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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

Dale E. Van Slambrook, Circuit Court Judge

Appellate Case No. 2026-001588

Edward E. Schatz, Jr., individually and derivatively on behalf of Bajìo, Inc., Respondent.

v.

Alvin P. Perkinson, III; Matthew Banker; Paul R. Vigano; and, as a nominal Defendant, Bajío, Inc., Defendants,

of which Alvin P. Perkinson, III and Bajío, Inc. are the Appellants, Appellants.

APPELLANTS' BRIEF.

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STATEMENT OF ISSUES[1]

1. In accordance with Delaware's "commitment to contractarianism," Delaware law upholds stockholders' freedom to contract about how to exercise their voting power. Did the trial court err in finding likelihood of success on merits and declaring a stockholder agreement which delineated a nomination procedure to elect board members invalid?
2. Under South Carolina law, for a preliminary injunction to be granted, a party must show likelihood of irreparable harm. The circuit court order failed to note evidence of irreparable harm to contradict empirical evidence of Bajìo, Inc.'s financial growth and stability. Did the trial court err in finding likelihood of irreparable harm?
3. Under South Carolina law, the purpose of a preliminary injunction is to preserve the status quo ante. The circuit court order granting preliminary injunction removed and replaced sitting board members and declared the election procedures set forth in the stockholder agreement invalid. Did the circuit court's preliminary injunction preserve the status quo ante?

[1] Individual Defendants, Alvin P. Perkinson, III; Matthew Banker; and Paul R. Vigano have not been properly served with the Summons and Complaint in accordance with South Carolina Rule of Civil Procedure 4. A Motion to Dismiss for lack of service is pending before the circuit court and not the subject of this appeal. However, Appellants note this lack of service deprives the circuit court of jurisdiction over Individual Defendants.

STATEMENT OF THE CASE

This matter concerns interpretation of the corporate documents of a Delaware company under Delaware law. The parties disagree on whether certain corporate documents conflict with one another and, in turn, the appropriate procedure by which members of the Board of Directors must be elected.

Bajío, Inc. ("Bajío" or "Appellant") is a company organized and existing under the laws of Delaware. It operates in accordance with its (1) Fifth Amended and Restated Certificate of Incorporation (the "Certificate"); (2) Bylaws (the "Bylaws"); and (3) Stockholders Agreement (the "SHA"). Section 9.11 of the SHA states, "[t]his Agreement shall be governed by the internal law of the State of Delaware, without regard to conflict of law principles that would result in the application of any law other than the law of the State of Delaware." (R. p. ___; SHA ¶ 9.11). However, by the terms of the Certificate, the courts of South Carolina "shall be the sole and exclusive forum." (R. p. ___; Certificate, ¶ Twelfth).

Each class of investors is permitted to elect directors to the Bajío Board of Directors (the "Board"). Pursuant to Section 3.2 of the Certificate, holders of Series E Preferred stock are entitled to elect one director to the Board; holders of Preferred Stock are entitled to elect two members of the Board; and holders of Common Stock are entitled to elect two members of the Board. (R. p. ___; Certificate, ¶ 3.2). At the time this action was filed, the Board was comprised of five members: (1) Al Perkinson (Common Stockholder director); (2) Randall Parker (Common Stockholder director); (3) Matthew Banker (Preferred Stockholder director); (4) Paul Vigano (Preferred Stockholder director); and (5) Fred Tanne (Series E Preferred Stockholder director). This lawsuit is rooted in Respondent's attempt to sidestep SHA election procedures to remove the two Preferred Stockholder directors (Matthew Banker and Paul Vigano) from the Board and replace them with

himself and an individual named Marshall Gregory.

