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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Williams H. Seals, Jr., Circuit Court Judge

Case No: 2022-CP-40-02958

Appellate Case No: 2025-001409

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

v.

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

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

AMENDED BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court correctly grant partial summary judgment with respect to the claim for breach of an Asset Purchase Agreement brought by Respondents Michael Jordan and Apple Services, Inc. when Appellant Liquid Services and Logistics, LLC failed to pay to an Earn-out Payment of $882,000.00, which is a sum certain specifically stated in the agreement, and Appellant has admitted the payment has been earned?

2. Did the trial court correctly find that the parties' failure to agree upon the amount of a post-closing working capital adjustment pursuant to the Asset Purchase Agreement does not create a genuine issue for trial so as to preclude summary judgment as to the Earn-out payment?

3. Did the trial court correctly award prejudgment interest on the Earn-out Payment?

STATEMENT OF THE CASE

On May 10, 2021, Plaintiffs/Respondents Michael Jordan and Apple Services, Inc. (collectively "Plaintiffs" or "Jordan") entered into an Asset Purchase and Sale Agreement ("APA") with Defendant/Appellant Liquid Services and Logistics, LLC ("LSL") for the purchase by LSL of certain business assets of Apple Services, Inc. ("Acquired Business"), including goodwill, furniture, fixtures, and equipment.[1] (R. at 50-78).

On June 8, 2022, Plaintiffs filed their Complaint against LSL and Defendant Tim Freeman, alleging numerous claims, including a claim for breach of contract only as to LSL. (R. 35-165). LSL filed its Answer and Affirmative Defenses on October 28, 2022. (R. 166-173).[2]

On October 30, 2023, Jordan filed a Motion for Partial Summary Judgment on the claim for breach of contract ("Motion"), which was supported by the Affidavits of Michael Jordan, Ashley Hawn, an employee of Apple Services, Inc., and Stephen Porter, counsel of record for the Plaintiffs which were filed contemporaneously with the Motion. (R. 174-199). After filing the motion, Jordan served its First Requests for Admission to LSL, all of which were directed to issues raised by the Motion, on November 28, 2023. (R. 302-307).

On December 1, 2023, Plaintiffs filed an Amended Motion for Partial Summary Judgment ("Amended Motion") (R. 202-214) supported by an Amended Affidavit of Michael D. Jordan (R. 216-287) and the Affidavit of Ashley Hawn. (R. 289-290). The Affidavit of Stephen Porter was withdrawn by stipulation on November 8, 2023. (R. 200-201). LSL served its responses to the Plaintiffs' First Requests for Admission on December 28, 2023. (R. 302-313).

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[1] Plaintiff Plumbinator 1051, LLC and Defendant Tim Freeman are not parties to the APA, the Motion for Partial Summary Judgment, or this Appeal.

[2] The case was transferred to the Business Court for Richland County and the Honorable Clifton Newman was assigned as judge on March 31, 2023. On May 31, 2024, due to the retirement of Judge Newman, the case was reassigned to the Honorable William H. Seals, Jr. (R. 3-4).

After several status conferences with counsel for the parties in the ensuing months, a hearing was scheduled on the Motion/Amended Motion for March 31, 2025. (R. 5-7). On March 28, 2025, new counsel for LSL appeared in this action. (R. 8-11). Counsel for Plaintiffs consented to the withdrawal and substitution of LSL's counsel and consented to continuing the scheduled hearing on Plaintiffs' Motion/Amended Motion until April 17, 2025. (R. 5-7). On April 16, 2025, Plaintiffs filed a supplemental memorandum and submitted LSL's answers to Plaintiffs' First Requests for Admission and several documents referenced therein. (R. 293-313).

A hearing on the Motion/Amended Motion was held on April 17, 2025, nearly eighteen months after the filing of the Motion. During that period, LSL did not notice any depositions, nor did it file any motion to continue the hearing or an affidavit pursuant to Rule 56(f), SCRCP. Nor did LSL submit ***any*** memoranda of law, witness affidavits, or other evidence in opposition to the Motion as required by Rule 56(e), SCRCP.

On May 7, 2025, the trial court entered an order granting, in part, and denying, in part, the Motion on the grounds that the plain, unambiguous language of the contract, combined with LSL's responses to Jordan's requests for admissions, left no genuine issue of material fact that the Earn-out Payment of $882,000.00 was earned and due to be paid without further delay. (R. 12-21). LSL moved to reconsider on May 19, 2025. (R. 314-348). On June 12, 2025, the trial court denied LSL's Rule 59(e) Motion to Reconsider the order and entered an amended order. (R. 32-34). This Appeal followed.

