THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

William H. Seals Jr., Circuit Court Judge

Appellate Case No.: 2025-001409

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

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

v.

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

of which Michael D. Jordan and Apple Services, Inc. are ..... Respondents.

and

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

BRIEF OF APPELLANT

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1. Did the lower court err in failing to apply the well-established rule that summary judgment is a drastic remedy and that deference on disputed issues of fact should be given to LSL, the nonmoving party?

2. Did the lower court err in finding that the Earn-out payment was a sum certain, despite having not calculated the Post-Closing Adjustment and setting off same from the Earn-out as required by the APA?

3. Did the lower court err in awarding prejudgment interest on the Earn-out payment, even though the APA expressly stated that no such interest shall be awarded, and despite the fact that the Earn-out payment was not a liquidated damages to support prejudgment interest?

STATEMENT OF THE CASE

On May 10, 2021, Appellant Liquid Services and Logistics, LLC, (the buyer) entered into an Asset Purchase and Sale Agreement (the "APA") with Respondents Michael D. Jordan and Apple Services, Inc., (the sellers) for certain assets of Apple Services, Inc. (R. pp. 50–165). At bottom, this case involves a dispute over two conditional payments set forth in the APA — (1) a Post-Closing Adjustment of Working Capital, and (2) Earn-out.

On June 8, 2022, Michael D. Jordan, Apple Services, Inc., and Plumbinator 1051, LLC, filed a Complaint in the Richland County Court of Common Pleas, alleging claims against Liquid Services and Logistics, LLC, and/or Tim Freeman for breach of contract (the APA); breach of contract accompanied by fraud; conversion; defamation; negligence; nuisance/trespass; quantum meruit; and accounting. (R. pp. 35–48). This action — hereinafter sometimes referred to as the "APA Matter" — is the subject of the current appeal. A second, companion case was commenced on March 14, 2023, by Plumbinator 1047, LLC, an entity owned by Respondent Michael D.

Jordan, against Appellant Liquid Services and Logistics, LLC, arising out of a commercial lease dispute (hereinafter sometimes referred to as the "Eviction Matter").[1] While the Eviction Matter is not subject to the current appeal, it is relevant to the procedural history of the APA Matter.

On October 30, 2023, in the APA Matter, Respondents Michael Jordan and Apple Services filed a partial Motion for Summary Judgment on their breach of contract claim. (R. pp. 174–185). The following evidence was produced in support of that Motion:

- Affidavit of Respondent Michael D. Jordan;
- Affidavit of Ashley Hawn, an employee of Respondent Jordan; and
- Affidavit of Stephen Porter, counsel of record for the Respondents.

(R. pp. 186–199).

Later, on December 1, 2023, Respondents amended their Motion for Partial Summary Judgment to remove Mr. Porter's Affidavit and to amend Respondent Jordan's Affidavit. (R. pp. 200–290). No additional evidence was added in support of the Motion.

Respondents' Motion remained pending for a year and a half without a hearing. Then, on January 3, 2025, the Eviction Matter was voluntarily dismissed by the plaintiff (an entity owned by Respondent Jordan) pursuant to Rule 40(j), SCRCP. Once the Eviction Matter was dismissed, Respondents shifted their focus to the APA Matter and requested that the Honorable William H. Seals, Jr., hear their partial Motion for Summary Judgment on the breach of contract claim originally filed on October 30, 2023. Finally, a hearing was scheduled on Respondents' Motion for March 31, 2025, a year and a half after it was filed.

[1] *See Plumbinator 1047, LLC, v. Liquid Services and Logistics, LLC*, filed in the Richland County Court of Common Pleas, on March 14, 2023, Civil Action No. 2023-CP-40-01360.

However, on March 28, 2025, the undersigned appeared as counsel of record for Appellant LSL, less than three days before the hearing. (R. pp. 8–11, 291–92). The court continued the hearing until April 17, 2025. (R. pp. 5–7).

On April 16, 2025, less than one day before the hearing, Respondents filed a Supplemental Memorandum of Law to support their Motion for Partial Summary Judgment, introducing new evidence that had not been presented in the original or Amended Motion. (R. pp. 293–301). The evidence included:

- Appellant LSL's responses to Respondents' Requests to Admit; and
- Several emails, including an email dated May 17, 2022, from Respondents' counsel (Stephen Porter) to LSL's former attorney (Dana Coleman).

(R. pp. 302–313).

At the hearing on April 17, Appellant LSL requested leave to respond to Respondents' Memorandum because it had been submitted the day before the hearing and introduced new evidence. However, the court denied said leave.

On May 7, 2025, the lower court entered an Order granting Respondents' Motion for Partial Summary Judgment on the breach of contract claim, holding that Appellant LSL had breached the APA by failing to pay Respondents an Earn-out payment of $882,000. *See* (R. pp. 12–21). The lower court also awarded prejudgment interest on the Earn-out payment totaling $229,199.18. (R. p. 20). However, the court denied entry of judgment on the Post-Closing Adjustment, finding that a genuine issue of material fact existed as to the amount owed, and to whom it was owed, and it denied attorney's fees. *Id*.

Appellant LSL timely filed a Motion to Reconsider within ten (10) days of the court's Order, and a copy of that Motion was emailed to the lower court per Rule 59(g), SCRCP. (R. pp. 314–348). On June 12, 2025, the lower court entered a Form 4 Order denying Appellant's Motion

to Reconsider, (R. pp. 32–34); however, on that same day, the lower court amended its original Order to correct several factual errors that it deemed "immaterial" and "minor." *See* (R. pp. 22–31).

On July 14, 2025, Appellant LSL timely filed this appeal. (R. pp. 368–69).

STATEMENT OF THE FACTS

I. The Parties and the Transaction.

On May 10, 2021, Respondents sold certain assets of Apple Services, Inc. to Appellant Liquid Services and Logistics (hereinafter, "LSL") pursuant to an Asset Purchase and Sale Agreement (the "APA"). (R. pp. 50–165). Per the APA, LSL agreed to buy, and Respondents agreed to sell, certain assets of Apple Services, Inc., including its goodwill, furniture, fixtures, and equipment. (R. p. 37, ¶ 8). At closing, LSL paid to Respondents a base purchase price of $2,930,000, as required by the APA. *See* (R. p. 37, ¶¶ 8, 9); *see also* (R. p. 51, § 3.1). That payment is not in dispute. Instead, the issues before this Court are two other conditional payments — (1) a Post Closing Adjustment of Working Capital, and (2) an Earn-out payment — and whether these payments were properly calculated, to whom they are owed, and when they are due. *See* (R. pp. 51–54, §§ 3.2, 3.3).

II. Relevant Portions of the APA.

a. The Post Closing Adjustment of Working Capital.

The first conditional payment was a Post Closing Adjustment of Working Capital, which considers the working capital of Apple Services' business as of the date of closing. To briefly summarize, if the working capital exceeded $84,000 as of the date of closing, LSL must pay Respondents the difference (i.e., the "Post Closing Adjustment"), but if the working capital was less than $84,000, Respondents must pay LSL the difference. (R. p. 52, § 3.2(a)(ii)). To calculate

the Post-Closing Adjustment, LSL was required to prepare a Working Capital Statement of Apple Services' business and deliver a copy of same to Respondents within 100 days of closing, or by August 18, 2021. (R. p. 51, § 3.2(a)(i)).