Section 6.2(c) of the SHA (an agreement signed by all Bajío investors) expressly sets forth the manner and process by which preferred stockholders exercise their right to elect members of the Board. Specifically, because no stockholder owns a majority of the Preferred Stock, there is a clear two-step process for selecting Board members: nominate, then elect. Board candidates are **(1)** nominated by the Board before **(2)** running for election, with votes being cast by the preferred stockholders. Section 6.2 reads, in relevant part:

> 6.2 Board Composition. Each Stockholder agrees to vote, or cause to be voted, all Shares owned by such Stockholder, or over which such Stockholder has voting control, from time to time and at all times, in whatever manner as shall be necessary to ensure that at each annual or special meeting of stockholders at which an election of directors is held or pursuant to any written consent of the stockholders, the following Persons shall be elected to the Board:
>
> . . .
>
> (c) Two (2) individuals designated by the single holder of at least a majority of the shares of Preferred Stock (voting together as a single class on an as-converted basis), but if there is not a single holder of at least a majority of the shares of Preferred Stock (voting together as a single class on an as-converted basis), **then such individuals shall be nominated by the Board and elected by the holders of the Preferred Stock** in accordance with the Certificate. At the Company's Annual Meeting of Stockholders held on April 14, 2023, Matthew Banker and Paul R. Vigano were elected to these positions.

(R. p. ___; SHA, § 6.2) (emphasis added).

The events giving rise to this lawsuit took place on January 23, 2026, when Respondent submitted a Written Consent of the Preferred Stockholders (the "Written Consent") purporting to remove Banker and Vigano as members of the Board, and install Respondent and Gregory in their place. Neither Respondent nor Gregory was nominated by the Board and, therefore, the Written Consent violated the SHA.

Because the Written Consent failed to comply with Section 6.2 of the SHA, the Board did

not recognize the removal of Vigano and Banker, nor did it recognize Respondent or Gregory as new members of the Board. Section 8.1 of the SHA appoints as proxy and grants a power of attorney to the president of Bajío with full power of substitution in the event a stockholder fails to vote in a manner consistent with the election procedure set forth in Section 6 of the SHA. Accordingly, because the purported election of Respondent and Gregory did not comply with Section 6, Bajío's president reinstated Vigano and Banker pursuant to Section 8.1 of the SHA. The power of attorney provision of the SHA served as a failsafe to protect the contractually mandated voting procedure.

On February 19, 2026, Respondent filed this action in the Charleston County Court of Common Pleas seeking a declaration that (1) Banker and Vigano were removed from the Board and (2) Schatz and Gregory are installed in their place as directors of the Board. Respondent also sought a preliminary injunction prohibiting any action by Perkinson, Banker, and Vigano inconsistent with the removal of Banker and Vigano and replacement with Schatz and Gregory. Respondent argued that the SHA interferes with the investors' right to elect directors, as set forth in Section 3.2 of the Certificate.

On March 9, 2026, Respondent filed a Motion for Temporary Restraining Order seeking the same relief. The Motion was denied by Circuit Court Judge Dale Van Slambrook, holding that:

> The Court is **unconvinced of Plaintiff's likelihood of success on the merits**, as stated in the arguments by Defendant. Further, that imposition of the requested TRO is likely to **upset the status quo between the parties, rather than preserve it**.

(R. p. ___; TRO Order) (emphasis added).

Respondent followed by filing a Motion for Preliminary Injunction, which was heard by the Court on May 22, 2026. After the hearing, the Court indicated it would grant Respondent's

Motion and asked Respondent's counsel to submit a proposed order. Respondent's counsel did so on June 3, 2026. On June 9, 2026, Appellants' counsel submitted written objections to the proposed order along with a request to submit their own order for the Court's consideration.

On July 2, 2026, the Court entered an order granting Respondent's Motion for Preliminary Injunction. (R. p. ___; Order). The Court found that the SHA conflicted with the Certificate and declined to enforce the nominate-then-elect requirements. The Court also determined the applicable "status quo" for purposes of the preliminary injunction analysis was **after** the Written Consent was submitted – *i.e.*, **after** the specific action disputed in this case. The Order includes very brief discussions of the likelihood of success on the merits, irreparable harm, and inadequate remedy at law elements. It also required that Respondent post a $250,000.00 bond pursuant to Rule 65(c) of the South Carolina Rules of Civil Procedure. Fifteen days later, on July 17, 2026, Appellants filed their Notice of Appeal.

