THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Appellate Case No. 2025-002136
Circuit Case No. 2025-CP-10-01835

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

v.

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

RESPONDENTS' FINAL BRIEF

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STATEMENT OF ISSUES

1. Did the circuit court err in holding that, in absence of corruption, fraud, or other undue means, a motion to vacate an arbitration award must be brought within ninety (90) days of issuance of the award pursuant to S.C. Code Ann. § 15-48-130(b)?

2. Did the arbitrator exceed his powers meriting vacatur under S.C. Code Ann. § 15-48-130(a)(3) by:

   a. Finding that Respondents were justified in terminating the contracts based on Appellants' failure to timely perform, when that determination relied on Appellants' representations rather than written terms of the contracts?

   b. Issuing a written award consistent with South Carolina standards for "reasoned awards"?

3. Did the arbitrator manifestly disregard the law by:

   a. Applying the fair use doctrine to Appellants' copyright infringement claims against Respondents without expressly addressing the arguments regarding the doctrine's scope?

   b. Failing to find that Appellants materially performed under the contracts prior to breaching those contracts?

4. Did the arbitrator refuse to consider evidence or conduct the hearing in violation of S.C. Code Ann. § 15-48-150 by:

   a. Requiring evidence to be presented at the hearing?

   b. Permitting Appellants to depose and cross-examine non-party witnesses in support of Appellants' vicarious and contributory copyright claims?

5. Did the circuit court improperly confirm the arbitration award after rejecting Appellants' motion to vacate?

STATEMENT OF THE CASE

This appeal represents Appellants' fourth attempt to vacate an arbitration award entered against Design Gaps, Inc. as a result of Appellants' failure to properly perform certain cabinetry work at the residence of Respondents Jason Highsmith and Kacie Highsmith on Daniel Island, South Carolina (the "Project"). After terminating Design Gaps' contracts on the Project, the Highsmiths and Shelter, LLC initiated arbitration, pursuant to the parties' arbitration agreement, after terminating Design Gaps' contracts on the Project. Following discovery and a three-day hearing, the arbitrator found in favor of the Highsmiths and Shelter, addressing and denying each of Design Gaps' counterclaims. Since issuance of the final award on October 7, 2022, Design Gaps has repeatedly sought to avoid enforcement of the award. Appellants first filed a motion to vacate the award in U.S. District Court, then appealed the district court's denial to the U.S. Court of Appeals for the Fourth Circuit. When that appeal was dismissed for lack of subject matter jurisdiction, the Highsmiths and Shelter then promptly filed in the Court of Common Pleas for Charleston County to confirm the award and begin collection efforts. Yet again, Appellants moved to vacate the award and, after the court rejected their arguments, filed this latest appeal.

A. The Project and Binding Arbitration.

The Highsmiths engaged Shelter, LLC, owned by Jenny Butler and her late-husband, Ryan Butler, to renovate their residence. On August 18, 2020, the Highsmiths and Design Gaps, Inc. entered into a contract for various cabinetry throughout the residence, and, on September 6, 2020, Shelter and Design Gaps entered into a contract for his-and-hers closets in the master bedroom (collectively, the "Contracts"). (R. pp. 309–10, 312–13). Each of the Contracts were drafted by Design Gaps and contained the same arbitration agreement:

> 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 byan [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 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.

(R. pp. 310, 313, Contracts § 17) (the "Arbitration Agreement").

The Highsmiths and Shelter requested that Design Gaps complete its work approximately four to eight weeks from contract signing, or October and November of 2020, respectively. (R. p. 150, Arbitration Award at 1.) Design Gaps indicated this time frame was achievable. (R. pp. 150–51, *id.* at 1–2.) Pursuant to the Contracts, Design Gaps prepared project drawings and sent them to the Highsmiths and Shelter. However, after numerous, lengthy delays and quality issues, the Highsmiths and Shelter terminated both Contracts with Design Gaps on May 14, 2021. (R. p. 152, *id.* at 3.) Prior to terminating Design Gaps, the Highsmiths and Shelter met with Bryan Reiss, owner of Distinctive Design & Construction, LLC ("Distinctive Design"), to discuss options for completing the project. (R. p. 155, *id.* at 6.) In preparation for this meeting, Shelter emailed Design Gaps' drawings to Distinctive Design for review in completing the work started by Design Gaps. (R. pp. 154–55, *id.* at 6–7.) Following termination, the Highsmiths and Shelter hired Distinctive Design to finish the Project. (R. p. 153, *id.* at 4.) Distinctive Design prepared its own drawings and designs to complete the Project, in part because Design Gaps' plans contained numerous errors. (R. p. 156, *id.* at 7; *see also, e.g.*, R. p. 62, B. Reiss Dep. 120:6–24.)

On July 20, 2021, the Highsmiths and Shelter filed a demand for arbitration against Design Gaps and its owners David and Eva Glover, asserting claims for breach of contract, promissory estoppel, fraud, and piercing the corporate veil (the "Arbitration"). (R. pp. 26–39, Demand for Arbitration.) Design Gaps filed counterclaims alleging negligence, breach of contract, fraudulent misrepresentation, failure to mitigate damages, tortious interference, civil conspiracy, conversion, unfair and deceptive trade practices, quasi-contract, and various violations of the Copyright Act. (R. p. 152, Arbitration Award at 2.) The parties jointly selected Mr. Coker, Esq. to serve as the arbitrator of their claims (the "Arbitrator). (R. pp. 55–56, Emails Selecting Arbitrator (August 25, 2021).) Appellant David Glover insisted on representing Design Gaps *pro se* in the Arbitration and obtained an opinion from the South Carolina Supreme Court's Office of Disciplinary Counsel permitting him to do so without a law license. (R. p. 151, Arbitration Award at 2 n.1.) The Arbitrator permitted Mr. Glover to take depositions and conduct other discovery.

Following discovery—including the depositions of Mr. Reiss and Ms. Butler—the parties presented their cases to the Arbitrator. (R. p. 151, *id.* at 2.) Shelter and the Highsmiths called as numerous witnesses, including Ms. Butler and Mr. Reiss. (R. p. 151, *id.*) Design Gaps called only David Glover as witness. (R. p. 151, *id.*) Before issuing his decision, the Arbitrator confirmed that both parties 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.

(R. p. 151, *id.*)

On October 7, 2022, the Arbitrator issued a nine-page reasoned award finding in favor of the Highsmiths and Shelter and denying each of Design Gaps' counterclaims (the "Arbitration

Award" or "Award"). (R. pp. 150–59, the Arbitration Award.) The Arbitrator discounted the damages awarded, however, to account for the higher quality product provided by Distinctive Design and for loss of use not attributable to Design Gaps. (R. pp. 153–54, *id.* at 4–5.) The Award constituted the "full settlement of all claims and counterclaims." (R. p. 158, *id.* at 9.)

