

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

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.: 2020-000370

J. DANIEL MAHONEY.....Respondent,

v.

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

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI

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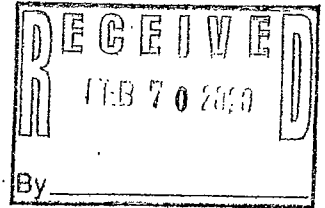
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The South Carolina Court of Appeals

J. Daniel Mahoney, Respondent,

v.

The Muhler Company, Inc. and Henry Hay III, in his
individual capacity, Appellants.



Appellate Case No. 2019-001237

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

James E. Lockery C.J.

Stephen P. McDonald J.

3ll J J.

Columbia, South Carolina

cc:

Clayton B. McCullough, Esquire

Andrew K. Epting, Jr., Esquire

Jaen Gunnar Rannik, Esquire

FILED

February 5, 2020

The South Carolina Court of Appeals

J. Daniel Mahoney, Respondent,

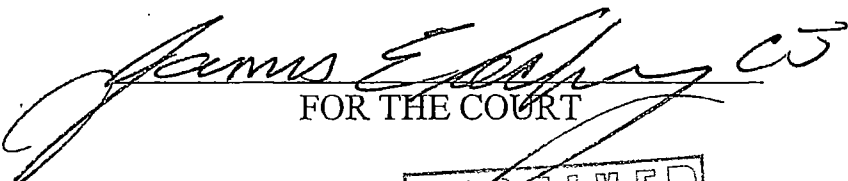
v.

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individual capacity, Appellants.

Appellate Case No. 2019-001237

ORDER

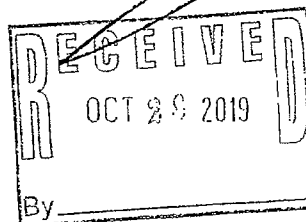
Respondent's motion to dismiss this appeal is granted. *See Toler's Cove Homeowners Ass'n, Inc. v. Trident Const. Co.*, 355 S.C. 605, 610, 586 S.E.2d 581, 584 (2003) (providing only those classes of orders listed in section 15-48-200(a) of the South Carolina Code (2005) are immediately appealable and holding an order compelling arbitration is not immediately appealable); *Heffner v. Destiny, Inc.*, 321 S.C. 536, 538, 471 S.E.2d 135, 136 (1995) (providing section 14-3-330 of the South Carolina Code (2017) has no applicability in determining the appealability of arbitration orders because a specific statute governs over a general statute). The remittitur will be provided as provided in Rule 221, SCACR.


FOR THE COURT

Columbia, South Carolina

cc:

Clayton B. McCullough, Esquire
Andrew K. Epting, Jr., Esquire
Jaan Gunnar Rannik, Esquire



FILED

October 25, 2019

The South Carolina Court of Appeals

J. Daniel Mahoney, Respondent,

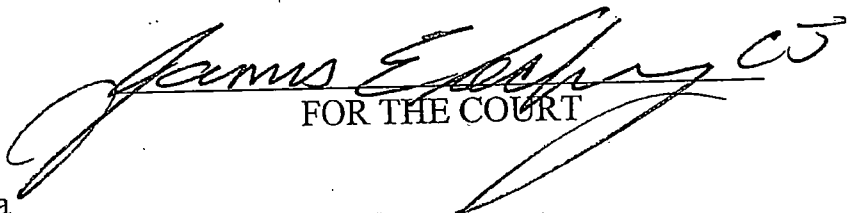
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Appellate Case No. 2019-001237

ORDER

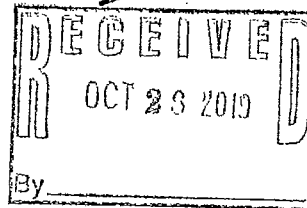
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FOR THE COURT

Columbia, South Carolina

cc:

Clayton B. McCullough, Esquire
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Jaan Gunnar Rannik, Esquire



FILED

0003

October 25, 2019

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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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.

PETITION FOR REHEARING

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Appellants, The Muhler Company, Inc. and Henry M. Hay, III, petition this Court pursuant to Rules 240(j), 221, and 219 S.C.A.C.R., for rehearing and *en banc* review of this Court's Order filed October 25, 2019 ("the Order"). The Order granted Respondent J. Daniel Mahoney's motion to dismiss the appeal, finding that the order appealed from granted a motion to compel arbitration and is therefore not immediately appealable. This was in error and Appellants seek rehearing *en banc* on the following bases.

I. **Manifest Error**

Under South Carolina and Federal law, arbitrator selection clauses must be enforced by the court. S.C. Code Ann. § 15-48-30 ("If the arbitration agreement provides a method of appointment of arbitrators, this method ***shall be followed.***" (emphasis added)); 9 U.S.C. § 5 ("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.***" (emphasis added)). The trial court struck the parties' arbitrator selection provision and then substituted its own arbitrator selection process. In substituting its own method, the trial court cites and quotes as support the very statute that says the substitution is prohibited and that the original method must be enforced. *See Exh. A* (Order, June 24, 2019) at ¶ 4. Whatever end-result is reached by the panel appointed by the trial court's substituted method will be reversed, because it will be based upon manifest error in the selection of the arbitrators. There is no interpretation required; the error of the trial court's order is obvious on its face.

Reversal is inevitable, and the only question is when the reversal will occur. If it occurs after this rehearing request, petition for *certiorari*, trial, and subsequent appeal, it will be three to five years from now. Alternatively, if it occurs in this appeal upon a motion by the Appellants to decide the case on the briefs, it can occur within the next eight to nine months.

II. Immediately Appealable

The Order dismissing this appeal overlooks and/or misapprehends the nature of the trial court order appealed from. Though styled an order “granting” the motion to compel arbitration, in reality it denies Appellants a right expressly set forth in the state and federal arbitration acts — to contractually establish the manner in which the arbitrators will be selected. At best, then, the order grants the motion in part and denies it in part by ordering arbitration on terms other than what are set forth in the arbitration provision. In light of the strong state and federal policy in favor of arbitration, and because any order denying a motion to compel arbitration is immediately appealable,¹ an order that denies such a motion *even in part* must also be immediately appealable.²

The arbitrator selection clause in the parties’ agreement states that each party to the dispute will select one arbitrator, both of whom will be CPAs, and the third arbitrator will be an employee of the accounting firm most recently employed by the Muhler Company. The trial court deemed the arbitrator selection provision “inequitable” and then rewrote it so that the court itself chose the third arbitrator (which a court is not permitted to do), before revising the ruling and simply striking the arbitrator selection provision entirely (rather than enforcing it, as a court is required to do).

In addition to how the three arbitrators are chosen, the arbitrator selection provision requires that all three arbitrators be CPAs, given that the disputes in question are most likely to be financial in nature. Since the order dismissing this appeal was entered however, Respondent Mahoney has appointed a non-CPA as his party-appointed arbitrator, instead naming an attorney

¹ *E.g., New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 626, 667 S.E.2d 1, 4 (Cl. App. 2008).

² This appears to be a matter of first impression in South Carolina, *see infra* Part III, rendering it of “exceptional importance” such that the matter should be heard *en banc* rather than being dismissed on a motion.

whose primary areas of practice are Personal Injury, Wrongful Death, Trucking Accidents, Motorcycle Accidents, Aviation Disasters, Premises Liability, Probate Litigation, Trust Disputes, Criminal Defense (City, State and Federal Charges), DUI Defense, Business and Shareholder Litigation, and Securities Litigation. So not only has the identity of the third arbitrator been altered by the trial court's ruling, but the required qualifications of the arbitrators have also been removed.³

By preventing arbitration pursuant to the express terms of the arbitration agreement, the trial court cannot be said to have "granted" the motion to compel arbitration. To illustrate, if a court ordered arbitration to proceed but changed the arbitration agreement so that the arbitration (i) was not binding, (ii) was to be performed pursuant to the South Carolina Rules of Civil Procedure with full discovery, and (iii) was to proceed not in front of arbitrators selected by the parties but in front of an arbitrator the court selected, would that properly be considered an order "granting" a motion to compel arbitration?

However the trial court's order is styled, it denies Appellants' motion to arbitrate pursuant to the parties' arbitration agreement, and it is immediately appealable.

III. Exceptional Importance

It is a matter of first impression whether, under South Carolina law, an order that is styled as "granting" a motion to compel arbitration pursuant to an arbitration agreement but denies an arbitration right set forth in that agreement is immediately appealable. The question is thus of exceptional importance and should be reheard *en banc*. Moreover, a negative answer to the question would run contrary to (i) the policy that parties' unambiguous agreements should be

³ Appellants do not believe this was the intent of the trial court's order, which was concerned with the identity of the third arbitrator, not the qualifications of the three arbitrators. This is another ground for reversal of the trial court's order.

enforced and (ii) the strong state and federal policy in favor of arbitration. These policies are themselves of exceptional importance.

Further, should this Court not rehear this issue, there is a risk that other parties will be able to gut the procedures set forth in an arbitration agreement and be safe from immediate appeal simply by calling the order in question an order "granting" the motion to compel arbitration. This would substantially weaken the policy in favor of arbitration.

These are issues of exceptional importance, and Appellants request rehearing before this Court *en banc*.

IV. Conclusion

For the reasons set forth herein, and for the reasons and arguments set forth in Appellants' briefs in this matter, all of which are incorporated herein, this Court should grant rehearing of the order dismissing this appeal.

This 7th day of November, 2019
Charleston, S.C.

Respectfully submitted:



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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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SC Court of Appeals

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

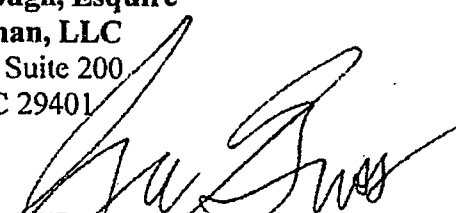
v.

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

PROOF OF SERVICE

The undersigned does hereby certify that he/she has served all counsel in this action with a copy of the Petition for Rehearing by mailing a copy of the same by United States Mail, postage prepaid, to the following:

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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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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. Sequest, 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

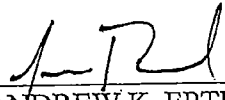
In South Carolina, orders affecting a substantial right are immediately appealable. S.C. Code Ann. § 14-3-330(2). The right to a particular mode of trial is a substantial right. *E.g.*, *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000) (“when a trial court’s order deprives 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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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

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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

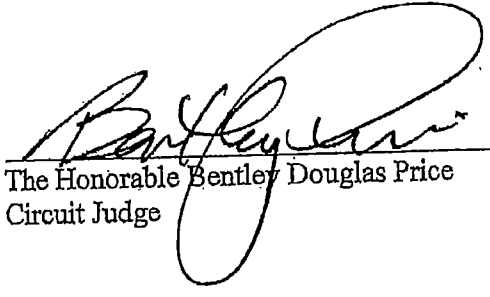


arbitration, one chosen by the party against whom demand is made and the third being chosen by those two chosen by the parties." S.C. Code Ann. Section 15-48-40.

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.

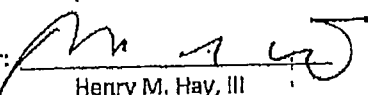
3. Place of Arbitration. The place of arbitration shall be Charleston, South Carolina.



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
BY *[Signature]*

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

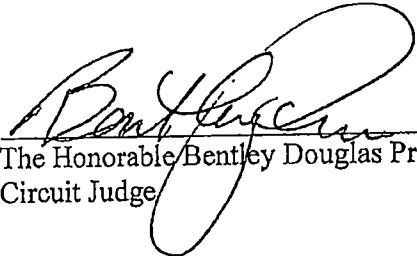


chosen by the Court. The Court hereby appoints Honorable Jack Early as the third arbitrator in the case.

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

RECEIVED

AUG 23 2019

SC Court of Appeals

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

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

v.

THE MUHLER COMPANY, INC. and HENRY M. HAY, III, in his individual capacity,
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.
Jaan G. Rannik
46A State Street, Charleston, SC 29401
Phone: 843-377-1871; Fax: 843-377-1310

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Bentley Price, Circuit Court Judge

Case No. 2019-CP-10-00178

J. Daniel Mahoney.....Respondent,

v.

The Muhler Company, Inc. and Henry Hay III, in his individual capacity..... Appellants.

RESPONDENT'S MOTION TO DISMISS

Background

In 2008, Henry Hay, III ("Hay"), the owner of The Muhler Company, Inc. ("Muhler"), hired J. Daniel Mahoney ("Mahoney") to serve as CEO of Muhler. As further incentive for this job, Hay also provided Mahoney with a 25% ownership interest in Muhler.

On or about January 15, 2008, Mahoney and Hay entered into a Stockholders' Agreement (attached hereto as Exhibit 1) whereby the stockholders for Muhler were set out with Hay owning 1000 shares and Mahoney owning 333 1/3rd shares. The Stockholders' Agreement was executed by Hay and Mahoney. The ownership remains the same with Hay owning 1000 shares and Mahoney maintaining ownership of his 333 1/3rd shares. There are no other shareholders. Mahoney served as Chief Executive Officer for Muhler from 2008 until he was terminated by Hay on September 18, 2018.

Article 3 of the Stockholder's Agreement states:

Upon the death or termination of the employment of Mahoney, the remaining Stockholders shall have the option to buy from Mahoney, or his Estate, as the case may be, all of the stock in the Corporation owned by Mahoney at the time of his departure or death by giving notice of acceptance as described in Article 2, Section A above. Should the remaining Stockholders not elect to exercise this option, based on the pro rata formula described in Article 2, Section A above, then the Corporation shall purchase and the departing or deceased Stockholder shall sell all of the stock in the Corporation owned by the departing Stockholder at the time of his death or departure. The option granted to the remaining Stockholders as described above shall expire fifteen (15) days after the completion of the valuation being made pursuant to Article 5 below, if a stipulated price is not applicable, and if such option lapses, then the Corporation shall purchase such shares of the departing or deceased Stockholder within thirty (30) days after the expiration of such option. The purchase price and terms of sale shall be as specified in Article 5 of this Agreement. Notwithstanding the above, this Article shall not supersede the provisions of Article 2 above regarding the voluntary sale of stock by a Stockholder.

Since Mahoney was terminated, neither the Stockholders nor the Corporation have purchased Mahoney's stock as dictated by Article 3. Article 5 of the Stockholders' Agreement specifies the purchase price per share for the stock shall be the "greater of Thirty Dollars (\$30.00) per share or an amount equal to each share's Appraised Fair Market Value."

Article 5 further states that "Appraised Fair Market Value shall equal the greater of:

- a. Four times adjusted EBITDA, divided by the number of outstanding shares, or
 - b. The Corporation's Book Value (defined as the sum of the Corporation's retained earnings and paid in capital) divided by the number of outstanding shares of stock."
- Agreement at Article 5.

Muhler created its own financial statement dated August 31, 2018. This information was created and provided by Muhler, therefore, should be viewed as accurate. Based on Muhler's own valuation, the appraised value of Mahoney's twenty-five percent interest in the company was \$989,308.00. This was calculated using adjusted EBITDA times four as outlined in Article 5 of the Stockholders Agreement.

Despite having a clear directive pursuant to the Shareholders' Agreement that Hay or the Company shall purchase Mahoney's stock, and a clear valuation provided by Muhler for the value

of that stock, Appellants failed to live up to the terms of the Agreement and purchase the stock. As such, on January 14, 2019, Mahoney filed a lawsuit against Hay and Muhler in the Charleston County Court of Common Pleas. In turn, Hay and Muhler filed a motion to dismiss and compel arbitration.

The Stockholder's Agreement, at Paragraph 26 titled "Adjudication" states: "Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by a court of competent jurisdiction in the State of South Carolina, County of Charleston." Years after the Stockholder's Agreement was signed, Hay changed the Muhler Bylaws by inserting, for the first time, an arbitration provision. Mahoney voted against the bylaw amendment, however, was outvoted by Hay's majority interest in Muhler (Amendment to Bylaws attached hereto as Exhibit 2).

This new arbitration amendment called for any dispute to be adjudicated by three Certified Public Accountant (CPA) arbitrators. It also specified that each party selects an arbitrator, however, 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." Amendment to Bylaws, Article 8.

This arbitration selection process is flawed for two primary reasons. First, it stacks the deck in favor of Muhler and against Mahoney 2 v. 1. Second, by specifying the arbitrators be CPAs, it focuses exclusively on a valuation of Mahoney's interest in Muhler. In fact, the lawsuit has other claims including Breach of Fiduciary Duty and a claim pursuant to the SC Statutory Close Corporation Act – protection of a minority shareholder suit. These claims should be considered by attorney arbitrators as they are detailed legal claims – not pure valuations.

The Defendants'/Appellants' motion to compel arbitration was heard by the Honorable

Bentley Price. Despite arguments from Mahoney that the provisions of the Stockholder's Agreement controlled the disputes resolution over the after-the-fact revision to the bylaws and the dispute should be settled in state court, Judge Price granted the motion and compelled arbitration. Judge Price's Order is attached hereto as Exhibit 3.

Judge Price modified Muhler's arbitration provision found in Article 8, Section 8 of the Amendment to Bylaws, which allowed each party to select a CPA arbitrator and the third arbitrator to be the Company's accountant. The court modified this provision to follow South Carolina Uniform Arbitration Act's default arbitrator selection rule, allowing each party to select an arbitrator and the third to be a selected by the neutrals. The court looked to S.C. Code Ann. § 15-48-10(a) (1978), which states that arbitration provisions exist within the law of contracts, and therefore can be revoked (or in this case modified, because of a severability clause (see Muhler Company Amendment to Bylaws Article 8, Section 10) if the provision is invalid, unenforceable or unconscionable.

Applicable Law

S.C. Code Ann. § 15-48-200(a) (1978) determines which arbitration matters can be appealed. Specifically,

(a) An appeal may be taken from:

- (1) An order denying an application to compel arbitration made under S.C. Code Ann. § 15-48-20 (1978);
- (2) An order granting an application to stay arbitration made under S.C. Code Ann. § 15-48-20(b) (1978);
- (3) An order confirming or denying confirmation of an award;
- (4) An order modifying or correcting an award;
- (5) An order vacating an award without directing a rehearing; or
- (6) A judgment or decree entered pursuant to the provisions of this chapter.

(b) The appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action

An interlocutory order not governed by a specialized appealability statute is not immediately appealable unless it fits into one of the categories listed in S.C. Code Ann. § 14-3-330 (1978) of the South Carolina Code. *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 300, 705 S.E.2d 477 (Ct. App. 2011) (quoting *Ex Parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006)). An order refusing to stay an action pending arbitration or compel arbitration is immediately appealable. *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 661, 521 S.E.2d 749, 771 (1999). This is because the order is considered “final” and disposes of the party’s rights. The South Carolina Supreme Court ruled that an order that “stayed an action and compelled arbitration could not be appealed because it was not expressly included in S.C. Code Ann. § 15-48-200 (1978).” *Heffner v. Destiny, Inc.*, 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995). The *Heffner* court stated that “by application of the rule of statutory construction *“expressio unius est exclusio alterius”* (the mention of one is the exclusion of another), all other orders related to arbitration are not immediately appealable.” (Citing *Pennsylvania Nat. Mut. Cas. Ins. Co. v. Parker*, 282 S.C. 546, 320 S.E.2d 458 (Ct. App. 1984)).

Final Orders and Judgements

Appeals from arbitration matters follow the same rules as other civil orders and judgements; the Court of Appeals and S.C. Supreme Court shall have appellate jurisdiction for final judgements. According to *Good v. Hartford Acc. & Indem. Co.*, 201 S.C. 32, 42, 21 S.E.2d 209, 212 (1942), “a final judgment is one which operates to divest some right in such a manner as to put it beyond the power of the Court making the order to place the parties in their original condition after the expiration of the term; that is, it must put the case out of Court, and must be final in all matters within the pleadings.”

Interlocutory Orders

Interlocutory orders are typically not immediately appealable because some further act must be done by the court to determine the rights of the parties. However, there are several exceptions within S.C. Code Ann § 14-3-330 (1991) that permit appeals from interlocutory orders, including orders "on the merits" and "orders affecting a substantial right". An avoidance of trial is not considered a substantial right. *McLaughlin v. Strickland*, 279 S.C. 513, 309 S.E.2d 787 (Ct. App. 1983).

- a. **Orders on the merits:** According to *Mid-State Distribs. v. Century Imps.*, 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993), the precise meaning of the words "involving the merits" . . . has never been distinctly determined. An order which "involves the merits," is now defined as an order which "must finally determine some substantial matter forming the whole or a part of some cause of action or defense..." *Jefferson v. Gene's Used Cars, Inc.*, 295 S.C. 317, 318, 368 S.E.2d 456, 456 (1988). If a substantial right could not be vindicated after the appeal of a case, it is considered immediately appealable." *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 529 S.E.2d 11 (2000).
- b. **Orders effecting a substantial right:** The *Mid-State Distribs.* case also states that an order affecting a substantial right is an order that "would discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense. The denial of a motion to dismiss for lack of jurisdiction does not impair a substantial right. Similarly, an avoidance of trial was not held as constituting a substantial right. *Shields v. Martin Marietta Corp.*, 303 S.C. 469, 402 S.E.2d 482 (1991).

Analysis

Judge Price's Order is not a final decision, does not fall within one of the classifications of S.C. Code Ann. §15-48-200 (1978) nor does it meet one of the interlocutory appeal exceptions. Because the matter is not disposed of in finality through this order – it only moves the case to arbitration, which was requested by the defendant – it is interlocutory, not final. *Bone v. United States Food Serv.*, 399 S.C. 566, 733 S.E.2d 200 (2012).

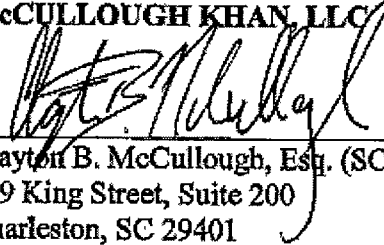
To determine an interlocutory order involves the merits of a case, it "must finally determine some substantial matter forming the whole or a part of some cause of action or defense..." *Jefferson v. Gene's Used Cars, Inc.*, 295 S.C. 317, 318, 368 S.E.2d 456 (1988). Although the judge modified the arbitrator selection method, the order did not impact any substantial matter within the case. By defaulting to the Uniform Arbitration Act's selection of a neutral third arbitrator, the arbitration process was made fairer to each party. No final decision in the case was made because of this modification – the court not only granted the motion to compel arbitration, but also made no decision as to Mr. Mahoney's rights to specified stock prices.

An order affecting a substantial right is one that "made in an action [and] . . . in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action. . . ." S.C. Code Ann. § 14-3-330(2)(a) (1991). Here no substantial right was impacted. By defaulting to the Uniform Arbitration Act, the Court protected all parties and made sure no substantial right, of any party, was impacted. Again, the Stockholder's Agreement specifies all disputes SHALL be "settled by a court of competent jurisdiction in the State of South Carolina, County of Charleston." That is what Mahoney agreed to. Later, against Mahoney's will, Hay changed the Muhler Bylaws and implemented the arbitration provisions. The Court sided with Hay and compelled the arbitration, however, deemed the arbitrator selection process as unfair

and defaulted to the S.C. Uniform Arbitration Act. Under these circumstances, this decision was interlocutory. As such, this appeal should be dismissed and the matter referred to arbitration as described in the Court's Order.