STANDARD OF REVIEW

This is an appeal of an order granting a preliminary injunction. "Actions for injunctive relief are equitable in nature." *Grosshuesch v. Cramer*, 367 S.C. 1, 4, 623 S.E.2d 833, 834 (2005) citing *Wiedemann v. Town of Hilton Head,* 344 S.C. 233, 236, 542 S.E.2d 752, 753 (Ct.App.2001). "In equitable actions, the appellate court may review the record and make findings of fact in accordance with its own view of the preponderance of the evidence." *Id.* citing *Doe v. Clark*, 318 S.C. 274, 276, 457 S.E.2d 336, 337 (1995).

ARGUMENT

For a preliminary injunction to be entered, the plaintiff must establish that: (1) he would suffer irreparable harm if the injunction is not granted; (2) he will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law. *Scratch Golf Co. v Dunes W.*

Residential Golf Props, Inc., 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004); *Peek v. Spartanburg Reg'l Healthcare Sys.,* 367 S.C. 450, 454–55, 626 S.E.2d 34, 36 (Ct. App. 2005). Our Supreme Court has squarely stated that, "[t]he party seeking an injunction has the burden of demonstrating facts and circumstances warranting an injunction." *Strategic Res. Co. v. BCS Life Ins. Co*., 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). Further, "the inherent purpose behind the equitable remedy of an injunction [is] to preserve the status quo." *Cnty. of Richland v. Simpkins*, 348 S.C. 664, 671, 560 S.E.2d 902, 905 (Ct. App. 2002); s*ee also Powell v. Immanuel Baptist Church,* 261 S.C. 219, 221, 199 S.E.2d 60, 61 (1973) ("[T]he sole purpose of a temporary injunction is to preserve the status quo . . .").

In this action, Appellants respectfully maintain that the Circuit Court erred on multiple fronts.

First, its finding that Respondent was likely to succeed on the merits conflicts with Delaware law and the factual record. Delaware law underscores an investor's right to enter into contracts as he or she sees fit, and the case law consistently enforces stockholder agreements like the SHA.

Second, the Circuit Court found irreparable harm while disregarding uncontroverted evidence that Bajío was financially healthy, stable, and operating successfully. The Order also relied on an irreparable-harm provision tied to a breach of the SHA, despite Respondent never alleging breach.

Third, the Order failed to preserve the status quo ante and instead granted Respondent the ultimate relief sought in this litigation. Rather than maintaining the circumstances that existed before the controversy in this case, the Order removed sitting directors and installed Respondent's preferred Board members before the merits were adjudicated.

I. The Circuit Court erred in finding Respondent was likely to succeed on the merits.

A. The Order creates an unnecessary conflict between the Certificate and the SHA.

Delaware follows "the rule that contemporaneous contracts between the same parties concerning the same subject matter should be read together as one contract." *Comerica Bank v. Glob. Payments Direct, Inc.*, No. CIV.A. 9707-CB, 2014 WL 3567610, at *7 (Del. Ch. July 21, 2014); *Ashall Homes Ltd. v. ROK Ent. Grp. Inc*., 992 A.2d 1239, 1250 (Del. Ch. 2010) ("related contemporaneous documents should be read together" especially where they "effectuate[] separate steps of a single integrated scheme"); *Crown Books Corp. v. Bookstop Inc.*, 1990 WL 26166, at *1 (Del.Ch. Feb. 28, 1990) ("[I]n construing the legal obligations created by [a] document, it is appropriate for the court to consider not only the language of that document but also the language of contracts among the same parties executed or amended as of the same date that deal with related matters.")

Here, the Circuit Court held that the Certificate and SHA "cannot be reconciled." (R. ____; Order, 8). The Court's determination is at odds with Delaware law and disregards the factual record. Appellants presented evidence at the preliminary injunction hearing that the Certificate and SHA were effectuated the same exact day: March 6, 2024. (R. ____; Bajío PI Exhibits 4 and 6, SHA and Certification). The Order fails to address how sophisticated parties, likely represented by counsel, would have intended to enact two documents on the very same day that cannot be reconciled with one another. If the goal of contract interpretation is to ascertain party intent, it seems much more likely that the parties intended the Certificate and SHA to work together rather than conflict with one another, especially considering their contemporaneous nature.[2]

[2] Respondent even conceded this point, testifying that the Certificate and SHA "can work together" and admitting he followed the nomination-and-election process without objection for five years. (R. ____, Hearing Transcript, 61, 64).