B. Appellants' Attempts to Vacate the Award.

On December 29, 2022, Design Gaps filed a petition in federal district court to vacate the Award, arguing the Arbitrator was evidently partial, manifestly disregarded the law, and imperfectly executed his duties (the "Vacatur Action"). (R. pp. 160–79, Pet. for Vacatur, No. 2:22-cv-04698, ECF 1 (D.S.C. Dec. 29, 2022).) Shelter and the Highsmiths responded by moving to confirm the Award. (R. p. 199, Appl. for Confirmation, 2:22-cv-04698, ECF 10 (D.S.C. Feb. 28, 2023).) After thorough briefing, the District Court confirmed the Award and rejected all of Design Gaps' arguments. (R. pp. 234–43, Order & Op., ECF 14, 2:22-cv-04698 (D.S.C. May 19, 2023).) The district court also found the Arbitration Agreement entitled Shelter and the Highsmiths to attorney's fees and costs they incurred defending the Award. (R. pp. 244–47, Order & Op., 2:22-cv-04698, ECF 15 (D.S.C. June 7, 2023).)

Design Gaps appealed the district court's orders to the U.S. Court of Appeals for the Fourth Circuit. After the appeal was fully briefed and argued, the Fourth Circuit *sua sponte* dismissed that appeal for lack of federal subject matter jurisdiction. *See Design Gaps, Inc. v. Shelter, LLC*, 130 F.4th 143 (4th Cir. 2025). In so doing, the Fourth Circuit offered no opinion on the merits of the district court's orders, or of the Award. *See generally id.* On remand, the district court carried out the Fourth Circuit's mandate by dismissing the case for lack of jurisdiction without addressing the merits of its prior orders. (R. pp. 413–14, Order & J, 2:22-cv-04698, ECF 25 & 26 (D.S.C. April 2, 2025).)

Meanwhile, on January 13, 2023, shortly after filing the Vacatur Action, Design Gaps filed a separate action against Ms. Highsmith, Shelter, its owners the Butlers, Distinctive Design, and its owners the Reisses, alleging, among other things, copyright infringement, Lanham Act violations, unfair trade practices, and violations of South Carolina's Trade Secrets Act, based on the same alleged misuse of its drawings at issue in the Arbitration. *See Design Gaps v. Distinctive Design & Constr. LLC*, 162 F.4th 452, 468 (4th Cir. 2025). The district court dismissed all claims against Ms. Highsmith, Distinctive Design, and the Reisses as well as all claims against Shelter and the Butlers related to the Project on the grounds that res judicata and collateral estoppel barred relitigation of issues determined in binding arbitration (the "Precluded Claims"). *See id.* at 469. Design Gaps appealed to the Fourth Circuit, arguing, among other things, that it was prevented from litigating its claims in Arbitration due, in large part, to the Arbitrator's refusal to join Ms. Butler, Mr. Reiss, and Distinctive Design as parties to the Arbitration. *See id.* at 473–74, 476–77. While the appeal was pending, the Fourth Circuit dismissed the Vacatur Action.

Seeking judicial assistance to collect their Award against Design Gaps and to preserve the district court's dismissal of the Precluded Claims, Shelter and Highsmiths filed a Petition for Order Confirming the Arbitration Award on April 2, 2025, and Amended Petition for Order Confirming the Arbitration Award on April 9, 2025, in the Court of Common Pleas for Charleston County. (R. pp. 261–65, Pet. to Confirm; R. pp. 291–96, Am. Pet. to Confirm.) Once again, Appellants filed a motion to vacate the Award in an effort avoid enforcement and its preclusive effects. The circuit court rejected Appellants' motion and confirmed the Award. With the Award once again confirmed, the Fourth Circuit issued its opinion affirming dismissal of the Precluded Claims, finding that Design Gaps had a full and fair opportunity to litigate its claims in Arbitration. *See Design Gaps v. Distinctive Design & Constr. LLC*, 162 F.4th at 476–78.

Appellants now bring this appeal, once again claiming they were deprived of the ability to present their claims in Arbitration, that the Arbitrator disregarded applicable law and procedure, and that the Award should be vacated to allow for re-litigation of their claims.

STANDARD OF REVIEW

"The circuit court's adoption of a legal standard . . . under [S.C. Code] section 15-48-130 is a question of law which [appellate courts] review de novo." *Crouch Constr. Co. v. Causey*, 405 S.C. 155, 163, 747 S.E.2d 482, 486 (2013). "[A] circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009).

"Arbitration is a favored method of settling disputes in South Carolina." *Gissel*, 382 S.C. at 241, 676 S.E.2d at 323. "When a dispute is submitted to arbitration, the arbitrator determines questions of both law and fact." *Id.* "Generally, an arbitration award is conclusive and courts will refuse to review the merits of an award." *C-Sculptures, LLC v. Brown*, 403 S.C. 53, 56, 742 S.E.2d 359, 360 (2013) (quoting *Gissel*, 382 S.C. at 241, 676 S.E.2d at 323). "In reviewing arbitration awards, 'the standards for judicial intervention are . . . narrowly drawn to assure the basic integrity of the arbitration process without meddling in it.'" *Crouch Constr. Co.*, 405 S.C. at 163, 747 S.E.2d at 486 (quoting *Merit Ins. v. Leatherby Ins.*, 714 F.2d 673, 681 (7th Cir. 1983)). "Review of arbitration awards is limited and the decision of an arbitration panel will be vacated only under certain grounds as provided by statute or upon the non-statutory ground of 'manifest disregard of the law.'" *Harris v. Bennett*, 332 S.C. 238, 243, 503 S.E.2d 782, 785 (Ct. App. 1998).

ARGUMENTS & AUTHORITIES

I. THE CIRCUIT COURT CORRECTLY HELD THE NINETY-DAY PERIOD TO CHALLENGE AN ARBITRATION AWARD IS TOLLED ONLY FOR CORRUPTION, FRAUD, OR UNDUE MEANS, WHICH IS NOT PRESENT HERE.

The circuit court properly found that, under the plain language of S.C. Code Ann. § 15-48-130(b), Design Gaps' motion to vacate was untimely. The South Carolina Uniform Arbitration Act (UAA) provides that 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).