For the Post Closing Adjustment to be completed, both parties had to agree on a "final determination of the amount owed." (R. p. 52, § 3.2(a)(ii)). As such, Respondents had thirty days to review the proposed Working Capital Statement and make any objections thereto (the "Review Period"), or by September 17, 2021. (R. p. 52, § 3.2(b)(i)). On or prior to the last day of the Review Period, Respondents were required to submit a Statement of Objections to LSL (if any), and together, the parties had thirty days to resolve any objections (the "Resolution Period"), or by October 17, 2021. (R. p. 52, § 3.2(b)(ii)). If the parties were unable to resolve the disputed amounts, they were required to mutually agree on an Independent Accountant who — "acting as experts and not arbitrators" — shall resolve the disputed amounts for the Post Closing Adjustment. (R. p. 52, § 3.2(b)(iii)). The Independent Accountant had thirty (30) days after engagement, or as soon as practicable, to resolve the disputed amounts. (R. p. 53, § 3.2(b)(v)). If the Independent Accountant resolved the dispute, payment was due by the owing-party within five business days of the resolution. (R. p. 53, § 3.2(b)(iv)).

The record shows that LSL prepared a Working Capital Statement and delivered it to Respondents as required by the APA, or by August 18, 2021. (R. p. 306). However, Respondent Michael Jordan rejected LSL's proposed calculations and then refused to provide LSL with the necessary financial documentation to finalize the amount owed.[2] In fact, the evidence shows that

[2] *See* (R. p. 306) ("LSL has provided Jordan with several Closing Working Capital Statements indicating LSL's position regarding the Working Capital payment, but Jordan has refused to accept LSL's Closing Working Capital Statements or provide the required financial documentation to finalize the Statement.").

LSL provided *several* proposed Closing Working Capital Statements (and proposed Earn-out calculations) to Respondent Jordan, all of which were rejected. *See id.* The record further shows that LSL tried to make "reasonable inquiry to Jordan to provide the necessary financial documentation to finalize the calculation of the Working Capital payment based on Jordan's objections, yet Jordan has repeatedly refused to provide this information." (R. p. 305). Because of Respondent Jordan's bad-faith and lack of cooperation, the parties were precluded from reaching a "final determination" on the Post-Closing Adjustment.[3]

b. The Earn-out payment.

The second conditional payment was the Earn-out. The pertinent Earn-out provisions — which reference each other in succession, *see* (R. p. 53, § 3.3(a), p. 54, §§ 3.3(d–e)), — begin by requiring LSL to pay Respondents an Earn-out payment of $882,000, "so long as LTM Revenue for the Earn-Out Period exceeds the Revenue Threshold." (R. p. 53, § 3.3(a)). The Earn-out payment, if any, was to be paid on or before a year after closing, or by May 10, 2022. (R. p. 54, § 3.3(d)); *see also* (R. p. 51, § 3.2(a)(i)). Critically, however, the APA then provides LSL with a contractual right to set off the Earn-out payment with any amount owed to it by the Post-Closing Adjustment. (R. p. 54, § 3.3(e)). When read together, Sections 3.3(a), (d), and (e) of the APA state that the timing of payment on the Earn-out is "*subject to*" LSL's contractual right to setoff the Post Closing Adjustment:

> Earn-out Payment. As additional consideration for the Acquired Assets, ***at the time provided in Section 3.3(d)***, Buyer shall pay to Seller with respect to the Earn-out Period an amount, if any (the "*Earn-out Payment*"), equal Eight Hundred Eighty-

[3] *See* (R. p. 305) ("[D]enied that any Working Capital Payment was due on September 30, 2021, based on the APA § 3.2(a)(ii) that states the 'Post-Closing Adjustment shall be paid to the applicable Party no later than thirty (30) days after final determination of the amount of the Post-Closing Adjustment,' and such final determination has not been made to date due to Jordan's bad-faith refusal to provide necessary financial documentation for its preparation.").

> two Thousand and 00/100 Dollars ($882,000.00) so long as LTM Revenue for the Earn-out Period exceeds the Revenue Threshold.

(R. p. 53, § 3.3(a)) (emphasis added).

> Timing of Payment of Earn-out Payments. ***Subject to Section 3.3(e)***, if Buyer is required to make the Earn-out Payment pursuant to Section 3.3(a), such payment shall be made no later than twelve (12) months after the Closing Date….

(R. p. 54, § 3.3(d)) (emphasis added).

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

(R. p. 54, § 3.3(e)) (emphasis added). In this case, the lower court's original and Amended Orders entered judgment on the Earn-out amount despite denying judgment on the Post-Closing Judgment for insufficient evidence regarding its calculation. Stated another way, the lower court's Order requires LSL to pay the Earn-out amount before LSL may exercise its contractual right to setoff the Earn-out with the Post-Closing Adjustment.

The APA also contains a dispute resolution mechanism for the Earn-out, (R. pp. 53-54, § 3.3(b)(ii)), similar to the dispute resolution mechanism provided for the Post-Closing Adjustment. (R. p. 52, § 3.2(b)(2)). If the parties could not resolve any disputed amounts in the Earn-out, they were required to jointly agree on an Independent Accountant who, acting as an expert, shall attempt to resolve any disputed amounts between the parties.

c. The APA precludes interest payments on the Earn-out.

Separately, the APA expressly precludes interest payments on the Earn-out. (R. p. 54, § 3.3(f)(iii)) ("The Parties hereto understand and agree that: … (iii) no interest is payable with respect to the Earn-out Payment."). While the APA allows for interest on non-payment of the Post-Closing Adjustment, (R. p. 52, § 3.2(a)(ii)), the parties expressly agreed not to allow interest on the amount owed for the Earn-out payment. (R. p. 54, § 3.3(f)(iii)). Despite this, the lower

court's Amended Order awarded Respondents prejudgment interest on the Earn-out totaling $229,199.18. (R. p. 30).

d. Respondents were required by the APA to cooperate in finalizing the Post-Closing Adjustment and Earn-out payment.

LSL provided "several" proposed Working Capital Statements and Earn-out calculations to Respondents, but Respondent Jordan refused to accept the statements and failed to cooperate with LSL to provide the necessary financial documentation to complete the payments.[4] Importantly, the APA plainly required Respondents to cooperate with LSL in providing the necessary financial documentation used to calculate the Post-Closing Adjustment and Earn-out calculations, and it also required Respondents to act in good faith to resolve any disputes:

- "The Parties shall timely and properly prepare, execute, file, and deliver all such documents forms and other information *as may reasonably be requested* to prepare such final allocation." (R. p. 51, § 3.1) (emphasis added);
- "The Parties will execute and deliver such further documents and do such further acts and things *as may be required* to carry out the intent and purpose of this Agreement." (R. p. 63, § 6.1) (emphasis added).
- "Buyer and Seller shall negotiate in good faith to resolve such objections…." (R. p. 52, § 3.2(b)(ii)).
- "Buyer and Seller shall negotiate in good faith to resolve the disputed items…." (R. pp. 53–54, § 3.3(b)(ii)).

Even the Complaint alleges that Respondent Jordan's financial records were necessary to perform both the Post Closing Adjustment and Earn-out payment. *See* (R. p. 39, ¶ 17) ("[Respondent] Jordan's accounting records, data, and emails are essential to calculating funds paid for work prior to closing as well as calculations required by the Agreement.").

[4] *See* (R. pp. 304–05); *see also* (R. p. 304) ("LSL prepared delivered to Jordan its calculation of the Earn-out payment including LSL's deduction of the Working Capital payment owed to it pursuant to the APA § 3.3(e), which amount Jordan repeatedly rejected while continuously refusing to cooperate with LSL to reach an agreed-upon amount.").