More fundamentally, a simple reading of the Certificate and SHA demonstrates two separate and distinct corporate-governance concepts: (1) the Certificate's allocation of election rights among stockholder classes and (2) the SHA's contractual procedure for nominating candidates for election. The Certificate determines *who may vote* and *for how many seats*; the SHA determines *how candidates are nominated* before they stand for election. The Circuit Court conflated these distinct functions, erroneously treating a nomination procedure as an improper restriction on voting rights. That error led the Court to declare the SHA unenforceable. As discussed *infra*, the SHA's nomination procedure is valid under Delaware law.

In short, the Circuit Court's inaccurate reading of Delaware law led to an incorrect result. There is no need to invalidate either document. The Certificate sets forth *how many* seats on the Board each class of investors may elect and the SHA – by agreement of every investor, including Respondent – sets forth *how the directors will be elected*. The documents work in conjunction with one another.

B. The Order relies on an abrogated case and contravenes well-settled Delaware law, which recognizes the validity of stockholder agreements like the SHA.

Delaware law is clear in that sophisticated parties are free to contract as they wish and Delaware courts will enforce those agreements. "The courts of this State hold freedom of contract in high—some might say, reverential—regard. Only a strong showing that dishonoring a contract is required to vindicate a public policy interest even stronger than freedom of contract will induce our courts to ignore unambiguous contractual undertakings." *Cantor Fitzgerald, L.P. v. Ainslie,* 312 A.3d 674, 676–77 (Del. 2024) (internal quotations omitted).

"Delaware's commitment to contractarianism should be at its height when stockholders enter into agreements about how they will exercise stockholder-level rights, because at that level, individual owners are bargaining over their private property. Consistent with that intuition, the

[Delaware General Corporation Law] demonstrates that stockholders can agree to greater constraints on their rights in a stockholders agreement than a corporation can impose in its charter or bylaws. As long as the contractual provision addresses a type of action that one stockholder or a group of stockholders can take, then there is greater space for private ordering, not less, when the provision appears in a stockholders agreement." *New Enter. Assocs. 14, L.P. v. Rich*, 295 A.3d 520, 570 (Del. Ch. 2023).

"Delaware law also permits stockholders to contract over their right to vote: An agreement between 2 or more stockholders, if in writing and signed by the parties thereto, may provide that in exercising any voting rights, the shares held by them shall be voted as provided by the agreement, or as the parties may agree, or as determined in accordance with a procedure agreed upon by them." *Id.*at 571, quoting 8 Del. C. § 218(c). Accordingly, stockholders are free to "contract about how to exercise their voting power to elect directors, and they could agree to maintain a lesser number of directors in office by making commitments about how to vote. That agreement would bind the stockholders as to the exercise of their rights qua stockholders, and it would not conflict with the charter or bylaws." *New Enter. Assocs. 14, L.P.*, 295 A.3d at 573; *See also Colon v. Bumble, Inc.*, 305 A.3d 352, 359 (Del. Ch.), judgment entered, (Del. Ch. 2023) ("A stockholder can freely choose whether or not to exercise a right, and a stockholder can contract in advance to assert a right in a particular way or not to assert it at all, thereby waiving it. The extent to which a stockholder can agree in a stockholder-level agreement to constrain its exercise of stockholder rights therefore differs from than the extent to which a charter can limit or eliminate those rights.").

In *Manti Holdings, LLC v. Authentix Acquisition Co., Inc*., 261 A.3d 1199, 1214 (Del. 2021), the Delaware Supreme Court discussed a "Refrain Obligation" within a stockholder

agreement, where common stockholders agreed to "refrain" from exercising appraisal rights with respect to a merger. *Id.* The Court held that the Refrain Obligation was not a restriction that needed to be included in the certificate of incorporation stating, "the Refrain Obligation is not a stock restriction because the Stockholders Agreement imposed *personal* obligations on the stockholders rather than encumbrances on the property rights that run with the stock. The parties, including the Company, did not transform the Petitioners' shares of stock into a new restricted class via the Stockholders Agreement; instead, individual stockholders took on contractual responsibilities in return for consideration." *Id.* at 1215 (cleaned up).