Design Gaps filed its motion to vacate on April 9, 2025, nine hundred and fifteen (915) days after receipt of the Arbitration Award on October 7, 2022. It provided no evidence or argument that it was prevented from timely filing due to corruption, fraud, or other undue means. Rather, Design Gaps filed in the wrong court (U.S. District Court for the District of South Carolina) and incorrectly alleged that the district court had jurisdiction to hear its challenges to the Award. *See Design Gaps, Inc. v. Shelter, LLC*, 130 F.4th 143, 146 (4th Cir. 2025) (citing *Badgerow v. Walters*, 596 U.S. 1 (2022)) (dismissing Design Gaps' appeal and noting that the Supreme Court abrogated the look-through approach which allowed for federal question jurisdiction under the Federal Arbitration Act when the underlying arbitration involved questions of federal law).[1]

Because Design Gaps' motion to vacate was filed outside the statutory period, the Court's analysis of Design Gaps' appeal should end here, and it should affirm the circuit court's confirmation of the Arbitration Award. *See* S.C. Code Ann. § 15-48-120 ("Upon application of a

[1] The United States Supreme Court decided *Badgerow* on March 31, 2022, approximately seven (7) months prior to the date Appellants filed their petition to vacate in district court.

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 . . . .").

A. Design Gaps' Tolling Arguments are not Preserved for Appeal and are Inapplicable.

Design Gaps raises two arguments in support of tolling the ninety-day period for motions to vacate. Neither theory was raised before the circuit court nor do they apply to the facts at hand.

1. Design Gaps did not raise its tolling theories for consideration by the circuit court and the court did not rule on them.

"As a general rule, an issue may not be raised for the first time on appeal, but must have been raised to *and* ruled upon by the court below to be preserved for appellate review." *Harris v. Bennett*, 332 S.C. 238, 245, 503 S.E.2d 782, 786 (Ct. App. 1998) (emphasis added).

In its motion to vacate, Design Gaps argued simply that "[t]he 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." (R. p. 267, Mot. for Vacatur at 2). Likewise, at the hearing, Design Gaps repeated the argument that it filed within the ninety-day period. (R. pp. 536–38, Hr'g Tr. 13:25–15:12.) Design Gaps provided no legal theories or authorities for its position. This is not sufficient to preserve an argument for appellate review. *See, e.g.*, *Jones v. State Farm Mut. Auto Ins.*, 364 S.C. 222, 234–35, 612 S.E.2d 719, 725–26 (Ct. App. 2005) (holding that merely asserting a certain document "created an issue of fact" without identifying a "concomitant legal theory" was not sufficient to preserve the argument that the document raised "factual issues as to existence of coverage" under the doctrine of estoppel).

Moreover, the circuit court did not rule on whether removal or equitable tolling applied under Section 15-48-130(b). Instead, the court held that there was no evidence supporting tolling

under the statutory exceptions. (R. pp. 5–6, Order Confirming the Award at 5–6.) Thus, the issues are not preserved for appellate review.

2. Removal tolling does not apply where an action is first filed in federal court.

Even if the issue had been preserved, removal tolling does not apply here. Design Gaps relies on *Limehouse v. Hulsey*, 404 S.C. 93, 744 S.E.2d 566 (2013). *See* Appellants' Final Brief at 11. However, there the court held "that removal of a state court case to federal court tolls the time period for filing responsive pleadings." *Limehouse*, 404 S.C. at 113, 744 S.E.2d at 577. Here, Shelter and the Highsmiths did not remove a state court action to federal court. Design Gaps chose to file in federal court. Thus, *Limehouse* and removal tolling is not applicable.

3. Equitable tolling does not apply to S.C. Code Ann. § 15-48-130.

Likewise, Design Gaps cites inapplicable case law in support of its assertion that equitable tolling should apply. *See* Appellants' Final Brief at 12–14. None of the cases involved a plaintiff improperly filing in the wrong forum. For example, the Supreme Court in *Hooper* applied equitable tolling where the plaintiff was unable to serve the defendant within the statute of limitations because of "[defendant's] failure to properly list its registered agent for service with the Secretary of State as required by state law." *Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 386 S.C. 108, 117–18, 687 S.E.2d 29, 33–34 (2009). The *Hooper* court also noted that "public policy and the interests of justice weigh heavily in favor of allowing [plaintiff's] claim to proceed. The statute of limitations' purpose of protecting defendants from stale claims must give way to the public's interest in being able to rely on public records required by law." *Id.* at 119, 687 S.E.2d at 34. Design Gaps has advanced no public policy supporting that it should be relieved of its error and be permitted to (again) pursue vacatur of the Award after having its arguments heard and rejected by the court of its choosing.

The other South Carolina cases cited by Design Gaps also demonstrate that equitable tolling only applies where conduct of the opposing party caused or contributed to the delay. *See Ross v. Ross*, 394 S.C. 261, 266, 715 S.E.2d 359, 361–62 (Ct. App. 2011) (tolling statute of limitations for alimony claim where husband attacked his ex-wife and threatened her with further violence if she pursued alimony); *Magnolia N. Prop. Owners' Ass'n v. Heritage Communities, Inc.*, 397 S.C. 348, 372, 725 S.E.2d 112, 125 (Ct. App. 2012) (tolling statute of limitations until control of the property owners' association transferred from the developer to the owners) ("We find unpersuasive [developers'] claim that an organization they controlled would have initiated an action against itself during this period."); *Kimmer v. Wright*, 396 S.C. 53, 62–63, 719 S.E.2d 265, 270 (Ct. App. 2011) (declining to equitably toll the statute of limitations where plaintiff believed the defendant would not raise statute of limitations defense and had entered into a tolling agreement with plaintiff) ("Although we are sympathetic to Kimmer's situation, we are mindful the supreme court cautioned the doctrine of equitable tolling was to be used sparingly"), *vacated by stipulation*, 2013 WL 8207447, at *1 (Dec. 5, 2013).

Design Gaps does not provide any case recognizing equitable tolling under the UAA. To the contrary, this Court has found "the case law clearly prohibits attempts to vacate, modify, or correct an arbitration award once the statutory ninety-day limit as expired." *Eatman's, Inc. v. Martin Eng'g, Inc.*, 311 S.C. 282, 284, 428 S.E.2d 736, 737 (Ct. App. 1993). As the party contending equitable tolling applies, Design Gaps "bears the burden of establishing sufficient facts to justify its use." *Magnolia N. Prop. Owners' Ass'n*, 397 S.C. at 372, 725 S.E.2d at 125. It has not done so.