Respectfully Submitted,

McCULLOUGH KHAN, LLC



Clayton B. McCullough, Esq. (SC Bar #13722)
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Charleston, SC 29401
(843) 937-0400
(843) 937-0706 (fax)
Clay@mnklawsc.com

8.5, 2019

ATTORNEY FOR RESPONDENT

STOCKHOLDERS' AGREEMENT

THIS AGREEMENT is made and entered into by and among Henry M. Hay, III, and J. Daniel Mahoney, hereinafter referred to collectively as "Stockholders" and each individually as a "Stockholder," and The Muhler Company, Inc., a South Carolina corporation, having its principal place of business at Charleston, South Carolina, hereinafter referred to as "Corporation."

Background

The Stockholders own all the issued and outstanding capital stock of the Corporation as follows:

<u>NAME</u>	<u>NUMBER OF SHARES</u>
Henry M. Hay, III	1,000
Daniel Mahoney	333 1/3

The parties to this Agreement believe it to be in their mutual interests to provide for continuity in the management and policies of the Corporation by imposing certain restrictions and obligations on themselves and the outstanding capital stock of the Corporation. The Corporation and the Stockholders desire to facilitate liquidation of the stock of any retiring, deceased, disqualified or disabled Stockholder by the creation of a guaranteed market for his stock at a fair value. The Corporation and the Stockholders further desire to impose certain restrictions on the transfer of stock in the Corporation during the lifetime of the Stockholders;

NOW THEREFORE, in consideration of the mutual covenants herein contained, the parties hereto agree as follows:

ARTICLE 1.

Restrictions on Transfer of Stock

No Stockholder shall at any time during the existence of this Agreement directly or indirectly, voluntarily or involuntarily, sell, assign, transfer, mortgage, encumber, pledge, gift, or otherwise deal with or dispose of all or any part of the shares of stock in the Corporation now owned and hereafter acquired by him without first obtaining the written consent of the Corporation and the other Stockholders or, in the absence of such written consent, without first complying with the terms and conditions of this Agreement. Without limiting the above, under no circumstances shall any transfer be made to any transferee which jeopardizes the Subchapter S status, if applicable, of the Corporation without the prior written consent of all Stockholders. Upon a transfer of any shares to any permitted transferee, the shares shall continue to be subject to this Agreement, and as a condition to the transfer, each proposed transferee shall



execute this Agreement or other documents satisfactory to counsel for the Corporation pursuant to which such proposed transferee becomes bound by the terms and conditions of this Agreement. In the event a proposed transferee shall refuse to execute such documents, such transferee shall not become a stockholder of the Corporation. During the term of this Agreement any action of the Corporation not in the ordinary course of business including specifically but not limited to the incurring of additional debt of greater than \$50,000 or the sale of substantially all of the Corporations' assets shall be approved by a vote by the holders of one hundred (100%) percent of the common stock of the Corporation, unless a higher percentage vote is required in the Articles of the Corporation, the bylaws of the Corporation, this Agreement or the laws of the State of South Carolina.

ARTICLE 2.

Transfer of Stock During Lifetime

A. If a Stockholder desires to gift, transfer (except for estate planning purposes, and only to such Stockholder's spouse or issue), sell, or in any way encumber or dispose of all or any portion of his or her stock in the Corporation, such Stockholder shall first serve notice (hereinafter referred to as "Offer to Sell") to that effect upon the other parties hereto, stating the number of shares desired to be gifted, sold, encumbered, or otherwise disposed of and offering to sell such shares to the Corporation and the other Stockholders in accordance with the terms hereof. The non-selling Stockholders shall have the first right to purchase all or any part of the stock so offered by giving notice of acceptance (specifying the number of shares to be purchased) to the selling Stockholder and the Corporation within fifteen (15) days after completion of the valuation process described in Article 5 below. Each of the non-selling Stockholders shall have an individual pro rata right to purchase the shares of the selling Stockholder based on the following formula: each non-selling Stockholder may agree to purchase stock owned by the selling Stockholder in an amount equal to the total number of common shares of stock owned by the selling Stockholder multiplied by a fraction equal to the number of common shares of stock owned by that particular non-selling Stockholder divided by the total number of common shares of stock owned by all non-selling Stockholders. Should any non-selling Stockholder fail to give the notice of acceptance to the selling Stockholder and the Corporation as described above, then the non-selling Stockholders who have given notice of acceptance shall have the right but not the obligation to increase their purchase of stock of the selling Stockholder by adjusting the denominator of the fraction in the above-described formula to be the total common shares of stock owned by those non-selling Stockholders who desire to purchase the stock of the selling Stockholder. The purchase by any non-selling Stockholder shall occur within thirty (30) days following said fifteen (15) day period.

B. If the non-selling Stockholders shall fail to exercise their right to purchase all of the stock offered by the selling Stockholder, then the Corporation shall have the right to purchase such portion of the stock offered for sale which is not purchased by the non-selling

Stockholders by giving notice of acceptance (specifying the number of shares to be purchased) to the selling Stockholder and the non-selling Stockholders within fifteen (15) days following the close of the aforesaid fifteen (15) day period. The decision of whether or not the Corporation accepts such offer shall be made in the form of a resolution adopted by the Stockholders at a valid meeting. The resolution in favor of the Corporation accepting the offer to purchase such shares shall be adopted by a vote by the holders of sixty-seven (67%) percent of the outstanding shares of the Corporation. The Stockholder who made the Offer to Sell agrees that he or she will vote his or her shares in favor of the Corporation accepting the Offer to Sell. However, notwithstanding the foregoing, if the Corporation and the non-selling Stockholders have elected to purchase only a portion and not all of the stock offered for sale by the selling Stockholder, then the selling Stockholder may elect not to sell such portion to either the Corporation or the non-selling Stockholders but may elect to sell all of the stock included in the Offer to Sell, in accordance with the provisions of Paragraph D of this Article. Any purchase by the Corporation hereunder shall occur within thirty (30) days following said fifteen (15) day period of acceptance for the Corporation.

C. In the event that any stock is to be purchased pursuant to the terms of this Article 2, the following provisions shall apply:

(1) Each share of stock to be purchased pursuant to the terms of this Article 2 shall be purchased at the price specified in Article 5 of this Agreement.

(2) The purchase price of each share of stock to be purchased pursuant to the terms of this Article 2 shall be paid in accordance with the provisions of Article 5 of this Agreement.

D. In the event that the Corporation and the non-selling Stockholders fail or refuse to purchase all of the stock offered for sale, the selling Stockholder shall be free to gift, sell, encumber, or otherwise dispose of the shares of stock in any manner and upon any terms and conditions; provided, however, that such selling Stockholder shall not in fact sell any stock to another person either for a price less than or on terms more favorable than the purchase price or the terms fixed by this Agreement without first offering the Corporation and the non-selling Stockholders the right to purchase at the same price and upon the same terms as such other person. In carrying out the intent of the immediately preceding sentence, the same procedure as specified in Paragraphs A, B, and C above shall again be followed except that the notice served upon the parties to this Agreement shall specify the name and address of the person to whom the selling Stockholder proposes to sell his or her stock and the price and terms of purchase offered by such person for such stock. In the event that the Corporation and the other Stockholders shall then fail or refuse to purchase all the stock offered for sale pursuant to this Agreement, the selling Stockholder shall then be free to sell the shares of unaccepted stock to such other person for the price and upon the terms set forth in such notice; provided, however, that any such sale shall take place within sixty (60) days following the last day that the non-selling Stockholders may give notice of acceptance as provided above, and upon the expiration of such sixty (60) day

period, the provisions of this Agreement shall reattach to all of the stock not sold during said sixty (60) day period.

E. In the event that any stock is not sold but is merely encumbered during the ninety (90) day period specified in Paragraph D above, then the transferee of such encumbered stock shall accept such stock subject to the terms and conditions of this Agreement, subject to any relevant provisions, if any, in the Corporation's Articles of Incorporation.

F. In the event that any stock be involuntarily transferred pursuant to a divorce decree or otherwise, this Article 2 will apply in creating options for the Corporation or the Stockholders to first purchase the stock before such involuntary transfer is deemed to be effective.

ARTICLE 3.

Purchase of Stock Upon the Death or Termination of Mahoney

Upon the death or termination of the employment of Mahoney, the remaining Stockholders shall have the option to buy from Mahoney, or his Estate, as the case may be, all of the stock in the Corporation owned by Mahoney at the time of his departure or death by giving notice of acceptance as described in Article 2, Section A above. Should the remaining Stockholders not elect to exercise this option, based on the pro rata formula described in Article 2, Section A above, then the Corporation shall purchase and the departing or deceased Stockholder shall sell all of the stock in the Corporation owned by the departing Stockholder at the time of his death or departure. The option granted to the remaining Stockholders as described above shall expire fifteen (15) days after the completion of the valuation being made pursuant to Article 5 below, if a stipulated price is not applicable, and if such option lapses, then the Corporation shall purchase such shares of the departing or deceased Stockholder within thirty (30) days after the expiration of such option. The purchase price and terms of sale shall be as specified in Article 5 of this Agreement. Notwithstanding the above, this Article 3 shall not supercede the provisions of Article 2 above regarding the voluntary sale of stock by a Stockholder.

ARTICLE 4.

Reserved

ARTICLE 5.

- 4 -

Purchase Price of Stock

A. The purchase price per share for stock purchased pursuant to this Agreement is hereby stipulated to be the greater of Thirty Dollars (\$30.00) per share or an amount equal to each share's Appraised Fair Market Value. To determine Appraised Fair Market Value, the accountant for the Corporation shall first calculate the total of the Corporation's earnings before interest, taxes, depreciation, amortization, and Stockholders salaries, dividends, bonuses, and benefits (the "Adjusted EBITDA"). Appraised Fair Market Value shall equal the greater of: (i) four times Adjusted EBITDA, divided by the number of outstanding shares, or (ii) the Corporation's Book Value (defined as the sum of the Corporation's retained earnings and paid in capital) divided by the number of outstanding shares of stock. There shall be no reduction in the valuation of stock purchased pursuant to this Agreement for minority interests, lack of control, or any other reason. The purchasing Stockholders, or, if the Corporation is purchasing, the board of directors of the Corporation or the Corporation's authorized representative(s) shall thereupon fix a date, hour and place for the closing, which shall be made known to the selling or disassociated Stockholder. At the closing, such Stockholder shall deliver to the Corporation the certificate or certificates representing all of the common shares of stock of the Corporation held by such Stockholder, regardless of whether or not some part of the purchase price is deferred as hereinafter provided, with the certificates being duly endorsed, and the Corporation shall, upon delivery of the certificate or certificates, pay to such Stockholder the purchase price for such stock as described in Section B below. Notwithstanding the above, EBITDA shall not include any income derived from the Settlement Agreement between the Corporation and Silverline dated _____, 2008.

B. The purchase price of stock subject to this Agreement shall be in cash at closing. In the event the Stockholder or Corporation lacks sufficient cash to purchase the stock, the unpaid balance of the purchase price shall be evidenced by a negotiable promissory note payable in equal monthly installments of principal and interest with simple interest at the rate of the then applicable prime rate plus three percent (3%) interest rate per annum, with the first payment due and payable on the 30th day following the closing, and the subsequent payments due and payable at similar time frames thereafter with a final payment of all unpaid interest and principal due on the first anniversary date of the closing. Said note shall be in the form attached hereto as Exhibit B. All of the stock in the Corporation being purchased shall be pledged as collateral security to the Stockholder from whom it was purchased to secure the full payment of the principal and interest on the negotiable promissory note. The form of the stock pledge to be used is attached hereto as Exhibit C.

ARTICLE 6.

Insurance

A. The Corporation or the Stockholders may be the owner of policies of insurance on the lives of the Stockholders as listed in Exhibit A attached hereto and made a part hereof.

B. The Corporation or the Stockholders are or will be the beneficiary of the policies listed in Exhibit A and of any additional policies which may become subject to the terms hereof; and during the continuance of this Agreement, the proceeds of all policies listed on Exhibit A and of all such additional policies shall be payable to the Corporation or the Stockholders in lump sums upon the death of the insureds.

C. The Corporation shall have the right to purchase additional policies of insurance on the lives of any or all of the Stockholders, who are parties hereto, whenever it deems it reasonably necessary to acquire such additional insurance in order to meet its obligations hereunder; and, the Stockholders agree to cooperate in the acquisition of such additional insurance and to perform all acts reasonably necessary and proper in connection therewith, including the submission to such medical examinations as may be required. Any such additional policies of insurance shall become subject to the terms of this Agreement and shall be listed in Exhibit A.

D. The Corporation or the Stockholders shall pay the premiums on all of the insurance policies at any time listed in Exhibit A and shall, if requested in writing, give written proof of such payment to the insured Stockholder within fifteen (15) days after the due date of each premium. If any premium is not paid within fifteen (15) days after its due date, the insured Stockholder shall have the right to pay the premium and be reimbursed therefor by the Corporation or the Stockholders.

E. During the continuance of this Agreement, the Corporation or the Stockholders shall own all the policies at any time listed in Exhibit A and shall have the right to apply the dividends on such policies to the payment of the premiums thereof; however, the Corporation or the Stockholders shall not exercise any of the other rights, powers, or privileges in or under any of the said policies without first obtaining the written consent of the Stockholders who are then parties hereto, except that the consent of the Stockholder whose life is insured by the policy with respect to which the Corporation or the Stockholders seeks to exercise any rights, powers, or privileges shall not be required to consent to such exercise.

F. The Corporation or the Stockholders may, at any time and from time to time, with the written consent of the Stockholders who are then parties hereto, withdraw a policy or policies listed in Exhibit A from the terms hereof or substitute a policy or policies for any policy or policies listed in Exhibit A.

G. No insurance company which has issued a policy of life insurance subject to the terms of this Agreement shall have any obligation to inquire into the terms hereof or to see to the application of the proceeds and benefits of such policy, and a receipt of the Corporation or

the Stockholders to any such insurance company shall be effective to release such company from any liability as a result of such policy, and such release shall be binding upon all the parties hereto.

H. Except as provided in the Agreement, no Stockholder shall have any right, title, or interest in or to any of the policies of insurance on his or her life at any time listed in Exhibit A.

I. Any insurance company that has issued a policy subject to the terms hereof is hereby authorized to provide a Stockholder, upon written request, with any information regarding a policy or policies on his or her life.

J. For the purposes of this Agreement, the term "proceeds" shall include all payments paid on a policy as a result of the death of the insured, including, but not limited to, the face amount of the policy, dividends, and any accidental death benefits.

ARTICLE 7.

Purchase of Insurance Policies

Upon the purchase of his or her entire stock interest in the Corporation as herein provided under this Agreement, whether due to termination of employment or otherwise or upon termination of this Agreement, a selling Stockholder, if living, shall have the right to purchase from the Corporation or non-selling Stockholders all life insurance contracts on his or her life owned by the Corporation or the non-selling Stockholders that are subject to this Agreement for a purchase price equal to the amount of:

(a) The cash surrender value thereof, if any, calculated on a prorated basis to the date of the transaction, exclusive of any dividend, dividend accumulations, or policy loans, but inclusive of the cash value of any paid-up insurance additions, plus

(b) The pro rata portion of any premium paid prior to such date which covers a period extending beyond the date of the transaction, plus

(c) Any dividends or dividend accumulations, and less

(d) Any policy loan plus interest then due. The rights granted in this Article 7 shall lapse unless the selling Stockholder notifies the Corporation or the non-selling Stockholders in writing within thirty (30) days of the termination of his or her employment of his or her desire to purchase all or some of the life insurance contracts on his or her life owned by the Corporation. Any policy or policies not purchased within such thirty (30) day period may be disposed of or otherwise dealt with by the Corporation or the non-selling Stockholders in any

manner they desire; and, the Stockholders agree to execute and deliver such instruments as may be required by the Corporation to dispose of or otherwise deal with such policy or policies. In the event of a sale of a policy or policies pursuant to the terms of this Article, the Corporation or Stockholders shall execute and deliver to the purchaser such instruments as are necessary and proper to transfer full and complete title to such policy or policies.

ARTICLE 8

Corporate Inability to Purchase Stock

If for any reason the Corporation is unable to purchase all or any part of the stock from a Stockholder or a Stockholder's estate, when the Corporation is obligated to make such a purchase pursuant to this Agreement, because of a limitation or restriction imposed by statute, charter, or bylaws, the Corporation shall take, as soon as possible after the acceptance of an offer to sell or the Stockholder's disability or death, such action as may be necessary to permit the Corporation to make the purchase, including, but not limited to, a reorganization of the Corporation and the contribution by the remaining Stockholders of additional assets to the capital of the Corporation. If, notwithstanding the action of the Corporation and the remaining Stockholders, the Corporation is still unable legally to purchase all of a Stockholder's stock when the Corporation is obligated to make such a purchase pursuant to this Agreement, then the remaining Stockholders shall purchase such portion of the stock of the selling Stockholder not purchased by the Corporation.

ARTICLE 9

Reserved

ARTICLE 10.

Mandatory Dividends if an S Corporation

(a) If the corporation elects to be an S corporation and while any Subchapter S election is in effect, the corporation shall make the pro rata distributions to the Stockholders at least equal to the estimated federal and state income taxes attributable to their pro rata share of the corporation's net long-term and Section 1231 capital gains and nonseparately computed income pursuant to Section 1366(a) of the Internal Revenue Code. This estimated tax liability, which shall be computed by the accountant who regularly prepares the corporation's tax returns, shall be computed on the basis of the highest marginal rate applicable to individuals on capital gains and other taxable income for the tax year in question. Unless prevented from making any distributions under applicable state law, or the Stockholders unanimously otherwise agree, these

minimum mandatory distributions shall be declared and paid on a quarterly basis beginning no later than the last day of the third month of a taxable year and shall be based on one fourth of the estimated tax liability for the full taxable year computed as of the declaration date. Any pro rata distributions made during the taxable year in question to Stockholders in excess of the minimum mandatory dividends required by this section can be taken into account in determining the extent of any future minimum mandatory dividends for that particular taxable year.

(b) If any Subchapter S election is revoked or terminated, the corporation shall, except to the extent the Stockholders unanimously agree to the election authorized by Section 1371(e)(2) of the Internal Revenue Code, or unless prevented from doing so by applicable state law, declare and pay pro rata cash distributions during the post-termination transition period equal to the corporation's accumulated adjustments account.

ARTICLE 11.

Specific Performance

The parties hereby declare that it is impossible to measure in money the damages which will accrue to a party hereto; or his or her heirs and assigns or to the personal representative of a deceased or disabled Stockholder by reason of another party's failure to perform any of the obligations under this Agreement. Therefore, if any party hereto or the personal representative shall institute any action or proceeding to enforce the provisions hereof, any person (including the Corporation) against whom such action or proceeding is brought hereby waives the claim or defense therein that such party or such personal representative has or have an adequate remedy at law, and such person shall not urge in any such action or proceeding the claim or defense that such remedy at law exists, and any party hereto may maintain a proceeding despite the claim or defense that such remedy at law exists, and any party hereto may maintain a proceeding to compel the specific performance of the terms and conditions set forth in this Agreement or any other applicable equitable relief.

ARTICLE 12.

Health Insurance

Following the Disassociation of a Stockholder, except for "cause" (which shall be defined as conviction of a felony), such Stockholder shall have the option to continue as a covered member of the Corporation's health insurance plan, if any, to the extent allowed by applicable rules, regulations and laws, by the timely payment to the Corporation of the applicable premiums due on behalf of such Stockholder, with the amount and the timing of such premium payments to be as set by the Corporation's health insurance plan company.

ARTICLE 13.

Invalid Provision

The invalidity or unenforceability of any particular provision of this Agreement shall not affect the other provisions of this Agreement and the Agreement shall be construed in all respects as if such invalid or unenforceable provisions were omitted.

ARTICLE 14.

Reserved

ARTICLE 15.

Endorsement of Stock Certificates

Simultaneously with the execution of this Agreement, the Stockholders shall surrender the stock certificates subject hereto to the Corporation and the following endorsement shall be placed on the face of each certificate:

"The sale, encumbrance or other disposition of the shares issued by this corporation may be subject to the terms and conditions of a shareholders agreement, by and among the shareholders of this corporation, with a copy of such an agreement, if it exists, being on file in the office of this corporation and to be furnished without charge to any shareholder upon written request."

After such endorsement, the certificates shall be returned to their respective owners who shall be entitled, subject to the terms hereof, to exercise all rights and interest therein. All stock hereafter issued shall bear the same endorsement. Upon the termination of this Agreement, such certificates shall be surrendered to the Corporation and new certificates without the foregoing endorsement shall be issued in lieu thereof.

ARTICLE 16.

Amendment

This Agreement may be amended, altered, or revoked at any time upon the mutual agreement of the Corporation and all of the Stockholders.

ARTICLE 17.

Termination of Agreement

This Agreement shall terminate upon the occurrence of any one of the following events:

- A. The written agreement of the parties hereto or their successors in interest to that effect;
- B. The bankruptcy, receivership, or dissolution of the Corporation;
- C. The complete fulfillment of this Agreement according to its terms upon the happening of whichever of the following events shall first occur:

- (1) The disposal of all the stock of any Stockholder during his or her lifetime shall terminate this Agreement as to such Stockholder;

- (2) The sale of the stock upon the disability or death of any Stockholder shall terminate this Agreement as to such disabled or deceased Stockholder and his or her estate; provided, however, that whether or not such stock is sold upon the disability or death of a Stockholder, such Stockholder's estate or other successor in interest to the stock shall be bound by this Agreement.

- D. The death of all Stockholders parties hereto, within thirty (30) days of each other.

ARTICLE 18.

Governing Law

This Agreement shall be subject to and governed by the laws and courts of the State of South Carolina.

ARTICLE 19.

Notice

Any notice required hereunder shall be given in writing and shall be sent by registered or certified mail, return receipt requested, to the parties hereto at the following addresses:

<u>Name</u>	<u>Address</u>
Henry M. Hay, III	_____
Daniel Mahoney	3910 Colonel Vanderhorst Circle Mt. Pleasant, SC 29464

Any notice required to be given hereunder to the estate of a disabled or deceased Stockholder shall be sent to the personal representative at his or her address or, if no personal representative is appointed, to the disabled or deceased Stockholder at his or her last designated address. As soon as practical after being appointed, the personal representative shall notify the other parties hereto of his or her address by notice sent in conformity with the foregoing requirements. Any party from time to time may change his or her address to which notice is to be sent pursuant hereto by sending a notice of such change in conformity with the foregoing requirements to the other parties or the personal representative.

ARTICLE 20.

Indebtedness of Stockholder

In the event that there is a purchase and sale of stock pursuant to the provisions of this Agreement and there is any indebtedness owed by the selling Stockholder or his or her estate to any party to this Agreement, then, notwithstanding the provisions of Articles 2, 3, and 5 hereof relating to the payment of the purchase price for such stock, any amount to be paid for the stock being purchased shall be applied first to reduce any indebtedness owed by the selling Stockholder or his or her estate to any party under this Agreement. If the indebtedness exceeds the total purchase price, then no payment shall be made for the stock and the excess of the indebtedness over the purchase price shall be immediately paid to such party by the selling Stockholder or his or her estate.