The Delaware Supreme Court's opinion in *Salomone v. Gorman* is instructive. 106 A.3d 354 (Del. 2014). In *Salomone*, stockholders executed a Voting Agreement providing that one director was "designated by the majority of the holders of the Series A Preferred Stock." *Id.* at 360. In an effort to gain board control, defendant Gorman attempted to nominate his own slate of directors without securing the approval of the stockholders. The Management Group argued that his slate was invalid under the shareholder agreement. Gorman countered that the shareholder agreement was void because it conflicted with the Certificate of Incorporation. The Delaware Supreme Court rejected Gorman's argument, holding that the "Voting Agreement established a two-step process in connection with the nomination and election of directors. The nominees are designated in the first step according to the Voting Agreement (which is permitted under Section 218(c)). Then, the nominees are elected in the second step consistent with the 'one share/one vote' default rule under Section 212(a)." *Id.* at 383–84.

The Order in our case is silent on *Salomone*. Instead, the Circuit Court relied on *W. Palm Beach Firefighters' Pension Fund v. Moelis & Co.*, 311 A.3d 809, 863 (Del. Ch. 2024) to find that "a stockholders' agreement may not alter voting rights established by the Certificate" and that the

SHA's nomination procedure impermissibly conflicted with the Certificate of Incorporation. (R. p. ___; Order). The Court's reliance is misplaced. First, SHA does not alter voting rights; it creates a process by which directors are elected. Second, the Court omits any discussion of the aftermath of the *Moelis* opinion. In swift response to the decision, the Delaware General Assembly adopted 8 Del. C. § 122(18):

> Every corporation created under this chapter shall have power, whether or not so provided in the certificate of incorporation, to…(18) Notwithstanding § 141(a) of this title, make contracts with 1 or more current or prospective stockholders (or 1 or more beneficial owners of stock), in its or their capacity as such, in exchange for such minimum consideration as determined by the board of directors (which may include inducing stockholders or beneficial owners of stock to take, or refrain from taking, 1 or more actions); provided that no provision of such contract shall be enforceable against the corporation to the extent such contract provision is contrary to the certificate of incorporation or would be contrary to the laws of this State (other than § 115 of this title) if included in the certificate of incorporation. Without limiting the provisions that may be included in any such contracts, the corporation may agree to: (a) restrict or prohibit itself from taking actions specified in the contract, (b) require the approval or consent of 1 or more persons or bodies before the corporation may take actions specified in the contract (which persons or bodies may include the board of directors or 1 or more current or future directors, stockholders or beneficial owners of stock of the corporation), and (c) covenant that the corporation or 1 or more persons or bodies will take, or refrain from taking, actions specified in the contract (which persons or bodies may include the board of directors or 1 or more current or future directors, stockholders or beneficial owners of stock of the corporation). Solely for purposes of applying the proviso in the first sentence of this subsection, a restriction, prohibition or covenant in any such contract that relates to any specified action shall not be deemed contrary to the laws of this State or the certificate of incorporation by reason of a provision of this title or the certificate of incorporation that authorizes or empowers the board of directors (or any 1 or more directors) to take such action. With respect to all contracts made under this paragraph (18), the corporation shall be subject to the remedies available under the law governing the contract, including for any failure to perform or comply with its agreements under such contract.

Delaware courts and treatises have interpreted this amendment to serve as a codification of the validity of the restrictions contained in stockholder agreements which the *Moelis* decision deemed improper. *See* 8 Del. C. § 122(18); Edward J. Yocum, *Setting Boundaries: The Delaware Courts Define the Contours of Shareholder Primacy and Board Primacy After Moelis and*

Mcritchie, 49 Del. J. Corp. L. 711, 717–18 (2025) ("The Delaware corporate bar reacted swiftly to seek legislative relief for this unexpected decision. The Delaware legislature passed an amendment, creating a new subsection (18) expressly authorizing a corporation to enter into contracts of the type invalidated by the *Moelis* decision and was signed into law by Governor Carney on July 17, 2024."); § 4:6. Agreements which limit powers of directors or tend to influence their decisions, 1 Close Corp and LLCs: Law and Practice § 4:6 (Rev. 3d ed.) ("[I]n 2024 Delaware enacted legislation adding § 122(18) that authorized an agreement between any one shareholder and the board of directors that could supplant such traditional director power, even if not included in the company's certificate of incorporation")

In a subsequent order, the *Moelis* court, itself, acknowledged the "prompt legislative response" to its decision and recognized that, "Three months after the court issued its merits opinion, legislation was introduced in the General Assembly to mitigate— if not annul—the effects of the court's opinion." *Moelis & Co. v. W. Palm Beach Firefighters' Pension Fund*, No. 340, 2024, 2026 WL 184868, at *4 (Del. Jan. 20, 2026).