FACTS

Plaintiffs' breach-of-contract claim stems from the APA. Under the APA, LSL agreed to purchase certain assets of Apple Services, Inc., including its goodwill, furniture, fixtures, and equipment. (*See* R. 216-217; R. 37; R. 167). As part of the purchase, LSL was required to make certain payments to Jordan under the APA, including an Earn-out Payment and a payment for the

post-closing adjustment of working capital. (R. 51-53). The following provisions of the APA are relevant to this appeal:

The Earn-Out Payment – Section 3.3 of the APA

Section 3.3 of the APA, titled "Earn-Out," provides as follows:

> (a) Earn-out Payment. As additional consideration for the Acquired Assets, at the time provided in Section 3.3(d), Buyer shall pay to Seller with respect to the Earn-out Period an amount, if any (the "***Earn-out Payment***"), equal Eight Hundred Eighty-two Thousand and 00/100 Dollars ($882,000.00) so long as LTM Revenue for the Earn-out Period exceeds the Revenue Threshold. If LTM Revenue does not exceed the Revenue Threshold, no Earn-out Payment shall be due for the Earn-out Period.[3]
>
> (c) Independence of Earn-out Payments. Buyer's obligation to pay the Earn-out Payment to Seller in accordance with Section 3.3(a) is an independent obligation of Buyer.
>
> (d) Timing of Payment of Earn-out Payments. Subject to Section 3.3(e), if Buyer is required to make the Earn-out Payment pursuant to Section 3.3(a), such payment shall be made no later than twelve (12) months after the Closing Date. Buyer shall pay to Seller the Earn-out Payment in cash by wire transfer of immediately available funds to the bank account for Seller set forth on Section 3.3(d) of the Disclosure Schedules.
>
> (e) 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; and (ii) any Adverse Consequences to which any Buyer Indemnitee may be entitled under Article VII of this Agreement.
>
> (f) No Security. The Parties hereto understand and agree that (i) the contingent rights to receive the Earn-out Payment shall not be represented by any form of certificate or other instrument, are not transferable, except by operation of Law relating to descent and distribution, divorce and community property, and do not constitute an equity or ownership interest in Buyer, (ii) Seller shall not have any rights as a securityholder of Buyer as a result of Seller's contingent right to receive the Earn-out Payment hereunder, and (iii) no interest is payable with respect to the Earn-out Payment.

(R. 53-54).

[3]The "Earn-out Period" means "the period beginning on the Closing Date and ending on the three-month anniversary of the Closing Date." (R. 73). And the "Revenue Threshold" means $1,000,000.00. (R. 77.) Thus, if the 12-month trailing gross revenue of Apple Services, Inc. exceeded $1,000,000.00 as of the Closing Date ***and*** at the end of the Earn-out Period, *i.e*. August 10, 2021, then the Earn-out payment is earned and due to be paid to Jordan.

In its answers to Plaintiffs' First Requests for Admission, LSL admitted that the Acquired Business exceeded the Revenue Threshold of $1,000,000.00 as of May 10, 2021, and August 10, 2021. (*See* R. 303). LSL admitted that Jordan "earned" the Earn-out Payment. (*Id.*).

As to the timing of the Earn-out Payment, the APA provides in Section 3.3(d): "[s]ubject 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 . . . in cash by wire transfer of immediately available funds to the bank account for Seller." (R. 54). The deadline for payment was thus May 10, 2022. LSL's obligation to make the Earn-out Payment is an "independent obligation," subject to limited rights of set-off. (*Id.*) Those rights of set-off, include (1) the post-closing adjustment of working capital and (2) any "Adverse Consequences" to LSL, as set forth in Section 7.1, of the APA.[4] (*Id.*) LSL did not present any evidence to the trial court of any right of set-off arising from Adverse Consequences.

While the APA contains a dispute resolution mechanism in Section 3.3(b) relating to the Earn-out, it applies only to the "determination of LTM Revenue for the Earn-out Period and whether the Earn-out Payment shall be made." (R. 53). Thus, the dispute resolution mechanism provided in subsection 3.3(b)(ii) was not implicated here, because LSL has admitted that the acquired Business exceeded the Revenue Threshold of $1,000,000.00 for the Earn-out Period and that Jordan "earned" the Earn-out Payment. (*See* R. 303).

[4] The APA defines "Adverse Consequences" as claims and resulting damages arising from (a) "misrepresentation or breach of warranty"; (b) "nonfulfillment of any covenant"; (c) any "liability or obligation of [Jordan] to any Party not being assumed by [LSL]" under the APA; and (d) "any liability or obligation arising out of the Business prior to the Closing, including, without limitation, the Vehicle Accident." (*See* R. 54; R. 65, R. 72).

The Post-Closing Adjustment of Working Capital – Section 3.2 of the APA

The APA also requires that LSL pay Jordan a Post-Closing Adjustment of Working Capital. (*See* R. 51-53). Not later than one-hundred days after the May 10, 2021 Closing date, or August 19, 2021, "Buyer shall prepare and deliver to Seller (A) a statement setting forth its calculation of Closing Working Capital," and "(B) a certificate of the Controller of Buyer" stating that the statement was prepared in accordance with generally accepted accounting principles. (R. 51.) In other words, LSL was required to provide Jordan a Closing Working Capital Statement, calculating the Working Capital as of the date of Closing ("Working Capital Statement"). (*Id.*).

If the Working Capital exceeded $84,000.00, LSL was required to pay Jordan the amount of the difference (the "Post-Closing Adjustment") within thirty-days of that determination, which was September 20, 2021. (R. 52). If the Working Capital was less than $84,000.00, Jordan was required to pay the difference to LSL. (*Id.*). The APA further provides that interest shall accrue on the Post Closing Adjustment at 12% per annum from the Post-Closing Adjustment Due Date until paid in full. (*Id.*).

