate.

3. A Failure to Recognize that Respondents Materially Performed Under the Terms of the Contracts and Petitioners Breached the Contracts Shows the Arbitrator Failed to Follow Well-Established Black Letter of Contract

72. Design Gaps had entered the Contracts with Petitioner Highsmiths for cabinetry at the Residence that totaled \$332,236.94. Petitioner Highsmiths only paid \$264,935.77 to Design Gaps leaving them with a balance of \$55,588.94 for cabinetry and materials and a balance for final installation in the amount of \$11,712.23 or a total amount owed to Design Gaps in the amount of \$67,301.17.

73. Respondent David Glover received emails from Andrew Walden, counsel for Petitioner Highsmiths around May 14, 2021, terminating Design Gaps access to the Residence. The Contracts did not include any provision concerning completion date for the materials to be delivered and work to be performed.

74. Respondents had ordered all materials and had a contractor on site to complete installation of same. Therefore, Respondents substantially performed in good faith the provision of the materials as they were proceeding to installation under the Contracts whereby such purchases were in compliance with the Contracts.

75. Rather, it was Petitioner Highsmiths that decided they wanted to upgrade the materials over those specified in the Contracts and they breached the Contracts with Respondents so that they could engage Distinctive Design to use the layout provided by Design Gaps but provide what Petitioner Highsmiths considered were high quality materials. (Reiss Dep. 120:1-121:8.)

76. The Contracts provided that the right of possession to, and ownership of all goods

and merchandise furnished under the Contracts remains the property of Design Gaps until all payments required to be made under the Contracts is made by the Buyer.

77. It is a well-established premise of South Carolina law that if subsequent to the execution of the contract, the purchaser breaches the contract, the seller shall have the right to declare this contract null and void and retain from the earnest money its actual damages caused by purchaser but shall not be precluded from pursuing any other rights the seller might have at law or in equity. *Richman Enterprises, Ltd. v. Pamplin*, 79 F.3d 1141 (4th Cir. 1995). Indeed, the Supreme Court has stated that it is not necessary that the plaintiff have fully and completely performed every item specified in the contract between the parties, but it is sufficient if there has been substantial performance, not necessarily full performance, so long as the substantial performance was in good faith and in compliance with the contract. *Salve Regina College v. Russell*, 499 U.S. 225, 229, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991).

78. Petitioner Highsmiths failure to pay the Contracts in full to Respondents, according to the terms of the Contracts resulted in a material breach of the Contracts by Petitioner Highsmiths. Pursuant to well-settled South Carolina law, Respondents as sellers were left with the right to declare the Contracts null and void and retain from the earnest money its actual damages caused by Petitioner Highsmiths' breach.

79. The Arbitrator failed to consider and provide a reasoned assessment that the refusal of Petitioner Highsmiths' to continue to pay Design Gaps was itself a breach that would have allowed Respondents to declare the Contracts null and void and retain from the earnest money their actual damages caused by Petitioner Highsmiths' breach.

80. Furthermore, the Arbitrator failed to consider that on January 14, 2021, the Petitioner Highsmiths transferred their interest in the Residence to the Kacie M Highsmith Trust

dated December 18th, 2020. Petitioner Kacie Highsmith was the Trustee of the said Trust. With Petitioner Highsmiths loss in ownership of the Residence, their standing to even bring the arbitration was called into question by Respondents. However, the Arbitrator chose not to even make a reasoned assessment on this rule of law.

81. The materials and pleadings filed by the parties fully informed the Arbitrator of the applicable law in the matters to be considered. The Arbitrator admits that he is aware of or had access to attorneys who have knowledge of Construction Contracts & Procurement Law, and the Arbitrator willfully flouted the governing law by refusing to apply it. This is a well-established principle that is clearly defined and not subject to reasonable debate, and the Arbitrator's refusal to heed that legal principle in Construction Contracts & Procurement Law demonstrates a manifest disregard of the law.

CONCLUSION

82. Upon showing that the Arbitrator exceeded his powers pursuant to S.C. Code Ann. § 15-48-130(a)(3), the Arbitrator leading up to and over the course of conducting the hearing prevented Respondents from presenting evidence material to the controversy that substantially prejudiced the rights of Respondents pursuant to S.C. Code Ann. § 15-48-130(a)(4), and the Arbitrator failed to follow controlling law governing copyright infringement and common law of contracts, Respondents respectfully move that the Arbitrator's award be vacated.

PRAYER FOR RELIEF

WHEREFORE, Respondents pray that this Court enters judgment in their favor on each and every claim for relief set forth herein and award Respondents relief according to the following:

a) That the October 7, 2022 Award be vacated for the reason that the Arbitrator exhibited exceeded his powers in the Arbitration in violation of S.C. Code Ann. § 15-48-130(a)(3);

b) That the October 7, 2022 Award be vacated for the reason that the Arbitrator prevented Respondents from presenting evidence material to the controversy that substantially prejudiced the rights of Respondents in the Arbitration in violation of S.C. Code Ann. § 15-48-130(a)(4);

c) That the October 7, 2022 Award be vacated for the reason that the Arbitrator failed to follow controlling law governing copyright infringement and common law of contracts;

d) That the parties' dispute be remanded to the AAA for the administration of a new hearing with a new arbitrator that included receipt of Respondents' expert testimony and application of controlling Federal law on Copyrights and infringement of such; and

e) That the Court award such relief as it deems just and proper.

This the 9th day of April, 2025

Respectfully Submitted,

Design Gaps, Inc., David Glover and Eva
Glover
By counsel

By: s/Todd M. Hess

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CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2025, the foregoing PETITION FOR VACATUR OF AN ARBITRATION AWARD was caused to be served on counsel of record for Respondents via email and United States mail, with due and proper postage affixed thereto, and addressed as follows:

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This the 9th day of April, 2025.

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