

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM Charleston COUNTY
Court of Common Pleas for the Ninth Circuit

The Honorable Bentley Price, Circuit Court Judge

Case No.: 2019-CP-10-00178
Appellate Case No.: 2019-001237

RECEIVED
AUG 23 2019
SC Court of Appeals

J. DANIEL MAHONEY.....Plaintiff / Respondent,

v.

THE MUHLER COMPANY, INC. and HENRY M. HAY, III, in his individual capacity,
Defendants/Appellants.....Defendants / Appellants.

APPELLANTS' RETURN TO RESPONDENT'S MOTION TO DISMISS APPEAL

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ATTORNEYS FOR APPELLANTS

Appellants, The Muhler Company, Inc. (“Muhler”) and Henry M. Hay, III (“Hay”), respond to Respondent J. Daniel Mahoney (“Mahoney”)’s motion to dismiss the appeal as follows.

I. THE ORDER IS IMMEDIATELY APPEALABLE

Respondents’ motion to dismiss the appeal should be denied¹ as the Order is immediately appealable.

A. The Order Denies in Part Muhler’s Motion to Stay and Compel Arbitration

That which we call a rose by any other name would smell as sweet.

Courts should look to the effect, not the label, of an order being appealed. *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 705 S.E2d 475 (Ct. App. 2011). An order denying a party’s right to arbitrate a dispute is immediately appealable. *E.g., New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 626, 667 S.E.2d 1, 4 (Ct. App. 2008).

The order proposed by Respondent and entered by the Court² is styled as “granting” Muhler’s motion to stay and compel arbitration; however, it expressly denies Muhler’s right to the method of arbitrator selection provided for in the arbitration provision. Accordingly, its effect is to deny Muhler’s motion in part.

¹ As this appeal involves a novel and/or close question, it is better suited for a ruling on the merits rather than a summary disposition.

Moreover, an issue in this appeal—whether the trial court had jurisdiction to consider matters outside of arbitrability—has been perhaps the most commonly litigated issue in arbitration nationwide. South Carolina has not addressed this question, but it is in issue in the case of *McIntire v. Seaquest, et al.*, set for oral argument in this Court on September 10, 2019. App. Case No. 2017-001270.

² **Exh. A** (June 24, 2019 Order).

1. The Purpose of the State and Federal Policies in Favor of Arbitration

There are strong State and Federal policies in favor of arbitration, the purpose of which is to promote efficient, economical resolution of disputes. *See Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013); *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001); *Thompson v. Pruitt Corp.*, 416 S.C. 43, 59, 784 S.E.2d 679, 688 (Ct. App. 2016).

2. The Purpose of Making Orders Denying Arbitration Rights Immediately Appealable

A powerful tool for promoting the policy in favor of arbitration is the guarantee of an immediate appeal of the denial of an arbitration right. If courts were to require a matter to proceed through trial before the denial of arbitration could be appealed, the benefits of the policy favoring arbitration would be lost.

Likewise here. If this order were found to be interlocutory and not immediately appealable, the issue (whether a Court must enforce an arbitrator selection provision when statutorily required to do so) could not be decided until the arbitration were concluded, post-arbitration matters heard and resolved by the Court, and final judgment entered.

This Court should find that this order is immediately appealable.

3. Muhler’s Arbitration Provision Contains an Arbitrator Selection Clause Which Courts are Statutorily Required to Enforce

The arbitration provision states that each party will select one arbitrator and the third shall be an employee of the accounting firm most recently employed by the corporation. **Exh. B** (Bylaws – Arbitration Provision). The inclusion of an employee of the accounting firm was intended to, and would, ensure a fair and accurate process that streamlines resolution of the dispute. In this dispute, for example, the corporation’s accounting firm (i) is well-acquainted

with the accounting concepts involved in valuing shares, which is central to the dispute, and (ii) is the organization most familiar with the corporation's finances for purposes of that valuation.

By statute, South Carolina courts are required to enforce arbitrator selection clauses:

If the arbitration agreement provides a method of appointment of arbitrators, *this method shall be followed*.