Yet, before the lower court, Respondents dismissed LSL's contention that Jordan's bad faith and lack of cooperation prevented the parties from reaching a final determination of the amounts owed, arguing that: "There is not one single sentence in the asset purchase agreement which obligates Mr. Jordan or Apple Services, Inc. or any other party on the Plaintiff side of this lawsuit to cooperate with them in producing the statement of working capital, here. It is solely within their control." (R. p. 402); *see also* (R. p. 298) ("[T]he APA does not require Jordan to cooperate with LSL in order to produce the Working Capital Statement. The plain language of the documents puts the onus *completely on LSL to prepare those statements*.") (emphasis added). Initially, the lower court agreed with Respondents but later amended its Order to remove this error.[5]

STANDARD OF REVIEW

An appellate court reviews a grant of summary judgment using "the same yardstick" as the trial court: viewing the facts in the light most favorable to the non-moving party and drawing all reasonable inferences in her favor. *Abdelgheny v. Moody*, 432 S.C. 346, 349, 852 S.E.2d 225, 227 (Ct. App. 2020). "Summary judgment is a drastic remedy, which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." *John Doe v. Batson*, 345 S.C. 316, 321-22, 548 S.E.2d 854, 857 (2001). "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Ray v. City of Rock Hill*, 434 S.C. 39, 45, 862 S.E.2d 259, 263 (2021). In that same vein, "[s]ummary judgment should not be granted even when there is no dispute as to evidentiary facts

[5] *Compare* (R. p. 17) ("LSL has also not demonstrated that Jordan is obligated under the APA to provide any information to LSL so that it can prepare the Post-Closing Adjustment."); *with* (R. pp. 27–28) (removing the cited phrase altogether).

if there is disagreement concerning the conclusion to be drawn from those facts." *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 362, 563 S.E.2d 331, 333 (2002).

"In determining whether summary judgment is appropriate, the evidence and its reasonable inferences must be viewed in the light most favorable to the nonmoving party." *Baughman v. AT&T*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). "All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the movant." *Young v. S.C. Dep't of Corr.*, 333 S.C. 714, 718, 511 S.E.2d 413, 415 (Ct. App. 1999).

ARGUMENT

The lower court committed reversible error by entering judgment on the Earn-out payment without first finalizing the Post-Closing Adjustment and applying the necessary setoff, as required by the APA. The APA plainly states that the timing of the Earn-out payment is "subject to" LSL's right to setoff the Post-Closing Adjustment from the Earn-out. The purpose of this setoff is to prevent LSL from overpaying on the purchase price, and it was agreed to by the parties. Logically, if the Earn-out is subject to a setoff of the Post-Closing Adjustment, and the lower court found that genuine issues of material fact precluded payment on the Post-Closing Adjustment, then the Earn-out cannot be a sum certain at this time, nor can it be due.

In committing this error, the court failed to apply the APA as written. The lower court failed to explain what purpose the "subject to" phrase has in the Earn-out payment provisions if not to mean that the Post-Closing Adjustment is a condition precedent to the Earn-out payment. The lower court's holding rewrites the APA's plain terms, rendering the "subject to" clause meaningless, and eliminates LSL's contractual protection against overpayment.

The lower court failed to give deference to LSL, the nonmoving party, on the evidence and, instead, resolved factual inferences in favor of Respondents or ignored the existence of disputed

issues of material fact. This was improper. Too, there was no reason for the lower court to enter partial summary judgment where the parties had not completed meaningful discovery.

Finally, the lower court erred in awarding prejudgment interest of $229,199.18 on the Earn-out payment, despite clear language in the APA stating that no interest is payable on the Earn-out. Moreover, at law, prejudgment interest is only allowed for liquidated amounts (i.e., sum certain), but here, the Earn-out cannot be a sum certain because it has not been subject to LSL's contractual right to setoff the Post-Closing Adjustment, as required by the APA.

I. Summary judgment is a drastic remedy that should be entered only after the parties have been provided a full and fair opportunity to complete discovery.

The South Carolina Supreme Court has repeatedly instructed that summary judgment is a "***drastic remedy***," *Baughman* at 115, 410 S.E.2d at 545 (emphasis added), an "***extreme remedy***," *Holloman v. McAllister*, 289 S.C. 183, 186, 345 S.E.2d 728, 729 (1986) (emphasis added), and must be "***cautiously invoked*** so that no person will be improperly deprived of a trial of the disputed factual issues." *Batson* at 321, 548 S.E.2d at 857 (emphasis added). Parties are entitled to a full and fair opportunity to complete discovery, which was not had here. *Middleborough Horizontal Prop. Regime Council of Co-Owners v. Montedison S.p.A.*, 320 S.C. 470, 479, 465 S.E.2d 765, 771 (Ct. App. 1995) ("Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law."). Not a single party has been deposed in this case. No experts have been identified. And judging by the record before the Court, little written discovery has been completed. In fact, excluding LSL's limited written discovery responses, the only evidence presented by Respondents to support summary judgment were Affidavits from Respondent Jordan, Respondent Jordan's employee, and Respondents' counsel of record, all filed with the original Motion in October of 2023. (R. pp. 186–199).

"A party claiming summary judgment is premature because they have not been provided a full and fair opportunity to conduct discovery must advance a good reason why the time was insufficient under the facts of the case, and why further discovery would uncover additional relevant evidence and create a genuine issue of material fact." *Guinan v. Tenet Healthsystems of Hilton Head, Inc.*, 383 S.C. 48, 54–55, 677 S.E.2d 32, 36 (Ct. App. 2009). Here, the undersigned appeared as counsel of record for the Appellant on March 28, 2025, less than three weeks before the trial court's hearing on Respondents' Motion. The undersigned asked the court for more time to complete discovery, explaining that, despite the age of the case, the parties had focused most of their efforts in litigating the companion Eviction Matter rather than the current APA Matter. (R. pp. 399–400). A simple comparison of the underlying dockets shows that the Eviction Matter was actively litigated while the APA Matter remained relatively dormant.[6] The plaintiff in the Eviction Matter — an entity owned by Respondent Jordan here — voluntarily dismissed the eviction case on January 3, 2025, pursuant to Rule 40(j), SCRCP. Then, Respondents turned to the APA Matter for a hearing on their Motion. Tellingly, Respondents' Motion was filed in the APA Matter on October 30, 2023, yet it was not scheduled for a hearing until April 17, 2025, ***one and a half years later***, and only after the Eviction Matter was dismissed.

Respondents' original Motion cited just three Affidavits as evidence, as no depositions of the parties were completed, nor experts identified. Although Respondents amended their Motion on December 1, 2023, it was to remove the Affidavit of Stephen Porter, Respondents' counsel of record, and to amend Jordan's Affidavit, not to add new and additional evidence developed in discovery. Despite withdrawing Mr. Porter's Affidavit, the lower court still cited to it in the Amended Order. *See* (R. pp. 26–27) (citing three Affidavits).

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6 *Compare* (R. pp. 413–417); *with* (R. pp. 418–426).

Of equal concern, Respondents waited until the day before the hearing to introduce LSL's responses to Requests to Admit in support of its Motion. Not once in Respondents' original Motion filed on October 30, 2023, or Amended Motion filed on December 1, 2023, did they cite to or even reference LSL's responses to Requests to Admit.[7] The undersigned requested the opportunity to submit a brief responding to Respondents' Supplemental Memorandum, including the new evidence, but that leave was denied without explanation. *See* (R. p. 401).

II. Summary judgment must be denied where there is a genuine issue of disputed fact as to the amount of damages owed in a contract claim.