In a recently issued Chancery Court decision citing the *Moelis* opinion, the court noted that 8 Del. C. § 122(18):

> authoriz[ed] governance agreements that contain granular control mechanisms, including a provision 'requir[ing] the approval or consent of 1 or more persons or bodies before the corporation may take actions specified in the contract (which persons or bodies may include the board of directors or 1 or more current or future directors, stockholders or beneficial owners of stock of the corporation)' or 'covenant[ing] that the corporation or 1 or more persons or bodies will take, or refrain from taking, actions specified in the contract (which persons or bodies may include the board of directors or 1 or more current or future directors, stockholders or beneficial owners of stock of the corporation.'

Maclaughlan v. Einheiber, No. 2024-1126-JTL, 2026 WL 539796, at *1 (Del. Ch. Feb. 26, 2026). The Chancery Court specifically noted that the *Moelis* decision described a "suite of granular

control mechanisms that Section 122(18) expressly validated." *Id.* **Nevertheless, the Circuit Court's injunction squarely rests on the earlier *Moelis* decision to invalidate the voting procedure set forth in the SHA.**

Simply put, the newly adopted Section 122(18) confirmed the validity of stockholder agreements, even if they impact other rights, and abrogated the *Moelis* decision. The Circuit Court erred as a matter of law when it relied on *Moelis* and cast aside long-standing Delaware case law supporting free will and contractarianism to find that the SHA's two-step nomination and election procedure "fundamentally alter[ed] stockholder rights and governance provisions established in the Certificate." (R. p. ___; Order). The Court's holding lies in direct contrast with Delaware law.

C. The Written Consent violates the voting procedure set forth in the SHA.

Because Delaware law recognizes the control mechanisms set forth in SHA, Respondent's breach of those mechanisms eliminates any chance of success on the merits. The actions taken by Respondent through the Written Consent ignored the plain, unambiguous terms of the SHA which governs how Preferred Stockholders exercise their voting rights to nominate and elect directors. The SHA expressly requires Board nomination of candidates where no single preferred holder controls a majority. Through the Written Consent, Respondent attempted to bypass mandatory contractual protocols. By the express terms of the SHA, the Written Consent was not valid or effective and therefore Respondent cannot succeed on the merits.

The SHA provides that where "there is not a single holder of at least a majority of the shares of Preferred Stock (voting together as a single class on an as-converted basis), **then such individuals shall be nominated by the Board** and elected by the holders of the Preferred Stock in accordance with the Certificate." (R. p. ___; SHA, § 6.2) (emphasis added). Here, there is no single holder of the majority of preferred stock. The Board must nominate individuals to stand for election to serve on the Board. Neither Respondent nor Gregory were nominated by the Board,

yet the Circuit Court found they were properly elected, a finding that simply cannot be reconciled with the SHA. Respondent, a sophisticated investor himself, signed the SHA and now asks the Court to nullify its terms. (R. p. ___; SHA). Respondent's actions were invalid and unenforceable pursuant to well established principles of Delaware law in conjunction with the clear terms of the SHA. Thus, Appellants maintain that the Circuit Court's findings with respect to likelihood of success on the merits were unsupported by the evidence and controlled by an error of law.

II. The Circuit Court erred in finding likelihood of irreparable harm.

The Circuit Court disregarded empirical evidence, misinterpreted the SHA, and misapplied Delaware law to find a likelihood of irreparable harm. For these reasons, its Order granting Respondent's Motion for Preliminary Injunction should be reversed.