II. THE ARBITRATOR ACTED WITHIN HIS AUTHORITY IN DECIDING ISSUES SUBJECT TO ARBITRATION.

"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. 72, 76, 488 S.E.2d 335, 338 (1997). "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). "A party may not attempt to relitigate the merits of the arbitrators' resolution of the arbitrable issues under the guise of questioning the arbitrators' power." *Id.* at 76–77, 488 S.E.2d at 338.

A. Whether Design Gaps Breached the Contract by Failing to Timely Perform was an Issue Subject to Arbitration.

Design Gaps first argues that the Arbitrator exceeded his powers by recognizing deadlines on Design Gaps' performance of the Contracts that were not expressly included in those Contracts. *See* Appellants' Final Brief at 15–16. Nonetheless, Design Gaps' performance (or nonperformance) under the Contracts was a necessary issue in the parties' competing breach of contract claims and the Arbitration Agreement plainly extended to interpretation of the Contracts and related findings of fact.

Using Design Gaps' form contract, the parties agreed "[a]ll 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." (R. pp. 310, 313, Contracts § 17.) "Courts generally hold broadly-worded arbitration agreements apply to disputes in which a 'significant relationship' exists between the asserted claims and the contract in which the arbitration clause is

contained." *Gissel v. Hart*, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009) (quoting *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596–97, 553 S.E.2d 110, 118–19 (2001)).

Here, Shelter and the Highsmiths brought claims alleging that Design Gaps inexcusably delayed, effectively abandoned the project, and otherwise failed to perform under the Contracts. (R. pp. 030–33, 036, Demand for Arbitration ¶¶ 17–34, ¶¶ 47–51). Design Gaps did not object to the arbitrability of these claims and brought a competing breach of contract claim for failure to pay and wrongful termination. (R. p. 76, Resp'ts Mem. in Supp. of Countercls. at 10.) These breach of contract claims "arose out of or in connection with" and bore a "significant relationship" to the Contracts containing the Arbitration Agreement. They were well-within the Arbitrator's power to decide.

Design Gaps' challenges focus on the Arbitrator's reasoning resolving the breach of contract claims rather than the arbitrability of the issues. Citing *Patten*, it argues the Arbitrator should not have recognized deadlines to contractual performance if not established in written change orders. The Fourth Circuit in *Patten* analyzed application of Section 10 under the Federal Arbitration Act and the "common law grounds" for vacating an award where it "fails to draw its essence from the contract." *Patten v. Signator Ins. Agency*, 441 F.3d 230, 234 (4th Cir. 2006). Design Gaps has not addressed whether South Carolina has also adopted this as a ground for vacatur under the UAA. Rather, South Carolina Courts have held that where an "issue is within the scope of the arbitration agreement, the court need not review the merits of the decision. Factual and legal errors by arbitrators do not constitute an abuse of powers under section 15-48-130(a)(3)." *Harris v. Bennett*, 332 S.C. 238, 243–44, 503 S.E.2d 782, 787 (Ct. App. 1998) (citing *Pittman Mortg. Co.*, 327 S.C. 76, 488 S.E.2d at 338); *Gissel*, 382 S.C. at 241, 676 S.E.2d at 323 (quoting

Trident Tech. Coll. v. Lucas & Stubbs, 286 S.C. 98, 108, 333 S.E.2d 781, 787 (1985)) ("Even a 'clearly erroneous interpretation of the contract' cannot be disturbed.").[2]

Even if the *Patten* standard applies, the Fourth Circuit explained, "an arbitration award does not fail to draw its essence from the agreement merely because a court concludes that an arbitrator has 'misread the contract.' An arbitration award fails to draw its essence from the agreement only when the result is not 'rationally inferable from the contract.'" *Patten*, 441 F.3d at 235 (first quoting *Upshur Coals Corp. v. United Mine Workers*, 933 F.2d 225, 229 (4th Cir. 1991), then *Apex Plumbing Supply, Inc. v. U.S. Supply Co.*, 142 F.3d 188, 193 n.5 (4th Cir. 1998)). Here, the Arbitrator tied his holding to the Contracts and explained why he recognized the promised deadlines:

> 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 [Shelter and Highsmiths]. The repeated failure to meet the many dates promised for completion justifies the termination of the contracts.

(R. p. 154, Arbitration Award at 5; *see also* R. pp. 152–53, *id.* at 3–4 (listing each of the promised deadlines from Design Gaps).)

[2] Challenges to an arbitrator's legal reasoning are more appropriately raised under the common-law ground for vacatur for manifest disregard of law. *See Waldo v. Cousins*, 442 S.C. 662, 669, 901 S.E.2d 276, 279–80 (2024) ("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. This may occur when an arbitrator substitutes his personal policy views in place of a plainly binding legal principle."). Design Gaps has not challenged the Arbitrator's interpretation of the Contracts as amounting to manifest disregard of the law and has not provided any "well-defined, explicit, clearly applicable controlling law" that the Arbitrator "refused to apply" in order to sustain such an argument. *Id.* at 665, 901 S.E.2d at 278. *See also infra* Section III.

In addition to being supportable by the factual record, this holding is consistent with South Carolina law. *See, e.g.*, *Drews Co. v. Ledwith-Wolfe Assocs.*, 296 S.C. 207, 209, 371 S.E.2d 532, 533 (1988) ("Where a contract sets no date for performance, time is not of the essence of the contract and it must be performed within a reasonable time") (collecting cases). Design Gaps itself established the "reasonable time" within which it was to perform but failed to meet each of those established deadlines. Thus, the Arbitrator determined issues presented in the breach of contract claims consistent with South Carolina law and the result is "rationally inferable from the contract[s]."

B. The Arbitrator Issued a Reasoned Award Under South Carolina Law, and Design Gaps does not Challenge this Fact on Appeal.

As an initial matter, Design Gaps does not challenge the circuit court's determination that the Arbitrator issued a reasoned award consistent with South Carolina precedent, acknowledging that South Carolina courts require only that the factual inferences and legal conclusions supporting the award are "barely colorable." Appellants' Final Brief at 16 (citing *Pittman Mortg.*, 327 S.C. at 77, 488 S.E.2d at 338.)); *see also TCC of Charleston, Inc. v. Concord & Cumberland, LLC*, 446 S.C. 202, 233, 918 S.E.2d 699, 717 (Ct. App. 2025) (reaffirming the "barely colorable" standard for "reasoned awards" under South Carolina law). Without challenging the sufficiency of the Award under South Carolina law, Design Gaps argues only that the Award does not meet the standard adopted by the Second Circuit in *Leeward Construction Co. v. American University of Antigua-College of Medicine*, 826 F.3d 634 (2d Cir. 2016). Thus, if this Court determines that the Second Circuit's approach is not adopted by South Carolina courts, it need not look any further into whether the Award is "reasoned."