ARTICLE 21.

Binding Effect

This Agreement shall be binding upon the parties, their heirs, legal representatives, successors and assigns. In furtherance hereof, each Stockholder may need to execute a will, or codicil to such, directing his or her personal representative to perform this Agreement and to do any and all things necessary to effectuate the Agreement and the purposes hereof, but the failure to execute such will or codicil shall not affect the rights or the obligations of the Stockholders or their respective estates hereunder.

ARTICLE 22.

Gender

All pronouns used herein shall be deemed to include the masculine, the feminine and the neuter, and the singular shall include the plural and vice-versa, whenever the context requires or permits.

ARTICLE 23.

Counsel

Each party hereto agrees and acknowledges that he or she has had ample opportunity and time prior to the execution of this Agreement to seek advice concerning the terms, conditions and effect of this Agreement from independent tax and/or legal advisors.

ARTICLE 24.

Counterparts

This Agreement may be executed simultaneously in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

ARTICLE 25.

Severability

If any clause or provision herein shall be adjudged invalid or unenforceable by a court of competent jurisdiction or by operation of any applicable law, it shall not affect the validity of any other clause or provision which shall remain in full force and effect.

ARTICLE 26.

Adjudication

Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by a court of competent jurisdiction in the State of South Carolina, County of Charleston.

ARTICLE 27.

Waiver

The waiver by either party of a breach of any provision of this Agreement by either party shall not operate or be construed as a waiver of any subsequent breach.

ARTICLE 28.

Entire Agreement

This Agreement constitutes the entire agreement among the parties hereto and supersedes all prior agreements, understandings and negotiations, both written and oral, among and between the parties with respect thereto.

ARTICLE 29.

Headings

The headings or titles of articles, sections and subsections contained in this Agreement are inserted only as a matter of convenience and for reference and in no way define, limit, extend or describe the scope of this Agreement or the intent of any provision hereof.

ARTICLE 30.

Nonpresumption

Neither this Agreement nor any uncertainty or ambiguity herein shall be construed or resolved using any presumption against any party hereto, whether under any rule of

construction or otherwise. On the contrary, this Agreement has been reviewed by the parties and their counsel and, in the case of any ambiguity or uncertainty, shall be construed according to the ordinary meaning of the words used so as to fairly accomplish the purposes and intentions of all parties hereto, and not against the party who drafted or had its counsel draft this Agreement or any section herein.

ARTICLE 31.

Prevailing Party

The parties hereto agree that should any party hereto prevail in a lawsuit, action or proceeding enforcing any of the terms, covenants or conditions contained herein, said prevailing party shall be reimbursed by the losing party, in addition to any damages that a court of competent jurisdiction may award, for the prevailing party's costs and expenses, including reasonable attorney's fees, associated with such lawsuit, action or proceeding.

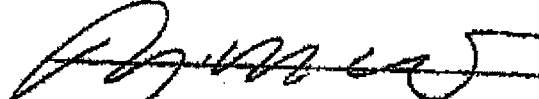
15, 2008. IN WITNESS WHEREOF, the parties executed this agreement effective January

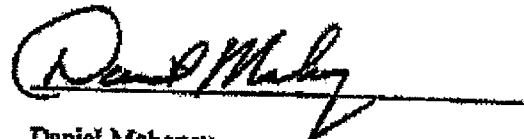
WITNESSES:

Attest:

Secretary
(Corporate Seal)

STOCKHOLDER:

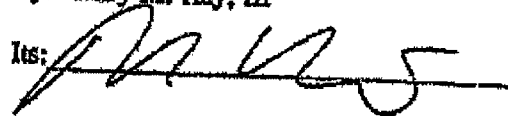

Henry M. Hay, III


Daniel Mahoney

CORPORATION:

The Muhler Company, Inc.

By: Henry M. Hay, III

Its: 

THE MUEHLER COMPANY, INC.

STOCKHOLDERS' AGREEMENT

EXHIBIT A

Policy Name

Insured

Policy Number

- 17 -

EXHIBIT B

SOUTH CAROLINA

\$ _____, 20__

FOR VALUE RECEIVED, the undersigned Maker promise(s) to pay to the order of _____ at Charleston, South Carolina, in lawful money of the United States of America, the principal sum of _____ (\$ _____) DOLLARS plus simple interest from date at the rate of _____ (%) Percent per annum, with a payment of \$ _____ due on _____ and a second and final payment of \$ _____ due on _____.

Provided, however, that the Maker shall have the right to prepay the within obligation in whole or in part at any time or times without penalty.

If default be made and be continuing for a period of ten (10) days in the performance of or compliance with any of the covenants and conditions of this note, then in any of said events, said principal sum with all accrued interest thereon shall become at once due and payable at the option of the Holder thereof and be collectible without further notice. Failure to exercise this option shall not constitute a waiver of the right to exercise the same in the event of any subsequent default.

If this note be placed in the hands of an attorney for collection after the same shall for any reason become due, or if collected by legal proceedings or through the probate or bankruptcy courts, then all costs of collection, including a reasonable sum for attorney's fees shall be added hereto as attorney's fees secured and collectible as the principal hereof.

The undersigned expressly agrees to remain and continue bound for the payment of the principal and interest provided for by the terms of this note notwithstanding any extension or extensions of the time of, or for the payment of said principal or interest, or any change or changes in the amount or amounts agreed to be paid under and by virtue of the obligation to pay provided for in this note, or any change or changes by way of release or surrender of any collateral held as security for this note and waive all and every kind of notice of such extension or extensions, change or changes and agree that the same may be made without the joinder of the undersigned.

Presentment, protest, and notice are hereby waived.

Witness the hand and seal of each of the signers hereof.

WITNESS:

(Maker)

By: _____

Its: _____

By: _____

Its: _____

EXHIBIT C

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

STOCK PLEDGE AGREEMENT

This Stock Pledge Agreement is made by and between _____
(hereinafter referred to as "Pledgor") and _____ (hereinafter referred to as
"Pledgee").

In consideration of Ten (\$10.00) Dollars, the mutual covenants and promises herein contained and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Pledgor and Pledgee agree:

1. Pledgor hereby grants a security interest to Pledgee in the following stock:
_____ shares of the common stock of _____ (hereinafter referred to as "Security"), the original certificates for such stock being attached hereto along with an executed blank stock power/assignment(s).
2. Pledgee shall hold the Security as security, for full payment by Pledgor of the principal and interest on that certain promissory note by and between Pledgor and Pledgee, dated of even date herewith (the "Note"), in the original principal amount of _____
(\$ _____) DOLLARS.
3. During the term of this Agreement so long as there has been no default by Pledgor hereunder which remains uncured as described in Section 6 below, Pledgor retains the right to collect all dividends and distributions that may become due on the Security and to vote the Security in all corporate matters.
4. In the event that during the term of this Agreement the issuing corporation shall grant warrants, rights, or options related to the Security, Pledgor can exercise such warrants, rights, or options as deemed best, but any new or additional Security so acquired by Pledgor shall be immediately assigned to Pledgee to be held under the terms hereof in the same manner as the Security originally pledged under this Agreement.
5. Pledgor shall be in default under this Agreement (1) in the event of a failure by Pledgor to comply with any of the terms or provisions of this Agreement or of the above referenced Note, or (2) in the event of a filing, declaration or petition, voluntary or involuntary, of insolvency or bankruptcy of Pledgor from any cause or source whatsoever, or (3) in the event any holder of any obligation of Pledgor shall become entitled to any interest or security in the Security.

6. On any default hereunder by Pledgor and if any default hereunder has not been cured within five (5) business days following written notice of default from Pledgor to Pledgee, all indebtedness owed by Pledgor to Pledgee shall, at the option of Pledgee, become immediately due and payable, and Pledgee shall have all the rights and remedies of a secured party under Section 36-9-101, *et. seq.*, of the Code of Laws of South Carolina, 1976, as amended, and any other laws of the State of South Carolina. Without limiting any of the foregoing, upon a default continuing by Pledgor after the above-mentioned five (5) day cure period, Pledgee is entitled to arrange for the transfer of the Security on the books of the issuing corporation to the name of the Pledgee and may thereafter exercise all rights and privileges in connection with the Security to which a transferee may be entitled as the record owner, including selling, without any previous demand for performance on, or notice to, Pledgor. Upon such a sale of all or any part of the Security, after deducting all legal and other costs, expenses, and charges, including reasonable attorneys' fees, incurred in the collection, sale, delivery, or preservation of the Security, or any part thereof, Pledgee shall apply the residue of such sale proceeds to the payment of the indebtedness of Pledgor to Pledgee hereunder and the interest thereon. Should there be any surplus of such proceeds, such surplus shall be paid to Pledgor.
7. Upon full repayment of all amounts owed to Pledgee by Pledgor under the Note, Pledgee agrees to return the Security and the executed blank stock power/assignment immediately to Pledgor.
8. Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by a court of competent jurisdiction in the State of South Carolina, County of Charleston.
9. If any clause or provision herein shall be adjudged invalid or unenforceable by a court of competent jurisdiction or by operation of any applicable law, it shall not affect the validity of any other clause or provision which shall remain in full force and effect.
10. This Agreement shall be governed by the laws of the State of South Carolina.
11. The waiver by either party of a breach of any provision of this Agreement by either party shall not operate or be construed as a waiver of any subsequent breach.
12. This Agreement, together with any amendments hereto, shall be binding upon the parties hereto, their heirs, successors and assigns.
13. The headings or titles of articles, sections and subsections contained in this Agreement are inserted only as a matter of convenience and for reference and in no way define, limit, extend or describe the scope of this Agreement or the intent of any provision hereof.
14. This Agreement may not be altered or amended except in writing signed by all parties hereto.

15. Neither this Agreement nor any uncertainty or ambiguity herein shall be construed or resolved using any presumption against any party hereto, whether under any rule of construction or otherwise. On the contrary, this Agreement has been reviewed by the parties and their counsel and, in the case of any ambiguity or uncertainty, shall be construed according to the ordinary meaning of the words used so as to fairly accomplish the purposes and intentions of all parties hereto, and not against the party who drafted or had its counsel draft this Agreement or any section herein.

16. The parties hereto agree that should any party hereto prevail in a lawsuit, action or proceeding enforcing any of the terms, covenants or conditions contained herein, said prevailing party shall be reimbursed by the losing party, in addition to any damages that a court of competent jurisdiction may award, for the prevailing party's costs and expenses, including reasonable attorney's fees, associated with such lawsuit, action or proceeding.

17. Each party hereto acknowledges that he or she has received, or has had adequate opportunity to receive, the advice of his or her respective tax and legal counsel regarding the transactions contemplated or referenced herein and all related documents.

18. This Agreement may be executed simultaneously in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

WITNESS our hands and seals this ____ day of _____, 20__.

IN THE PRESENCE OF:

PLEDGEE:

By: _____
Its: _____

PLEDGOR:

By: _____
Its: _____

ACTION OF
THE STOCKHOLDERS
OF
THE MUHLER COMPANY, INC.
WITHOUT A MEETING

The undersigned, being all of the stockholders of The Muhler Company, Inc. (the "Corporation"), do hereby consent to the following action on behalf of the Corporation pursuant to S.C. Code Ann. §33-7-104 (Law. Co-op. 1990), to the same effect as if said action were taken at a meeting of the stockholders duly called and held for such purpose and at which the following resolution was unanimously adopted:

RESOLVED, that the Corporation enter into the Stockholders' Agreement with its Stockholders and that any one Officer of the Corporation is authorized to execute the Stockholder's Agreement and carry out the obligations of the Corporation contained therein.

No further action was taken on this date.

Dated this 4th day of November, 2008.


Henry M. Hay, III, Stockholder


Daniel Mahoney, Stockholder

_____, Stockholder

THE MUHLER COMPANY, INC.

Stock Ledger

COMMON STOCK

Authorized and Issued Number of Shares as of January 15, 2008

* = Original Issue

<u>Certificate Number</u>	<u>Name of Shareholder</u>	<u>Date of Issue</u>	<u>Number of Shares</u>	<u>Cancellations, Transfers, etc.</u>
*1	Henry M. Hay, III	05/31/96	650	Issued and Outstanding
*2	Henry M. Hay, III	05/31/96	350	Lost and Replaced by Cert #3
*3	Henry M. Hay, III	05/09/01	350	Reissue of Lost Cert #3
4	Daniel Mahoney	10/17/08	333 1/3	Issued and Outstanding

- Doc# 681198.1 -

ACTION
OF
THE SHAREHOLDERS
OF
THE MUHLER COMPANY, INC.
WITHOUT A MEETING

Charleston, South Carolina

The undersigned, being all of the shareholders of The Muhler Company, Inc. (the "Corporation"), do hereby consent to the following action on behalf of the Corporation pursuant to S.C. Code Ann. §33-7-104 (Law. Co-op. 1990), to the same effect as if said action were taken at a meeting of the shareholders duly called and held for such purpose and at which the following resolutions were unanimously adopted:

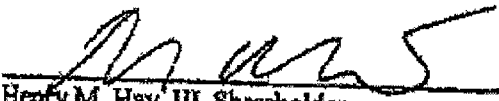
RESOLVED, that the number of authorized shares of the corporation shall be increased from 1,000 to 1,333 1/3; and

FURTHER RESOLVED, that amendment of the Articles of Incorporation shall require the vote of the holders of at least One Hundred (100%) percent of the issued and outstanding shares entitled to vote; and

FURTHER RESOLVED, that Henry M. Hay, III, as President of the Corporation, is hereby authorized to execute and deliver the Articles of Amendment and any other documents necessary, incidental or desirable thereto.

No further action was taken on this date.

Dated effective this 15th day of January, 2008.


Henry M. Hay, III, Shareholder

~~Notice of Annual Shareholders' Meeting~~
of The Muhler Company, Inc. for Fiscal Year 2017

To: The Muhler Company Inc.; The Stockholders

Notice

You are hereby notified that the annual meeting of the shareholders of The Muhler Company, Inc. (hereinafter "Muhler") for fiscal year 2017 will be held on Tuesday, October 25, 2016, at 5:00 p.m. at 630 Skylark Drive, Suite U, Charleston, SC 29407. This meeting is requested by Henry M. Hay, III, 75% stockholder.

Notice is provided this 14th day of October, 2016.

Agenda

The meeting will be held for the purpose of a shareholders' vote on (i) the election of Muhler corporate officers, and (ii) a proposed amendment to the Muhler bylaws.

The order of business will be as follows:

1. Proof of notice of meeting;
2. Calling of roll;
3. Reading and disposal of any unapproved minutes;
4. Reading of any annual reports of officers and committees;
5. Unfinished business;
6. New business;
 - a. Election of Corporate Officers
 - i. Nomination of corporate officers;
 - ii. Shareholders' vote to elect corporate officers;
 - b. Amendment of Bylaws
 - i. Reading of proposed amendment to Muhler's bylaws by requiring arbitration of claims;
 - ii. Shareholders' vote on adoption of amendment;
7. Adjournment.


Henry M. Hay, III

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.: 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

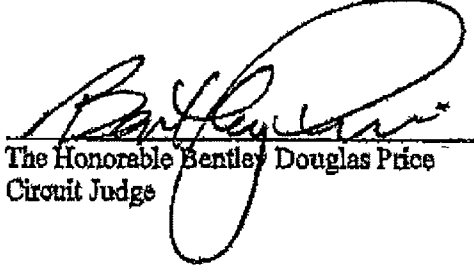

The Honorable Bentley Douglas Price
Circuit Judge

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Bentley Price, Circuit Court Judge

Case No. 2019-CP-10-00178

J. Daniel Mahoney.....Respondent,

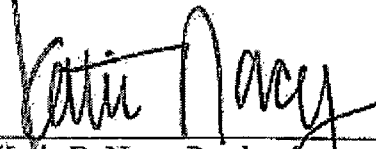
v.

The Muhler Company, Inc. and Henry Hay III, in his individual capacity..... Appellants.

PROOF OF SERVICE

I hereby certify that a true and correct copy of *Respondent's Motion to Dismiss* has been served upon the following by mailing a copy, properly addressed and with sufficient postage affixed thereto, on this 5th day of August, 2019.

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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

RECEIVED
JUL 24 2019
SC Court of Appeals

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

v.

THE MUHLER COMPANY, INC. and HENRY M. HAY, III,..... Defendants/Appellants.

NOTICE OF APPEAL

Defendants, The Muhler Company, Inc. and Henry M. Hay, III, appeal from the order of Judge Bentley Price dated June 24, 2019 (**Exh. A**) in which the Court denied the parties to this suit the right to arbitrate pursuant to binding agreement terms, namely the arbitrator selection provision. The Court's ruling is immediately appealable as it denies a right of arbitration, *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 626, 667 S.E.2d 1, 4 (Ct. App. 2008), and denies the right to a particular mode of trial. *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000).

July 22nd, 2019
Charleston, South Carolina

ANDREW K. EPTING, JR., LLC

By 
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ATTORNEYS FOR DEFENDANTS/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

RECEIVED
JUL 24 2019
SC Court of Appeals

FILED
2019 JUN 24 PM 3:35
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

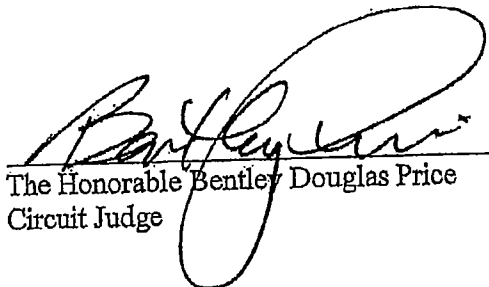


arbitration, one chosen by the party against whom demand is made and the third being chosen by those two chosen by the parties." S.C. Code Ann. Section 15-48-40.

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

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

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

v.

THE MUHLER COMPANY, INC. and HENRY M. HAY, III..... Defendants/Appellants.

INITIAL BRIEF OF APPELLANTS

RECEIVED
JUL 24 2019
SC Court of Appeals

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ISSUE ON APPEAL

1. When both the Federal Arbitration Act and the South Carolina Arbitration Act provide that the Court must enforce the method of arbitrator selection provided for in an arbitration provision, did the Court err altering the manner in which arbitrators would be selected?

STATEMENT OF THE FACTS

A. The Bylaws

The Muhler Company, Inc. ("Muhler") bylaws require arbitration of all claims by, against, or involving the corporation. As Muhler believed the disputes would largely concern the financial affairs of the corporation, the arbitration clause provided that the corporation's CPA would be one of three arbitrators, with each party to a dispute having the ability to appoint their own arbitrator.

Plaintiff/Respondent J. Daniel Mahoney ("Mahoney") was the CEO of Muhler and, as part of his duties, enforced the corporate bylaws. It is only two years after arbitration was made part of the bylaws and he himself is the plaintiff that he now objects to arbitration as provided in the bylaws. **Bylaws, Article XIII.**

B. Procedural Facts

Mahoney has filed not one but two lawsuits using separate counsel for each. Defendants asserted their right to arbitrate in each suit. **December 17, 2018 Motion to Compel (2018-CP-10-05077); February 15, 2019 Motion to Compel (2019-CP-10-00178).** In the first suit (2018-CP-10-05077, for wrongful termination of Mahoney as CEO), Judge Price enforced the arbitration clause as provided for in the bylaws and this matter is proceeding in arbitration. **May 17, 2019 Order (2018-CP-10-05077).** The second lawsuit (2019-10-CP-00178) was a claim by

Mahoney seeking the sale of his stock upon his termination, which occurred September 18, 2018.

Judge Price ordered arbitration in the second suit, but:

- a. His first order appointed Judge Early to serve as an arbitrator rather than the corporation's CPA and was erroneously entered in the wrongful termination suit. **June 5, 2019 Order (2018-CP-10-05077)**. Realizing the order was filed in the wrong suit, Judge Price vacated that order. **June 14, 2019 Order (2018-CP-10-05077)**;
- b. Prior to entry of the June 5 Order in the wrong suit, the Parties had submitted proposed orders. Defendants objected to Plaintiff's proposed order (see **June 5, 2019 Objections**), *inter alia*, on the grounds that the key component of the arbitration was the requirement that the company's CPA serve as an arbitrator;
- c. Judge Price rejected Defendants' objections and ordered that the arbitrator selection clause be struck and that the arbitrators be appointed pursuant to S.C. Code Ann. § 15-48-30. **June 24, 2019 Order (2019-CP-10-00178)**. Ironically, it is this very code section that states "[i]f the arbitration agreement provides a method of appointment of arbitrators, this method shall be followed."

This appeal timely follows the entry of this Order, filed and served on June 24, 2019, as it denied Defendants' right to arbitrate pursuant to the terms of the corporate bylaws.

LEGAL STANDARDS

The denial of a party's right to arbitration 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). Parties are entitled to arbitrate in the manner provided for in the arbitration provision. *See* 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"); 9 U.S.C. § 3 (a court ordering arbitration must stay the case "until such arbitration has been had in accordance with the terms of the [arbitration] agreement").

The right to select arbitrators in the manner provided for in the arbitration provision is an arbitration right expressly provided in both State and Federal statutes. *See* S.C. Code Ann. § 15-48-30 ("If the arbitration agreement provides a method of appointment of arbitrators, this method

shall be followed.”); 9 U.S.C. § 5 (“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.”);

Additionally, orders affecting the mode of trial are immediately appealable. *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”).

SUMMARY OF ARGUMENT

The trial court erred and exceeded its authority in striking the arbitrator selection clause and substituting another mode of selecting arbitrators for the following reasons:

- A. Mahoney is collaterally estopped from arguing the mode of appointment provision is not enforceable because the same judge ordered arbitration pursuant to that provision in a prior suit between the same parties;
- B. The trial court’s order is in error because:
 - a. The South Carolina and Federal arbitration acts expressly require that an arbitrator selection provision be enforced;
 - b. A court cannot decide issues other than arbitrability when considering a motion to compel arbitration;
 - c. A court may not rewrite a valid agreement between parties simply because it finds it or part of it inequitable, especially where the court’s rewriting contradicts the court’s prior order entered in a suit between the same parties;
 - d. The record is devoid of evidence supporting the trial court’s finding of inequity, and all evidence in the record supports the reasonableness of including the corporation’s CPA as an arbitrator of a financial dispute regarding the corporation.

The trial court’s order must be vacated, and arbitration ordered pursuant to and in the manner provided in the corporate bylaws, in keeping with the trial court’s order entered pursuant to the arbitration provision in the prior suit between the same parties.

ARGUMENT

The trial court's order improperly denies Defendants a contractual arbitration right and must be vacated for the following reasons.

I. Collateral Estoppel

A party is collaterally estopped from relitigating an issue that was decided in a previous action between the two parties. *E.g., Carolina Renewal, Inc. v. S. C. Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E. 2d 779, 782 (Ct. App. 2009). "The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." *Id.*

Judge Price's prior order in the employment suit between these same parties compelled arbitration pursuant to the corporate bylaws, necessarily including the enforcement of the arbitrator selection clause. **May 17, 2019 Order (2018-CP-10-05077).**

Accordingly, Mahoney was and is collaterally estopped from arguing in this case that the arbitrator selection clause should be struck from the corporate bylaws.