First, the Circuit Court failed to address the uncontested evidence of Bajío's financial wellbeing that directly undermines arguments concerning irreparable harm. Bajío presented empirical evidence through its Chief Financial Officer Sarah Swafford that, *inter alia*, the company is thriving financially, with significant margins, healthy EBITDA, and double-digit sales growth. (R. p. ___; Aff. of Swafford.) Ms. Swafford testified that, "There is ample cash/liquidity to run Bajío today through the 2026 budget period assuming financial targets are met." (R. p. ___; Aff. of Swafford.) She added that, "[a]ll vendors are current and within Bajío's historical payment guidelines and vendors shipping new inventory without requiring any special terms or restrictions (i.e. Letters of Credit)," and "[a]ll debt is current and in full convenient compliance." (R. p. ___; Aff. of Swafford.) Respondent offered no evidence to refute these points. (R. ____; Hearing Transcript, 55–56). The Order fails to address how or why the CFO's uncontested testimony is not credible.

The Order further failed to address how or why uncontested testimony by Bajío's Chief

Executive Officer, Al Perkison, is not credible. Mr. Perkinson testified that removing and replacing two directors at this point in time (rather than through annual elections) would cause irreparable harm to the company. (R. p. ___; Aff. of Perkinson). Specifically, he testified that, "The change in Board composition, and subsequent changes in company direction created by that change, would cause disruption during the height of the season when the company's focus must be on driving sales and profits." *Id.* Mr. Perkinson detailed the extensive industry experience held by current Board members Banker and Vigano in contrast with the complete lack thereof by Respondent and Gregory. He unequivocally testified that "[Respondent's] hostile takeover of the Company would be highly disruptive and expose shareholders to significantly greater risk." *Id.* Again, Respondent presented no evidence to controvert Mr. Perkinson's testimony. (R. ____; Hearing Transcript, 55–56). The Circuit Court erred by failing to address this uncontested evidence, but nevertheless finding a likelihood of irreparable harm.

Second, in support of its irreparable harm findings, the Circuit Court found that, "the Parties agreed in the Stockholders' Agreement that any breach thereof would cause irreparable harm and entitle the non-breaching party to injunctive relief." (R. p. ___; Order). The Court's conclusion finds no support in the record. At no point in the Complaint, Motion for Temporary Restraining Order, Motion for Preliminary Injunction, or anywhere else in this case has Respondent alleged a breach of the SHA. Rather, Respondent insisted that the SHA was unenforceable. Given that Respondent never alleged any breach, the section of the SHA providing for equitable relief – *only in the event of a breach* – cannot serve as a basis for granting injunctive relief in this case.

Finally, and as discussed in greater detail in Section I., the Circuit Court's conclusion that the SHA cannot coexist with the Certificate conflicts with Delaware law as well as the corporate

documents in this case. Any reliance upon that finding as evidence of irreparable harm is likewise a misapplication of Delaware law and done in error. Absent any conflict between the SHA and the Certificate, there is no basis for a finding of irreparable harm.

III. The Circuit Court employed an incorrect status quo ante analysis.

The Circuit Court's designation of the state of affairs on January 28, 2026 as the status quo is inconsistent with South Carolina law[3] in that it disrupts, rather than preserves, the true status quo between the parties. The Order's status quo analysis rests on a litany of merits-based findings that were improper at the preliminary injunction stage.

"The sole purpose of an injunction is to preserve the status quo." *Levine v. Spartanburg Reg'l Servs. Dist., Inc*., 367 S.C. 458, 464, 626 S.E.2d 38, 41 (Ct. App. 2005). "A preliminary injunction should issue only if necessary to preserve the status quo ante." *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc*., 387 S.C. 583, 586, 694 S.E.2d 15, 17 (2010); *Hook Point, LLC v. Branch Banking & Tr. Co*., 397 S.C. 507, 511, 725 S.E.2d 681, 683 (2012). By definition, status quo ante means: "The situation that existed before something else (being discussed) occurred." STATUS QUO ANTE, Black's Law Dictionary (12th ed. 2024); *Disability Rts. S.C. v. Richland Cnty*., No. 8:22-CV-1358-MGL-WSB, 2024 WL 7006037, at *14 (D.S.C. Dec. 9, 2024) ("In the Motion for Preliminary Injunction, Plaintiffs ask the Court to require Defendant to provide certain therapeutic services not currently available at ASGDC, to remediate current conditions of ASGDC facilities, and to rectify the staffing shortages at ASGDC. Such requests are not seeking to preserve the status quo but are instead a request to mandate that Defendant do something different.")