1. *This Court has previously declined to adopt the Second Circuit standard for "reasoned awards."*

Recently, this Court addressed a similar request to adopt the Second Circuit's standard for a "reasoned award." The *TCC* Court was presented with an unpublished New York case espousing the same standard later adopted by the Second Circuit in *Leeward*: "A 'reasoned award' requirement means that the arbitrator is obligated to present 'something short of findings of fact and conclusions of law but more than a simple result.'" *TCC of Charleston*, 446 S.C. at 233, 918 S.E.2d at 716 (quoting *Tully Constr. Co v. Canam Steel Corp.*, No. 13 Civ. 3037, 2015 WL 906128, at *14 (S.D. N.Y. March 2, 2015)) (cleaned up); *compare with Leeward Constr.*, 826 F.3d at 640 ("a reasoned award is 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"). The *TCC* Court did not adopt the standard.

> This court has stated, "It is well settled that 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 if a ground for the award can be inferred from the facts, the award should be confirmed."

TCC of Charleston, 446 S.C. at 232, 918 S.E.2d at 716–17 (quoting *Renaissance Enter., Inc. v. Ocean Resorts, Inc.*, 310 S.C. 395, 399, 426 S.E.2d 821, 823 (Ct. App. 1992)); *see also Pittman*, 327 S.C. at 77, 488 S.E.2d at 338 ("If the grounds for the award can be inferred from the facts, the award should be confirmed.").

This Court should continue to apply South Carolina's standard for reasoned awards, which ensures that arbitrators provide sufficient reasoning to enable review under § 15-48-130 while maintaining South Carolina's policy of favoring arbitration for dispute resolution.

2. *Even if this Court adopts a new standard for "reasoned awards," the Arbitration Award here more than satisfies the requirements.*

Nonetheless, even if this Court adopts the Second Circuit standard for "reasoned awards," that standard is met here.

> [A] reasoned award is 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. A reasoned award sets forth the basic reasoning of the arbitral panel on the central issue or issues raised before it. It need not delve into every argument made by the parties. The award here satisfies that standard: while it does not provide a detailed rationale for each and every line of damages awarded, it does set forth the relevant facts, as well as the key factual findings supporting its conclusions.

Leeward Constr., 826 F. at 640. The nine-page Arbitration Award here certainly offers more than "a line or two of unexplained conclusions" and provides an accounting of the relevant factual record to support "the basic reasoning" on "central issues raised." *Id.*

Contrary to Design Gaps' assertions, the Award addresses each of its counterclaims separately and includes related findings of fact set forth in the first few pages of the Award. 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. When addressing the Highsmiths' and Shelter's claim for breach of contract, the Arbitrator found that "[Design Gaps'] repeated failure to meet the many dates promised for completion justifies the termination of the contracts [by Shelter and Highsmiths]." (R. p. 154, Arbitration Award at 5.) As the Arbitrator turned to Design Gaps' counterclaims, he found that "[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 [Shelter and Highsmiths] completion costs for its contract balance. That is all it is entitled to receive." (R. p. 155, *id.* at 6.) Second, on the counterclaim for fraud, the Arbitrator found that "[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." (R. p. 155, *id.*)

Third, 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 tortiously interference with the Contracts, committing civil conspiracy and converting the drawings in the act. (R. pp. 89–90, Resp'ts Mem. in Supp. of Countercls. at 23–24.) The Arbitrator identified the specific facts supporting his decision on these counterclaims:

> [Design Gaps] 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 [Shelter, Highsmiths], Distinctive Design or any other party. While [Shelter and Highsmiths] did meet with Distinctive Design as early as January 2021 to review [Design Gaps'] performance, [Shelter and Highsmiths] 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 [Shelter and Highsmiths] terminate the contract.

(R. p. 155, Arbitration Award at 6.)

Fourth, 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. "[Design Gaps] did not establish that [Shelter and Highsmiths'] conduct was unfair or deceptive and therefore cannot sustain an unfair trade practices act claim. [Design Gaps] did not establish that the conduct it complains of was repetitive or in violation of the public interest." (R. p. 155, *id*.)

Finally, it is unclear how Design Gaps can reasonably contend the Arbitrator did not provide 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:

> [Design Gaps] gave to [Shelter and Highsmiths] their drawings for the cabinets. Obviously, this was for [Shelter and Highsmiths'] review, approval, and use during the construction process. [Shelter and Highsmiths] 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. [Design Gaps] failed to enter into evidence a valid copyright registration; however, even if they had, [Shelter and Highsmiths] 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. [Design Gaps] failed to prove that [Shelter, Highsmiths,] 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 [Design Gaps] may have had.

(R. pp. 155–56, Arbitration Award at 6–7.) The Arbitrator's thorough explanation plainly "set[s] forth the relevant facts, as well as the key factual findings supporting its conclusions." *Leeward Constr.*, 826 F.3d at 640. "No more is needed." *Id.*

III. THE ARBITRATOR DID NOT MANIFESTLY DISREGARD THE LAW.

"When the attack on the award claims the arbitrator failed to follow controlling law, we may only vacate the award where the arbitrator knew of well-defined, explicit, and clearly applicable controlling law, yet still refused to apply it." *Waldo v. Cousins*, 442 S.C. 662, 665, 901 S.E.2d 276, 277–78 (2024). "The focus is on the conduct of the arbitrator and **presupposes something beyond a mere error in construing or applying the law.**" *Gissel v. Hart*, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009) (emphasis in original). "This standard is met only when the award is the product of an intentional or reckless flouting of the law, not a mere error in interpreting it." *Waldo*, 442 S.C. at 665, 901 S.E.2d at 278. "This complements the well-known rule that the form of the award need not be accompanied by any reasoning, so long as the award can be reconciled with factual inferences and legal conclusions that are at least 'barely colorable.'" *Id.*

(quoting *Trident Tech. Coll. v. Lucas & Stubbs, Ltd.*, 286 S.C. 98, 111, 333 S.E.2d 781, 789 (1985)).

A. The Arbitrator's Application of Fair Use Defense to Copyright Infringement Claims was not Manifest Disregard of Law.

Design Gaps argues the Arbitrator erred in his application of the fair use doctrine and exceeded his powers by applying the doctrine without regard to alleged breach of the Contracts. Even accepting these arguments as true, "error in construing or applying the law" does not constitute manifest disregard. *Gissel*, 382 S.C. at 241, 676 S.E.2d at 323. For Design Gaps to prevail on this argument, it must show the Arbitrator acknowledged an unambiguous and applicable legal principle yet refused to apply it. *See Waldo*, 442 S.C. at 665, 901 S.E.2d at 277–78. That is simply not the case here.