STANDARD OF REVIEW

This Court must affirm a grant of summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; *Singleton v. Sherer*, 377 S.C. 185, 197, 659 S.E.2d 196, 202 (Ct. App. 2008). Stated another way, "summary judgment is proper where plain, palpable, and indisputable facts exist on which reasonable minds cannot differ." *Rothrock v. Copeland*, 305 S.C. 402, 405, 409 S.E.2d 366, 368 (1991).

Although the "evidence and its reasonable inferences must be viewed in the light most favorable to the nonmoving party," *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 115, 410

S.E.2d 537, 545 (1991), "it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine," *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 460, 892 S.E.2d 297, 300 (2023).

The rules expressly contemplate that motions for summary judgment will be decided based on the summary judgment record, including affidavits and admissions by the parties. "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." Rule 56(e) SCRCP; *Belton v. Cincinnati Ins. Co.*, 360 S.C. 575, 580, 602 S.E.2d 389, 392 (2004).

ARGUMENT

I. The circuit court correctly granted judgment to Jordan on the Earn-out Payment. Under the APA, the Earn-out payment is due and owing.

"The construction and enforcement of an unambiguous contract is a question of law for the court, and thus can be properly disposed of at summary judgment." *Middleborough Horizontal Prop. Regime Council of Co-Owners v. Montedison S.p.A.*, 320 S.C. 470, 478, 465 S.E.2d 765, 770 (Ct. App. 1995). Section 3.3(a) of the APA states that the Earn-out Payment of $882,000.00 is "additional consideration for the Acquired Assets" of the "Business." (R. 53). Whether it is "earned" is contingent on only one metric: whether "LTM Revenue for the Earn-out Period exceeds the Revenue Threshold." (*Id.*)

The APA provides that LSL's "obligation to pay the Earn-out Payment to Seller in accordance with Section 3.3(a) is an *independent* obligation of Buyer." (R. 54. (emphasis added)). The APA also provides that "[s]ubject 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* . . . in cash by wire transfer of *immediately available funds* to the bank account for Seller . . . ." (R. 54. (emphasis added)). Section 3.3(e) provides that LSL "shall have the right to withhold and set off against" the Earn-out Payment "the amount of any Post-Closing Adjustment owed to it pursuant to Section 3.2." (*Id.*).

LSL admitted in its discovery responses that the Revenue Threshold has been met and the Earn-out Payment was "earned." (R. 303). LSL is thus clearly "required to make the Earn-out Payment pursuant to Section 3.3(a)" and to do so no later than 12-months after the Closing Date "by wire transfer of immediately available funds" to the Seller's bank account. (R. 54).

Even after this admission, LSL continues to resist making this payment, relying solely on the "subject to" clause in Section 3.3(d) and the right to set-off the Post Closing Adjustment in Section 3.3(e). The essence of LSL's argument is that the Earn-out Payment is *not* a sum certain because *payment* is conditioned on and *subject to* a prior calculation of the Post Closing Adjustment. "[U]nless 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 claims for damages." (Appellant's Initial Brief ("AIB"), p. 18).

First, this is a logical fallacy, because it is equally possible, and more probable than not based upon the undisputed evidence before the trial court, and as discussed in the following section, that the calculation of the Post Closing Adjustment could result in *an amount owed to Jordan*. In such a case, LSL's right of set-off would not exist and could not possibly stand as a reason to delay payment of the Earn-out Payment beyond the 12-month limit clearly stated in the APA. In fact, the only actual Working Capital Calculation produced by LSL in discovery, and the

only one in the record here, shows net working capital of $84,000.00, which would result in a Post Closing Adjustment payment to Jordan of $1,000.00.00. (R. 298-99).

Second, LSL's proposed interpretation of the "subject to" clause would improperly elevate the clause to the position of a condition precedent upon performance and have the effect of nullifying the contract language in Section 3.3(d) imposing a 12-month limit for payment of the Earn-out Payment. "A condition precedent is an act which must occur before performance by the other party is due." *Gecy v. S.C. Bank & Tr.*, 422 S.C. 509, 521–22, 812 S.E.2d 750, 757 (Ct. App. 2018) (quoting *Alexander's Land Co. v. M & M & K Corp.*, 390 S.C. 582, 596, 703 S.E.2d 207, 214 (2010)). Here, the only condition precedent for the Earn-out Payment to be "earned" is whether "LTM Revenue for the Earn-out Period exceeds the Revenue Threshold." (R. 53). LSL has admitted that this lone condition was met.

Third, LSL's proposed interpretation of the "subject to" clause would ignore the contract provision stating that the obligation to pay the Earn-out Payment is an "independent" obligation. An earn-out provision in an asset purchase agreement often includes an independent obligation clause to ensure the buyer's duty to pay is separate and enforceable regardless of other contractual conditions. The appellate court in *Colaco v. Cavotec*, considered claims for breach of an asset purchase agreement where the buyer withheld a $2-million performance earn-out payment based on the Seller's failure to forward certain post-closing customer payments it received on the Buyer's behalf. *Colaco v. Cavotec SA*, 25 Cal. App. 5th 1172, 1182, 236 Cal. Rptr. 3d 542, 552 (2018). In its opinion, the *Colaco* court provided a thorough and comprehensive statement of the three legal principles relevant here. First,

> [t]he obligations of the parties to a contract are either dependent or independent. The parties' obligations are dependent when the performance by one party is a condition precedent to the other party's performance. In that event, one party is excused from its obligation to perform if the other party fails to perform. If the

> parties' obligations are independent, the breach by one party does not excuse the other party's performance. Instead, the nonbreaching party still must perform and its remedy is to seek damages from the other party based on its breach of the contract.