Respondents bear the burden of proving each element of their contract claim, including the amount of damages. *See Tucker v. Reynolds*, 268 S.C. 330, 336, 233 S.E.2d 402, 405 (1977) ("The burden to prove his case is *always* on the plaintiff.") (original emphasis). To prove damages, "the evidence should be such as to enable the court or jury to determine the amount thereof with ***reasonable certainty or accuracy***." *Gray v. S. Facilities, Inc.*, 256 S.C. 558, 570, 183 S.E.2d 438, 444 (1971) (emphasis added). While mathematical certainty is not required, the amount of damages cannot be left to speculation. *Id*. at 570-71, 183 S.E.2d at 444 ("Neither the existence…nor amount of damages can be left to conjecture, guess or speculation."). "The proof must pass the realm of conjecture, speculation, or opinion not founded on facts, and must consist of actual facts from which a reasonably accurate conclusion regarding the cause and the amount of the loss can be logically and rationally drawn." *Drews Co. v. Ledwith-Wolfe Assocs., Inc.*, 296 S.C. 207, 213, 371 S.E.2d 532, 536 (1988).

Here, the lower court held that the Earn-out payment of $882,000 was a "sum certain" without first applying the setoff of the Post-Closing Adjustment. This was in error. In the APA,

[7] Respondents also introduced several emails the day before the hearing that had not been previously identified in the record.

the clause titled — "Timing of Payment of Earn-Out Payment" — states that the Earn-out is "subject to" LSL's right to setoff the Post-Closing Adjustment from any amount owed. *See* (R. p. 54, §§ 3.3(d), (e)). But unless the parties know the Post-Closing Adjustment, the Earn-out payment cannot be adjusted to completion, and until the setoff is applied, the Earn-out cannot be reduced to a "reasonable certainty" as required for Respondents to prevail on their claim for damages. *Gray* at 570, 183 S.E.2d at 444. Additional discovery is needed to resolve this material issue of fact. Until this issue is resolved, Respondents cannot prove that LSL is in breach of the APA for failing to have paid the Earn Out *or* their damages.

In that same vein, it is legion that the jury is the fact finder on disputed damages, not the trial court. *See Vinson v. Hartley*, 324 S.C. 389, 408, 477 S.E.2d 715, 725 (Ct. App. 1996) ("South Carolina law requires the jury to be the sole judge of issues of fact, including the issue of damages."); *Perry v. Green*, 313 S.C. 250, 255, 437 S.E.2d 150, 153 (Ct. App. 1993) ("The amount of damages is a question for the jury."); *Benya v. Gamble*, 282 S.C. 624, 631, 321 S.E.2d 57, 62 (Ct. App. 1984) ("We believe the question of whether the provision at issue provides for liquidated damages or a penalty is a question of fact for a jury to determine."). Therefore, because there is a genuine issue of material fact regarding the Post-Closing Adjustment, which directly affects the outcome of the Earn-out because of LSL's right to setoff, the damages-issue is for the jury.

III. The lower court violated multiple cardinal rules for contract interpretation in holding that the Earn-out payment was due prior to the parties agreeing to and setting off the Post-Closing Adjustment.

South Carolina's rules for contract interpretation are clear. "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *BMW of N. Am., LLC v. Complete Auto Recon Servs.*, 399 S.C. 444, 451, 731

S.E.2d 902, 906 (Ct. App. 2012). "It is not the function of the court to rewrite contracts for parties." *Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002). "[A]n interpretation that gives meaning to all parts of the contract is preferable to one which renders provisions in the contract meaningless or superfluous." *Stevens Aviation, Inc. v. DynCorp Int'l LLC*, 407 S.C. 407, 417, 756 S.E.2d 148, 153 (2014).

a. The Earn-out payment is "subject to" LSL's right to set off the Post-Closing Adjustment, meaning that the Post-Closing Adjustment must be known before the Earn-out payment is a sum certain.

The APA's plain language states that the timing of payment on the Earn-out is "subject to" LSL's contractual right to set off the Post-Closing Adjustment:

> Timing of Payment of Earn-out Payments. *Subject to Section 3.3(e)*, if Buyer is required to make the Earn-out Payment pursuant to Section 3.3(a), such payment shall be made no later than twelve (12) months after the Closing Date….

(R. p. 54, § 3.3(d)) (emphasis added).

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

(R. p. 54, § 3.3(e)) (emphasis added). Logically, then, for the Earn-out payment to be "subject to" a setoff of the Post Closing Adjustment, the Post Closing Adjustment must exist at the time the Earn-out is owed. If the Post-Closing Adjustment is unknown, then it cannot be setoff against the Earn-out, which means the Earn-out cannot be a sum certain, as the lower court held.

Respondents have acknowledged repeatedly that the Earn-out is subject to a setoff of the Post-Closing Adjustment, so this fact should not be disputed. *See* (R. p. 295) ("LSL's obligation to make the Earn-out payment is an 'independent obligation,' *subject to limited rights of set-off*.") (emphasis added); (R. p. 298) ("[T]he Earn-Out Payment is subject only to the right of set off for the Post-Closing Adjustment . . . .").

Courts are required to interpret contract language using its plain and ordinary meaning. *See, e.g.*, *Bardsley v. Gov't Emples. Ins. Co.*, 405 S.C. 68, 76, 747 S.E.2d 436, 440 (2013) ("It is a well-settled principle of contract interpretation that absent a contractual definition to the contrary, contract language is given its ordinary and plain meaning."). The phrase "subject to" is not defined in the APA, but it is common vernacular. Webster's Dictionary defines "subject to" to mean: "affected by or possibly affected by (something);" "dependent on something else to happen to be true."[8] Applied here, the phrase "subject to" means that the Earn-out amount is "affected by" or "dependent on" the Post-Closing Adjustment, and if the Post-Closing Adjustment is unknown, then so too is the Earn-out. Any other interpretation would render the "subject to" language superfluous and without meaning, striking it from the APA. Not only did the lower court fail to apply the "subject to" phrase in its holding, but it also failed to meaningfully explain how its holding can co-exist with the "subject to" language as written.

b. The APA's prescribed deadlines requiring that the Post-Closing Adjustment be agreed upon and setoff before payment on the Earn-out.

The court held that the Earn-out payment was an "independent obligation" of the Post-Closing Adjustment altogether, and that "no reasonable interpretation of the APA would allow LSL to indefinitely withhold a required payment to Jordan based upon a condition, in this instance, calculating and proving a possible set-off of the Earn-out payment, that is largely within LSL's power to complete."[9] *See* (R. pp. 25, 28–29). In holding that the Earn-out was an independent

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[8] *Subject to*, Webster's Dictionary, https://www.merriam-webster.com/dictionary/subject%20to (last visited June 4, 2025).

[9] It bears repeating that the Earn-out clause was not "largely within LSL's power to complete," as the lower court held because LSL does not have the authority to finalize the calculations on its own. The parties must reach a final determination together, as evidenced by multiple provisions in the APA requiring that the parties jointly approve the figures and "negotiate in good faith" to resolve any disputed amounts. *See* (R. p. 52, § 3.2(b)(ii), pp. 53–54, § 3.3(b)(ii)).

obligation, the court relied on Section 3.3(c), a single, isolated clause that notably has nothing to do with the timing or calculation of payment on the Earn-out, or the setoff requirement. *See* (R. p. 54, § 3.3(c)) ("Buyer's obligation to pay the Earn-out Payment to Seller in accordance with Section 3.3(a) is an independent obligation of the Buyer.").

Two errors become immediately apparent in the lower court's reasoning. First, trial courts in South Carolina must consider all provisions in the contract, not just isolated clauses. *See, e.g.*, *Herrington v. SSC Seneca Operating Co., LLC*, 435 S.C. 243, 248, 866 S.E.2d 579, 581 (Ct. App. 2021) ("We are bound to interpret the agreement by looking at *the entire agreement from beginning to end*: precedent explains that when construing a contract, all of its provisions should be considered, and one may not, by pointing out a single sentence or clause, create an ambiguity.") (emphasis added). Thus, just because the Earn-out is an "independent obligation," *see* (R. p. 54, § 3.3(c)), does not mean that the court can ignore other language in the APA that directly affects the calculation and timing of payment on the Earn-out. *See* (R. p. 54, § 3.3(d)) ("Timing of Payment of Earn-Out Payments"); (R. p. 54, § 3.3(e)) ("Right to Set-Off"). Theoretically, any single contract clause could be coined an "independent obligation" when analyzed in a vacuum, but critically, individual clauses do not exist independently from the contract as a whole. For this reason, trial courts must consider "the entire agreement from beginning to end," so as to avoid creating ambiguities or rewriting the agreement between the parties. *Herrington* at 248, 866 S.E.2d at 581.