When analyzing the direct and indirect copyright infringement claims, the Arbitrator determined that fair use applied as a defense for Shelter and the Highsmiths' transmission of Design Gaps' drawings to Distinctive Design and that Distinctive Design did not actually use the drawings:

> [Design Gaps] gave to the [Shelter and Highsmiths] their drawings for the cabinets. Obviously, this was for [Shelter and Highsmiths'] review, approval, and use during the construction process. [Shelter and Highsmiths] 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. [Design Gaps] failed to enter into evidence a valid copyright registration; however, even if they had, [Shelter and Highsmiths] 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. [Design Gaps] failed to prove that [Shelter and Highsmiths] 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.

(R. pp. 155–56, Arbitration Award at 6–7.) The Arbitrator's finding that Shelter and the Highsmiths had a defense of fair use to any alleged infringement of Design Gaps' copyrights when emailing the PDF drawings to Distinctive Design is a finding that "can be reconciled with factual inferences and legal conclusions that are at least 'barely colorable.'" *Waldo*, 442 S.C. at 665, 901 S.E.2d at 278 (quoting *Trident Tech. Coll.*, 286 S.C. at 111, 333 S.E.2d at 789).

1. *The Arbitrator did not reject a "well-defined, explicit, and clearly applicable controlling law" when applying the fair use doctrine to copyright infringement claims.*

As an initial matter, Design Gaps has not identified a "well-defined, explicit" law. *Waldo*, 442 S.C. at 665, 901 S.E.2d at 278. The fair use doctrine is not such a law. "[T]he doctrine of fair use continues to be applied as 'an equitable rule of reason, for which no generally applicable definition is possible.'" *Bouchat v. Baltimore Ravens Ltd. P'ship*, 619 F.3d 301, 308 (4th Cir. 2010). "The fair use inquiring is 'not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.'" *Id.* (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994)).

Design Gaps generally challenges the applicability of the doctrine, citing the examples of fair use in 17 U.S.C. § 107. *See* Appellants' Final Brief at 26. However, that list is non-exclusive and does not expressly preclude application in this context. *See, e.g.*, *Acuff-Rose Music, Inc.*, 510 U.S. at 577–78 (explaining that the text of § 107 "employs the terms 'including' and 'such as' in the preamble paragraph to indicate the 'illustrative and not limitative' function of the example given, which thus provide only general guidance about the sorts of copying that courts and Congress most commonly had found to be fair uses.") (internal citations omitted).

Design Gaps then proceeds to walk through the guiding factors to be weighed when applying fair use. *See* Appellants' Final Brief at 26–28. Nonetheless, this is merely a challenge to the weight the Arbitrator gave to some factors such as the fact that Shelter "did not profit" and

sharing the PDF "did not materially impair the marketability of the design." (R. pp. 155–56, Arbitration Award at 6–7.) At bottom, Design Gaps' argument is simply that, because it would have weighed or applied the factors differently, the Arbitrator must have disregarded the law. This is not sufficient to show manifest disregard of law.

Finally, Design Gaps delves into the Arbitrator's experience to argue that he should have understood the asserted contours of the fair use doctrine and applied it differently.[3] *See* Appellants' Final Brief at 28. Design Gaps goes further to suggest that the Arbitrator should have consulted with others at his firm. The parties agreed to select Mr. Coker as their arbitrator and agreed that he would decide the issues in a final, binding arbitration. (R. pp. 055–56, Emails Selecting Arbitrator (August 25, 2021).) Design Gaps has provided no authority for the contention that other attorneys not selected as the arbitrator should have weighed in on the outcome. These arguments run contrary to the basic principles of arbitration and do not establish manifest disregard of law. *E.g.*, *Waldo*, 442 S.C. at 668, 901 S.E.2d at 279 ("Arbitration rests on consent of the parties, where parties freely exchange the expansive litigation rights court actions provide for the speed, informality, and finality arbitration promises."); *see also Crouch Constr. Co. v. Causey*, 405 S.C. 155, 163 747 S.E.2d 482, 486 (2013) (quoting *Merit Ins. v. Leatherby Ins. Co.*, 714 F.2d 673, 681 (7th Cir. 1983)) ("[W]e seek to discourage 'the losing party to every arbitration' from 'conduct[ing] a background investigation of each of the arbitrators in an effort to uncover evidence' to have the arbitration award set aside.").

[3] Design Gaps cites to the Arbitrator's biography, but the cited document is not in the record on appeal and should be disregarded.

2. *For the first time on appeal, Design Gaps argues that the Arbitrator exceeded his powers by applying the fair use doctrine without regard to terms in the Contracts.*

Design Gaps argues for the first time on appeal that the Arbitrator exceeded his powers by applying the fair use defense contrary to language in the Contracts. Because this argument was not raised below, it should not be considered here. *See, e.g.*, *Harris v. Bennett*, 332 S.C. 238, 245, 503 S.E.2d 782, 786 (Ct. App. 1998).

Furthermore, Design Gaps' argument is baseless. Design Gaps argues that the Arbitrator "exceeded his powers" by "wrongful adoption of the fair use defenses to overcome Appellants' copyright infringement counterclaim that was otherwise supported by the Contracts." Appellants' Final Brief at 29. This argument fails for at least four reasons. First, to the extent Design Gaps is alleging that the fair use defense does not apply to copyright infringement claims, such argument is soundly contradicted by prevailing law. *See Bouchat*, 619 F.3d at 307 (quoting 17 U.S.C. § 107) ("Fair use is a complete defense to infringement. In other words, 'the fair use of a copyrighted work . . . is not an infringement of copyright.'"). Second, to the extent Design Gaps is challenging the Arbitrator's application of fair use to breach of contract claims related to the alleged misuse, such claims were subsumed into the copyright claims. *See, e.g.*, *Rozciszewski v. Arete Assocs., Inc.*, 1 F.3d 225, 232 (4th Cir. 1993) ("Congress has clearly indicated that state-law claims which come within the subject matter of copyright law and which protect rights equivalent to any of the exclusive rights within the scope of federal copyright law . . . should be litigated only as federal copyright claims.").

Third, even if the Arbitrator's finding resulted from a misapplication of the Contracts, the Supreme Court has held that, when reviewing an arbitration award, "[e]ven a 'clearly erroneous interpretation of the contract' cannot be disturbed." *Gissel*, 382 S.C. at 243, 676 S.E.2d at 323. Finally, Design Gaps' argument that the Arbitrator exceeded his powers invokes Section 15-48-

130(a)(3), which, as described above, *supra* Section II, relates to the arbitrability of the issue. Design Gaps has not argued that copyright infringement, breach of contract, or conversion claims were not subject to arbitration. Accordingly, this argument should be rejected as unpreserved and meritless.