Colaco, 25 Cal. App. 5th at 1182–83, 236 Cal. Rptr. 3d at 552–53; *accord Am. Nat. Bank of Winter Haven, Fla., v. Caldwell*, 166 S.C. 194, 164 S.E. 613, 615 (1932).

Second, "[t]he law is settled that where covenants of a contract are to be performed at different times, they are independent, and the breach by one party of his covenant does not excuse the performance by the other party of his covenant or relieve him of liability for damages for a breach thereof." *Colaco*, 25 Cal. App. 5th at 1182–83, 236 Cal. Rptr. 3d at 552–53; *Am. Nat. Bank of Winter Haven, Fla.*, 166 S.C. 194, 164 S.E. at 615 (holding covenants to pay prior installments of purchase money note for deed "are independent of the covenant to convey, but the payment of the last installment and the delivery of the deed are dependent and concurrent.")

Third "[w]hen a covenant or promise goes only to a part of the consideration, and a breach thereof may be paid for in damages, it is an independent covenant or promise." *Colaco*, 25 Cal. App. 5th at 1182–83, 236 Cal. Rptr. 3d at 552–53.; *Am. Nat. Bank of Winter Haven, Fla.*, 166 S.C. 194, 164 S.E. at 616 ("where mutual covenants go to the whole of the consideration on both sides, they are dependent, but if to only a part of the consideration, they are independent, and the reason for this rule is apparent and sound.")

> Whether specific contractual obligations are independent or dependent is a matter of contract interpretation based on the contract's plain language and the parties' intent. Dependent covenants or [c]onditions precedent are not favored in the law, and courts shall not construe a term of the contract so as to establish a condition precedent absent plain and unambiguous contract language to that effect. To construe covenants as dependent is to work a forfeiture as to one party, and no obligation of a contract is to be regarded as a condition precedent unless made so by express terms or necessary implication. Courts are disinclined to construe the stipulations of a contract as conditions precedent, unless compelled by the language of the contract plainly expressed. Where, as here, the parties present no extrinsic

> evidence on the meaning of their contract, we independently interpret the contract to determine whether its covenants are independent or dependent.

Colaco, 25 Cal. App. 5th at 1182–83, 236 Cal. Rptr. 3d at 552–53 (internal citations and quotations omitted).

Here, the APA states that the obligation to pay the Earn-out Payment in cash by wire transfer to the Seller's bank account within 12-months of the closing date is an "independent obligation" of the Buyer, LSL. (R. 54). There can be no dispute about the parties' intent, based on the plain, unambiguous language of the APA, and no extrinsic evidence on this clause was offered by either party. As LSL discusses at length in its Brief, the APA's payment schedule "require[ed] that the Post-Closing Adjustment be finalized and paid many months *prior* to payment on the Earn-out." (AIB at p. 22-24). This fact only reinforces the "settled law" that where "covenants of a contract are to be performed at different times, they are independent, and the breach by one party of his covenant does not excuse the performance by the other party of his covenant or relieve him of liability for damages for a breach thereof." *Colaco*, 25 Cal. App. 5th at 1183, 236 Cal. Rptr. 3d at 553. Finally, the Earn-out Payment was only a part of the total purchase consideration for the Acquired Assets of the Business, contingent upon only whether the LTM Revenue exceeded the Revenue Threshold, which LSL has admitted it did.

And other sections of the APA also distinguish between "independent" and "dependent" provisions.

> 7.5. Independent Significance. The Parties intend that each representation, warranty and covenant contained herein has independent significance. If any Party has breached any representation, warranty or covenant contained herein in any respect, the fact that there exists another representation, warranty or covenant relating to the same subject matter (regardless of the relative levels of specificity) which the Party has not breached will not detract from or mitigate the fact that the Party is in breach of the first representation, warranty or covenant.

(R. 66).

As LSL stated in its initial brief: "trial courts in South Carolina must consider *all* provisions in the contract, *not just isolated clauses*." (AIB at p. 22; citing *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)).

For these reasons, LSL's proposed interpretation of the "subject to" language in section 3.3(d) of the APA is illogical and unreasonable and would improperly elevate this clause to a condition precedent for payment. It would also have the effect of nullifying the 12-month outer limit for payment of the Earn-out payment in section 3.3(d) and the "independent obligation" language in section in section 3.3(c). It simply does not accord with other provisions of the APA or established principles of contract interpretation.

LSL's other arguments excusing or delaying payment of the Earn-out lack merit.