Second, and in that same vein, the Earn-out payment cannot be an "independent obligation" separate and apart from the Post-Closing Adjustment when the Earn-out's timing of payment clause, (R. p. 54, § 3.3(d)), states that payment is "subject to" LSL's right to setoff the Post-Closing Adjustment. (R. p. 54, § 3.3(e)). Clearly then, because the timing of payment clause

expressly states the Earn-out is subject to (or dependent on) the Post-Closing Adjustment, the final Earn-out payment cannot exist independently of the Post-Closing Adjustment.

Additionally, in isolating one clause from the remainder of the APA, the lower court ignored the APA's repayment schedule as agreed to by the parties, requiring that the Post-Closing Adjustment be finalized and paid many months prior to payment on the Earn-out. And the repayment schedule is important because it provides meaningful insight into the parties' intent and expectations regarding payments made thereunder. South Carolina courts must "read agreements in a way that will give effect to the whole instrument and to each of its various parts and provisions, if it is reasonable to do so." *Herrington* at 248, 866 S.E.2d at 581.

Consider the following payment schedule as outlined in the APA. The Earn-out payment was due "no later than twelve (12) months after the Closing Date," or by May 10, 2022. (R. p. 54, § 3.3(d)). Yet, the deadline for calculating and paying the Post-Closing Adjustment preceded the Earn-out payment deadline by many months. To calculate the Post-Closing Adjustment, the APA first required LSL to prepare a Working Capital Statement of Apple Services' business and deliver a copy of same to Respondents within 100 days of closing, or by August 18, 2021, **265 days *before* the Earn-out payment deadline**. (R. p. 51, § 3.2(a)(i)).

After receiving the Working Capital Statement, Respondents had thirty (30) days to review it and make objections thereto. (R. p. 52, § 3.2(b)(i)). The APA calls this the "Review Period." *Id*. Applied here, if LSL delivered the Working Capital Statement to Respondents on August 18, 2021 (the deadline), Respondents would have until September 17, 2021, to complete the Review Period, **235 days *before* the Earn-out payment deadline**. *Id*.

On or before the last day of the Review Period, Respondents were required to submit a Statement of Objections to LSL, which then triggered a thirty (30) day period for the parties to

resolve any objections. (R. p. 52, § 3.2(b)(ii)). The APA calls this the "Resolution Period." *Id*. Applied here, if the deadline to complete the Review Period was September 17, 2021, the parties would have until October 17, 2021, to complete the Resolution Period, **205 days *before* the Earn-out payment deadline**. *Id*.

Assuming the parties were unable to resolve the disputed amounts within the Resolution Period, the APA required the parties to jointly appoint an Independent Accountant, who — "acting as experts" — shall resolve the disputed amounts in the Post-Closing Adjustment. (R. p. 52, § 3.2(b)(iii)). The Independent Accountant had thirty (30) days after engagement to resolve the disputed amounts. (R. p. 53, § 3.2(b)(v)). Applied here, if the Independent Accountant was appointed on the final day of the Resolution Period, October 17, 2021, he/she would have until November 16, 2021, to resolve the dispute, **175 days *before* the Earn-out payment deadline**.

Clearly, the APA prescribed a timeline that required resolving the Post-Closing Adjustment well in advance of the deadline to pay on the Earn-out. After all, the Resolution Period for resolving disputes over the Post-Closing Adjustment was October 17, 2021, seven (7) months before the Earn-out payment deadline, leaving ample time to obtain an Independent Accountant per the APA's dispute resolution mechanism, if needed. Considering the payment schedule contemplated in the APA, plus the plain language of the Earn-out clauses stating that the timing of payment is "subject to" a setoff of the Post-Closing Adjustment, (R. p. 54, §§ 3.3(d), (e)), the Post-Closing Adjustment was a condition precedent to the Earn-out payment and not an "independent obligation," as the lower court construed that term. And it is not LSL's fault that Respondents prioritized other litigation brought by it against LSL (i.e., the Eviction Matter) and waited to litigate the Post-Closing Adjustment issue in this case until after they voluntarily dismissed the Eviction Matter per Rule 40(j), SCRCP.

c. The lower court erred by acting as a "fact finder" on the issue of damages, despite little to no evidence in the record to support its holding.

Per the APA, disputed amounts in the Post-Closing Adjustment or Earn-out payment that could not be resolved between the parties should be referred to a "nationally recognized firm of independent certified public accountants," who, "*acting as experts and not arbitrators*," shall resolve the disputed amount. (R. p. 52, § 3.2(b)(iii)); *see also* (R. p. 53–54, § 3.3(b)(ii)). Thus, expert accountants are needed to resolve these complicated business disputes, and other courts analyzing similar dispute resolution provisions have emphasized the significance of the Independent Accountants:

> [T]he parties would not have selected an 'independent accounting firm of national reputation' to serve as an 'expert' if all they wanted that firm to do was to engage in a bean-counting exercise. Instead, such a selection supports the notion that they intended the expert to consider each side's position and to apply genuine expertise to resolve purchase price adjustment disputes promptly.

Alliant Techsystems, Inc. v. Midocean Bushnell Holdings, L.P., No. 9813-CB, 2015 Del. Ch. LX 118, at *32 (Del. Ch. Apr. 24, 2015).

The APA provides a complex formula for calculating Post-Closing Adjustment and Earn-out payments which necessitates an expert, but experts have not been identified in this case, much less relied on by the trial court in entering judgment. For example, to calculate the Post-Closing Adjustment, LSL had to create a Working Capital Statement based on "generally accepted accounting principles ('GAAP') applied using the same accounting methods, practices, principles, policies and procedures, with consistent classifications, judgments and valuation and estimation methodologies that were used in the preparation of the Financial Statements for [Apple Services, Inc.'s] most recent fiscal year end." (R. p. 51, § 3.2(a)(i)). GAAP principles are not for the layperson or the court to define and apply; an expert is needed. Similarly, to calculate the Earn-out payment required analyzing the company's long-term revenue over a period and confirm

whether it met a threshold. (R. pp. 53–54, § 3.3(b)(ii)). Should a dispute arise, the APA instructed the parties to select an Independent Accountant "by mutual agreement," (R. p. 52, § 3.2(b)(iii)), who, acting as a fact finder, would review the financials. *See Ldc v. Essential Utils.*, No. N20C-08-127 MMJ CCLD, 2021 Del. Super. LX 394, at *14-15 (Super. Ct. Apr. 28, 2021) ("[R]eferral of the Disputed Item makes the accountant a finder of fact applying accounting principles."). In this case, no such expert has been offered in the record to support the disputed amounts, yet the lower court entered judgment anyway.

IV. The lower court failed to give deference to LSL, the nonmoving party, and otherwise erred in relying on hearsay Affidavits and other inadmissible evidence in favor of Respondents.

As a matter of law, summary judgment cannot be supported by inadmissible evidence, including hearsay. *See Hall v. Fedor*, 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct. App. 2002) ("Our appellate courts have interpreted Rule 56(e) to mean materials used to support or refute a motion for summary judgment *must be those which would be admissible in evidence*.") (emphasis added). Further, in reviewing evidence at the summary judgment stage, "[a]ll ambiguities, conclusions, and inferences arising from the evidence *must* be construed most strongly against the movant." *Young v. S.C. Dep't of Corr.*, 333 S.C. 714, 718, 511 S.E.2d 413, 415 (Ct. App. 1999) (emphasis added).

a. The Affidavits cited by Respondents are inadmissible hearsay.