II. The Court Erred.

A. State and Federal Law Require Enforcement of Arbitrator Selection Provisions

Under the South Carolina Uniform Arbitration Act, S.C Code Ann. § 15-48-10 *et seq.*, "[i]f the arbitration agreement provides a method of appointment of arbitrators, *this method shall be followed.*" S.C. Code Ann. § 15-48-30 (emphasis added). Under the Federal Arbitration Act, "[i]f 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 any discretion with regard to arbitrator selection when an arbitration

provision designates the method of selection. *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)).

The Court’s order denies Appellants the right to select arbitrators as provided in the arbitration provision and is subject to reversal.

B. When Considering a Motion to Compel Arbitration, the Court’s Authority is Limited to Determining Arbitrability

When considering a motion to compel arbitration, the sole issue before the court is whether the parties’ contractual agreement renders the dispute arbitrable. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83–85, 123 S.Ct. 588, 591–92 (2002). All other questions, including “procedural” questions and questions regarding the interpretation of the agreement to arbitrate, are for the arbitrator to decide in the first instance, not the court. *Id.* at 85, 123 S.Ct. at 592; *Dockser v. Schwartzberg*, 433 F.3d 421, 425 (4th Cir. 2006) (“We conclude that the question of the number of arbitrators is one of arbitration procedure, and that the parties’ agreement does nothing to overcome the presumption that such questions are for arbitral, rather than judicial, resolution.”).

The manner of arbitrator selection is a procedural matter that raises no questions of arbitrability. The trial court therefore exceeded its authority in altering the manner in which the third arbitrator would be selected, and its June 24, 2019 order is subject to reversal on this basis.

C. Courts May Not Rewrite Parties’ Agreements

Furthermore, even if the Court had authority to consider questions outside of arbitrability, is well-settled that the Court is not permitted to rewrite an agreement between parties. *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 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.”).

Nor are Courts permitted to superimpose their opinions on the agreement of the parties. *E.g., Texcon, Inc. v. Anderson Aviation, Inc.*, 284 S.C. 307, 308, 326 S.E.2d 168, 169 (Ct. App. 1985) (“courts cannot rule on [contractual provisions’] wisdom or substitute their interpretation for the agreement clearly entered into between the parties”); *Lindsay v. Lindsay*, 328 S.C. 329, 340, 491 S.E.2d 583, 589 (Ct. App. 1997) (“The court must enforce an unambiguous contract according to its terms, regardless of the contract’s wisdom or folly, or the parties’ failure to guard their rights carefully.”). As these precedents indicate, a finding of inequity is not a valid basis for striking a contractual provision.

D. No Evidence in the Record Supports a Finding of Inequity

Setting aside that the trial court could not reach the question because it is not a question of arbitrability, the Court erred in finding the arbitrator selection provision inequitable. **June 24, 2019 Order (2019-CP-10-00178)**. The argument that the arbitrator selection clause unfairly benefits Appellants was raised at oral argument. There was and is nothing in the record to support the Court’s justification. Because inequity had not been raised previously, Appellants submitted an affidavit of Appellant Hay demonstrating that the provision is not inequitable. Respondents did not submit any affidavits, and so there is no evidence in the record to support Respondent’s counsel’s argument. **Hay Affidavit**.

The affidavit establishes the following facts:

- the arbitration provision was not adopted to disadvantage anyone, but rather to streamline resolution of disputes;
- Mahoney, as CEO of Muhler, had a duty to act in the best interest of the corporation;
- Mahoney remained CEO of Muhler for two years after the arbitration provision was adopted and did not object to it during that time;
- As CEO of Muhler, it was Mahoney, and not Hay, who had a working relationship with the CPA (Mr. Kent) who would serve as an arbitrator in this dispute;
- Because of Mahoney's working relationship with Mr. Kent, Mr. Kent was hired as CPA of a separate company Mahoney and Hay were involved in.

Hay Affidavit at 1–2. There is no evidence to the contrary.

Additionally, the wisdom of the arbitrator selection as set forth in the agreement is evident as most disputes in a closely held corporation will be financial in nature. Included is this dispute, which centers around the calculation of the value of shares based on the corporation's Earnings Before Interest, Tax, Depreciation, and Amortization ("EBITDA"). The corporation's accounting firm (i) is well-acquainted with the accounting concepts involved in valuing the shares and (ii) is the organization most familiar with the corporation's finances for purposes of that valuation. The inclusion of the accounting firm's employee was intended to, and would, ensure a fair and accurate process that streamlines resolution of the dispute. As to the other arbitrators, each party appoints one. This is a logical and fair method for resolving a dispute involving the valuation of a stockholder's shares.

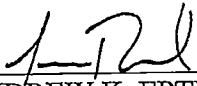
Because the court's finding of inequity is entirely unsupported in the record, this Court should find that the trial court abused its discretion (in addition to exceeding its authority) in striking the Parties' arbitrator selection clause.

CONCLUSION

The Parties to this lawsuit are all bound by the terms of a valid, enforceable arbitration agreement contained within Muhler's corporate bylaws. The trial court's order must be vacated and the case remanded with instructions to enter an order compelling arbitration pursuant to the express terms of the corporate bylaws.

Respectfully submitted,

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



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ATTORNEYS FOR APPELLANTS

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

RECEIVED
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SC COURT of Appeals

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

v.

THE MUHLER COMPANY, INC. and HENRY M. HAY, III.....
Defendants/Appellants.

APPELLANTS'
DESIGNATION OF MATTER TO BE INCLUDED
IN THE RECORD ON APPEAL

Appellants assert the following documents should be included in the Record on

Appeal:

1. May 17, 2019 Order (2018-CP-05077)
2. June 5, 2019 Order (2018-CP-10-05077)
3. June 14, 2019 Order (2018-CP-10-05077)
4. June 24, 2019 Order (2019-CP-10-00178)
5. December 17, 2018 Motion to Compel (2018-CP-10-05077)
6. February 15, 2019 Motion to Compel (2019-CP-10-000178)
7. June 5, 2019 Objections to Plaintiff's Proposed Order

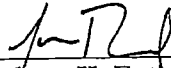
8. June 5, 2019 Affidavit of Henry Hay

9. Article XIII to the Bylaws of The Muhler Company, Inc.

I certify this designation contains no matter which is irrelevant to this appeal.

Respectfully Submitted by:

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ATTORNEYS FOR APPELLANTS

Dated this 22nd day of July, 2019
Charleston, South Carolina

**IN ARBITRATION WITH THE
AMERICAN ARBITRATION ASSOCIATION**

J. DANIEL MAHONEY,

Claimant,

v.

THE MUHLER COMPANY, INC.
And HENRY M. HAY, III, in his
individual capacity,

Respondents.

ARBITRATION AWARD

I. INTRODUCTION

This matter was heard by us on December 3, 2019. The parties provided briefs with exhibits and deposition excerpts. We heard from witnesses J. Daniel Mahoney, Michael Herlocker, Henry Hay, and Matthew Patz, and received further exhibits into evidence. The parties, by agreement, conducted this proceeding before us without opening statements or closing arguments, and by agreement, proposed orders were submitted. The parties request that our order set forth its underpinnings.

II. THE CLAIMS

Dan Mahoney ("Mahoney") has sued, claiming \$129,000 in salary and benefits; he asks that these sums be trebled under the South Carolina Payment of Wages Act, S.C. Code Ann. § 41-10-80. Alternatively, he claims a breach of contract accompanied by fraud and requests \$129,000 plus punitive damages.

The Muhler Company, Inc. ("Muhler") claims amounts owed by Mahoney on account of monies advanced or paid by Muhler on behalf of Mahoney which have not been repaid. Muhler seeks \$25,447 plus interest.

III. THE PARTIES

Muhler and Glasscorp LLC (“Glasscorp”) are both in the window business. Glasscorp was created to perform commercial glass installation and was spun out of Muhler’s more extensive window products business. The Glasscorp shareholders at the time of its inception were Michael Herlocker (“Herlocker”), 44%, Henry Hay (“Hay”) 42%, and Mahoney 14%. Mahoney became the CEO of Muhler on January 15, 2008 and was terminated on September 18, 2018. Respondents’ Trial Exh. 5. Mahoney became a 25% shareholder in Muhler on November 4, 2008. Respondents’ Trial Exh. 2. The balance of Muhler stock is owned by Hay, who is Muhler’s founder.

IV. CONTROLLING LAW

“A fiduciary relationship exists when one reposes special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing confidence.” *O’Shea v. Lesser*, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992). The duty of loyalty requires that officers and directors must act in good faith and the best interest of the corporation. See Black’s Law Dictionary (2d ed.) (“Duty of Loyalty”). Self-dealing—defined as an action taken by a corporate fiduciary done for personal gain rather than for the benefit of the corporation—constitutes a breach of the duty of loyalty. *Menezes v. WL Ross & Co.*, 403 S.C. 522, 533 (2013) (citing Delaware case referring to “self-dealing or other breach of loyalty”). Self-serving acts or agreements between a fiduciary and the corporation constitute a breach of the duty of loyalty and are unenforceable. See Restatement (Second) of Contracts § 193; *Ace Limited v. Capital Re Corporation*, 747 A.2d 95, 105 (Del. Ch. 1999). A fiduciary relationship “imposes on the members the obligation of refraining from taking any advantage of one another by the slightest misrepresentation or concealment.” *Lawson v. Rogers*, 312 S.C. 492, 499 (1993). Indeed, a significant feature of a fiduciary relationship is that the representations of a fiduciary can

be trusted and relied upon, unlike in an arm's length transaction. *See Ardis v. Cox*, 314 S.C. 512, 516 (Ct. App. 1993).

Where there is a bona fide dispute as to whether wages are owed under the S.C. Payment of Wages Act, S.C. Code Ann. § 41-10-10 *et seq.*, there can be no trebling of the wages even if they are determined as owing. *Morin v. Innegrity, LLC*, 424 S.C. 559, 573–74 (Ct. App. 2018).

V. MAHONEY'S CLAIM

a. Standards

Mahoney testified that as CEO he owed a duty of loyalty which he would violate by doing any of the following:

1. Compromising Muhler's ability to compete;
2. Misrepresenting facts to Muhler and its shareholders;
3. Self-dealing, defined by Mahoney as preferring one's own interests to that of Muhler;
4. Failing to follow the directives of Muhler's shareholders;
5. Failing to enforce Muhler's bylaws.

We accept Mahoney's formulation of his CEO duty of loyalty. A breach of the duty of loyalty justifies a termination for cause and would deny a recovery to Mahoney.

b. Shareholder Meetings

Muhler's trial exhibit 8 was the Glasscorp Operating Agreement which was signed by all three members and effective October 30, 2013. Of particular interest to this dispute is § 3.1, which defines the purpose for which the company was created:

The company has been formed to engage in the commercial glass installation and repair business and to engage in other ancillary businesses provided all activities are legally allowed pursuant to South Carolina law.

Respondents' Trial Exh. 8 at § 3.1.

Mahoney, Herlocker, and Hay all testified that their agreement was that Muhler and Glasscorp would never compete with each other. This agreement flowed from Muhler loaning the money to start Glasscorp, funding the members' shareholder accounts, giving its commercial glass business to Glasscorp as a starter, and providing access to banking, clients, and materials; indeed a weekly meeting was held at which Muhler's and Hay's expertise was given to Glasscorp, Michel Herlocker, and Dan Mahoney so as to facilitate Glasscorp's competitiveness in its market.¹

This dispute largely arises from Muhler's and Hay's attempt to have Mahoney and Herlocker affirm the agreed-upon product delineation stated above. When Hay's negotiations were unsuccessful, Hay called first a meeting of Muhler in which he sought and received the agreement of Mahoney to the following:

In order to avoid a conflict between Glasscorp and Muhler, Glasscorp shall not offer clad-wood doors or windows, vinyl doors or windows, sunrooms, shutters, replacement vinyl or wood windows, or hurricane protection.

Respondents' Trial Exh. 3. Hay then requested a meeting of the Glasscorp shareholders to accept the exact same delineation contained in the Muhler Motion:

In order to avoid conflict between Glasscorp and Muhler I propose that Glasscorp shall not offer clad wood windows and doors, vinyl doors and windows, sunrooms, shutters, replacement vinyl or wood windows, or hurricane protection, which is basically what Muhler does.

Respondents' Trial Exh. 4. Both Mahoney and Herlocker voted against the Motion so that it failed.

c. Mahoney's Defense Fails – Product Delineation

¹ Mr. Hay was animated in his description of his sharing (for many years) his sales strategy and pricing, product patent development, product testing, and budgets. Hay testified to Herlocker's previous experience millwork and lack of experience in the commercial glass business.

By his own standards as testified to before us, Mahoney failed to follow the unequivocal and unanimous directions of his shareholders as expressed at the Muhler meeting. Further, Mahoney had the opportunity and duty to vote at the Glasscorp meeting in favor of the product delineation. In failing to do so, he was facilitating competition with Muhler and compromising Muhler's market "space" and value. This is all the more irregular as this product delineation was expressed in the operating agreement and affirmed by Mahoney's and Herlocker's testimony at trial.

Mahoney advanced in his brief and in his and Herlocker's testimony that Glasscorp was not competing with Muhler. While we reject this contention based upon Hay's testimony, the issue before us is the conduct of a CEO. Mahoney, as CEO, wears a Muhler hat, and it is no defense to say that at the time he voted against Muhler's interest he was wearing his Glasscorp hat.

There are two subsequent events that support Muhler and Hay's insistence on affirming the product delineation. First, within weeks of Mahoney's termination from Muhler, he began work with Glasscorp. Muhler's comptroller, Todd Currie, within weeks of Mahoney's termination, gave notice to Muhler that he would begin working for Glasscorp. Second, under § 13.3 of the Glasscorp Operating Agreement, Mahoney's termination from Muhler created a call option on Mahoney's Glasscorp stock. Glasscorp failed to exercise the call option, and it passed to the shareholders. Hay exercised the option. Thereafter, Mahoney, without notice to Hay, sold his interest in Glasscorp to Herlocker for in excess of \$500,000 despite the outstanding call by Hay. While both of these events occurred after Mahoney's termination, they support that Mahoney pursued his own interest and not that of Muhler.

We find Mahoney's termination to be with cause.

d. Self-Dealing

Hay was asked on cross examination if certain events were grounds for Mahoney's termination. He was asked whether:

- The Savannah competitive bid by Glasscorp was a basis for termination.
- The irregularity surrounding car leases was a basis for termination.
- The loans due from shareholder were a basis for termination.
- The amount of vacation days was a basis for termination.

Hay acknowledged the above grounds were not additional grounds for termination. However, the issue before this Panel is whether Mahoney can recover. It is true that Mahoney and Currie's employment at Glasscorp and Mahoney's sale of stock to Herlocker occurred after Mahoney's termination and were not grounds for termination, but they are actions that support Mr. Hay's claim of self-dealing. Mahoney's representation to Hay that the employment and shareholder agreements were prepared to be "fair" to Muhler and Hay are belied by the documents themselves. We find Mahoney's admission at trial that Exhibits 1 and 2 were prepared by his lawyer to protect his interests as employee and shareholder are acts of self-dealing, not enforceable, and further reason that Mahoney's claims fail.

e. All American Windows

Mr. Hay testified that collaboration with All-American Windows represented a potentially lucrative business opportunity for Muhler and that he, as majority shareholder, directed Mahoney to pursue it. He testified, and we accept, that Mahoney refused to pursue the opportunity. This is another breach of the duty of loyalty.

f. Conclusion

For each reason stated above, Mahoney's claim fails.

VI. MUHLER'S CLAIMS

We decline to award Muhler on its counterclaim as they deal with events which are too stale by passage of time.

VII. CONCLUSION

Mahoney's claims are denied, and Muhler's counterclaims are denied. The costs of this proceeding are taxed against Mahoney, pursuant to §15-48-110, S.C. Code Ann. Costs of this proceeding shall be limited to arbitrators' fees which shall be submitted with reasonable promptness and paid within 30 days of receipt of the arbitrators' statement for services.

IT IS SO ORDERED, this 12th day of December 2019.

for *Barry Gumb*
BARRY GUMB, Arbitrator, on behalf of the Panel, at
Mr. Gumb's request

for *Peter Kent*
PETER KENT, Arbitrator, on behalf of the Panel at
Mr. Kent's request

Marvin D. Infinger
MARVIN D. INFINGER, Arbitrator, on behalf of
the Panel

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

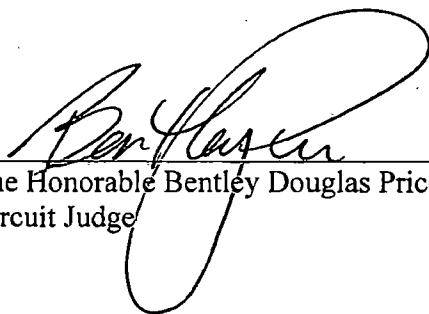
FILED
2019 MAY 17 AM 11:45
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Before the Court is a motion to stay and compel arbitration filed by Defendants The Muhler Company, Inc. and Henry Hay. Having had the benefit of oral argument on May 16, 2019, and for the reasons stated on the record and in Defendants' brief, the Court rules as follows:

1. Defendants' motion is granted.
2. Defendants shall not oppose discovery in the arbitration.
3. I will retain jurisdiction to hear all matters once the arbitration is concluded.

IT IS SO ORDERED.

This 17 day of May, 2019


The Honorable Bentley Douglas Price
Circuit Judge

**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

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:

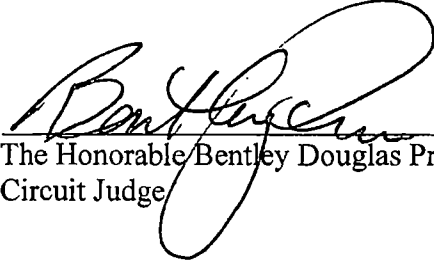
1. Defendants' Motion is granted, and arbitration is compelled.
2. Based on the facts and circumstances of this dispute, I find Article XIII, Section 2 of the Amended Bylaws to the Muhler Company, Inc. regarding the selection of the arbitrators to be inequitable and therefore unenforceable. S.C. Code 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

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

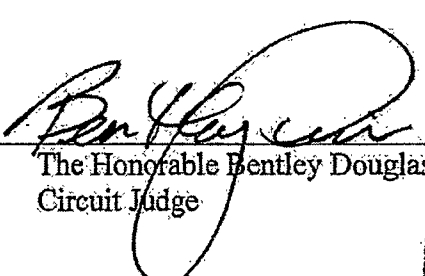
CASE NO.: 2018-CP-10-5077

ORDER VACATING JUNE 5, 2019
ORDER

On June 5, 2019, an Order was entered in this case inadvertently as the result of a clerical error. That Order is hereby vacated.

IT IS SO ORDERED.

This 14th day of June, 2019


The Honorable Bentley Douglas Price
Circuit Judge

FILED
2019 JUN 14 AM 10:16
JULIE J. ARMSTRONG
CLERK OF COURT

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:

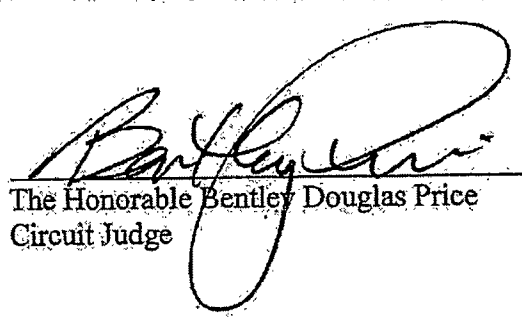
1. Defendants' Motion is granted, and arbitration is compelled.
2. Based on the facts and circumstances of this dispute, I find Article XIII, Section 2 of the Amended Bylaws to the Muhler Company, Inc. regarding the selection of the arbitrators to be inequitable and therefore unenforceable. S.C. Code 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

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

J. DANIEL MAHONEY,

Plaintiff,

vs.

THE MUHLER COMPANY AND HENRY
HAY, SR., IN HIS INDIVIDUAL
CAPACITY,

Defendant.)

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

CASE NO.: 2018-CP-10-5077

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney:

_____, Bar No. _____

Address: _____

Phone: _____ Fax: _____

E-mail: _____ Other: _____

Defendant's Attorney:

JAAN G. RANNIK, Bar No. 103014

Address: _____

46-A State Street, Charleston, SC 29401

Phone: 843-377-1871 Fax 843-377-1310

E-mail: jgr@epting-law.com Other: _____

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**

☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**

☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion to Stay and Compel Arbitration

Estimated Time Needed: 15 min.

Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant

12/17/18

Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: \$ _____

☐ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ MOTION FEE COLLECTED: \$ _____

☐ CONTESTED – AMOUNT DUE: \$ _____

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

J. DANIEL MAHONEY,

Plaintiff,

v.

THE MUHLER COMPANY AND HENRY
HAY, SR., IN HIS INDIVIDUAL
CAPACITY,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR CHARLESTON COUNTY

CASE NO.: 2018-CP-10-5077

MOTION TO STAY THE CASE AND
COMPEL ARBITRATION

2018 DEC 17 PM 3:44
CLERK OF COURT
NY

Defendants hereby demand Plaintiff arbitrate this dispute and move this Court for an Order staying this matter and compelling arbitration. In support thereof, Defendants state as follows:

1. Article XIII of the Muhler Bylaws states:

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").

(Exh. A).

2. The instant dispute is accordingly subject to arbitration and this action must be stayed or dismissed pending a final decision in arbitration

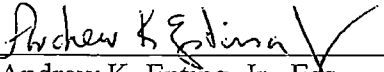
WHEREFORE:

1. Defendants move this Court for an order staying or dismissing this matter in favor of arbitration.

Respectfully submitted:

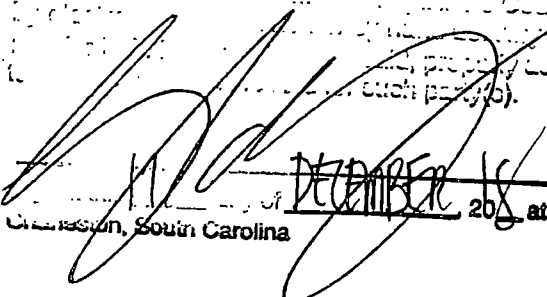
ANDREW K. EPTING, JR., LLC

On this 14th day of December, 2018
Charleston, SC


Andrew K. Epting, Jr., Esq.
Jaan G. Rannik, Esq.
46A State Street, Charleston, SC 29401
P: 843.377.1871
F: 843.377.1310
ake@epting-law.com
jgr@epting-law.com

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF
THE UNDERSIGNED
and correct
this cert
to the court
properly
such party(s).


DECEMBER 18, 2018 at
Charleston, South Carolina

**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.

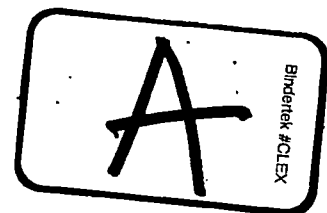
2. Arbitrators. There shall be three arbitrators, each of whom shall be a Certified Public Accountant ("CPA") licensed in the State of South Carolina.