To further justify its delay in paying the Earn-out Payment, and rather than attempting to refute the evidence presented by Jordan or abide by the plain language of the contract, LSL has repeatedly argued that it has "provided '*several*' Working Capital Statements and Earn-out calculations to Respondents, but Jordan refused to accept the statements and failed to cooperate with LSL to provide the necessary financial documentation to complete the payments." (AIB pp. 12-13 (emphasis added)). LSL claims that "[b]ecause of Respondent Jordan's bad faith and lack of cooperation, the parties were precluded from reaching a 'final determination' on the Post-Closing Adjustment." (AIB p. 11). Notably LSL did not put any affidavit or any of these "several"

Closing Working Statements in the record before the trial court.[5] Thus, there was no evidence to refute the properly made and supported Motion presented by Jordan.

Further, LSL's claim that Jordan failed to provide necessary financial documents to complete either the Working Capital Statement or the Earn-out Calculation is completely belied by LSL's competing argument that LSL produced "several" such statements to Jordan. And the claim that LSL lacked access to Jordan's financial information is belied by the ***unrefuted*** Jordan Amended Affidavit, which demonstrates that after the closing of the APA, LSL's employees had full access to the "dispatch and accounting software" used in the Acquired Business, and that in a meeting on May 20, 2021, 10-days after the closing date, and in another meeting on May 9, 2022, Jordan and others met with LSL employees "to review financial information of the purchased Business for the preceding 12-month period." (R. 189-190).

Plaintiffs also presented ***unrefuted*** evidence that *the Post Closing Adjustment should result in a payment to Jordan*. On May 9, 2022, Jordan, Ashley Hawn, and Stephen Porter, an attorney for Plaintiffs, attended a meeting with LSL employees to discuss several issues related to the APA, including the overdue Post-Closing Adjustment. (*See* R. 220-21; R. 195). Darra Coleman, an attorney for LSL; Tim Freeman ("Freeman"), LSL's manager; Jacob Taylor, LSL's accountant; and an IT specialist attended the meeting on behalf of LSL. (*See* R. 221; R. 195-196). At that meeting, Taylor presented financial information regarding Apple Services' performance to all the

[5] In response to the Motion, LSL did not itself present any evidence of a single Closing Working Capital Statement (or Earn-out calculation) presented to Jordan. In response to discovery requests from Plaintiffs, LSL produced only one, undated, single page, "draft" Closing Working Capital calculation apparently shared by email only between two LSL employees, Brandi Milsap and Jacob Taylor, on October 7, 2021. Plaintiffs, not LSL, presented this document to the trial court. This document shows "Adjusted Net Working Capital" at Closing on May 20, 2021, of $85,000.00, which would mean a Post Closing Adjustment payment of $1,000.00 *from LSL to Jordan* and would result in no set-off to the Earn-out Payment. (R. 313) attached as Exhibit D to Plaintiffs' April 16, 2025, supplemental memorandum in support of their Motion. (*See* R. 311-313).

meeting participants. (*See* R. 221; R. 196). Taylor stated that Apple Services was "$79,000 to the good" on the working capital adjustment, meaning LSL owed Jordan a Post-Closing Adjustment equal to $79,000.00. (*See* R. 221; R. 196).[6]

Even so, Jordan has a contractual right under the APA to object to LSL's proposed Working Capital Calculation, and he suffers no penalty for doing so. (R. 52). ("On or prior to the last day of the Review Period, Seller [Jordan] may object to the [Buyer's/LSL] Closing Working Capital Statement . . . ."). LSL's remedy in such case is to invoke the dispute resolution procedure provided in Section 3.2(b)(iii) of the APA and allow the Independent Accountant to "resolve the Disputed Amounts only and make any adjustments to the Post-Closing Adjustment, as the case may be, and the Closing Working Capital Statement." (R. 52). Per the APA, the Post Closing Adjustment of Working Capital was due to be calculated and paid on or about September 17, 2021. (R. 315, 324-25). In the many months and years since this deadline, LSL has failed to invoke the contractual procedure for resolving this issue, and presented no evidence to the trial court that it had. For this reason, if no other, LSL should not be allowed to continue using this issue as a reason to further delay the Earn-out Payment.

LSL did not meet its burden of showing a genuine issue of fact in response to Jordan's properly made and supported Motion.

In the face of Jordan's properly made and supported Motion, LSL did not have the luxury of resting on its pleadings but rather had the burden to come forth with "specific facts showing

[6] LSL's argument that these affidavits are inadmissible hearsay is completely misplaced because the affiants all describe information or events of which they have first-hand knowledge. The out-of-court statements in the affidavits were made by LSL's employee accountant, Jacob Taylor "in a meeting between the parties" on May 9, 2022 "to discuss several issues related to the APA, notably the Closing Working Capital Statement and the Earn-out Calculation." (AIB at p. 26.) Pursuant to SCRE 801(d)(2)(D) ("A statement is not hearsay if - . . . the statement is offered against a party and is (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship.")

that there is a genuine issue for trial." Rule 56(e), SCRCP. LSL argues *incorrectly*, and for the first time in Appellant's Initial Brief, that "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." (AIB p. 16). This issue is not preserved for this Court's review. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 734 (1998) (holding that an argument must have been raised to and ruled on by the circuit court to be preserved for appellate review).