Respondents' original Motion was based on three Affidavits completed by: (1) Respondent Jordan; (2) Ashley Hawn, an employee of Respondent Jordan; and (3) Stephen Porter, counsel for Respondent. Each of these Affidavits describes a meeting between the parties that took place on May 9, 2022, at the (then named) law firm of Nexsen Pruet. The parties held the meeting to discuss

several issues related to the APA, notably the Closing Working Capital Statement and the Earn-out Calculation. *See* (R. pp. 220–21, ¶¶ 19–20); *see also* (R. p. 198, ¶ 5).

To the extent the lower court relied on these Affidavits, it was improper. Each Affidavit is classic hearsay because they are out-of-court statements offered to prove the truth of the matter asserted. *See* Rule 801(c), SCRE. None of these individuals have been deposed, and Respondents have not authenticated or established in the record what role, if any, the declarants had on behalf of LSL.[10]

b. The email from Mr. Porter dated May 17, 2022, is also inadmissible to support summary judgment.

The day before the hearing, Respondents introduced as evidence LSL's responses to Requests to Admit and certain emails, including an email from Respondents' counsel, Mr. Porter, dated May 17, 2022. While LSL admitted that the Earn-out payment had been "earned," it denied that the Earn-out payment was due because of the issues resolving the calculations and based on "correspondence between the parties acknowledging an adjusted timeline for payment of the Earn-out, pursuant to the May 17, 2022, email from Stephen Porter to Darra Coleman." *See* (R. pp. 303–04). To the extent the court relied on Respondents' counsel's email to support judgment on the Earn-out, it was improper because the email is undoubtedly hearsay evidence and at a minimum fails to meet basic authentication requirements. Moreover, the court failed to interpret the email and discovery responses in a light most favorable to LSL, drawing any conclusions, inferences, and ambiguities in LSL's favor as required at the summary judgment stage.

[10] Even though Respondents amended their Motion on Dec. 1, 2023, to withdraw Mr. Porter's Affidavit, the lower court still cited to it the original and Amended Order. *See* (R. pp. 26–27).

On May 17, 2022, following the May 9 meeting at the (then named) law firm of Nexsen Pruet, attorney Stephen Porter (for Respondents) sent an email to attorney Darra Coleman (for LSL), stating:

> It appears that the working capital adjustment will take some time to calculate based upon our conversations last week. However, can you provide me with a timeline for payment of the earn-out? I do not know that any of the financial information we discussed last week will impact that analysis.

(R. p. 308). Respondents offered this email, and LSL's discovery responses, the day before the hearing as evidence to contradict LSL's belief that the Earn-out would be owed after the parties resolved the ongoing issues involving the Post-Closing Adjustment and Earn-out, which had just been discussed at the March 9 meeting. *See* (R. pp. 303–04). In offering Mr. Porter's email the day before the hearing, Respondents argued that:

> [T]he email dated May 17, 2022, which is attached as Exhibit B, does not adjust the due-date for the Earn-Out Payment. In fact, rather the extending the due-date, Jordan's counsel Stephen Porter asked LSL's counsel for a timeline on when the Earn-Out Payment was to be expected, with the obvious understanding that it was due on May 10, 2022, and was one-week late.

(R. p. 297).

The lower court accepted Respondents' interpretation wholesale, and in doing so drew conclusions and inferences of disputed fact in Respondents' favor, the moving party, holding:

> Clearly, this email communication does not express an agreement to extend the due date for any required payment…. Jordan's counsel asked LSL's counsel for a timeline on when the Earn-Out Payment would be paid, with the obvious understanding that it was due on May 10, 2022, and was already one-week late. Nothing in the May 17, 2022 email or other evidence in the record establishes an adjusted due date for the Earn-Out payment.

(R. p. 28).

"Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts." *See*

Lanham v. Blue Cross & Blue Shield of S.C., Inc., 349 S.C. 356, 362, 563 S.E.2d 331, 333 (2002). Mr. Porter's email creates several disputed issues of fact. First, the email was sent a week after the May 9th meeting, and it confirmed that there was an ongoing issue with the Post-Closing Adjustment, stating: "It appears that the working capital adjustment will take some time to calculate based upon our conversations last week." Pls.' Suppl. Mem. at Ex. B. The contested valuation is a disputed issue of fact, which directly affects the Earn-out.

Second, with the understanding that the parties had just met on May 9th to discuss issues regarding the Closing Working Capital Statement and the Earn-out Calculation,[11] Mr. Porter's email dated May 17th asked LSL's then-counsel for a timeline for repayment on the Earn-out. *See* (R. p. 308). Viewed in a light most favorable to LSL, Mr. Porter's question about the timing of repayment could reasonably be interpreted by a fact finder as an extension or, at the least, the parties attempting to finalize disputed amounts that remain unresolved. This, too, is a disputed issue of fact.

Third, by his own admission, Mr. Porter's email states, "*I do not know*" if the financial matters discussed will impact the Earn-out analysis. *Id*. (emphasis added). Viewed in a light most favorable to LSL, Mr. Porter's uncertainty regarding how the calculations impact the Earn-out creates a genuine issue of fact.

In addition, the record does not even contain a response from Ms. Coleman, LSL's then counsel, to demonstrate the understanding between the parties. Instead, Respondents offer this unilateral email from their counsel of record as proof that LSL breached its payment obligations under the contract, despite the fact that LSL's discovery responses show that the Earn out payment was not due because the post-closing working capital adjustment had not been agreed upon and

[11] *See* (R. p. 217, ¶¶ 5–6, pp. 220–21, ¶¶ 19–20); *see also* (R. p. 198, ¶ 5).

paid, or set off. *See* (R. p. 302, ¶ 2, p. 305, ¶ 12). Here again are disputed issues of act. Still, the lower court concluded that Mr. Porter's unilateral email exhibited an "***obvious understanding*** that [the Earn-out payment] was due on May 10, 2022, and was already one-week late." (R. p. 28) (emphasis added). A single, unilateral email from Respondents' counsel to LSL's former counsel does not establish an "obvious understanding" between the parties, particularly when there is no evidence that LSL's counsel responded to the email, and especially when deference should be given to LSL on disputed issues of fact like these.

In addition, Mr. Porter's email is classic hearsay and does not meet basic authentication requirements to support summary judgment. The email is hearsay because it purports to prove what the repayment terms were, even though neither Mr. Porter (the sender) nor Ms. Coleman (the recipient) have been deposed.

Importantly, too, as Respondents' counsel of record, Mr. Porter cannot be a fact witness to the case, nor can his unilateral email be considered sufficient evidence of a breach of the APA or damages to support a judgment on his clients' contract claim.[12] The lower court should not have accepted Respondents' counsel's email as evidence of a "meeting of the minds" with LSL or its attorney, Ms. Coleman.

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[12] The Rules do not allow a party's counsel of record to serve as a fact witness on disputed issues such as these, particularly when so little discovery has been completed. *See* Rule 3.7, RPC, Rule 407, SCACR ("A lawyer ***shall not*** act as advocate at a trial in which the lawyer is likely to be a necessary witness unless: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client."). Clearly, neither of these exceptions apply here. The Earn-out's repayment terms are a highly contested issue, Mr. Porter is not a "necessary witness" in light of the other witnesses available and lack of discovery completed to date, and the Court should require disputed issues of fact to be developed through other sources, not Respondents' current counsel acting as a fact witness at the summary judgment stage. *Cf. Fine Hous., Inc. v. Sloan*, 431 S.C. 499, 508, 848 S.E.2d 581, 585 (Ct. App. 2020) ("An attorney is likely to be a necessary witness when the attorney's testimony is relevant to disputed, material questions of fact and *there is no other evidence available to prove those facts*.") (emphasis added).