[3] South Carolina law, including Rule 65 of the South Carolina Rules of Civil Procedure, governs procedural matters including the preliminary injunction analysis.

"Although a court may consider the merits of a case to the extent necessary to determine whether a temporary injunction should be issued, it is improper for a court to make a final determination on the merits of a case at the hearing for a temporary injunction." *Roberts v. Union Cnty. Bd. of Sch. Trs*., 284 S.C. 299, 301, 326 S.E.2d 163, 164 (Ct. App. 1985); *see also Helsel v. City of North Myrtle Beach*, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992) ("it would have been improper for the hearing judge who issued the temporary injunction to make a finding upon the facts in such a manner as to affect the merits of the case.")

County of Richland v. Simkins is instructive. 348 S.C. 664 (Ct. App. 2002). In *Simkins*, the County sought an injunction preventing Defendant from continuing to operate Lucky's, which the County alleged was an unlawful sexually-oriented business. The Court of Appeals affirmed the denial of the preliminary injunction, noting that the trial court properly determined that the status quo was the continued operation of the business, and that any injunction would disrupt that status quo. The claim that Bajío improperly rejected the Written Consent, just like Richland County's assertions regarding Lucky's, represents a change to status quo that must be resolved on the merits. The Circuit Court's Order granting preliminary injunction effectively upended the Board composition and established a new Board, all under the assumption that the Written Consent could validly replace board members.

The purported restructuring of the Board set forth in the Written Consent triggered this lawsuit. The true status quo **ante** was the Board functioning as it existed on January 23, 2026, **before** Respondent attempted to remove and replace two Board members, not after-the-fact. Nevertheless, the Circuit Court held that status quo considerations required that Banker and Vigano be removed from the Board, and Respondent and Gregory installed in their place.

To reach that conclusion, the Court rendered multiple improper merits-based decisions at

the preliminary injunction stage. In other words, to enter an injunction that terminates Banker and Vigano's rights to serve on the Board and appoints Respondent and Gregory, logically the Court must **(a)** conclude that Section 6.2(c) of the SHA cannot be reconciled with Section 3.2 of the Certificate, **(b)** hold that Section 6.2(c) of the SHA is invalid and must be nullified by judicial decree, **(c)** find that Respondent was permitted to remove and replace two Board members, and **(d)** determine that Respondent was entitled to bypass the annual election cycle that has been observed and utilized by Bajío every year for elections since its inception. These holdings – all made in the absence of discovery, motion practice, and trial proceedings – were simply improper at the preliminary injunction stage and effectively granted Respondent his ultimate relief in the case. The result is improper as a matter of law.

The Order disrupts the parties' status quo before the controversy arose and supplants it with Respondent's ultimate desired outcome. The Court of Appeals should reverse the Order accordingly.

CONCLUSION

This appeal concerns far more than a disagreement over corporate governance. It turns on whether a preliminary injunction may be used to rewrite bargained-for contractual rights, disregard controlling Delaware law, and award substantive relief before the parties have had the opportunity to litigate the merits. The Circuit Court's Order reads a conflict into the Certificate and the SHA where none exists, relies on an abrogated decision, disregards Delaware's longstanding commitment to freedom of contract, and excuses Respondent's failure to comply with the very agreement he signed. Because Respondent failed to demonstrate a likelihood of success on the merits or irreparable harm, the essential prerequisites for injunctive relief were not met.

The Order also disrupts, rather than preserves, the status quo ante. By removing sitting

directors and installing Respondent's chosen replacements (including himself), the Circuit Court effectively granted Respondent the ultimate relief sought in this action while substantial legal and factual disputes remain unresolved. For these reasons, Appellants request that this Court reverse the Order Granting Preliminary Injunction and grant such other relief as it deems just and proper.

Respectfully submitted,

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PROOF OF SERVICE

I, the undersigned Attorney of the law offices of Womble Bond Dickinson (US) LLP, Attorneys for Respondents, do hereby certify that I have served the below parties in this action with a copy of the pleading(s) specified below by emailing a copy of the same to the following address(es):

Pleading: Appellant's Initial Brief

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