In addition, this statement is false and irrelevant to the inquiry at the Rule 56 stage as LSL was required to present facts showing a genuine issue for trial. Plaintiff had ample time to conduct any discovery it wished. It simply failed to do so. The complaint in this matter was filed on June 8, 2022. Sixteen months and 3 weeks later on October 30, 2023, Plaintiffs filed the subject Motion on the breach of contract claim. Seventeen months and 2 weeks later, on April 17, 2025, the trial court held a hearing on the Motion. If, in fact, a lack of discovery prevented LSL from adequately opposing the Motion, it was incumbent on LSL to file an affidavit pursuant to Rule 56(f) demonstrating this fact. It did not do so.

LSL further argues that the Court erred by relying on the affidavits of Plaintiff Jordan, Ashley Hawn, and Stephen Porter, which were submitted with Plaintiffs' original motion for partial summary judgment. (R. 329). Rule 56 contemplates that motions for summary judgment will be decided based on the summary judgment record, including affidavits. To the extent the affidavits contain information within the personal knowledge of the affiant, they are not hearsay. Under Rule 56(e), a responding party has a range of alternatives for rebutting a submitted affidavit. LSL did not elect to pursue those options. There was nothing inappropriate about the consideration of the affidavits. Furthermore, none of the affidavits are cited in the Order other than to state that Plaintiffs submitted them in support of their motion for partial summary judgment. (R. 12-21).

The findings of fact in the Order are grounded solely upon the plain language of the APA and LSL's responses to the Plaintiffs' Requests for Admission. (*Id.*). Therefore, the consideration of the affidavits does not present a basis for reversal.

LSL further argues that the Court erroneously relied on an email from Darra Coleman dated May 17, 2022, for purposes of establishing the Earn-out. (AIB pp. 27-28). This is also inaccurate. LSL, not Plaintiffs, relied on this email to attempt to side-step its obligations under the APA and to argue that the Earn-out Payment was not yet due, despite being earned, a fact clearly admitted in LSL's responses to Plaintiffs' Request for Admit. No. 8.[7] Plaintiffs, and in turn, the Court, addressed this email only to establish that LSL does not have any viable evidence to support the assertion that the Earn-out Payment was not yet due, because the email does not represent an agreement between the parties to an "adjusted timeline for payment of the Earn-out." Assuming, as LSL suggests, but without conceding, that this email is hearsay evidence and does not meet basic authentication requirements, and thus cannot be relied on to support summary judgment (AIB p. 27), then Plaintiffs have no evidence in support of their theory that the parties agreed to an "adjusted timeline for payment of the Earn-out" and have abandoned that argument in opposition to Plaintiffs' Motion.

Jordan is entitled to prejudgment interest on the Earn-out Payment.

The Earn-out Payment is a sum certain that is due and owing.

"The law permits the award of prejudgment interest when a monetary obligation is a sum certain, or is capable of being reduced to certainty, accruing from the time payment may be

[7] Request to Admit No 8: "The Earn-out Payment" was earned and due to be paid to Jordan by LSL on May 10, 2022.
"**RESPONSE**: Admitted that the Earn-out payment was earned but denied that the Earn-out payment was due to be paid to Jordan by LSL on May 10, 2022, 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." (R. 303-04).

demanded either by the agreement of the parties or the operation of law." *Miller Constr. Co., LLC v. PC Constr. of Greenwood, Inc.*, 418 S.C. 186, 206–07, 791 S.E.2d 321, 332 (Ct. App. 2016) (quoting *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 435, 673 S.E.2d 448, 457 (2009)); *see also* S.C. Code Ann. § 34–31–20(A) ("In all cases of accounts stated and in all cases wherein any sum or sums of money shall be ascertained and, being due, shall draw interest according to law, the legal interest shall be at the rate of eight and three-fourths percent [8¾%] per annum.").

LSL argues that "prejudgment interest is not appropriate here because the Earn-out payment has not been calculated with certainty absent the setoff of the Post-Closing Adjustment." (AIB at p. 34). "*The right of a party to prejudgment interest is not affected by rights of discount or offset claimed by the opposing party*. It is the character of the claim and not the defense to it that determines whether prejudgment interest is allowable." *Miller Constr. Co., LLC*, 418 S.C. at 207, 791 S.E.2d at 332–33 (quoting *Butler Contracting, Inc.*, 369 S.C. at 133–34, 631 S.E.2d at 259). "The fact that the amount due is disputed does not render the claim unliquidated for purposes of awarding prejudgment interest. Rather, the proper test is 'whether or not the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose." *Miller Constr. Co., LLC*, 418 S.C. at 207, 791 S.E.2d at 332–33 (quoting *Butler Contracting, Inc.*, 369 S.C. at 133, 631 S.E.2d at 259). Here, there can be no question that the "measure of recovery," $882,000.00, was "fixed by conditions existing at the time the claim arose," because it was plainly stated in the APA.[8]

[8] If the Post Closing Adjustment results in an amount due to LSL, then that obligation will bear interest at 12% per annum from the time of the Post-Closing Adjustment Due Date to the time it is "paid in full." (R. 52). This is a greater amount of interest than the legal rate of 8.75% pursuant to S.C. Code Ann. § 34–31–20(A).