To complicate matters further, the lower court ended its discussion of Mr. Porter's email by stating: "The email also appears to be a Rule 408 SCRCP communication between counsel to facilitate resolution of the dispute that has led to this litigation and is likely not evidence in this case." (R. p. 28). If the email is in fact inadmissible evidence at trial under Rule 408, SCRCP, as the lower court stated, *then it cannot be used to support summary judgment now*, and to rely on such evidence is a clear error of law. *Fedor*, 349 S.C. at 175, 561 S.E.2d at 657 (holding that evidence which is inadmissible at trial cannot be used as the basis to support summary judgment). If the evidence would have been inadmissible at trial under Rule 408, SCRCP, then it is inadmissible now for purposes of summary judgment.

c. The jury must consider whether Respondents' failed to cooperate in good faith and perform their duties under the APA.

As a matter of law, "[a] party who seeks to recover damages for breach of a contract must show that the contract has been performed on his part, or at least that he was, at the appropriate time, able, ready and willing to perform it." *Mozingo & Wallace Architects, L.L.P. v. Patricia Grand, Ltd. P'ship*, 379 S.C. 478, 484, 666 S.E.2d 267, 270 (Ct. App. 2008). In this case, the evidence shows that LSL provided Respondents with several proposed Working Capital Statements and Earn-out calculations, but Respondent Jordan refused to accept them and further failed to cooperate in calculating these payments, which then prevented LSL from meeting its obligations under the APA.[13] Considering the evidence in a light most favorable to LSL, the

[13] (R. p. 304, ¶ 10) ("LSL delivered to Jordan its calculation of the Earn-out payment including LSL's deduction of the Working Capital payment owed to it pursuant to the APA § 3.3(e), which amount Jordan repeatedly rejected while continuously refusing to cooperate with LSL to reach an agreed-upon amount."); (R. p. 306, ¶ 14) ("LSL has provided Jordan with several Closing Working Capital Statements indicating LSL's position regarding the Working Capital payment, but Jordan has refused to accept LSL's Closing Working Capital Statements or provide the required financial documentation to finalize the Statement.").

nonmoving party, it is for the jury to decide whether LSL breached the contract or whether Respondents' failure to cooperate prevented the completion of payment and other material terms.

There can be no disputing that the parties were required to cooperate and share financial information in completing the Post-Closing Adjustment and Earn-out payment. The APA plainly demands this from both parties.[14] Even Respondents' Complaint alleges that Jordan's financial records were necessary to perform both the Post Closing Adjustment and Earn-out payment. Compl. ¶ 17. And the South Carolina Supreme Court has "repeatedly" held that the law implies into every contract a promise between the parties to act in good faith in executing the contract. *Hall v. UBS Fin. Servs.*, 435 S.C. 75, 94, 866 S.E.2d 337, 346 (2021).

Respondents never denied rejecting all of LSL's proposed calculations; rather, they claimed that Jordan was never required to participate in the calculations to begin with, and they further insisted that it was LSL's exclusive burden to calculate and finalize the payments.[15] Clearly, this is in direct contravention to the APA, the implied obligation of good faith and fair dealing in all contracts, and Respondents' own allegations stating that Jordan's financial documents were necessary to the calculations. In error, the lower court agreed with Respondents, holding that LSL failed to show that Jordan was required to participate in completing the payment

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[14] *See* (R. p. 51) ("The Parties shall timely and properly prepare, execute, file, and deliver all such documents forms and other information *as may reasonably be requested* to prepare such final allocation.") (emphasis added); (R. p. 63) ("The Parties will execute and deliver such further documents and do such further acts and things *as may be required* to carry out the intent and purpose of this Agreement.") (emphasis added).

[15] *See, e.g.*, (R. p. 402) ("There is not one single sentence in the asset purchase agreement which obligates Mr. Jordan or Apple Services, Inc. or any other party on the Plaintiff side of this lawsuit to cooperate with them in producing the statement of working capital, here. It is solely within their control."); *see also* (R. p. 298) ("[T]he APA does not require Jordan to cooperate with LSL in order to produce the Working Capital Statement," and that, "[t]he plain language of the documents puts the onus *completely on LSL to prepare those statements*.") (emphasis added).

calculations.[16] Only after LSL filed its Motion to Reconsider addressing these factual and legal inaccuracies did the lower court enter an Amended Order correcting itself — at least in part — although it described its errors as "immaterial" and "minor." *See* (R. p. 32).[17]

While the lower court called its errors "immaterial" and "minor," there is nothing immaterial or minor about a party's covenant of good faith and fair dealing that exists both in contract and at common law. At law, Respondents may not act in a way to prevent LSL from complying with the terms of the APA and then complain that LSL is in breach of the contract. In considering the evidence in a light most favorable to LSL, there is a genuine issue of material fact as to whether Respondents acted in good faith to resolve the disputes between the parties, and as such, it is for a jury to decide whether LSL is in breach of the APA, not the trial court.

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[16] *See* (R. p. 17) ("LSL has also not demonstrated that Jordan is obligated under the APA to provide any information to LSL so that it can prepare the Post-Closing Adjustment."); (R. p. 29) (holding that "calculating and proving a possible set-off to the Earn-out payment…is largely, *if not exclusively within LSL's power to complete*.") (emphasis added).

[17] In the Amended Order, the court removed in its entirety the first quote at Note 16, *supra*, and it also removed the phrase, "if not exclusively within LSL's power to complete" cited in the second quote at Note 16, *supra*. *See* (R. p. 29). Despite these corrections, the court continued to incorrectly insist that the calculations were "largely within LSL's power to complete." *Id*. LSL does not have the authority or ability to complete the calculations on its own, nor does it have greater discretion than Respondents in making a final determination on the payments owed. The APA provides both parties an equal opportunity in reaching a final determination. LSL initiates the statements and then delivers them to Respondents, who then review the statements and either accept or object to the calculations. Respondents have access to LSL's books and records for purposes of completing the review. *See* (R. p. 52) ("Seller shall have full access to the relevant books and records of Buyer") (Post-Closing Adjustment); *id*. ("Seller shall have the right to inspect Buyer's books and records") (Earn-out). And if Respondents object to the calculations, then the parties — together — must cooperate in "*good faith*" to resolve the disputed amounts. *See id*. ("Buyer and Seller shall negotiate in good faith to resolve such objections") (Post-Closing Adjustment); (R. p. 54) ("Buyer and Seller shall negotiate in good faith to resolve the disputed items") (Earn-out). Thus, it is patently wrong for the trial court to have insisted that it is largely within LSL's power to complete the calculations when the APA repeatedly requires mutual cooperation and agreement by the parties to complete the figures.

V. The lower court erred in awarding prejudgment interest on the Earn-out payment because such interest is precluded by the APA, and prejudgment interest is not available because the Earn-out amount has not been reduced to a sum certain.

The lower court awarded prejudgment interest of $229,199.18 on the Earn-out payment based on the court's finding that the Earn-out was a sum certain. (R. pp. 29–30). In so holding, the court patently violated the clause in the APA stating that interest is *not* allowed on the Earn-out payment. *See* (R. p. 54, § 3.3(f)(iii)). ("The Parties hereto understand and agree that … (iii) *no interest is payable with respect to the Earn-out payment*.") (emphasis added). The court erred in awarding prejudgment interest when the parties plainly agreed that no such interest was applicable.