S.C. Code Ann. § 15-48-30 (emphasis added). The same holds true under the Federal

Arbitration Act:

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, *such method shall be followed*.

9 U.S.C. § 5 (emphasis added).

These statutes divest the courts of discretion with regard to arbitrator selection when an arbitration provision designates the method. *See also* 9 U.S.C. § 4 (a party "aggrieved by the alleged failure, neglect, or refusal of another to arbitrate" is entitled to an order "directing that such arbitration proceed *in the manner provided for in such agreement*" (emphasis added)).

4. Plaintiff Originally Sought to Have the Clause Rewritten by the Court

During oral argument, Plaintiff's counsel requested the Court rewrite the arbitrator selection clause and itself appoint the third arbitrator. The first Order signed by the Court did just that, appointing the Honorable Jack Early as the third arbitrator. **Exh. C** (June 5, 2019 Order).³

However, it is well-settled that courts are not permitted to rewrite parties' agreements. *See, e.g., Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002) ("It is not the function of the court to rewrite contracts for parties."); *Gordon Farms, Inc. v. Carolina*

³ The original order was inadvertently entered in the wrong case, hence the difference in case number on that Order.

Cinema Corp., 294 S.C. 158, 160, 363 S.E.2d 235, 236 (Ct. App. 1987) (“Parties to a contract have a right to make their own contracts, and when the contracts they make are capable of clear interpretation, the court’s province is confined to the enforcement of the contract as written; the court cannot exercise its discretion as to the contents of the contract or substitute its own construction for an agreement clearly entered into between the parties.”).

5. Plaintiff Then Asked the Court to Strike the Arbitrator Selection Provision

Realizing this overstep, Plaintiff then requested that the Court simply strike the arbitrator selection provision and replace it with the default provision found in the South Carolina Uniform Arbitration Act, S.C. Code Ann. § 15-48-30. Notably, this provision is the very same provision that provides, “[i]f the arbitration agreement provides a method of appointment of arbitrators, *this method shall be followed.*” *Id.* (emphasis added).

The Court granted Plaintiff’s request on the grounds that the original provision was “inequitable.”⁴ **Exh. A** at ¶ 2 (June 24, 2019 Order)

6. The Court’s Order is Erroneous, Denies Appellant an Arbitration Right, and Is Immediately Appealable

Appellant included an arbitration provision in its bylaws in order to minimize the duration and expense of dispute resolution. Part of that provision is a clause regarding the selection of arbitrators best suited to resolve the types of disputes most likely to arise in a close corporation. That clause must be enforced by statute. The Court’s order rewrites the arbitrator selection provision, despite the statutory obligation to enforce it. This is in error and, as it denies

⁴ As noted in Appellants’ Initial Brief, there is no evidentiary basis for such a finding.

Appellant a right under its arbitration clause, and for the reasons stated *supra* (and *infra*), it is immediately appealable.

B. The Order Affects the Mode of Trial, a Substantial Right

In South Carolina, orders affecting a substantial right are immediately appealable. S.C. Code Ann. § 14-3-330(2). The right to a particular mode of trial is a substantial right. *E.g.*, *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000) (“when a trial court’s order deprives a party of a mode of trial to which it is entitled as a matter of right, such order is immediately appealable”). Indeed, such orders *must* be immediately appealed, or the argument is waived. *Id.*

Under South Carolina law, the method of selecting arbitrators, if included in an arbitration provision, must be enforced by the courts. S.C. Code Ann. § 15-48-30. The Court’s Order affects the mode of trial by changing who the factfinders will be. *See, e.g., Creed v. Stokes*, 285 S.C. 542, 331 S.E.2d 351 (1985) (order referring case to master in equity affects mode of trial and was immediately appealable). The order is immediately appealable.

II. CONCLUSION

The Order in question is immediately appealable. Muhler requests this Court deny Respondents’ Motion to Dismiss.

This 22nd day of August, 2019
Charleston, South Carolina



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ATTORNEYS FOR APPELLANTS

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

J. DANIEL MAHONEY,

Plaintiff,

v.