B. The Arbitrator did not Manifestly Disregarding the Law When Making Findings of Fact to Decide Competing Breach of Contract Claims.

Design Gaps challenges the Arbitrator's holding with respect to the competing breach of contract claims on the grounds that the Arbitrator failed to find that the Highsmiths first breached the Contracts by refusing to pay Design Gaps. *See* Appellants' Final Brief at 30–32. This is simply a challenge to the Arbitrator's reasoning and finding of fact. Moreover, the cases provided by Design Gaps do not set forth "clearly applicable controlling law." *Waldo*, 442 S.C. at 665, 901 S.E.2d at 278.

For example, *Bannon v. Knauss* involved a contract to purchase real estate. The buyer backed out a couple of months after executing the purchase and sale agreement and the Court of Appeals affirmed the district court's holding that the sellers were able to retain the earnest money deposit, in accordance with the contract, *and* recover their actual damages as determined by a jury. *See Bannon v. Knauss*, 282 S.C. 589, 592, 320 S.E.2d 470, 472 (Ct. App. 1984) (internal citations omitted) ("In a contract for sale of real estate, a clause providing forfeiture of the earnest money if the purchaser defaults is ordinarily construed as giving the seller the election to disaffirm the contract and retain the earnest money or to affirm it and sue for the purchase price. If the seller affirms the contract and sues for damages, the earnest money becomes a fund out of which the damages may be partially paid if the proven damages exceed the amount of the earnest money."). This case does not address substantial performance of a construction contract.

Likewise, the U.S. Supreme Court cited by Design Gaps was merely describing the jury instructions, under Rhode Island law, provided by the U.S. District Court for the District of Rhode Island. *See Salve Regina Coll. v. Russell*, 499 U.S. 225, 229 (1991). Not only does Design Gaps' citation *not* represent the Supreme Court's holding,[4] it also does not provide a legal principle under South Carolina law that applies in this context.

Finally, Design Gaps provides no authority supporting its assertion that the Highsmiths lacked standing under the Contracts (to which they were parties) simply because they transferred their residence to trust (which was not a party). Thus, Design Gaps does not meet the threshold to identify a clearly applicable legal principle, much less that such principle was ignored.

In any event, the Arbitrator found that Design Gaps breached the Contracts by failing to perform within a reasonable time justifying the Highsmiths' termination of the Contracts. (R. p. 154, Arbitration Award at 5.) Accordingly, Design Gaps' breach preceded and excused any subsequent breach by the Highsmisths.

IV. THE ARBITRATOR DID NOT REFUSE TO HEAR, AND DESIGN GAPS WAS NOT PREVENTED FROM PRESENTING, EVIDENCE MATERIAL TO THE CONTROVERSY.

Under S.C. Code Ann. § 15-48-130(a)(4), an award may be vacated where the arbitrator "refused to hear evidence material to the controversy or otherwise conducted the hearing, contrary to the provisions of § 15-48-50, as to prejudice substantially the rights of a party." In pertinent part, S.C. Code Ann. § 15-48-50 provides, "[t]he arbitrators may hear and determine the controversy upon the evidence produced" and "[t]he parties are entitled to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing."

[4] The Supreme Court addressed the question of whether the Court of Appeals for the First Circuit "erred in deferring to the District Court's determination of state law," finding that it did, in fact err and remanded for further consideration of the district court's interpretation of Rhode Island law. *See Salve Regina Coll. v. Russell*, 499 U.S. at 239–40.

A. Although Design Gaps Failed to Present its Copyright Registration at the Hearing, this Failure did not Affect the Outcome of Arbitration.

On April 13, 2022, Design Gaps emailed the Arbitrator a copy of its recently obtained copyright registration for the drawings. (R. p. 64, Email from Mr. Glover (April 13, 2022).) However, Design Gaps did not offer the registration as evidence at the hearing. Nonetheless, it cited the registration—along with other exhibits and deposition testimony not offered at the hearing—in its closing brief. (R. p. 111, Email from Mr. Walden (June 20, 2022).) Design Gaps has offered no evidence of any alleged agreement that evidence was to be accepted by the Arbitrator even if not presented at the hearing. Furthermore, S.C. Code § 15-48-130(a)(4) only provides for vacatur where an arbitrator conducts a hearing "contrary to the provisions of § 15-48-50," which requires parties to "present evidence . . . at the hearing."

Additionally, Design Gaps' reliance on the AAA Commercial Arbitration Rules fails to support its position. Rule 32 states "[t]he claimant shall present evidence to support its claim. The respondent shall then present evidence to support its defense." R. 32(a), AAA Commercial Arbitration Rules. Similarly, the rules governing evidence provide "[t]he parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary . . . . All evidence shall be taken in the presence of all of the arbitrators and all of the parties." R. 34(a), AAA Commercial Arbitration Rules. The rules explicitly state "[t]he arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant." R. 34(b), AAA Commercial Arbitration Rules.

Thus, even if the Arbitrator refused to consider the registration, this would not violate the applicable Rules nor would it provide grounds for vacatur under South Carolina law. Moreover, the Arbitrator explicitly stated that the copyright registration would not have changed the result:

"[Design Gaps] failed to enter into evidence a valid copyright registration; however, even if they had, [Shelter and Highsmiths] certainly established fair use of the design work, especially considering that Shelter did not profit from the design." (R. pp. 155–56, Arbitration Award at 6–7.) Moreover, Design Gaps' argument that, because the Arbitrator did not admit the registration, he also did not consider Distinctive Design and Mr. Reiss' access to the drawings nor any alleged similarities between the work is also demonstrably false. As explained by the Arbitrator, he considered the similarities between the designs and determined there was no 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.

(R. p. 156, *id.* at 7.) Therefore, Design Gaps' failure to offer its evidence did not prevent the Arbitrator from considering it nor from analyzing the copyright infringement claims. There is no substantial prejudice even arguably supporting vacatur.