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.

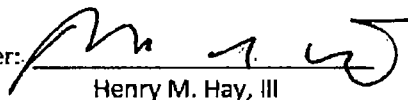
3. Place of Arbitration. The place of arbitration shall be Charleston, South Carolina.



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 and HENRY
HAY, III, in his individual capacity,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR CHARLESTON COUNTY

CASE NO.: 2019-CP-10-178

MOTION TO STAY THE CASE AND
COMPEL ARBITRATION

FILED
2019 FEB 15 PM 3:48
JULIE J. ARMSTRONG
CLERK OF COURT

Defendants hereby demand Plaintiff arbitrate this dispute and move this Court for an Order staying this matter and compelling arbitration. In support thereof, Defendants state as follows:

1. Article XIII of the Muhler Bylaws states:

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").

(Exh. A).

2. The instant dispute is accordingly subject to arbitration and this action must be stayed or dismissed pending a final decision in arbitration

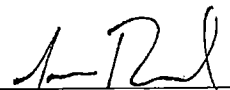
WHEREFORE, Defendants move this Court for an order staying or dismissing this matter in favor of arbitration.

[signature on following page]

Respectfully submitted:

ANDREW K. EPTING, JR., LLC

On this 15th day of February, 2019
Charleston, SC

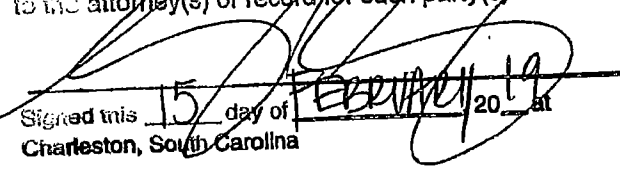


Andrew K. Epting, Jr., Esq.
Jaan G. Rannik, Esq.
46A State Street, Charleston, SC 29401
P: 843.377.1871
F: 843.377.1310
ake@epting-law.com
jgr@epting-law.com

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES that true and correct copies of the pleading or paper to which this certificate is affixed was served upon the party(s) to this action in accord with the applicable Court Rules by electronic transmission or by hand delivery or by regular U.S. Mail, postage prepaid, properly addressed to the attorney(s) of record for such party(s).


Signed this 15 day of February, 2019 at
Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

J. DANIEL MAHONEY,

Plaintiff,

v.

THE MUHLER COMPANY and HENRY
HAY, III, in his individual capacity,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR CHARLESTON COUNTY

CASE NO.: 2019-CP-10-178

**DEFENDANTS' OBJECTIONS TO
PLAINTIFF'S PROPOSED ORDER**

FILED
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JULIE H. STRONG
CLERK OF COURT

Defendants, the Muhler Company, Inc. ("Muhler") and Henry Hay, III ("Hay"), object to the proposed order submitted by J. Daniel Mahoney ("Mahoney"). The Parties were before the Court on May 31, 2019 with regard to Defendants' motions (i) to stay the case and compel arbitration, and (ii) to quash subpoenas. The Court was disposed to rule that the dispute should be arbitrated, but that the arbitration provision should be rewritten with regard to the manner of selecting the arbitrators. Plaintiff provided a proposed order for the Court to sign, and Defendants now object as follows.

I. OBJECTIONS

Under the South Carolina Uniform Arbitration Act, S.C Code Ann. § 15-48-10 *et seq.*, "[i]f the arbitration agreement provides a method of appointment of arbitrators, this method shall be followed." S.C. Code Ann. § 15-48-30. Under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"), a party to an arbitration agreement who is "aggrieved by the alleged failure, neglect, or refusal of another to arbitrate" is entitled to an order from a court of competent jurisdiction "directing that such arbitration proceed *in the manner provided for in such agreement.*" 9. U.S.C. § 4 (emphasis added).

Plaintiff's proposed order denies Defendants that right and, in seeking to rewrite the Parties' agreement, exceeds this Court's authority over this dispute, which is limited to determining arbitrability. Indeed, when a party moves to stay litigation and compel arbitration under the FAA, the only question before the court is whether the parties' contractual agreement renders the dispute arbitrable. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83–85 (2002). All other questions, including “procedural” questions and questions regarding the interpretation of the agreement to arbitrate, are for the arbitrator to decide in the first instance, not the court. *Id.* at 85; *Dockser v. Schwartzberg*, 433 F.3d 421 (4th Cir. 2006) (“We conclude that the question of the number of arbitrators is one of arbitration procedure, and that the parties’ agreement does nothing to overcome the presumption that such questions are for arbitral, rather than judicial, resolution.”).

It is well-settled that the Court is not permitted to rewrite an agreement between parties. *E.g.*, *Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 171 (2002) (“It is not the function of the court to rewrite contracts for parties.”); *McPherson v. J. E. Sirrine & Co.*, 206 S.C. 183, 207 (1945) (“Parties *sui juris* bind themselves by their lawful contracts, and Courts cannot alter them because they work a hardship. The rights of the parties must be measured by the contract which they themselves made.” (citation omitted)); *Gordon Farms, Inc. v. Carolina Cinema Corp.*, 294 S.C. 158, 160 (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.”); *Texcon, Inc. v. Anderson Aviation, Inc.*, 284 S.C. 307308 (Ct. App.

1985) (“courts cannot rule on their wisdom or substitute their interpretation for the agreement clearly entered into between the parties”).

The Court’s proposed ruling as stated during the May 31 hearing denies Defendants’ motion by altering the arbitration agreement as written by the shareholders pursuant to the corporate bylaws. The Court’s jurisdiction does not extend this far. *See supra*. Moreover, as most disputes in a closely held corporation will be financial in nature, the wisdom of the arbitrator selection as set forth in the agreement is evident; likewise with this dispute, which centers around the calculation of EBITDA. The corporation’s CPA is most familiar with the corporation’s finances. As to the other arbitrators, each party appoints one. This streamlines the resolution of the dispute and ensure that the corporation’s finances are accurately understood.

The proposed order suggests the arbitrator selection provision is “inequitable”¹ based upon representations made by counsel at the May 31st hearing. As Plaintiff did not file a memorandum, Defendants were faced with certain factual allegations for the first time at that hearing. These included: (i) that Mr. Mahoney had no notice of the proposal to modify the bylaws; (ii) that the relationship between Mr. Mahoney and Mr. Hay was going bad in 2016 which was the reason for the bylaws amendment; and (iii) that Peter Kent, the CPA for the Muhler Company, is a “close friend” of Henry Hay’s such that it would be improper for him to serve as an arbitrator. Counsel’s recitation is inaccurate.

As evidenced by the meeting notice dated October 14, 2016 and hand-delivered to Mr. Mahoney that same day (**Exh. A; Exh. B** at ¶ 8), Mr. Mahoney *did* receive notice of the

¹ No authority is provided in support of the proposition that an inequitable provision (which this is not) is unenforceable. However, as stated above, issues regarding the procedures outlined in the arbitration provision are not issues of arbitrability and therefore are not for the Court to decide in any event, but rather are for the arbitrator in the first instance.

proposed amendment. The amendment was enacted after a vote at a shareholder's meeting and the adoption of a resolution to amend the bylaws. Any contention to the contrary is untenable.

As evidenced by the attached affidavit of Hay, the purpose of amending the bylaws was to benefit the Corporation by increasing the efficiency and reducing the cost of resolving any and all disputes, including with shareholders. **Exh. B** at ¶ 4. Mr. Mahoney, as the CEO of the corporation, had a vested interest in such an amendment as it benefitted of the corporation.² Mr. Hay is likewise bound by the terms of the arbitration provision. From Mr. Hay's perspective, his relationship with Mr. Mahoney was the same in 2016 as it ever was. *Id.* at ¶ 7.

As to Mr. Kent, Mr. Mahoney was the CEO of Muhler and thus had significantly more interaction with him than Mr. Hay. **Exh. B** at ¶ 10. Mr. Kent is also the CPA for Glasscorp, a related entity that hired Mr. Kent because of Mr. Mahoney's relationship with him. *Id.* at ¶ 9. If something occurred in the interactions between Mr. Mahoney and Mr. Kent that leads Mr. Mahoney to be uncomfortable with Mr. Kent serving as an arbitrator, it has nothing to do with Mr. Hay or any purported "friendship" between them. Mr. Hay hardly interacted with Mr. Kent in his role at Muhler or any other corporation, *id.* at ¶ 10.

II. CONCLUSION

For the foregoing reasons, Defendants object to Plaintiff's proposed order and request the Court not deny the Defendants their contractual right to arbitrate.

[signature on following page]

² Defendants have argued that Mr. Mahoney violated this fiduciary duty in other respects too, as demonstrated by his conduct regarding the product delineation between Glasscorp, a related entity, and Muhler. *See Exh. C*. A copy of this exhibit was handed up to the Court during the May 31st hearing.

Respectfully submitted:

ANDREW K. EPTING, JR., LLC

On this 5th day of June, 2019
Charleston, SC



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Jaan G. Rannik, Esq.
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ATTORNEYS FOR DEFENDANTS

~~*Notice of Annual Shareholders' Meeting*~~
of The Muhler Company, Inc. for Fiscal Year 2017

To: The Muhler Company Inc.; The Stockholders

Notice

You are hereby notified that the annual meeting of the shareholders of The Muhler Company, Inc. (hereinafter "Muhler") for fiscal year 2017 will be held on Tuesday, October 25, 2016, at 5:00 p.m. at 630 Skylark Drive, Suite U, Charleston, SC 29407. This meeting is requested by Henry M. Hay, III, 75% stockholder.

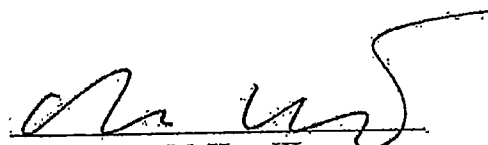
Notice is provided this 14th day of October, 2016.

Agenda

The meeting will be held for the purpose of a shareholders' vote on (i) the election of Muhler corporate officers, and (ii) a proposed amendment to the Muhler bylaws.

The order of business will be as follows:

1. Proof of notice of meeting;
2. Calling of roll;
3. Reading and disposal of any unapproved minutes;
4. Reading of any annual reports of officers and committees;
5. Unfinished business;
6. New business;
 - a. Election of Corporate Officers
 - i. Nomination of corporate officers;
 - ii. Shareholders' vote to elect corporate officers;
 - b. Amendment of Bylaws
 - i. Reading of proposed amendment to Muhler's bylaws by requiring arbitration of claims;
 - ii. Shareholders' vote on adoption of amendment;
7. Adjournment.


Henry M. Hay, III



**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.

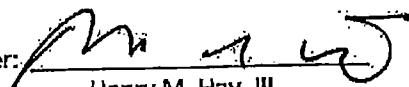
The third arbitrator shall be an employee of the Corporation's accountant. This third arbitrator will be appointed even in the event that the corporation is a claimant or respondent.

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 and HENRY
HAY, III, in his individual capacity,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR CHARLESTON COUNTY

CASE NO.: 2019-CP-10-178

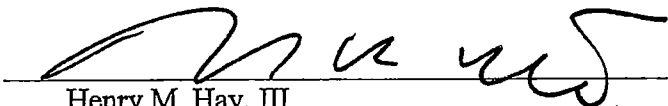
AFFIDAVIT OF HENRY M. HAY, III

PERSONALLY appeared before me Henry M. Hay, III, stating as follows:

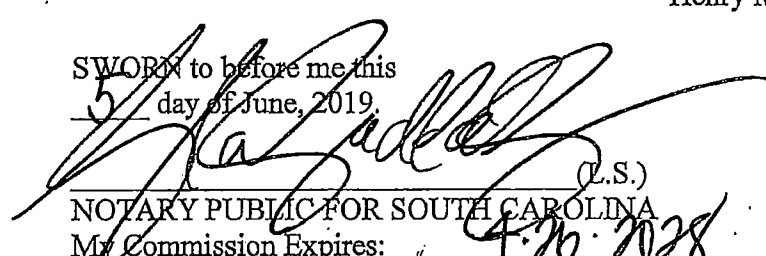
1. I am the President and majority shareholder of The Muhler Company, Inc. ("Muhler").
2. J. Daniel Mahoney ("Mahoney") was formerly the CEO of Muhler and claims a 25% ownership of Muhler.
3. As stated in my previous affidavit handed up to the Court by my attorneys, Muhler is a South Carolina corporation that does business in other states, including Florida, Alabama, Georgia, Oregon, and Wisconsin.
4. The purpose of amending Muhler's bylaws to include an arbitration provision was to streamline the resolution of any disputes that might arise.
5. The bylaws were not amended in order to disadvantage anyone, including Mr. Mahoney. I never suspected Mr. Mahoney would have any objection to the arbitration agreement as we both had a duty to act in the best interests of the Corporation. Further, Mr. Mahoney, as a member of two other corporations in which I am also involved, included arbitration provisions in the corporations' operating agreements. **Exh. 1** (Hawkes operating agreement); **Exh. 2** (Glasscorp operating agreement).
6. Mr. Mahoney remained the CEO of Muhler for 2 years after the arbitration clause was added to the bylaws. During that period, he also claimed a 25% share of the corporation. At no time did Mr. Mahoney object to the amended agreement.



7. My relationship with Mr. Mahoney had not changed in any particular way prior to the amendment of the bylaws. Our relationship was never personal and only professional.
8. Prior to the meeting to vote on the proposed amendment to the bylaws, I hand-delivered a meeting notice and agenda to Mr. Mahoney.
9. Peter Kent is the CPA for both Muhler and a related entity, Glasscorp LLC, of which Mr. Mahoney was a shareholder. He was hired by Glasscorp because of Mr. Mahoney's relationship with him.
10. As CEO of Muhler, Mr. Mahoney maintained Muhler's working relationship with Mr. Kent. My interactions with Mr. Kent in the matters of Muhler, Glasscorp, and Hawkes were insignificant, especially in Muhler as Mr. Mahoney was the CEO and largely in control of finance.
11. Further affiant sayeth naught.


Henry M. Hay, III

SWORN to before me this
5 day of June, 2019.


(L.S.)
NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: 4-26-2028

THIS AGREEMENT IS SUBJECT TO ARBITRATION PURSUANT TO THE SOUTH CAROLINA UNIFORM ARBITRATION ACT, S.C. CODE ANN. SECTION 15-48-10 ET. SEQ.

OPERATING AGREEMENT

of

HAWKES DESIGN AND CONSULTING, LLC

a South Carolina limited liability company

This Operating Agreement of HAWKES DESIGN AND CONSULTING, LLC, a South Carolina limited liability company, is made to be effective as of March 4, 2013. This Agreement supersedes prior oral or written operating agreements of the Company, if any.

1. DEFINITIONS

For purposes of this Agreement (as defined below) unless the context clearly indicates otherwise, terms shall have the following meanings; as a matter of convenience, the terms dealing with tax and accounting have been separately grouped in this Article 1.

GENERAL DEFINITIONS

1.1. **Act.** The South Carolina Uniform Limited Liability Company Act of 1996, and all amendments thereto.

1.2. **Additional Capital Contribution.** A Capital Contribution other than the initial capital contribution.

1.3. **Agreement.** This Operating Agreement and all amendments thereto adopted in accordance with the Agreement and the Act.

1.4. **Articles.** The Articles of Organization of the Company as properly adopted and amended from time to time by the Members and filed with the South Carolina Secretary of State.



1.5. **Assignee.** A transferee of a Membership Interest who has not been admitted as a Substitute Member.

1.6. **Business Day.** Any day other than Saturday, Sunday or any legal holiday observed by the State.

1.7. **Call Option.** As set forth in Section 13.3.

1.8. **Call Trigger.** As set forth in Section 13.3.

1.9. **Capital Contribution.** Any contribution of cash, property, services rendered, or a promissory note, or other written obligation to contribute cash or property or to perform services made by or on behalf of a Member.

1.10. **Company.** HAWKES DESIGN AND CONSULTING, LLC, a South Carolina limited liability company.

1.11. **Company Liability.** Any enforceable debt or obligation for which the Company is liable or which is secured by any Company Property.

1.12. Intentionally Blank.

1.13. **Company Property.** Any Property owned by the Company.

1.14. **Dissolution Event.** An event, the occurrence of which will result in the dissolution of the Company under Section 14.1.

1.15. **Distribution/Distributed.** A transfer of Property to a Member.

1.16. **Effective Date.** As set forth in the opening recital.

1.17. **Fair Market Value/ Company Value.** With respect to the purchase of the Membership Interest of any Member by the Company, the Company shall be valued at four (4) times ADJUSTED EBITDA as herein defined, "Company Value". The Fair Market Value of a Membership Interest shall be the selling Member's Percentage Interest times the Company

Value. "ADJUSTED EBITDA" means for any period, earnings of the Company plus interest, taxes, depreciation, amortization or any Members payment or Distribution (including payroll and cost of fringe benefits) calculated in accordance with Generally Accepted Accounting Principles ("GAAP"), unless the Members otherwise agree. In calculating Company Value, the greater of 1) the average of the ADJUSTED EBITDA for the two consecutive twelve month periods ending on the last day of the calendar quarter prior to the quarter in which the Membership Interest is purchased or 2) the ADJUSTED EBITDA for the immediate twelve month period ending on the last day of the calendar quarter prior to the quarter in which the Membership Interest is purchased shall be used. If the purchase occurs before the Company has been in business for twenty-four (24) months, then the EBITDA for twelve (12) months ending on the last day of the calendar quarter prior to the quarter in which the Membership Interest is purchased shall be used.

1.18. **Majority.** Members holding greater than 50% of the Percentage Interests.

1.19. **Members.** The members are Henry M. Hay, III and J. Daniel Mahoney or their permitted successors or assigns under Article 11.

1.20. **Member Loan.** As set forth in Section 7.6.

1.21. **Membership Interest.** The rights of a Member in Distributions (liquidating or otherwise) and allocations of the profits, losses, gains, deductions, and credits of the Company, (the foregoing rights, collectively, are equivalent to "Distributional Interest" as defined in the Act) and all other benefits, including the right to vote, to which such Member may be entitled pursuant to this Agreement, together with all obligations attributable thereto pursuant to the terms of this Agreement.

1.22. **Notice.** As set forth in Section 17.9.

1.23. **Percentage Interest.** A Membership Interest in the Company, expressed as a percentage. The Percentage Interest of the Members is set forth on Schedule A.

1.24. **Property.** Any property real or personal, tangible or intangible, and any legal or equitable interest in such property, but excluding services and promises to perform services in the future.

1.25. **State.** The State of South Carolina.

1.26. **Substitute Member.** An Assignee who has been admitted to all of the rights of membership pursuant to this Agreement, including but not limited to the right to participate in the management of the Company, to receive information, and to consent to or approve actions of the Company.

1.27. **Super Majority.** The approval of both Henry M. Hay, III and J. Daniel Mahoney.

1.28. **Term.** The term "Term" shall have the meaning set forth in Section 2.4 hereof.

TAX AND ACCOUNTING DEFINITIONS

1.29. **Adjusted Capital Account Deficit.** With respect to any Member, the deficit balance, if any, in such Member's Capital Account as of the end of the relevant Taxable Year, after giving effect to the following adjustments:

1.29.1. Credit to such Capital Account of any amounts which such Member is obligated to restore (pursuant to the terms of such Member's promissory note or otherwise) or is deemed to be obligated to restore pursuant to the penultimate sentences of Regulations Sections 1.704-2(g)(1) and 1.704-2(i)(5); and

1.29.2. Debit to such Capital Account of the items described in §§1.704-1(b)(2)(ii)(d)(4), 1.704-1(b)(2)(ii)(d)(5) and 1.704-1(b)(2)(ii)(d)(6) of the Regulations. The

foregoing definition of Adjusted Capital Account Deficit is intended to comply with the provisions of §1.704-1(b)(2)(ii)(d) of the Regulations and shall be interpreted consistently therewith.

1.30. **Capital Account.** The account maintained for a Member or Assignee determined in accordance with Section 7.4 hereof.

1.31. **Code.** The Internal Revenue Code of 1986, as amended or corresponding provisions of subsequent superseding federal revenue laws.

1.32. **Company Minimum Gain.** An amount determined by first computing for each Company Nonrecourse Liability any gain the Company would realize if it disposed of the Company Property subject to that liability for no consideration other than full satisfaction of the liability, and then aggregating the separately computed gains. The amount of Company Minimum Gain includes such minimum gain arising from a conversion, refinancing, or other change to a debt instrument, only to the extent a Member is allocated a share of that minimum gain. For any Taxable Year, the net increase or decrease in Company Minimum Gain is determined by comparing the Company Minimum Gain on the last day of the immediately preceding Taxable Year with the Company Minimum Gain on the last day of the current Taxable Year. Notwithstanding any provision to the contrary contained herein, Company Minimum Gain and increases and decreases in Company Minimum Gain are intended to be computed in accordance with § 704 of the Code and the Regulations issued thereunder, as the same may be issued, amended and interpreted from time to time. A Member's share of Company Minimum Gain at the end of any Taxable Year equals: the sum of Nonrecourse Deductions allocated to that Member (and to that Member's predecessors in interest) up to that time and the distributions made to that Member (and to that Member's predecessors in interest) up to that time of proceeds

of a nonrecourse liability allocable to an increase in Company Minimum Gain minus the sum of that Member's (and that Member's predecessors in interest) aggregate share of the net decreases in Company Minimum Gain plus their aggregate share of decreases resulting from revaluations of Company Property subject to one or more Company Nonrecourse Liabilities.

1.33. **Company Nonrecourse Liability.** A Company Liability to the extent that no Member or Related Person bears the economic risk of loss (as defined in §1.752-2 of the Regulations) with respect to the liability.

1.34. **Member Minimum Gain.** An amount determined by first computing for each Member Nonrecourse Liability any gain the Company would realize if it disposed of the Company Property subject to that liability for no consideration other than full satisfaction of the liability, and then aggregating the separately computed gains. The amount of Member Minimum Gain includes such minimum gain arising from a conversion, refinancing, or other change to a debt instrument, only to the extent a Member is allocated a share of that minimum gain. For any Taxable Year, the net increase or decrease in Member Minimum Gain is determined by comparing the Member Minimum Gain on the last day of the immediately preceding Taxable Year with the Member Minimum Gain on the last day of the current Taxable Year. Notwithstanding any provision to the contrary contained herein, Member Minimum Gain and increases and decreases in Member Minimum Gain are intended to be computed in accordance with § 704 of the Code and the Regulations issued thereunder, as the same may be issued, amended and interpreted from time to time.

1.35. **Member Nonrecourse Liability.** Any Company Liability to the extent the liability is nonrecourse under state law, and on which a Member or Related Person bears the

economic risk of loss under §1.752-2 of the Regulations because, for example, the Member or Related Person is the creditor or a guarantor.

1.36. **Net Losses.** The losses and deductions of the Company determined in accordance with accounting principles consistently applied from year to year employed under the method of accounting adopted by the Company and as reported separately or in the aggregate, as appropriate, on the tax return of the Company filed for federal income tax purposes.