THE MUHLER COMPANY, INC. and
HENRY HAY, SR., in his individual
capacity,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR CHARLESTON COUNTY

CASE NO.: 2019-CP-10-178

ORDER GRANTING DEFENDANTS'
MOTION TO STAY AND COMPEL
ARBITRATION

FILED
2019 JUN 24 PM 3:38
JULIE J. ARMSTRONG
CLERK OF COURT

Before the Court is a Motion to Stay the Case and Compel Arbitration filed by Defendants.

Having had the benefit of oral argument on May 31, 2019, as well as after reviewing materials provided by all parties at the hearing, the Court rules as follows:

1. Defendants' Motion is granted, and arbitration is compelled.
2. Based on the facts and circumstances of this dispute, I find Article XIII, Section 2 of the Amended Bylaws to the Muhler Company, Inc. regarding the selection of the arbitrators to be inequitable and therefore unenforceable. S.C. Code Ann. Section 15-48-10(a) ("A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.") I find Section 2 should be stricken.
3. Further, Article XIII, Section 8 contains a Severability clause meaning the remainder of the arbitration provision is valid and binding.
4. Having struck Article XIII, Section 2, the default arbitrator selection language of the South Carolina Uniform Arbitration Act applies: "If the arbitration agreement provides a method of appointment of arbitrators, this method is followed. In the absence thereof, there shall be three arbitrators with one chosen by the party making the demand for



arbitration, one chosen by the party against whom demand is made and the third being chosen by those two chosen by the parties.” S.C. Code Ann. Section 15-48-40.

5. I will retain jurisdiction of this case to hear all matters once the arbitration is concluded.

IT IS SO ORDERED.

This 24th day of June, 2019


The Honorable Bentley Douglas Price
Circuit Judge

AMENDMENT TO BYLAWS
THE MUHLER COMPANY, INC.

October 14, 2016

The following is hereby added to the Bylaws of The Muhler Company, Inc. dated May 31, 1996.

ARTICLE XIII - ARBITRATION

1. Procedures for Arbitration of Disputes. Any and all disputes, claims, or controversies (i) relating to the Corporation, (ii) brought against the Corporation by or on behalf of any third party or any shareholder of the Corporation, or (iii) between shareholders of the Corporation (hereinafter "Disputes"), shall, upon the demand of any party to such Dispute, be resolved via binding and final arbitration in accordance with the South Carolina Uniform Arbitration Act, S.C. Code §§ 15-48-10 et seq. (the "UAA").

For purposes of this Article, "shareholder" shall mean any shareholder of record, any beneficial owner of shares of the Corporation, or any former shareholder of record or beneficial owner of shares of the Corporation.

This provision applies, regardless of whether the Dispute is brought on the shareholder's own behalf, on behalf of the Corporation, or on behalf of any series or class of shares of the Corporation or shareholders of the Corporation against the Corporation or any Director, officer, manager, agent, or employee of the Corporation, including Disputes relating to the meaning, interpretation, effect, validity, performance, or enforcement of the Articles of Incorporation or these bylaws or relating in any way to such a Dispute or Disputes. For the avoidance of doubt, and not as a limitation, Disputes are intended to include derivative actions against the Corporation or its Directors, officers, or managers and class actions by shareholders against those individuals or entities and the Corporation. For the avoidance of doubt, a Dispute shall include a Dispute made derivatively on behalf of one party against another party.

2. Arbitrators. There shall be three arbitrators, each of whom shall be a Certified Public Accountant ("CPA") licensed in the State of South Carolina.

The claimant or claimants shall select one arbitrator within fifteen (15) days following notice of the demand for arbitration; provided, that, if there is more than one claimant, such arbitrator shall be selected by the majority vote of the claimants.

The respondent or respondents shall select one arbitrator within fifteen (15) days following notice of the demand for arbitration; provided, that, if there is more than one respondent, such arbitrator shall be selected by the majority vote of the respondents.

The third arbitrator shall be an employee of the Corporation's accountant. This third arbitrator will be appointed even in the event that the corporation is a claimant or respondent.