B. Design Gaps was Permitted to Depose and Cross-Examine Non-Party Witnesses.

Design Gaps argues that the Arbitrator's rejection of its request to add certain third parties to the Arbitration had the effect of prevented it from presenting evidence material to the controversy. *See* Appellants' Final Brief at 21–24. Prior to the hearing, the Arbitrator declined to join Ms. Butler, Mr. Reiss, and Distinctive Design as parties to the arbitration. (R. p. 107, Interim Order on Mot. to Join and Am. Countercl. at 1.) Because they were not parties to the Contracts, the Arbitrator found he did not have authority to join the additional parties in the Arbitration. (R. p. 107, *id.*) Importantly, Design Gaps does not identify any evidence it was unable to present as a result. In fact, Design Gaps was permitted to depose Ms. Butler and Mr. Reiss and cross-examined

both at the arbitration hearing. (R. p. 151, Arbitration Award at 2.) Thus, it has not provided any grounds to vacate under S.C. Code Ann. § 15-48-130(a)(4).

1. Design Gaps has not identified any way in which it was prevented from presenting evidence supporting its copyright infringement claims.

In Arbitration, Design Gaps pursued claims of indirect copyright infringement against the Highsmiths and Shelter. Such claims depended on a finding of direct infringement by third parties, specifically, Distinctive Design and Mr. Reiss. Design Gaps advanced these very issues for decision by the Arbitrator. The Arbitrator could not reach a decision on Design Gaps' vicarious and contributory infringement claims without first addressing underlying direct infringement. *See Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005) (internal citations omitted) ("One infringes contributorily by intentionally inducing or encouraging direct infringement and infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it."). The Arbitrator was obligated to resolve all issues presented, and this included deciding whether Distinctive Design infringed on the alleged copyrighted designs and whether Shelter and the Highsmiths could be held liable for that infringement.

Design Gaps implies it was not able to fully investigate or present its claims involving non-parties. Yet again, this assertion is false. Both Mrs. Butler and Bryan Reiss, as the agent of Distinctive Design, were deposed and testified at the Arbitration where Design Gaps cross-examined them. (R. p. 151, Arbitration Award at 2.) Design Gaps' arguments that the Arbitrator did not allow presentation of evidence regarding "the difference between aesthetic copyrighted elements and functional elements" is directly refuted by the plain language of the Award. (R. p. 156, *id.* at 7.) Design Gaps has identified no reason that it was unable to present evidence material to the controversy simply because Distinctive Design, Mr. Reiss, and Ms. Butler were not joined as parties.

Furthermore, Design Gaps has not demonstrated how joining the non-parties to the arbitration proceedings would have changed the outcome such that its rights were "prejudiced substantially." S.C. Code Ann. 15-48-130(a)(4). Although Design Gaps challenges the Arbitrator's application of fair use to Distinctive Design's alleged use of the designs. This is merely a challenge to the Arbitrator's legal analysis. *See supra* Section III (discussing alleged manifest disregard of law related to the fair use defense). In any event, the Arbitrator applied the fair use defense to copyright infringement claims against "Claimants" (Shelter and Highsmith) while finding that Distinctive Design while Mr. Reiss simply did not copy the designs in a manner that constituted copyright infringement. (R. pp. 155–56, Arbitration Award at 6–7.)

Most importantly, at the end of the hearing, the Arbitrator verified the parties 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.

(R. p. 151, *id.* at 2.) Design Gaps provides no support for its argument the Arbitrator refused to hear evidence pertinent and material to the controversy – nor can Design Gaps now argue it was not afforded an opportunity to present any and all evidence it found material after certifying to the Arbitrator it had "adequate opportunity to present their case." (R. p. 151, *id.*).

2. *The Fourth Circuit has conclusively found that Design Gaps had a "full and fair opportunity" to present its copyright infringement claims at the Arbitration.*

After losing in Arbitration, Design Gaps attempted to pursue the same copyright infringement claims against Distinctive Design and its owners. *See Design Gaps v. Distinctive Design & Constr. LLC*, 162 F.4th 452, 466 (4th Cir. 2025). It quickly learned that, because the

Arbitrator necessarily determined the copyright infringement claims in reaching his holding, Design Gaps was precluded by the doctrine of collateral estoppel from pursing claims against Distinctive Design. *See id.*

Recently, the Court of Appeals for the Fourth Circuit conclusively held that Design Gaps did in fact have a full and fair opportunity to present its claims against Distinctive Design in the same Arbitration:

> [Design Gaps] argues that Distinctive Design was not a party to the arbitration, despite the fact that Design Gaps tried to make it one. Having been denied that request, Design Gaps insists it did not have a full and fair opportunity to litigate against Distinctive Design and that the arbitration did not decide such claims.
> . . .
> As to Design Gaps' contention that it did not have a full and fair opportunity to litigate its claims against Distinctive Design in arbitration, considerations relevant to this analysis include whether a party had "difficulties in procuring witnesses" and faced "procedural limitations affecting his opportunity to litigate." *See Zurcher v. Bilton*, 379 S.C. 132, 666 S.E.2d 224, 227 (2008). Design Gaps makes a fair point that its inability to bring Distinctive Design and Mr. Reiss into the arbitration compromised its ability to litigate its claims against them. Had they been parties, Design Gaps may have had greater flexibility and options. But the arbitrator did not limit Design Gaps' ability to take discovery from Distinctive Design about how it received and used Design Gaps' drawings. In fact, Design Gaps had the opportunity to depose and cross-examine Mr. Reiss and question Ms. Butler about her interactions with Mr. Reiss. This was sufficient for Design Gaps to explore the conduct of all the parties as to any use of Design Gaps' drawings of the Ralston Creek renovations. Thus, even though Distinctive Design and Mr. Reiss were not parties, Design Gaps had sufficient opportunity to litigate the issues underlying its claims against Distinctive Design.

Id. at 476 (finding collateral estoppel prevented Design Gaps from bringing copyright infringement claims against Distinctive Design when the Arbitrator had decided the question of whether Distinctive Design infringed on its copyrights). Thus, the Fourth Circuit has already determined

that Design Gaps did not face any "procedural limitations affecting his opportunity to litigate" in Arbitration. *See id.* (quoting *Zurcher*, 379 S.C. at 137, 666 S.E.2d at 227).

V. DESIGN GAPS DOES NOT SUBSTANTIVELY CHALLENGE THE ORDER CONFIRMING THE ARBITRATION AWARD.

Design Gaps only argues that that the circuit court's confirmation was incorrect because the Award should have been vacated. As shown above, there are no grounds to vacate the Award. Accordingly, the circuit court's confirmation should be affirmed.

CONCLUSION

"Arbitration is designed to be the end, not the beginning, of legal wrangling." *Waldo*, 442 S.C. at 668, 901 S.E.2d at 279. Design Gaps has spent more than three years working against that design, first through meritless litigation in federal court and now by capitalizing on a fortuitous ruling to assert even more unfounded claims here. That effort should end here. The circuit court's order confirming the Arbitration Award should be AFFIRMED.

March 27, 2026

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