1.37. **Net Profits.** The income and gains of the Company determined in accordance with accounting principles consistently applied from year to year employed under the method of accounting adopted by the Company and as reported separately or in the aggregate, as appropriate, on the tax return of the Company filed for federal income tax purposes.

1.38. **Nonrecourse Liabilities.** Nonrecourse liabilities include Company Nonrecourse Liabilities and Member Nonrecourse Liabilities.

1.39. **Offsettable Decrease.** Any adjustment, allocation or distribution described in §§ 1.704-1(b)(2)(ii)(d)(4), 1.704-1(b)(2)(ii)(d)(5) or 1.704-1(b)(2)(ii)(d)(6) of the Regulations that unexpectedly causes or increases a deficit balance in a Member's Capital Account as of the end of the taxable year.

1.40. **Regulations.** Except where the context indicates otherwise, the permanent, temporary, proposed, or proposed and temporary regulations of the Department of the Treasury under the Code as such regulations may be lawfully changed from time to time.

1.41. **Related Person.** A person having the relationship to a Member that is described in §1.752-4(b) of the Regulations.

1.42. **Taxable Year.** The term "Taxable Year" shall have the meaning set forth in Section 10.4.

1.43. **Taxing Jurisdiction.** Any state, local, or foreign government that collects tax, interest or penalties, however designated, on any Member's share of the income or gain attributable to the Company.

2. FORMATION

2.1. **Formation.** The Company was organized on September 27, 2012. The Members shall be admitted to the Company as of the Effective Date.

2.2. **Agreement.** For and in consideration of the mutual covenants herein contained and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Members executing the Agreement hereby agree to the terms and conditions of the Agreement, as it may from time to time be amended according to its terms.

2.3. **Name.** The name of the Company shall be "HAWKES DESIGN AND CONSULTING, LLC."

2.4. **Term.** The Company shall be a term company as contemplated by the Act. The term of the Company commenced upon the filing of the Articles with the Secretary of State, and shall continue until the Company shall be dissolved and its affairs wound up in accordance with the Act and this Agreement on November 23, 2061, unless sooner terminated as provided herein, or continued by the Members pursuant to Section 33-44-411 of the Act.

2.5. **Registered Agent.** The initial registered agent for the service of process shall be Cheryl K Hay. The Members may designate another person or entity to serve as Registered Agent at any time.

2.6. **Principal Office.** The Principal Office of the Company shall be that location designated by the Members from time to time.

3. PURPOSE OF COMPANY

3.1. The Company has been formed to engage in the development of window, door, storm protection systems and the sale, installation or assignment of such products and to engage in other ancillary businesses provided all activities are legally allowed pursuant to South Carolina law. The Company may carry on any other activities that the Members determine to be necessary or advisable, subject to the applicable terms of this Agreement.

3.2. Each Member shall devote such time as is reasonably necessary to the purposes of the Company.

4. MEMBERS; VOTING RIGHTS

4.1. **Admission of Members.** The Members shall be deemed admitted to the Company as of the Effective Date.

4.2. **Voting Rights.** Each Member shall have one vote for each one percentage point of Percentage Interest or fraction thereof held by such Member and shall be entitled to vote on any matter.

4.3. **Action Without Meeting.** To the fullest extent permitted by the Act, Members may take action without a meeting by written consent as to such matters and in accordance with such requirements and procedures authorized by the Act. Such written consent must be signed by all Members. The failure of a Member to respond within ten (10) days to a request for consent as to any matter set forth in Article 5 shall be deemed to constitute consent by such Member.

5. MANAGEMENT OF THE COMPANY

5.1. **Management by Members.** The Company shall be member managed within the meaning of the Act. The Members shall annually designate a Managing Member ("Manager") to serve one year terms or until death, disability or resignation.

5.2. **General Administration.** The day-to-day business of the Company shall be carried out by the Manager.

5.3. **Decisions of the Members.** The vote of Members holding a Majority shall constitute approval of any matter, including without limitation, Member Loans.

5.4. **Officers.** The Members shall designate Members to fill such offices, bearing such titles (*e.g.*, President, *etc.*) as they deem necessary for the efficient administration of the Company and all such officers shall serve at the pleasure of the Members. The Members may also delegate, in writing, such authority to the officers as they deem fit.

5.5. **Certain Consents.** Except as hereinafter provided, no act shall be taken, monies expended, decision made or obligation incurred by the Company with respect to : 1) any matter (including, without limitation, loans, purchases, leases, entering into contracts or hiring) involving more than Fifty Thousand and No/100 (\$50,000.00) Dollars; or 2) payment of any salary or distribution to any manager or member, unless such payment or decision has been approved in writing by a Super Majority or such decision was specifically approved in a budget or resolution previously approved by a Super Majority..

5.6. **Meetings of the Members.** Meetings of the Members may be called for any lawful purpose or purposes by any Member by giving Notice to the other Members at least seventy-two (72) hours in advance of the meeting. The Notice shall state the place, time and purpose of the meeting.

6. RIGHTS AND DUTIES OF MEMBERS

6.1. **Liability of Members.** A Member of the Company is not liable, solely by reason of being a Member, under a judgment, decree, or order of a court, or in any other manner for any debt, obligation, or liability of the Company, whether arising in contract, tort, or otherwise, or for the acts or omission of any other Member, agent, or employee of the Company.

6.2. **Indemnification of Members.** The Company shall indemnify the Members as follows:

6.2.1. The Members shall be indemnified by the Company from any liability resulting from any act performed by them within the scope of the authority conferred upon them by this Agreement, except for acts of gross negligence or willful misconduct; provided, however, that any indemnity under this Section 6.2.1 shall be provided out of and be limited solely to the extent of the Company assets or applicable liability insurance, if any.

6.2.2. A Member shall not be liable to the Company or to any other Member for or as a result of any act, omission or error in judgment which was taken, omitted or made by them in the exercise of their judgment and good faith under this Agreement and which does not constitute willful misconduct or gross negligence.

6.3. **Representations and Warranties.** Each Member hereby represents and warrants to the Company and the other Members that: (a) the Member is acquiring such Member's interest in the Company for the Member's own benefit and will not distribute the interest, (b) the Member acknowledges that such Member's interest has not been registered under the Securities Act of 1933 or any state securities laws; (c) the Member acknowledges that such Member's interest is subject also to the restrictions on transfer contained in the Agreement and the Act, and may not be resold or transferred by the Member without appropriate registration or the availability of an exemption from such requirements.

6.4. **Fiduciary Duties of Members.** To the fullest extent set forth in the Act, each Member owes a fiduciary duty to the other Members and the Company. Nothing contained herein shall be interpreted in any way to increase or modify the fiduciary duties set forth in the Act which are owed by a Member to the Members or the Company.

6.5. **Waiver of Action for Partition.** Each Member irrevocably waives any right that they may have to maintain any action for partition with respect to the property of the Company.

6.6. **Authority of Managers to Bind the Company.** Each Manager is hereby authorized to sign all documents and instruments on behalf of the Company subject to the provisions hereof concerning required approval. By resolution the Members may delegate their authority to bind the Company to the officers. A Member acting in contravention of this Agreement shall be liable for all damages sustained by the Company as a result of such action, notwithstanding the indemnification provisions of Section 6.2.

7. CONTRIBUTIONS, OWNERSHIP, REIMBURSEMENTS AND CAPITAL ACCOUNTS

7.1. **Initial Contributions and Percentage Interests.** The Initial Contributions and Percentage Interests set forth on Schedule A shall apply from the date hereof and may be amended only with the consent of a Majority.

7.2. Intentionally Blank.

7.3. **Certain Reimbursements and Fees.** Upon the submission and approval of appropriate documentation and the consent, if any, required pursuant to Section 5, the Company shall reimburse the Members for out-of-pocket expenses paid or incurred by the Members in connection with the business of the Company.

7.4. **Maintenance of Capital Accounts.** The Company shall establish and maintain a Capital Account for each Member and Assignee. Each Member's Capital Account shall be

increased by (1) the amount of any Money actually contributed by the Member to the capital of the Company, (2) the fair market value of any Property contributed, as determined by the Company and the contributing Member at arm's length at the time of contribution (net of liabilities assumed by the Company or subject to which the company takes such Property, within the meaning of § 752 of the Code), and (3) the Member's share of Net Profits and of any separately allocated items of income or gain, including income and gain exempt from tax (and including any income or gain allocated to the Member in accordance with § 1.704-1(b)(2)(iv)(g) of the Regulations). Each Member's Capital Account shall be decreased by (1) the amount of any Money distributed to the Member by the Company, (2) the fair market value of any Property distributed to the Member (net of liabilities of the Company assumed by the Member or subject to which the Member takes such Property within the meaning of § 752 of the Code), (3) the Member's share of any non-capital expenses of the Company which are not deductible for federal income tax purposes; and (4) the Member's share of Net Losses and of any separately allocated items of loss or deduction (including any loss or deduction allocated to the Member in accordance with § 1.704-1(b)(2)(iv)(g) of the Regulations).

Notwithstanding any provision to the contrary contained herein, each Member's Capital Account shall be determined and maintained strictly in accordance with Code § 704(b) and the Regulations thereunder, as the same may be issued, amended and interpreted from time to time, including, as applicable, any hypothetical adjustments required thereby.

7.5. **Member Loans.** Subject to Section 5.3 and Section 5.5, The Members may provide loans ("Member Loans") to the Company to fund operating or capital needs. Members shall have the opportunity to make Member Loans in proportion to their Percentage Interests, but no Member shall be required to make such a loan. Unless the Members otherwise agree,

Member Loans shall bear interest with a fluctuating rate of interest equal to the prime rate of Bank of America, N.A., a national banking association, per annum plus one percentage point.

7.6. **Guaranteed Loans.** A Member shall not be required to guarantee a loan by the Company.

7.7. **Additional Capital Contributions.** No Member shall be obligated to make an Additional Capital Contribution.

8. ALLOCATIONS

8.1. **Allocations of Net Profits and Net Losses from Operations.** Except as may be required by § 704(c) of the Code, and after giving effect to the special allocations set forth in Section 8.2 hereof or as otherwise approved by a Majority, Net Profits, Net Losses, and other items of income, gain, loss, deduction and credit shall be apportioned among the Members as follows:

8.1.1. **Net Profits.** Net Profits for any Taxable Year, or fraction thereof, shall be allocated to the Members in the following order and priority:

8.1.1.1. First, to the Members in an amount equal to the Losses previously allocated pursuant to Section 8.1.2 hereof; and

8.1.1.2. Second, to the Members in accordance with their respective Percentage Interests.

8.1.2. **Net Losses.** Net Losses for any Taxable Year, or fraction thereof, shall be allocated in the following order and priority:

8.1.2.1. Except as provided in Section 8.1.2.2 below, Net Losses shall be allocated to the Members in accordance with their respective Percentage Interests.

8.1.2.2. The Net Losses allocated pursuant to Section 8.1.2.1 hereof shall not exceed the maximum amount of Net Losses that can be so allocated without causing any

Member to have an Adjusted Capital Account Deficit at the end of any Taxable Year. In the event some but not all of the Members would have Adjusted Capital Account Deficits as a consequence of an allocation of Net Losses pursuant to Section 8.1.2.1, the limitation set forth in this Section 8.1.2.2 shall be applied on a Member by Member basis so as to allocate the maximum permissible Net Losses to each Member under § 1.704-1(b)(2)(ii)(d) of the Regulations. All Net Losses in excess of the limitation set forth in this Section 8.1.2.2 shall be allocated to the Members in accordance with their Percentage Interests.

8.2. **Special Allocations.** The following special allocations shall be made in the following order:

8.2.1. **Company Minimum Gain Chargeback.** Except as otherwise provided in §1.704-2(f) of the Regulations, notwithstanding any other provision of this Section 8, if there is a net decrease in Company Minimum Gain for a Taxable Year, each Member shall be specially allocated items of income and gain for that Taxable Year (and, if necessary, for succeeding Taxable Years) in accordance with the Regulations. The allocation required by this Section 8.2.1 shall be made prior to any other allocation of Company items for the year but subsequent to all distributions for the year. This Section 8.2.1 is intended to comply with the minimum gain chargeback requirement in §1.704-2(f) of the Regulations and shall be interpreted consistently therewith.

8.2.2. **Member Minimum Gain Chargeback.** Except as otherwise provided in §1.704-2(i)(4) of the Regulations, notwithstanding any other provision of this Section 8, if there is a net decrease in Member Minimum Gain for a Taxable Year, any Member with a share of that Member Minimum Gain (as determined under §1.704-2(i)(5) of the Regulations) as of the beginning of that Taxable Year shall be specially allocated items of income and gain for that

Taxable Year (and, if necessary, for succeeding Taxable Years) equal to that Member's share of the net decrease in the Member Minimum Gain, as determined in accordance with §1.704-2(i)(4) of the Regulations. The allocation required by this Section 8.2.2 shall be made subsequent to the allocation in Section 8.2.1 above and prior to any other allocation of Company items for the year. This Section 8.2.2 is intended to comply with the minimum gain chargeback requirement in §1.704-2(i)(4) of the Regulations and shall be interpreted consistently therewith.

8.2.3. Qualified Income Offset. In the event any Member unexpectedly receives an Offsettable Decrease, items of income and gain shall be specially allocated to such Member (consisting of a pro rata portion of each item of Company income and gain for such year) in an amount and manner sufficient to offset such Offsettable Decrease as quickly as possible in accordance with the Regulations. The allocation required by this Section 8.2.3 shall be made subsequent to the allocations in Section 8.2.1 and Section 8.2.2 above and prior to any other allocation of Company items for the year.

8.2.4. Section 754 Adjustment. To the extent an adjustment to the adjusted tax basis of any Company asset pursuant to §§734(b) or 743(b) of the Code is required, pursuant to §§1.704-1(b)(2)(iv)(m)(2) or 1.704-1(b)(2)(iv)(m)(4) of the Regulations, to be taken into account in determining Capital Accounts as the result of a distribution to a Member in complete liquidation of his interest in the Company, the amount of such adjustment to the Capital Accounts shall be treated as an item of gain (if the adjustment increases the basis of the asset) or loss (if the adjustment decreases such basis) and such gain or loss shall be specially allocated to the Members in accordance with their interests in the Company in the event that §1.704-1(b)(2)(iv)(m)(2) of the Regulations applies, or to the Members to whom such distribution was made in the event that §1.704-1(b)(2)(iv)(m)(4) of the Regulations applies.

8.3. **Overriding Allocations for Contributed Property.** Income, gain, loss, and deduction with respect to any property contributed to the capital of the Company shall, solely for tax purposes, be allocated among the Members for tax purposes so as to take account of the variation between the basis of such property to the Company and its fair market value in accordance with §704(c) of the Code.

8.4. **Varying Interests in the Company.** Allocations to any Member whose Membership Interest changes during a Taxable year or to any Member who is a Member for less than a full Taxable year shall be made in accordance with § 706(d) of the Code and the Regulations promulgated thereunder to take into account the Member's varying Membership Interest in the Company during the Taxable Year.

9. DISTRIBUTIONS

9.1. **Interim Distributions.** From time to time, when approved in writing by a Super Majority or such decision was specifically approved in a budget or resolution previously approved by a Super Majority, and the Managers determine in their reasonable judgment to what extent, if any, the Company's cash on hand exceeds the current and anticipated needs, including, without limitation, needs for operating expenses, debt service, acquisitions, reserves, and other expenses, if any ; the Company may make Distributions to the Members in accordance with their Percentage Interests. No Distributions shall be made so long as any principal or interest is outstanding on any Member Loan unless the lending Member consents.

9.2. **Limitations on Distributions.** No Distribution shall be made if after giving effect to the Distribution:

9.2.1. The Company would not be able to pay its debts as they come due in the usual course of business;

9.2.2. The Company's assets would be less than the sum of its liabilities plus the amount that would be needed if the Company were to be dissolved at the time of the Distribution to satisfy the rights of the other Members upon Distribution which are superior to the rights of the Member receiving the Distribution.

10. TAXES

10.1. **Elections.** The Company may make any tax elections for the Company allowed under the Code or the tax laws of any state or other jurisdiction having taxing jurisdiction over the Company.

10.2. **Tax Matters Partner.** The Members shall designate a Member to act as the "tax matters partner" of the Company pursuant to §6231(a)(7) of the Code. The Member designated as tax matters partner shall keep the other Members informed of all administrative and judicial proceedings as required by §6223(g) of the Code and furnish the other Members a copy of each notice or other communication received by the Member designated as the tax matters partner from the IRS. A Member who is designated a tax matters partner may not take any action contemplated by §§6222 through 6231 of the Code without the consent of the Members. Such tax matters partner is hereby designated by the Company to maintain the records required by §6112 of the Code. The initial tax matters partner shall be J. Daniel Mahoney. Upon the resignation, legal incompetency or disqualification of the tax matters partner, a successor to serve in such position shall be designated by the Members.

10.3. **Accrual Method of Accounting.** The records of the Company shall be maintained on the accrual method of accounting.

10.4. **Taxable Year.** Except as otherwise required by §706 of the Code, the taxable year of the Company shall be an annual accounting period ending on December 31st of each calendar year of the Company.

11. ASSIGNMENT OF MEMBERSHIP INTERESTS

11.1. **Assignment.** A Member may not dispose of all or a portion of the Member's Membership Interest by sale, transfer, exchange, gift, bequest, pledge, hypothecation, or other method of transfer except upon compliance with this Section. Any attempted sale, transfer, exchange, gift, bequest, pledge, hypothecation, or other method of transfer of a Membership Interest, or any part thereof, not in compliance with this Section 11.1 is null and void. An Assignee is not a Member and has no voting rights unless admitted as a Member pursuant to Section 12. No Membership Interest shall be assigned:

11.2. Without the consent of a Majority of Members.

11.2.1. If such assignment, alone or when combined with other transactions would result in a termination of the Company within the meaning of Section 708 of the Code;

11.2.2. Unless and until the Company receives from the assignee the information and agreements that the non-assigning Members may reasonably require, including but not limited to an admission agreement binding the assignee to the terms of this Agreement, any taxpayer identification number and any agreement that may be required by any taxing jurisdiction.

11.2.3. Except that consent of a Majority of Members is not required for an Assignment made under section 13.3.5 of this Agreement .

11.3. **Effect of Assignment on Member and Assignee.** Upon full compliance with the provisions of Articles 11 and 12, a selling or transferring Member shall cease to be a Member and the Assignee or transferee shall become a Member.

11.4. **Rights of Judgment Creditors.** On application to a court of competent jurisdiction by any judgment creditor of a Member, the court may charge the Membership Interest of a Member with payment of the unsatisfied amount of the judgment.

12. ADMISSION OF ADDITIONAL MEMBERS

12.1. **Admission.** Additional members shall not be admitted to the Company except (i) with the consent of a Majority; and (ii) the approval of a Majority as to the amendments to the Agreement required by such admission.

13. DISSOCIATION OF A MEMBER

13.1. **Dissociation.** Unless specifically provided for in this Agreement, a Member shall not dissociate from the Company. A Member shall cease to be a Member upon the occurrence of any of the following events, none of which shall be deemed in contravention of this Agreement:

13.1.1. The Assignee of a Member's entire Membership Interest becomes a Substitute Member;

13.1.2. The death of a Member; or

13.1.3. The purchase of a Member's entire Membership Interest pursuant to Section 13.3.

13.2. **Wrongful Dissociation.** If a Member dissociates in contravention of this Agreement, the dissociating Member shall be liable to the Company and to the other Members for damages caused by the dissociation.

13.3. **Termination of a Member's Employment.** Any Member may serve as an employee of the Company in addition to their status as Members. If any member becomes an employee of the Company and thereafter ceases to be employed by the Company, or an affiliate thereof, for any reason, including death (the "Call Trigger"), then the Membership Interest of that Member may be transferred (the "Call Option") under the terms and conditions hereinafter provided.

13.3.1. The Call Option may be exercised by the Company at any time by the giving of Notice to all Members, or their personal representatives, within 90 days of the Call

Trigger. If the Company does not exercise the Call Option in the 90 day period, any non-terminating Member shall have the right to exercise the Call Option by the giving of Notice to all Members, or their personal representatives, within 120 days of the Call Trigger. Such exercise shall be effective only if it applies to the terminating Member's entire Membership Interest in the Company.

13.3.2. The purchase price to be paid for a purchased Membership Interest pursuant to this Section, shall be Fair Market Value. Any dispute concerning the calculation of Fair Market Value shall be conclusively resolved by the independent accounting firm most recently employed by the Company.

13.3.3. The closing shall occur within thirty (30) days after the occurrence of the exercise of the Call Option. The purchase price shall be paid in the purchaser's sole discretion either (i) in cash, or (ii) one-third in cash at closing and the remainder in two (2) equal annual installments commencing one (1) year from the date of closing, with interest accrued on the outstanding principal balance to be paid with each such installment at a simple fixed rate equal to the prime rate of Bank of America, N.A. on the date of closing plus one percentage point.

13.3.4. At closing, a purchased Membership Interest shall be transferred free and clear of all liens and encumbrances whatever and with such instruments of transfer as shall be reasonably acceptable to the Company.

13.3.5. Should neither the Company nor any non-terminating Member exercise the Call Option, then the selling Member's Membership Interest may be Assigned without the consent of a Majority of Members.

14. DISSOLUTION AND WINDING UP

14.1. **Dissolution.** The Company shall be dissolved and its affairs wound up, upon the first to occur of the following events:

- 14.1.1. the expiration of the Term;
- 14.1.2. the written consent of a Super Majority;
- 14.1.3. entry of a decree of judicial dissolution as set forth in the Act; or
- 14.1.4. administrative dissolution under the Act.

14.2. **Effect of Dissolution.** Upon the occurrence of the dissolution of the Company, the Members shall wind up the business and affairs of the Company in accordance with the Act and the provisions hereof.

14.3. **Distribution of Assets Upon Winding Up.** Upon the winding up of the Company, the Company Property shall be distributed as follows:

14.3.1. Payment, or adequate provision for payment, shall be made to creditors of the Company including, to the extent permitted by law, Members who are creditors in satisfaction of liabilities of the Company;

14.3.2. To Members in proportion to their positive Capital Account balances taking into account all Capital Account adjustments for the Company's Taxable Year in which the liquidation occurs. Liquidation proceeds shall be paid by the end of the Company's Taxable Year or, if later, within ninety (90) days after the date of liquidation. Such distributions shall be in cash or property (which need not be distributed proportionately) or partly in both, as determined by the Members.

14.4. **Articles of Termination.** Upon dissolution and winding up of the Company, the Company shall file Articles of Termination with the South Carolina Secretary of State in accordance with Section 33-44-805 of the Act.

14.5. **No Obligation to Restore.** No Member shall be obligated to contribute money or property to the Company in order to restore a deficit in such Member's Capital Account.

15. ACCOUNTING AND RECORDS

15.1. **Records to be Maintained.** The Company shall maintain its records in accordance with sound business practice and shall make such records available to the members upon reasonable notice during regular business hours.

15.2. **Reports to Members.** The Company shall provide the following to the Members:

15.2.1. Financial Statements of the Company at least annually to the Members and Assignees at such time and in such manner as the Members may determine reasonable.