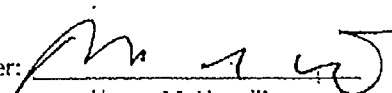
3. Place of Arbitration. The place of arbitration shall be Charleston, South Carolina.



4. Discovery. There shall be only limited documentary discovery of documents directly related to the issues in dispute, as may be ordered by the arbitrators.
5. Awards. All matters shall proceed under South Carolina law. Any arbitration proceedings or award rendered hereunder and the validity, effect and interpretation of this arbitration agreement shall be governed by the UAA; provided, however, that, if the UAA should be held inapplicable for any reason, then the Federal Arbitration Act, 9 U.S.C. §1 et seq. shall govern with respect to the foregoing. The Award shall be in writing and may, but shall not be required to, briefly state the findings of fact and conclusions of law on which it is based. Any monetary award shall be made and payable in U.S. dollars free of any tax, deduction or offset. The party or parties to the Dispute shall direct the arbitrators to issue the Award within thirty (30) days of the completion of the arbitration proceedings (subject to payment of the arbitrators as set forth below in Section 6 of this Article X). The party against which the Award assesses a monetary obligation shall pay that obligation on or before the thirtieth (30th) day following the date of the Award or such other date as the Award may provide. Costs and expenses shall be paid equally during the conduct of the proceeding, but shall be allocated by the panel in favor of the prevailing party.
6. Final and Binding. An Award shall be final and binding upon the parties thereto and shall be the sole and exclusive remedy between such parties relating to the Dispute, including any claims, counterclaims, issues, or accounting presented to the arbitrators. Judgment upon the Award may be entered in any court having jurisdiction. To the fullest extent permitted by law, no application or appeal to any court of competent jurisdiction may be made in connection with any question of law arising in the course of arbitration or with respect to any award made except for actions relating to enforcement of this agreement to arbitrate or any arbitral award issued hereunder and except for actions seeking interim or other provisional relief in aid of arbitration proceedings in any court of competent jurisdiction.
7. Beneficiaries. This Article is intended to benefit and be enforceable by the shareholders, Directors, officers, managers, agents or employees of the Corporation and the Corporation and shall be binding on the shareholders of the Corporation and the Corporation, as applicable, and shall be in addition to, and not in substitution for, any other rights to indemnification or contribution that such individuals or entities may have by contract or otherwise.
8. Severability. If any of the provisions, terms or clauses of this Article is declared illegal, unenforceable, or ineffective in a legal forum, those provisions, terms and clauses shall be deemed severable, such that all other provisions, terms, and clauses of this Article shall remain valid and binding upon the applicable parties.

Adopted by vote of the shareholders this 25 day of October 2016.

Attested to by Henry M. Hay, III, 75% stockholder:


Henry M. Hay, III

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

J. DANIEL MAHONEY,

Plaintiff,

v.

THE MUHLER COMPANY, INC. and
HENRY HAY, SR., in his individual
capacity,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR CHARLESTON COUNTY

CASE NO.: 2018-CP-10-5077

ORDER GRANTING DEFENDANTS'
MOTION TO STAY AND COMPEL
ARBITRATION

FILED
2019 JUN -5 AM 11:53
JULIE J. ARMSTRONG
CLERK OF COURT
RY

Before the Court is a Motion to Stay the Case and Compel Arbitration filed by Defendants. Having had the benefit of oral argument on May 31, 2019, as well as after reviewing materials provided by all parties at the hearing, the Court rules as follows:

1. Defendants' Motion is granted, and arbitration is compelled.
2. Based on the facts and circumstances of this dispute, I find Article XIII, Section 2 of the Amended Bylaws to the Muhler Company, Inc. regarding the selection of the arbitrators to be inequitable and therefore unenforceable. S.C. Code Ann. Section 15-48-10(a) ("A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.") I find Section 2 should be stricken.
3. Further, Article XIII, Section 8 contains a Severability clause meaning the remainder of the arbitration provision is valid and binding.
4. Having struck Article XIII, Section 2, the Court rules: In the absence thereof, there shall be three arbitrators with one chosen by the party making the demand for arbitration, one chosen by the party against whom demand is made and the third being

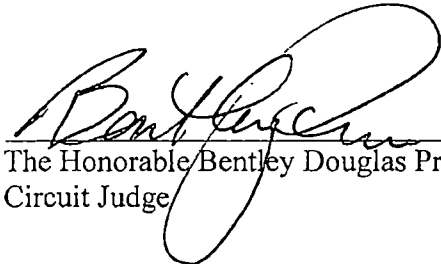


chosen by the Court. The Court hereby appoints Honorable Jack Early as the third arbitrator in the case.