LSL's reliance on *Hess v. Morphis Pediatric Grp. of Lancaster, P.A.*, 446 S.C. 389, 416, 920 S.E.2d 1, 15 (Ct. App. 2025) is misplaced because that case is distinguishable from this one. In *Hess*, a physician sued his employer for payment of wages and a share of the profits of the business pursuant to a 2010 employment agreement. The *Hess* court agreed that prejudgment interest should be denied given the "uncertainty [] involved because many terms in Hess's employment agreement were unclear and undefined" and reversed the award of prejudgment interest finding:

> 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 his bonus. Thus, Hess's claims were unliquidated because the amount of his bonuses could not be reduced to a certainty.

Id., 446 S.C. at 416, 920 S.E.2d at 15.

LSL mistakenly compares the above process involved in *Hess* of determining the amount of net revenue of a business after deducting business expenses, or calculating what are the actual business profits, subject to the 50% compensation bonus payment amid "unclear and undefined" agreement terms, as "akin to a setoff." (AIB p. 35). This is not a fair characterization.

In contrast, here, the Earn-out Payment is a stated sum certain specifically set forth in the APA. There is no uncertainty and no genuine issue of material fact as to the amount of the Earn-out Payment. The amount of the Earn-out Payment is not subject to being calculated by any formula with "unclear and undefined" inputs or the subjective application of generally accepted accounting principles. It is the quintessential "liquidated" sum. The only calculation involved was whether the LTM Revenue Threshold had been met, and LSL has admitted, albeit only after years of litigation, that it was and that the sum certain Earn-out Payment had been "earned." The Earn-out Payment is also therefore demandable "by the agreement of the parties." *Miller Constr. Co., LLC* 418 S.C. at 206–07, 791 S.E.2d 332.

The APA does not prohibit an award of prejudgment interest on the Earn-out Payment.

LSL argued for the first time in its Rule 59(e) motion that the APA's Earn-out section prohibits an award of prejudgment interest because it states "no interest is payable with respect to the Earn-out Payment." (R. 54). This argument was not made previously and a party cannot raise new arguments in a Rule 59(e) motion. *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990). For this reason, the argument is not preserved for appellate review.

Whether preserved for review or not, LSL's proposed interpretation of section 3.3(f) is not reasonable because it disregards the contractual and regulatory context of Section 3.3(f). In whole, Section 3.3(f) provides:

> No Security: The Parties hereto understand and agree that (i) the contingent rights to receive the Earn-out Payment shall not be represented by any form of certificate or other instrument, are not transferable, except by operation of Law relating to descent and distribution, divorce and community property, and do not constitute and equity or ownership interest in Buyer, (ii) Seller shall not have any rights as a security holder of Buyer as a result of Seller's contingent right to receive the Earn-out Payment hereunder, and (iii) no interest is payable with respect to the Earn-out Payment.

(R. 54)

The purpose of Section 3.3(f) is to ensure that the earn-out right is not classified as a security under U.S. securities law, thereby avoiding the registration requirements of the Securities Act of 1933. The Securities and Exchange Commission ("SEC"), through a series of no-action letters beginning in 1988 has consistently identified five factors to determine whether an earn-out payment is a contractual right rather than a security,

> (1) it is an integral part of the consideration to be received in the proposed transaction;
> (2) it is not represented by a form of certificate or instrument;
> (3) the holder of the earn-out right has no rights common to stockholders such as voting and dividend rights***, nor does the earn-out right bear a stated interest rate***;
> (4) it does not represent an equity or ownership interest in the buyer or the target company;
> (5) it is not assignable or transferable, except by operation of law.

Ryan Murr, Stephen Glover, Branden Berns, Behind The 'CVR Spin' Method Of Unlocking Assets In M&A, Page 3, citations included on page 7 (Law360, March 11, 2024) https://www.gibsondunn.com/wp-content/uploads/2024/03/Murr-Glover-Berns-Behind-The-CVR-Spin-Method-Of-Unlocking-Assets-In-MA-Law360-3-11-24.pdf; Richard De Rose, The Ins and Outs of Earn-Outs: A Delaware Perspective (American Bar Association, March 18, 2022).

For example, in the no action letter to Minnesota Mining and Manufacturing Company ("3M") dated October 13, 1988, the SEC staff did not require registration under the Securities Act for contingent payment rights structured as part of the merger consideration in a stock-for-stock acquisition. *Minnesota Mining & Mfg. Co.*, 1988 WL 234978 (S.E.C. No - Action Letter Oct. 13, 1988). There, a portion of the consideration took the form of contingent rights, similar to an earnout, entitling the former shareholders of the acquired company to receive additional shares of 3M common stock if specified post-closing performance targets were achieved. The SEC Staff cited the following factors as relevant to its decision: (1) the contingent rights were an integral component of the merger consideration; (2) the holders of the rights had no stockholder privileges, such as voting or dividend rights; (3) the contingent rights bore no stated interest; (4) the contingent rights were nontransferable except by operation of law; and (5) the contingent rights were not represented by any form of certificate or instrument. (*Id.*)

The inclusion of the "no interest payable" clause specifically addresses the third factor. The intent of Section 3.3(f) was to reinforce that the Earn-out Payment lacks characteristics of an investment security, not to preclude prejudgment interest as a statutory remedy resulting from delayed payment of a contractual obligation.[9] Allowing LSL to evade prejudgment interest would

[9] Further, the commentary on the template document underlying the APA between the parties highlights these factors as the rationale for including Section 3.3(f): "Parties should include this provision to ensure the right to receive the earn-out payments is not deemed to be a security under

reward noncompliance with contractual obligations, contrary to both parties' intent and established principles of contract law.