15.2.2. Information returns required by the Code and the laws of the State.

15.3. **Accounts.** The Company shall maintain a record of the Capital Account for each Member in accordance with Section 7.4 hereof.

16. AMENDMENT

16.1. **Amendment or Modification of Agreement.** This Agreement may be modified or amended by the agreement of a Super Majority.

17. MISCELLANEOUS PROVISIONS

17.1. **Entire Agreement.** The Agreement represents the entire agreement among the Members and between the Members and the Company.

17.2. **No Partnership Intended for Non-tax Purposes.** The Members have formed the Company under the Act, and expressly do not intend hereby to form a partnership under either the South Carolina Uniform Partnership Act or the South Carolina Uniform Limited Partnership Act. The Members do not intend to be partners one to another, or partners as to any third party. To the extent any Member, by word or action, represents to another person that any

other Member is a partner or that the Company is a partnership, the Member making such wrongful representation shall be liable to any other Member who incurs personal liability by reason of such wrongful representation. Solely for Federal income tax purposes, each of the Members hereby recognizes that the Company will be subject to all provisions of Subchapter K of Chapter 1 of the Code; PROVIDED, HOWEVER, the filing of U. S. Partnership Tax Returns shall not be construed to extend the purposes of the Company or expand the obligations or liabilities of the Company or its Members.

17.3. Rights of Creditors and Third Parties under Agreement. The Agreement is entered into among the Company and the Members for the exclusive benefit of the Company, its Members, and their successors and assignees. The Agreement is expressly not intended for the benefit of any creditor of the Company or any other Person. Except and only to the extent provided by applicable statute, no such creditor or third party shall have any rights under the Agreement or any agreement between the Company and any Member with respect to any Capital Contribution or otherwise.

17.4. Interpretation and Governing Law. When the context in which words are used in this Agreement indicates that such is the intent, words in the singular number shall include the plural and vice versa, and the masculine gender shall include the feminine and the neuter shall include the masculine and feminine. The headings or titles and the table of contents shall not define, limit, extend or interpret the scope of this Agreement or any particular Section. This Agreement shall be governed and construed in accordance with the laws of the State of South Carolina.

17.5. Arbitration. If a dispute arises out of or relates to this Agreement, or its breach, the parties agree to submit the dispute to a sole mediator selected by the parties. If not thus

resolved it shall be referred to a sole arbitrator selected by the parties within thirty (30) days of the mediation or, in the absence of such selection, to the American Arbitration Association ("AAA") for arbitration which shall be governed by its Commercial Arbitration Rules. If the parties do not resort to AAA arbitration they shall agree on the rules under which the arbitration shall be conducted. The award shall be made within six (6) months of selection of the arbitrator and judgment on the award may be entered in any court having jurisdiction. The mediation and arbitration shall be held in Charleston, South Carolina. The arbitrator shall determine issues of arbitrability but may not limit, expand or otherwise modify the terms of the Agreement, nor have authority to award punitive or other damages in excess of compensatory damages and each party irrevocably waives any claim thereto. The costs of mediation shall be born equally by the parties to the dispute. The costs of arbitration shall be apportioned amongst the parties as the arbitrator shall determine in his or her discretion. The parties, their representatives, other participants and the mediator and arbitrator shall hold the existence, content and result of mediation and arbitration in confidence.

17.6. **Waiver.** Any waiver by the Company or any Member of any breach or any term or condition hereof shall be effective only if in writing and such writing shall not be deemed to be a waiver of any subsequent or other breach, term or condition of this Agreement.

17.7. **Severability.** If any provision, sentence, phrase or word of this Agreement or the application thereof to any person or circumstance shall be held invalid, the remainder of this Agreement, or the application of such provision, sentence, phrase, or word to persons or circumstances, other than those as to which it is held invalid, shall not be affected thereby.

17.8. **Agreement in Counterparts.** This Agreement may be executed in several counterparts, each of which shall be deemed an original, but all of which shall constitute one and

the same instrument. In addition, this Agreement may contain more than one counterpart of the signature page and this Agreement may be executed by the affixing of the signatures of each of the Members to one of such counterpart signature pages; all of such signature pages shall be read as though one, and they shall have the same force and effect as though all of the signers had signed a single signature page.

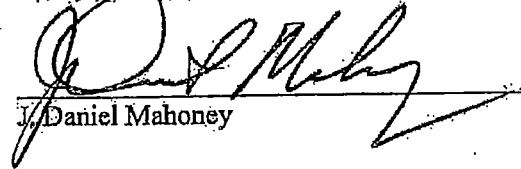
17.9. **Notice.** Any notice request, approval, consent, demand or communication shall be in writing and shall be effective upon the first to occur of the following: upon receipt by the Member to whom intended or three Business days after deposit in the United States Mail, registered or certified, return receipt requested to the address set forth in Schedule A. A Member may change addresses by giving the other Members written notice.

IN WITNESS WHEREOF, the parties hereto have executed this Operating Agreement
this 3 day of September, 2014, to be effective as of the Effective Date.

MEMBERS:



Henry M. Hay, III



Daniel Mahoney

SCHEDULE A

<u>Member</u>	<u>Members</u>	<u>Percentage Interest</u>	<u>Capital Contribution</u>
Henry M. Hay, III 11 Sayle Rd Charleston SC 29407		75.0%	\$ 750.00
J. Daniel Mahoney 184 Fair Sailing Rd Mount Pleasant SC 29466		25.0%	\$ 250.00

Initialed:

DM
HM

Date 9/3/2014

THIS AGREEMENT IS SUBJECT TO ARBITRATION PURSUANT TO THE SOUTH CAROLINA UNIFORM ARBITRATION ACT, S.C. CODE ANN. SECTION 15-48-10 ET. SEQ.

OPERATING AGREEMENT

of

GLASSCORP LLC

a South Carolina limited liability company

This Operating Agreement of **GLASSCORP LLC**, a South Carolina limited liability company, is made to be effective as of November 1, 2013 . This Agreement supersedes prior oral or written operating agreements of the Company, if any.

1. DEFINITIONS

For purposes of this Agreement (as defined below) unless the context clearly indicates otherwise, terms shall have the following meanings; as a matter of convenience, the terms dealing with tax and accounting have been separately grouped in this Article 1.

GENERAL DEFINITIONS

1.1. **Act.** The South Carolina Uniform Limited Liability Company Act of 1996, and all amendments thereto.

1.2. **Additional Capital Contribution.** A Capital Contribution other than the initial capital contribution.

1.3. **Agreement.** This Operating Agreement and all amendments thereto adopted in accordance with the Agreement and the Act.

1.4. **Articles.** The Articles of Organization of the Company as properly adopted and amended from time to time by the Members and filed with the South Carolina Secretary of State.



1.5. **Assignee.** A transferee of a Membership Interest who has not been admitted as a Substitute Member.

1.6. **Business Day.** Any day other than Saturday, Sunday or any legal holiday observed by the State.

1.7. **Call Option.** As set forth in Section 13.3.

1.8. **Call Trigger.** As set forth in Section 13.3.

1.9. **Capital Contribution.** Any contribution of cash, property, services rendered, or a promissory note, or other written obligation to contribute cash or property or to perform services made by or on behalf of a Member.

1.10. **Company.** Glasscorp LLC, a South Carolina limited liability company.

1.11. **Company Liability.** Any enforceable debt or obligation for which the Company is liable or which is secured by any Company Property.

1.12. Intentionally Blank.

1.13. **Company Property.** Any Property owned by the Company.

1.14. **Dissolution Event.** An event, the occurrence of which will result in the dissolution of the Company under Section 14.1.

1.15. **Distribution/Distributed.** A transfer of Property to a Member.

1.16. **Effective Date.** As set forth in the opening recital.

1.17. **Fair Market Value/ Company Value.** With respect to the purchase of the Membership Interest of any Member by the Company, the Company shall be valued at four (4) times ADJUSTED EBITDA as herein defined, "Company Value". The Fair Market Value of a Membership Interest shall be the selling Member's Percentage Interest times the Company Value. "ADJUSTED EBITDA" means for any period, earnings of the Company plus interest,

taxes, depreciation, amortization or any Members' payment or Distribution (including payroll and cost of fringe benefits) calculated in accordance with Generally Accepted Accounting Principles ("GAAP"), unless the Members otherwise agree. In calculating Company Value, the greater of 1) the average of the ADJUSTED EBITDA for the two consecutive twelve month periods ending on the last day of the calendar quarter prior to the quarter in which the Membership Interest is purchased or 2) the ADJUSTED EBITDA for the immediate twelve month period ending on the last day of the calendar quarter prior to the quarter in which the Membership Interest is purchased shall be used. If the purchase occurs before the Company has been in business for twenty-four (24) months, then the EBITDA for twelve (12) months ending on the last day of the calendar quarter prior to the quarter in which the Membership Interest is purchased shall be used.

1.18. **Majority.** Members holding greater than 50% of the Percentage Interests.

1.19. **Members.** The members are Henry M. Hay, III, J. Daniel Mahoney and Michael D. Herlocker or their permitted successors or assigns under Article 11.

1.20. **Member Loan.** As set forth in Section 7.6.

1.21. **Membership Interest.** The rights of a Member in Distributions (liquidating or otherwise) and allocations of the profits, losses, gains, deductions, and credits of the Company, (the foregoing rights, collectively, are equivalent to "Distributional Interest" as defined in the Act) and all other benefits, including the right to vote, to which such Member may be entitled pursuant to this Agreement, together with all obligations attributable thereto pursuant to the terms of this Agreement.

1.22. **Notice.** As set forth in Section 17.9.

1.23. **Percentage Interest.** A Membership Interest in the Company, expressed as a percentage. The Percentage Interest of the Members is set forth on Schedule A.

1.24. **Property.** Any property real or personal, tangible or intangible, and any legal or equitable interest in such property, but excluding services and promises to perform services in the future.

1.25. **State.** The State of South Carolina.

1.26. **Substitute Member.** An Assignee who has been admitted to all of the rights of membership pursuant to this Agreement, including but not limited to the right to participate in the management of the Company, to receive information, and to consent to or approve actions of the Company.

1.27. **Term.** The term "Term" shall have the meaning set forth in Section 2.4 hereof.

TAX AND ACCOUNTING DEFINITIONS

1.28. **Adjusted Capital Account Deficit.** With respect to any Member, the deficit balance, if any, in such Member's Capital Account as of the end of the relevant Taxable Year, after giving effect to the following adjustments:

1.28.1. Credit to such Capital Account of any amounts which such Member is obligated to restore (pursuant to the terms of such Member's promissory note or otherwise) or is deemed to be obligated to restore pursuant to the penultimate sentences of Regulations Sections 1.704-2(g)(1) and 1.704-2(i)(5); and

1.28.2. Debit to such Capital Account of the items described in §§1.704-1(b)(2)(ii)(d)(4), 1.704-1(b)(2)(ii)(d)(5) and 1.704-1(b)(2)(ii)(d)(6) of the Regulations. The foregoing definition of Adjusted Capital Account Deficit is intended to comply with the

provisions of §1.704-1(b)(2)(ii)(d) of the Regulations and shall be interpreted consistently therewith.

1.29. **Capital Account.** The account maintained for a Member or Assignee determined in accordance with Section 7.4 hereof.

1.30. **Code.** The Internal Revenue Code of 1986, as amended or corresponding provisions of subsequent superseding federal revenue laws.

1.31. **Company Minimum Gain.** An amount determined by first computing for each Company Nonrecourse Liability any gain the Company would realize if it disposed of the Company Property subject to that liability for no consideration other than full satisfaction of the liability, and then aggregating the separately computed gains. The amount of Company Minimum Gain includes such minimum gain arising from a conversion, refinancing, or other change to a debt instrument, only to the extent a Member is allocated a share of that minimum gain. For any Taxable Year, the net increase or decrease in Company Minimum Gain is determined by comparing the Company Minimum Gain on the last day of the immediately preceding Taxable Year with the Company Minimum Gain on the last day of the current Taxable Year. Notwithstanding any provision to the contrary contained herein, Company Minimum Gain and increases and decreases in Company Minimum Gain are intended to be computed in accordance with § 704 of the Code and the Regulations issued thereunder, as the same may be issued, amended and interpreted from time to time. A Member's share of Company Minimum Gain at the end of any Taxable Year equals: the sum of Nonrecourse Deductions allocated to that Member (and to that Member's predecessors in interest) up to that time and the distributions made to that Member (and to that Member's predecessors in interest) up to that time of proceeds of a nonrecourse liability allocable to an increase in Company Minimum Gain minus the sum of

that Member's (and that Member's predecessors in interest) aggregate share of the net decreases in Company Minimum Gain plus their aggregate share of decreases resulting from revaluations of Company Property subject to one or more Company Nonrecourse Liabilities.

1.32. **Company Nonrecourse Liability.** A Company Liability to the extent that no Member or Related Person bears the economic risk of loss (as defined in §1.752-2 of the Regulations) with respect to the liability.

1.33. **Member Minimum Gain.** An amount determined by first computing for each Member Nonrecourse Liability any gain the Company would realize if it disposed of the Company Property subject to that liability for no consideration other than full satisfaction of the liability, and then aggregating the separately computed gains. The amount of Member Minimum Gain includes such minimum gain arising from a conversion, refinancing, or other change to a debt instrument, only to the extent a Member is allocated a share of that minimum gain. For any Taxable Year, the net increase or decrease in Member Minimum Gain is determined by comparing the Member Minimum Gain on the last day of the immediately preceding Taxable Year with the Member Minimum Gain on the last day of the current Taxable Year. Notwithstanding any provision to the contrary contained herein, Member Minimum Gain and increases and decreases in Member Minimum Gain are intended to be computed in accordance with § 704 of the Code and the Regulations issued thereunder, as the same may be issued, amended and interpreted from time to time.

1.34. **Member Nonrecourse Liability.** Any Company Liability to the extent the liability is nonrecourse under state law, and on which a Member or Related Person bears the economic risk of loss under §1.752-2 of the Regulations because, for example, the Member or Related Person is the creditor or a guarantor.

1.35. **Net Losses.** The losses and deductions of the Company determined in accordance with accounting principles consistently applied from year to year employed under the method of accounting adopted by the Company and as reported separately or in the aggregate, as appropriate, on the tax return of the Company filed for federal income tax purposes.

1.36. **Net Profits.** The income and gains of the Company determined in accordance with accounting principles consistently applied from year to year employed under the method of accounting adopted by the Company and as reported separately or in the aggregate, as appropriate, on the tax return of the Company filed for federal income tax purposes.

1.37. **Nonrecourse Liabilities.** Nonrecourse liabilities include Company Nonrecourse Liabilities and Member Nonrecourse Liabilities.

1.38. **Offsettable Decrease.** Any adjustment, allocation or distribution described in §§ 1.704-1(b)(2)(ii)(d)(4), 1.704-1(b)(2)(ii)(d)(5) or 1.704-1(b)(2)(ii)(d)(6) of the Regulations that unexpectedly causes or increases a deficit balance in a Member's Capital Account as of the end of the taxable year.

1.39. **Regulations.** Except where the context indicates otherwise, the permanent, temporary, proposed, or proposed and temporary regulations of the Department of the Treasury under the Code as such regulations may be lawfully changed from time to time.

1.40. **Related Person.** A person having the relationship to a Member that is described in §1.752-4(b) of the Regulations.

1.41. **Taxable Year.** The term "Taxable Year" shall have the meaning set forth in Section 10.4.

1.42. **Taxing Jurisdiction.** Any state, local, or foreign government that collects tax, interest or penalties, however designated, on any Member's share of the income or gain attributable to the Company.

2. FORMATION

2.1. **Formation.** The Company was organized on November 23, 2011. The Members shall be admitted to the Company as of the Effective Date.

2.2. **Agreement.** For and in consideration of the mutual covenants herein contained and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Members executing the Agreement hereby agree to the terms and conditions of the Agreement, as it may from time to time be amended according to its terms.

2.3. **Name.** The name of the Company shall be "Glasscorp LLC."

2.4. **Term.** The Company shall be a term company as contemplated by the Act. The term of the Company commenced upon the filing of the Articles with the Secretary of State, and shall continue until the Company shall be dissolved and its affairs wound up in accordance with the Act and this Agreement on November 23, 2061, unless sooner terminated as provided herein, or continued by the Members pursuant to Section 33-44-411 of the Act.

2.5. **Registered Agent.** The initial registered agent for the service of process shall be Henry M. Hay, III. The Members may designate another person or entity to serve as Registered Agent at any time.

2.6. **Principal Office.** The Principal Office of the Company shall be that location designated by the Members from time to time.

3. PURPOSE OF COMPANY

3.1. The Company has been formed to engage in the commercial glass installation and repair business and to engage in other ancillary businesses provided all activities are legally

allowed pursuant to South Carolina law. The Company may carry on any other activities that the Members determine to be necessary or advisable, subject to the applicable terms of this Agreement.

3.2. Each Member shall devote such time as is reasonably necessary to the purposes of the Company.

4. MEMBERS; VOTING RIGHTS

4.1. **Admission of Members.** The Members shall be deemed admitted to the Company as of the Effective Date.

4.2. **Voting Rights.** Each Member shall have one vote for each one percentage point of Percentage Interest or fraction thereof held by such Member and shall be entitled to vote on any matter.

4.3. **Action Without Meeting.** To the fullest extent permitted by the Act, Members may take action without a meeting by written consent as to such matters and in accordance with such requirements and procedures authorized by the Act. Such written consent must be signed by all Members. The failure of a Member to respond within ten (10) days to a request for consent as to any matter set forth in Article 5 shall be deemed to constitute consent by such Member.

5. MANAGEMENT OF THE COMPANY

5.1. **Management by Members.** The Company shall be member managed within the meaning of the Act. The Members shall annually designate a Managing Member ("Manager") to serve a one year term or until death, disability or resignation.

5.2. **General Administration.** The day-to-day business of the Company shall be carried out by the Manager.

5.3. **Decisions of the Members.** The vote of Members holding a Majority shall constitute approval of any matter, including without limitation, Member Loans.

5.4. **Officers.** The Members shall designate Members to fill such offices, bearing such titles (*e.g.*, President, *etc.*) as they deem necessary for the efficient administration of the Company and all such officers shall serve at the pleasure of the Members. The Members may also delegate, in writing, such authority to the officers as they deem fit.

5.5. **Certain Consents.** Except as hereinafter provided, no act shall be taken, monies expended, decision made or obligation incurred by the Company with respect to : 1) any matter (including, without limitation, loans, purchases, leases, entering into contracts or hiring) involving more than Twenty Five Thousand and No/100 (\$25,000.00) Dollars; or 2) payment of any salary or distribution to any manager or member, unless such payment or decision has been approved in writing by a majority of members or such decision was specifically approved in a budget or resolution previously approved by a majority of members..

5.6. **Meetings of the Members.** Meetings of the Members may be called for any lawful purpose or purposes by any Member by giving Notice to the other Members at least seventy-two (72) hours in advance of the meeting. The Notice shall state the place, time and purpose of the meeting.

6. RIGHTS AND DUTIES OF MEMBERS

6.1. **Liability of Members.** A Member of the Company is not liable, solely by reason of being a Member, under a judgment, decree, or order of a court, or in any other manner for any debt, obligation, or liability of the Company, whether arising in contract, tort, or otherwise, or for the acts or omission of any other Member, agent, or employee of the Company.

6.2. **Indemnification of Members.** The Company shall indemnify the Members as follows:

6.2.1. The Members shall be indemnified by the Company from any liability resulting from any act performed by them within the scope of the authority conferred upon them by this Agreement, except for acts of gross negligence or willful misconduct; provided, however, that any indemnity under this Section 6.2.1 shall be provided out of and be limited solely to the extent of the Company assets or applicable liability insurance, if any.

6.2.2. A Member shall not be liable to the Company or to any other Member for or as a result of any act, omission or error in judgment which was taken, omitted or made by them in the exercise of their judgment and good faith under this Agreement and which does not constitute willful misconduct or gross negligence.

6.3. **Representations and Warranties.** Each Member hereby represents and warrants to the Company and the other Members that: (a) the Member is acquiring such Member's interest in the Company for the Member's own benefit and will not distribute the interest, (b) the Member acknowledges that such Member's interest has not been registered under the Securities Act of 1933 or any state securities laws; (c) the Member acknowledges that such Member's interest is subject also to the restrictions on transfer contained in the Agreement and the Act, and may not be resold or transferred by the Member without appropriate registration or the availability of an exemption from such requirements.

6.4. **Fiduciary Duties of Members.** To the fullest extent set forth in the Act, each Member owes a fiduciary duty to the other Members and the Company. Nothing contained herein shall be interpreted in any way to increase or modify the fiduciary duties set forth in the Act which are owed by a Member to the Members or the Company.

6.5. **Waiver of Action for Partition.** Each Member irrevocably waives any right that they may have to maintain any action for partition with respect to the property of the Company.

6.6. **Authority of Managers to Bind the Company.** Each Manager is hereby authorized to sign all documents and instruments on behalf of the Company subject to the provisions hereof concerning required approval. By resolution the Members may delegate their authority to bind the Company to the officers. A Member acting in contravention of this Agreement shall be liable for all damages sustained by the Company as a result of such action, notwithstanding the indemnification provisions of Section 6.2.

7. CONTRIBUTIONS, OWNERSHIP, REIMBURSEMENTS AND CAPITAL ACCOUNTS

7.1. **Initial Contributions and Percentage Interests.** The Initial Contributions and Percentage Interests set forth on Schedule A shall apply from the date hereof and may be amended only with the consent of a Majority.

7.2. Intentionally Blank.

7.3. **Certain Reimbursements and Fees.** Upon the submission and approval of appropriate documentation and the consent, if any, required pursuant to Section 5, the Company shall reimburse the Members for out-of-pocket expenses paid or incurred by the Members in connection with the business of the Company.

7.4. **Maintenance of Capital Accounts.** The Company shall establish and maintain a Capital Account for each Member and Assignee. Each Member's Capital Account shall be increased by (1) the amount of any Money actually contributed by the Member to the capital of the Company, (2) the fair market value of any Property contributed, as determined by the Company and the contributing Member at arm's length at the time of contribution (net of liabilities assumed by the Company or subject to which the company takes such Property, within the meaning of § 752 of the Code), and (3) the Member's share of Net Profits and of any separately allocated items of income or gain, including income and gain exempt from tax (and

including any income or gain allocated to the Member in accordance with § 1.704-1(b)(2)(iv)(g) of the Regulations). Each Member's Capital Account shall be decreased by (1) the amount of any Money distributed to the Member by the Company, (2) the fair market value of any Property distributed to the Member (net of liabilities of the Company assumed by the Member or subject to which the Member takes such Property within the meaning of § 752 of the Code), (3) the Member's share of any non-capital expenses of the Company which are not deductible for federal income tax purposes; and (4) the Member's share of Net Losses and of any separately allocated items of loss or deduction (including any loss or deduction allocated to the Member in accordance with § 1.704-1(b)(2)(iv)(g) of the Regulations).

Notwithstanding any provision to the contrary contained herein, each Member's Capital Account shall be determined and maintained strictly in accordance with Code § 704(b) and the Regulations thereunder, as the same may be issued, amended and interpreted from time to time, including, as applicable, any hypothetical adjustments required thereby.