5. I will retain jurisdiction of this case to hear all matters once the arbitration is concluded.

IT IS SO ORDERED.

This 5th day of June, 2019



The Honorable Bentley Douglas Price
Circuit Judge

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM Charleston COUNTY
Court of Common Pleas for the Ninth Circuit

The Honorable Bentley Price, Circuit Court Judge

Case No.: 2019-CP-10-00178
Appellate Case No.: 2019-001237

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Defendants/Appellants.....Defendants / Appellants.

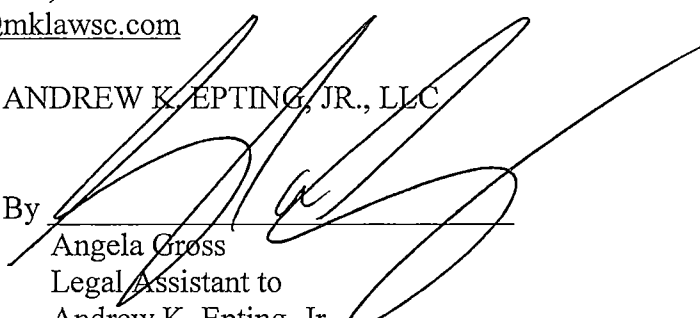
PROOF OF SERVICE

I certify that I have served Appellants' Return to Respondent's Motion to Dismiss Appeal on opposing counsel by depositing a copy in the United States Mail, Postage prepaid, on August 22, 2019, addressed to Respondent's attorneys of record as follows:

Clay McCullough, Esq.
359 King Street, # 200
Charleston, SC 29401
clay@mklawsc.com

ANDREW K. EPTING, JR., LLC

By


Angela Gross
Legal Assistant to
Andrew K. Epting, Jr.
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JAAN G. RANNIK · JGR@EPTING-LAW.COM

August 22, 2019

RECEIVED

AUG 23 2019

SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

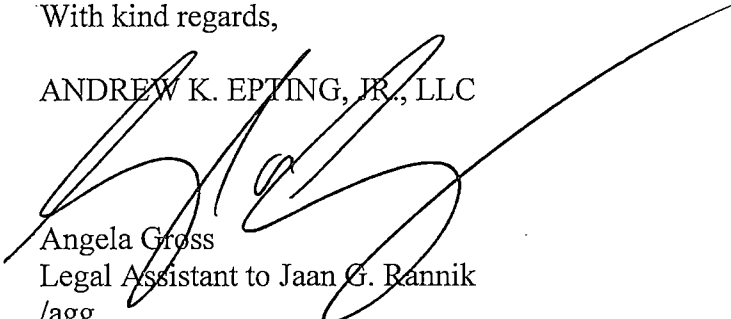
RE: *J. Daniel Mahoney v. The Muhler Company, Inc. and Henry M. Hay, III*
Case No.: 2019-CP-10-00178
Appellate Case No.: 2019-001237

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of Appellants' Return to Respondent's Motion to Dismiss and the original and one (1) copy of the Proof of Service of same in the above-referenced appeal. I would greatly appreciate your filing the originals and returning filed-stamped copies to me in the self-addressed, stamped envelope provided. Thank you.

With kind regards,

ANDREW K. EPTING, JR., LLC


Angela Gross
Legal Assistant to Jaan G. Rannik
/agg

Enclosures – as stated

cc: Clay McCullough, Esquire (w/enc.)

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1220 Senate Street
Columbia SC 29201-3769

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SC Court of Appeals
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