Furthermore, the interpretation suggested by LSL is not reasonable or fair because it would allow LSL to indefinitely withhold payment of the Earn-out without consequence or penalty, as it has done in this case. In fairness to the seller, contract payments of a sum certain which have been "earned" and are "demandable" pursuant to the contract should qualify for pre-judgment interest to prevent unjust enrichment to the Buyer and a forfeiture for the Seller. Based on South Carolina law, a judgment debtor must pay interest "as compensation for his continued retention and use of the creditor's money beyond the date payment was due." *Sears v. Fowler*, 293 S.C. 43, 45-46, 358 S.E.2d 574, 575 (1987). In *Butler v. Contracting, Inc. v. Court Street, LLC*, the South Carolina Supreme Court emphasized that a debtor could not hold back a due sum without compensation to the creditor when the sum was certain or reducible to certainty because a dispute as to the amount does not make a claim unliquidated, and importantly, offsets and counterclaims cannot defeat a claim for prejudgment interest because "it is the character of the claim and not the defense to it" that governs entitlement. 369 S.C. at 133-35, 631 S.E.2d at 258-59.

Here, the earn-out is a stated sum certain of $882,000.00. This sum was earned upon satisfaction of the APA's threshold metric and demandable on the APA's due date. Therefore, as emphasized by the South Carolina Supreme Court in *Butler*, LSL may not indefinitely withhold this sum certain without compensating Jordan for the time-value of the withheld payment. Denying

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applicable U.S. securities laws." *Purchase Agreement: Earn-Out with EBITDA Targets*, Practical Law Corporate & Securities (Thomson Reuters, 2025), available on Westlaw (Practical Law Document No. 2-501-7344). https://1.next.westlaw.com/Document/I03f4dac8eee311e28578f7ccc38dcbee/View/FullText.html?originationContext=document&contextData=%28sc.RelatedInfo%29&cacheScope=undefined&transitionType=DocumentItem&chunkSize=XXL&docSource=33a6f3d72ff240719f54a2bed6f4f865

interest would allow LSL to unjustly benefit from delay: LSL would have *de facto* use of the funds–effectively an interest free loan–while Jordan is deprived of the economic value of money rightfully owed. This is exactly the kind of inequitable result South Carolina's statutory and common law prohibits.

The right to prejudgment interest is a statutory remedy that has not been waived.

Finally, the right to prejudgment interest is a statutory remedy and there is no indication in the APA or elsewhere that the parties intended to waive this statutory remedy. *Keane v. Lowcountry Pediatrics, P.A.*, 372 S.C. 136, 143, 641 S.E.2d 53, 57 (Ct. App. 2007) ("The determination of the appropriateness of an award of [prejudgment] interest . . . is a question of law because the right to relief is entirely statutory."). Although parties may contractually waive certain statutory rights, such waivers are disfavored and must be strictly construed. *Tri-South Mortg. Investors v. Fountain*, 266 S.C. 141, 147-148, 221 S.E.2d 861, 864 (1976). The South Carolina federal district court in *Eldeco* emphasized this principle in rejecting an asserted waiver of prejudgment interest. *Eldeco, Inc. v. Skanska USA Bldg., Inc.*, No. CV 2:05-2329-PMD, 2007 WL 9735185. There, the plaintiff argued that the subcontract between the parties incorporated general-conditions language waiving claims for prejudgment interest. The court disagreed, holding that a waiver of statutory prejudgment interest must be explicit and unambiguous, and no such language appeared in the subcontract. The subcontract bound Eldeco only with respect to its work, not to a broad waiver of statutory remedies. After considering evidence outside of the subcontract and strictly construing the language of the subcontract, the court found no clear contractual relinquishment of Eldeco's statutory right and proceeded to apply South Carolina's prejudgment interest statute.

Here, Jordan has not expressed a clear and unambiguous waiver of his rights to prejudgment interest. The evidence outlined above indicates that the "no interest" language was

intended to reinforce that the Earn-out lacks characteristics of an investment security, not to preclude prejudgment interest as a statutory remedy. Strictly construing the language of the APA, and considering other authorities, underscores that Jordan did not intend to waive the right to prejudgment interest. Therefore, this Court should not interpret the APA to waive Jordan's statutory right to prejudgment interest. As the Order and this Brief explain, the situation here meets the statutory requirements for an award of prejudgment interest, and the prejudgment interest awarded by the Court does not begin to accrue until the date the Earn-out Payment was due. For all these reasons, the trial court's award of pre-judgment interest does not contravene the contractual prohibition against interest on the Earn-out Payment.

CONCLUSION

Based on the record before it, the circuit court correctly granted summary judgment in Jodan's favor as to the Earn-out Payment. In addition, the circuit court correctly found that pre-judgment interest was appropriate on that liquidated amount. For all of the reasons set forth above, the Court should affirm the trial court's amended order of partial summary judgment filed June 12, 2025.

Respectfully submitted,

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