Second, even if this clause were absent from the APA, prejudgment interest is still not appropriate here because the Earn-out payment has not been calculated with certainty absent the setoff of the Post-Closing Adjustment. Prejudgment interest is allowed on liquidated claims involving sum certain damages. *See Butler Contracting, Inc. v. Court St., LLC*, 369 S.C. 121, 133, 631 S.E.2d 252, 259 (2006) ("Prejudgment interest is allowed on a claim of liquidated damages; i.e., the sum is certain or capable of being reduced to certainty based on a mathematical calculation previously agreed to by the parties."). Here, however, because the Earn-out has not been reduced by LSL's contractual right to setoff any Post-Closing Adjustment, the Earn-out has not been adjusted to completion and thus cannot be a sum certain or liquidated damage.

Just recently, in *Hess v. Morphis Pediatric*, the Court of Appeals held that when intermediate questions must be settled before the damages can be ascertained, the damages are not liquidated or a sum certain, and prejudgment interest is improper. 446 S.C. 389, 416, 920 S.E.2d 1, 15 (Ct. App. 2025). In *Hess*, the plaintiff filed suit against his employer alleging breach of contract arising from the employer's failure to pay him annual bonuses earned under a 2010

Agreement. *Id*. at 399–400, 920 S.E.2d at 7. At trial, the plaintiff obtained a verdict in his favor, after which he petitioned the court to award prejudgment interest on the damages. *Id.* at 403, 920 S.E.2d at 8. The circuit court granted the plaintiff's petition, awarding prejudgment interest on the bonus payments, and the defendants appealed. *Id.*

The Court of Appeals reversed, holding that the damages were unliquidated because additional information was needed to finalize the bonus payments. *Id.* at 416, 920 S.E.2d at 15. The agreement in *Hess* provided that the plaintiff was entitled to fifty percent (50%) of the end of year profits, minus all debts, expenses, royalties, and expenditures. *Id*. However, as the Court noted:

> Although the 2010 Agreement states that Hess would receive 50% of the year's profits, it does not make certain what debts, expenses, royalties, and expenditures can be taken out of the profits before calculating the bonus. Thus, Hess's claims were unliquidated because the amount of his bonuses could not be reduced to a certainty. Because Hess's claims were unliquidated, we reverse the circuit court's award of prejudgment interest.

Id. at 416, 920 S.E.2d at 15.

The logic from *Hess* applies equally here. That is, the *Hess* court concluded that the bonus was an unliquidated sum because the contract required that certain debts, expenses, royalties, and expenditures be taken out of the profits before calculating the bonus, akin to a setoff. *Id.* So too here, the APA provides that the Earn-out payment is subject to a setoff of the Post-Closing Adjustment, but the evidence in this case shows that the Post-Closing Adjustment has not been finalized by the parties, and thus, the Earn-out has not been reduced to a certainty. (R. p. 18) ("[T]here remain genuine issues of material fact regarding the Post-Closing Adjustment of Working Capital which prevent a grant of summary judgment on this issue."). Therefore, because the Earn-out cannot be reduced to certainty absent the Post-Closing Adjustment being calculated

and paid or setoff, the Earn-out payment cannot be a liquidated damage, and prejudgment interest is improper.

Further, equitable principles favor denying prejudgment interest. The Post-Closing Adjustment setoff is, by nature, a hedge against overpayment, but given that the principal Earn-out amount has not been reduced by the Post-Closing Adjustment, LSL will have to pay more in principal *and* interest than it may otherwise owe to Respondents if the setoff had been applied. This is why prejudgment interest is not allowed on amounts that cannot be calculated with certainty, because in this case, it would effectively require LSL to give Respondents an interest free loan that it must later attempt to collect through future proceedings (and at additional cost).

The lower court tries to explain this away by suggesting that even if LSL overpays now, it can simply initiate a future proceeding, or trigger one of the dispute resolution clauses, to recover the monies it is owed. *See* (R. p. 19) ("If future proceedings in this case, or in the 'Examination and Review' process for 'Resolution of Disputes' regarding the Post Closing Adjustment provided in Section 3.2(b) of the APA, determine that either party owes additional money to the other, then judgment may be granted to that party, and any appropriate set-offs may be applied at that time."). The lower court's reasoning is wrong for three significant reasons.

First, if "future proceedings" are required to resolve whether "either party owes additional money to the other," *id*., then summary judgment is not proper. *See Middleborough Horizontal Prop. Regime Council of Co-Owners v. Montedison S.p.A.*, 320 S.C. 470, 479, 465 S.E.2d 765, 771 (Ct. App. 1995) ("Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law."). The trial court should not have entered judgment if it would lead to a ripple-effect of future litigation involving the same disputed damages currently before the Court.

Second, the uncertain judgment unfairly prejudices LSL at this stage of the litigation, allowing Respondents to initiate potentially costly ancillary collections proceedings against LSL, who is trying to run a business, and may result in rulings against LSL that are hard to unwind and not as simple as merely applying monetary set-offs at a later time.

Third, the lower court cites to a dispute resolution mechanism for the Post Closing Adjustment, which is inapplicable because judgment was entered on the Earn-out, not the Post-Closing Adjustment, and if payment is made it will be on the Earn-out, not the Post-Closing Adjustment. Problematically, the Post-Closing Adjustment's dispute resolution clause does not allow LSL to retroactively recoup principal and interest payments paid *in the form of an Earn-out*. Nor does the dispute resolution mechanism work backwards by allowing the Post-Closing Adjustment to be setoff by the Earn-out payments (only the Earn-out is subject to a contractual right of setoff, not vice versa). And assuming this Court allows prejudgment interest on the Earn-out, none of the dispute resolution clauses allows LSL to recover excess payment in the form of interest. As such, the lower court offers a dispute resolution clause as a remedy to its potential error, but that remedy is inapplicable per the parties' agreement and unduly prejudices LSL.[18]

CONCLUSION

South Carolina's cardinal rules for contract interpretation are critical to ensuring that parties' agreements are carried out in full and as intended. The lower court failed to do that here. The lower court erred in finding that the Earn-out payment was a sum certain and due without first calculating and applying LSL's contractual right to setoff the Earn-out from the Post-Closing

[18] Both the Post Closing Adjustment and Earn-out's dispute resolution clauses contemplate a situation where the Parties disagree on the amount owed *prior* to payment (not after), and the clauses outline the procedure for resolving the disputed amounts *prior* to payment (not after). *See* (R. pp. 52–54).

Adjustment. The APA plainly states that the timing of the Earn-out payment is "subject to" LSL's right to setoff the Post-Closing Adjustment, so without setting off the Post-Closing Adjustment from the Earn-out, the Earn-out cannot possibly be a sum certain or due.

In entering judgment against LSL, the lower court erred in giving deference to Respondents, the moving party, which is contrary to the court's standard of review. The court resolved factual inferences in favor of Respondents or ignored the existence of disputed issues of material fact. This was improper. Too, so little discovery has been completed in the APA Matter because the parties had been focused on the Eviction Matter, and thus, summary judgment is premature at this time. None of the parties have been deposed, nor have any experts been identified, despite Respondents initiating this action in June 2022.

Finally, the lower court erred in awarding prejudgment interest of $229,199.18 on the Earn-out payment. The APA plainly states that no interest is payable on the Earn-out. *See* (R. p. 54, § 3.3(f)(iii)). Moreover, at law, prejudgment interest is only allowed for liquidated amounts (i.e., sum certain), but here, the Earn-out cannot be a sum certain because it has not been subject to LSL's contractual right to setoff the Post-Closing Adjustment, as required by the APA. For multiple reasons, entry of prejudgment interest was proper and should be reversed.

For these reasons, this Court should reverse the trial court's Amended Order and, in doing so, provide sanctity to the parties' agreement and by allowing the jury to consider issues of fact.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

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