7.5. Member Loans. Subject to Section 5.3 and Section 5.5, The Members may provide loans ("Member Loans") to the Company to fund operating or capital needs. Members shall have the opportunity to make Member Loans in proportion to their Percentage Interests, but no Member shall be required to make such a loan. Unless the Members otherwise agree, Member Loans shall bear interest with a fluctuating rate of interest equal to the prime rate of Bank of America, N.A., a national banking association, per annum plus one percentage point.

7.6. Guaranteed Loans. A Member shall not be required to guarantee a loan by the Company.

7.7. Additional Capital Contributions. No Member shall be obligated to make an Additional Capital Contribution.

8. ALLOCATIONS

8.1. **Allocations of Net Profits and Net Losses from Operations.** Except as may be required by § 704(c) of the Code, and after giving effect to the special allocations set forth in Section 8.2 hereof or as otherwise approved by a Majority, Net Profits, Net Losses, and other items of income, gain, loss, deduction and credit shall be apportioned among the Members as follows:

8.1.1. **Net Profits.** Net Profits for any Taxable Year, or fraction thereof, shall be allocated to the Members in the following order and priority:

8.1.1.1. First, to the Members in an amount equal to the Losses previously allocated pursuant to Section 8.1.2 hereof; and

8.1.1.2. Second, to the Members in accordance with their respective Percentage Interests.

8.1.2. **Net Losses.** Net Losses for any Taxable Year, or fraction thereof, shall be allocated in the following order and priority:

8.1.2.1. Except as provided in Section 8.1.2.2 below, Net Losses shall be allocated to the Members in accordance with their respective Percentage Interests.

8.1.2.2. The Net Losses allocated pursuant to Section 8.1.2.1 hereof shall not exceed the maximum amount of Net Losses that can be so allocated without causing any Member to have an Adjusted Capital Account Deficit at the end of any Taxable Year. In the event some but not all of the Members would have Adjusted Capital Account Deficits as a consequence of an allocation of Net Losses pursuant to Section 8.1.2.1, the limitation set forth in this Section 8.1.2.2 shall be applied on a Member by Member basis so as to allocate the maximum permissible Net Losses to each Member under § 1.704-1(b)(2)(ii)(d) of the

Regulations. All Net Losses in excess of the limitation set forth in this Section 8.1.2.2 shall be allocated to the Members in accordance with their Percentage Interests.

8.2. Special Allocations. The following special allocations shall be made in the following order:

8.2.1. Company Minimum Gain Chargeback. Except as otherwise provided in §1.704-2(f) of the Regulations, notwithstanding any other provision of this Section 8, if there is a net decrease in Company Minimum Gain for a Taxable Year, each Member shall be specially allocated items of income and gain for that Taxable Year (and, if necessary, for succeeding Taxable Years) in accordance with the Regulations. The allocation required by this Section 8.2.1 shall be made prior to any other allocation of Company items for the year but subsequent to all distributions for the year. This Section 8.2.1 is intended to comply with the minimum gain chargeback requirement in §1.704-2(f) of the Regulations and shall be interpreted consistently therewith.

8.2.2. Member Minimum Gain Chargeback. Except as otherwise provided in §1.704-2(i)(4) of the Regulations, notwithstanding any other provision of this Section 8, if there is a net decrease in Member Minimum Gain for a Taxable Year, any Member with a share of that Member Minimum Gain (as determined under §1.704-2(i)(5) of the Regulations) as of the beginning of that Taxable Year shall be specially allocated items of income and gain for that Taxable Year (and, if necessary, for succeeding Taxable Years) equal to that Member's share of the net decrease in the Member Minimum Gain, as determined in accordance with §1.704-2(i)(4) of the Regulations. The allocation required by this Section 8.2.2 shall be made subsequent to the allocation in Section 8.2.1 above and prior to any other allocation of Company items for the year.

This Section 8.2.2 is intended to comply with the minimum gain chargeback requirement in §1.704-2(i)(4) of the Regulations and shall be interpreted consistently therewith.

8.2.3. Qualified Income Offset. In the event any Member unexpectedly receives an Offsettable Decrease, items of income and gain shall be specially allocated to such Member (consisting of a pro rata portion of each item of Company income and gain for such year) in an amount and manner sufficient to offset such Offsettable Decrease as quickly as possible in accordance with the Regulations. The allocation required by this Section 8.2.3 shall be made subsequent to the allocations in Section 8.2.1 and Section 8.2.2 above and prior to any other allocation of Company items for the year.

8.2.4. Section 754 Adjustment. To the extent an adjustment to the adjusted tax basis of any Company asset pursuant to §§734(b) or 743(b) of the Code is required, pursuant to §§1.704-1(b)(2)(iv)(m)(2) or 1.704-1(b)(2)(iv)(m)(4) of the Regulations, to be taken into account in determining Capital Accounts as the result of a distribution to a Member in complete liquidation of his interest in the Company, the amount of such adjustment to the Capital Accounts shall be treated as an item of gain (if the adjustment increases the basis of the asset) or loss (if the adjustment decreases such basis) and such gain or loss shall be specially allocated to the Members in accordance with their interests in the Company in the event that §1.704-1(b)(2)(iv)(m)(2) of the Regulations applies, or to the Members to whom such distribution was made in the event that §1.704-1(b)(2)(iv)(m)(4) of the Regulations applies.

8.3. Overriding Allocations for Contributed Property. Income, gain, loss, and deduction with respect to any property contributed to the capital of the Company shall, solely for tax purposes, be allocated among the Members for tax purposes so as to take account of the

variation between the basis of such property to the Company and its fair market value in accordance with §704(c) of the Code.

8.4. **Varying Interests in the Company.** Allocations to any Member whose Membership Interest changes during a Taxable year or to any Member who is a Member for less than a full Taxable year shall be made in accordance with § 706(d) of the Code and the Regulations promulgated thereunder to take into account the Member's varying Membership Interest in the Company during the Taxable Year.

9. DISTRIBUTIONS

9.1. **Interim Distributions.** From time to time, when approved in writing by a majority of members or such decision was specifically approved in a budget or resolution previously approved by a majority of members, and the Managers determine in their reasonable judgment to what extent, if any, the Company's cash on hand exceeds the current and anticipated needs, including, without limitation, needs for operating expenses, debt service, acquisitions, reserves, and other expenses, if any ; the Company may make Distributions to the Members in accordance with their Percentage Interests. No Distributions shall be made so long as any principal or interest is outstanding on any Member Loan unless the lending Member consents.

9.2. **Limitations on Distributions.** No Distribution shall be made if after giving effect to the Distribution:

9.2.1. The Company would not be able to pay its debts as they come due in the usual course of business;

9.2.2. The Company's assets would be less than the sum of its liabilities plus the amount that would be needed if the Company were to be dissolved at the time of the Distribution to satisfy the rights of the other Members upon Distribution which are superior to the rights of the Member receiving the Distribution.

10. TAXES

10.1. **Elections.** The Company may make any tax elections for the Company allowed under the Code or the tax laws of any state or other jurisdiction having taxing jurisdiction over the Company.

10.2. **Tax Matters Partner.** The Members shall designate a Member to act as the "tax matters partner" of the Company pursuant to §6231(a)(7) of the Code. The Member designated as tax matters partner shall keep the other Members informed of all administrative and judicial proceedings as required by §6223(g) of the Code and furnish the other Members a copy of each notice or other communication received by the Member designated as the tax matters partner from the IRS. A Member who is designated a tax matters partner may not take any action contemplated by §§6222 through 6231 of the Code without the consent of the Members. Such tax matters partner is hereby designated by the Company to maintain the records required by §6112 of the Code. The initial tax matters partner shall be J. Daniel Mahoney. Upon the resignation, legal incompetency or disqualification of the tax matters partner, a successor to serve in such position shall be designated by the Members.

10.3. **Accrual Method of Accounting.** The records of the Company shall be maintained on the accrual method of accounting.

10.4. **Taxable Year.** Except as otherwise required by §706 of the Code, the taxable year of the Company shall be an annual accounting period ending on December 31st of each calendar year of the Company.

11. ASSIGNMENT OF MEMBERSHIP INTERESTS

11.1. **Assignment.** A Member may not dispose of all or a portion of the Member's Membership Interest by sale, transfer, exchange, gift, bequest, pledge, hypothecation, or other method of transfer except upon compliance with this Section. Any attempted sale, transfer,

exchange, gift, bequest, pledge, hypothecation, or other method of transfer of a Membership Interest, or any part thereof, not in compliance with this Section 11.1 is null and void. An Assignee is not a Member and has no voting rights unless admitted as a Member pursuant to Section 12. No Membership Interest shall be assigned:

11.2. Without the consent of a Majority of Members.

11.2.1. If such assignment, alone or when combined with other transactions would result in a termination of the Company within the meaning of Section 708 of the Code;

11.2.2. Unless and until the Company receives from the assignee the information and agreements that the non-assigning Members may reasonably require, including but not limited to an admission agreement binding the assignee to the terms of this Agreement, any taxpayer identification number and any agreement that may be required by any taxing jurisdiction.

11.2.3. Except that consent of a Majority of Members is not required for an Assignment made under section 13.3.5 of this Agreement.

11.3. **Effect of Assignment on Member and Assignee.** Upon full compliance with the provisions of Articles 11 and 12, a selling or transferring Member shall cease to be a Member and the Assignee or transferee shall become a Member.

11.4. **Rights of Judgment Creditors.** On application to a court of competent jurisdiction by any judgment creditor of a Member, the court may charge the Membership Interest of a Member with payment of the unsatisfied amount of the judgment.

12. ADMISSION OF ADDITIONAL MEMBERS

12.1. **Admission.** Additional members shall not be admitted to the Company except (i) with the consent of a Majority; and (ii) the approval of a Majority as to the amendments to the Agreement required by such admission.

13. DISSOCIATION OF A MEMBER

13.1. **Dissociation.** Unless specifically provided for in this Agreement, a Member shall not dissociate from the Company. A Member shall cease to be a Member upon the occurrence of any of the following events, none of which shall be deemed in contravention of this Agreement:

13.1.1. The Assignee of a Member's entire Membership Interest becomes a Substitute Member;

13.1.2. The death of a Member; or

13.1.3. The purchase of a Member's entire Membership Interest pursuant to Section 13.3.

13.2. **Wrongful Dissociation.** If a Member dissociates in contravention of this Agreement, the dissociating Member shall be liable to the Company and to the other Members for damages caused by the dissociation.

13.3. **Termination of a Member's Employment.** Any Member may serve as an employee of the Company in addition to their status as Members. If any member becomes an employee of the Company or of The Muhler Company, Inc. and thereafter ceases to be employed by both the Company and The Muhler Company, Inc., for any reason, including death (the "Call Trigger"), then the Membership Interest of that Member may be transferred (the "Call Option") under the terms and conditions hereinafter provided.

13.3.1. The Call Option may be exercised by the Company at any time by the giving of Notice to all Members, or their personal representatives, within 90 days of the Call Trigger. If the Company does not exercise the Call Option in the 90 day period, any non-terminating Member shall have the right to exercise the Call Option by the giving of Notice to all Members, or their personal representatives, within 120 days of the Call Trigger. Such exercise

shall be effective only if it applies to the terminating Member's entire Membership Interest in the Company.

13.3.2. The purchase price to be paid for a purchased Membership Interest pursuant to this Section, shall be Fair Market Value. Any dispute concerning the calculation of Fair Market Value shall be conclusively resolved by the independent accounting firm most recently employed by the Company.

13.3.3. The closing shall occur within thirty (30) days after the occurrence of the exercise of the Call Option. The purchase price shall be paid in the purchaser's sole discretion either (i) in cash, or (ii) one-third in cash at closing and the remainder in two (2) equal annual installments commencing one (1) year from the date of closing, with interest accrued on the outstanding principal balance to be paid with each such installment at a simple fixed rate equal to the prime rate of Bank of America, N.A. on the date of closing plus one percentage point.

13.3.4. At closing, a purchased Membership Interest shall be transferred free and clear of all liens and encumbrances whatever and with such instruments of transfer as shall be reasonably acceptable to the Company.

13.3.5. Should neither the Company nor any non-terminating Member exercise the Call Option, then the selling Member's Membership Interest may be Assigned without the consent of a Majority of Members.

14. DISSOLUTION AND WINDING UP

14.1. **Dissolution.** The Company shall be dissolved and its affairs wound up, upon the first to occur of the following events:

14.1.1. the expiration of the Term;

14.1.2. the written consent of a Majority of members;

14.1.3. entry of a decree of judicial dissolution as set forth in the Act; or

14.1.4. administrative dissolution under the Act.

14.2. **Effect of Dissolution.** Upon the occurrence of the dissolution of the Company, the Members shall wind up the business and affairs of the Company in accordance with the Act and the provisions hereof.

14.3. **Distribution of Assets Upon Winding Up.** Upon the winding up of the Company, the Company Property shall be distributed as follows:

14.3.1. Payment, or adequate provision for payment, shall be made to creditors of the Company including, to the extent permitted by law, Members who are creditors in satisfaction of liabilities of the Company;

14.3.2. To Members in proportion to their positive Capital Account balances taking into account all Capital Account adjustments for the Company's Taxable Year in which the liquidation occurs. Liquidation proceeds shall be paid by the end of the Company's Taxable Year or, if later, within ninety (90) days after the date of liquidation. Such distributions shall be in cash or property (which need not be distributed proportionately) or partly in both, as determined by the Members.

14.4. **Articles of Termination.** Upon dissolution and winding up of the Company, the Company shall file Articles of Termination with the South Carolina Secretary of State in accordance with Section 33-44-805 of the Act.

14.5. **No Obligation to Restore.** No Member shall be obligated to contribute money or property to the Company in order to restore a deficit in such Member's Capital Account.

15. ACCOUNTING AND RECORDS

15.1. **Records to be Maintained.** The Company shall maintain its records in accordance with sound business practice and shall make such records available to the members upon reasonable notice during regular business hours.

15.2. **Reports to Members.** The Company shall provide the following to the Members:

15.2.1. Financial Statements of the Company at least annually to the Members and Assignees at such time and in such manner as the Members may determine reasonable.

15.2.2. Information returns required by the Code and the laws of the State.

15.3. **Accounts.** The Company shall maintain a record of the Capital Account for each Member in accordance with Section 7.4 hereof.

16. AMENDMENT

16.1. **Amendment or Modification of Agreement.** This Agreement may be modified or amended by the agreement of a Majority of Members.

17. MISCELLANEOUS PROVISIONS

17.1. **Entire Agreement.** The Agreement represents the entire agreement among the Members and between the Members and the Company.

17.2. **No Partnership Intended for Non-tax Purposes.** The Members have formed the Company under the Act, and expressly do not intend hereby to form a partnership under either the South Carolina Uniform Partnership Act or the South Carolina Uniform Limited Partnership Act. The Members do not intend to be partners one to another, or partners as to any third party. To the extent any Member, by word or action, represents to another person that any other Member is a partner or that the Company is a partnership, the Member making such wrongful representation shall be liable to any other Member who incurs personal liability by reason of such wrongful representation. Solely for Federal income tax purposes, each of the Members hereby recognizes that the Company will be subject to all provisions of Subchapter K of Chapter 1 of the Code; PROVIDED, HOWEVER, the filing of U. S. Partnership Tax Returns

shall not be construed to extend the purposes of the Company or expand the obligations or liabilities of the Company or its Members.

17.3. Rights of Creditors and Third Parties under Agreement. The Agreement is entered into among the Company and the Members for the exclusive benefit of the Company, its Members, and their successors and assignees. The Agreement is expressly not intended for the benefit of any creditor of the Company or any other Person. Except and only to the extent provided by applicable statute, no such creditor or third party shall have any rights under the Agreement or any agreement between the Company and any Member with respect to any Capital Contribution or otherwise.

17.4. Interpretation and Governing Law. When the context in which words are used in this Agreement indicates that such is the intent, words in the singular number shall include the plural and vice versa, and the masculine gender shall include the feminine and the neuter shall include the masculine and feminine. The headings or titles and the table of contents shall not define, limit, extend or interpret the scope of this Agreement or any particular Section. This Agreement shall be governed and construed in accordance with the laws of the State of South Carolina.

17.5. Arbitration. If a dispute arises out of or relates to this Agreement, or its breach, the parties agree to submit the dispute to a sole mediator selected by the parties. If not thus resolved it shall be referred to a sole arbitrator selected by the parties within thirty (30) days of the mediation or, in the absence of such selection, to the American Arbitration Association ("AAA") for arbitration which shall be governed by its Commercial Arbitration Rules. If the parties do not resort to AAA arbitration they shall agree on the rules under which the arbitration shall be conducted. The award shall be made within six (6) months of selection of the arbitrator

and judgment on the award may be entered in any court having jurisdiction. The mediation and arbitration shall be held in Charleston, South Carolina. The arbitrator shall determine issues of arbitrability but may not limit, expand or otherwise modify the terms of the Agreement, nor have authority to award punitive or other damages in excess of compensatory damages and each party irrevocably waives any claim thereto. The costs of mediation shall be born equally by the parties to the dispute. The costs of arbitration shall be apportioned amongst the parties as the arbitrator shall determine in his or her discretion. The parties, their representatives, other participants and the mediator and arbitrator shall hold the existence, content and result of mediation and arbitration in confidence.

17.6. **Waiver.** Any waiver by the Company or any Member of any breach or any term or condition hereof shall be effective only if in writing and such writing shall not be deemed to be a waiver of any subsequent or other breach, term or condition of this Agreement.

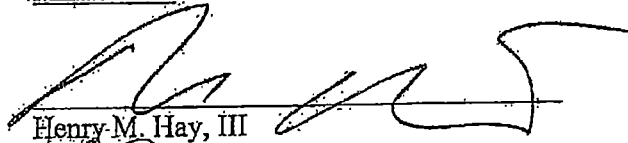
17.7. **Severability.** If any provision, sentence, phrase or word of this Agreement or the application thereof to any person or circumstance shall be held invalid, the remainder of this Agreement, or the application of such provision, sentence, phrase, or word to persons or circumstances, other than those as to which it is held invalid, shall not be affected thereby.

17.8. **Agreement in Counterparts.** This Agreement may be executed in several counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same instrument. In addition, this Agreement may contain more than one counterpart of the signature page and this Agreement may be executed by the affixing of the signatures of each of the Members to one of such counterpart signature pages; all of such signature pages shall be read as though one, and they shall have the same force and effect as though all of the signers had signed a single signature page.

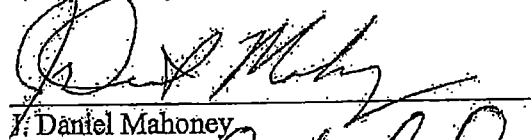
17.9. **Notice.** Any notice request, approval, consent, demand or communication shall be in writing and shall be effective upon the first to occur of the following: upon receipt by the Member to whom intended or three Business days after deposit in the United States Mail, registered or certified, return receipt requested to the address set forth in Schedule A. A Member may change addresses by giving the other Members written notice.

IN WITNESS WHEREOF, the parties hereto have executed this Operating Agreement
this 30th day of October 2013, to be effective as of the Effective Date.

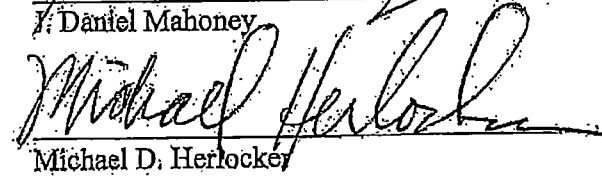
MEMBERS:



Henry M. Hay, III



Daniel Mahoney

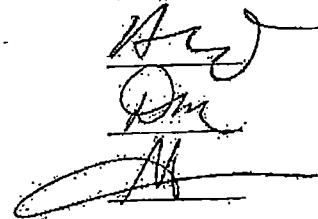


Michael D. Herlocker

SCHEDULE A

<u>Members</u>		
<u>Member</u>	<u>Percentage Interest</u>	<u>Capital Contribution</u>
Henry M. Hay, III 630 Skylark Dr Charleston SC	42.0 %	\$ 420.00
J. Daniel Mahoney 630 Skylark Dr Charleston SC	14.0 %	\$ 140.00
Michael D. Herlocker 630 Skylark Dr Charleston SC	44.0 %	\$ 440.00

Initialed :



10/30/13

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

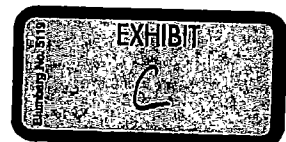
**DEFENDANTS' MEMORANDUM IN
SUPPORT OF MOTION TO COMPEL
ARBITRATION**

Defendants, The Muhler Company, Inc. and Henry Hay, III, provide this memorandum
(i) in support of their motion to stay and compel arbitration and (ii) in response to Plaintiff's
memorandum filed May 10, 2019 and served on Defendants May 13, 2019.

FILED
2019 MAY 16 PM 11:26
JULIE A. STRONG
CLERK OF COURT

I. BACKGROUND

By way of background, Plaintiff was not just an employee at Muhler; he also claims a 25% ownership interest in Muhler and was the CEO of the company. He was terminated for cause on September 18, 2018 after violating his fiduciary duty to the company by voting in favor of a product delineation that was harmful to Muhler but favorable to a separate company, of which Plaintiff was a shareholder. Exhs. A & B. Mr. Mahoney had never invested capital into Muhler and sought to use loans to the company by Defendant Hay to increase the value of his own shares (which are calculated based on EBITDA) by voting against a measure that would allow Hay to be reimbursed for those loans. Exhs. C & D.



II. LEGAL STANDARD

“The policy of the United States and South Carolina is to favor arbitration of disputes.” *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 585 (2001). “[U]nless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered.” *Id.* “Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” *Id.*; see also *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 476 (1989) (“due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration”).

III. RESPONSE TO PLAINTIFF’S MEMORANDUM

The principal contentions raised by Plaintiff Mahoney in opposition to Defendants’ motion to compel arbitration are as follows:

1. Defendant has no arbitration right because Plaintiff’s employment agreement does not contain an arbitration provision;
2. The instant dispute is outside of the scope of the arbitration provision in the corporate bylaws;
3. Plaintiff has an absolute right to a jury trial under the SCPWA;
4. The arbitration provision in the bylaws is unenforceable because it does not comply with the notice requirements of the SCUAA.

1. Plaintiff Is Bound by the Arbitration Clause

With regard to Plaintiff’s first contention in response to Defendants’ motion to compel arbitration, Plaintiff is bound by the arbitration clause in the bylaws (Exh. E) because he, as a shareholder and employee, is bound by the bylaws themselves. See, e.g., *Airgas, Inc. v. Air*

Prods. & Chems., Inc., 8 A.3d 1182, 1188 (Del. 2010) (“bylaws are contracts among a corporation's shareholders”). Accordingly, the absence of an arbitration agreement in the employment contract does not negate Defendants’ right to arbitration as provided for in the bylaws, especially so when the employment agreement is silent on forum selection. *See, e.g., Mich. Health Info. Network Shared Servs. v. Notarycam, Inc.*, No. 1:16-cv-342, 2016 WL 9330848 (W.D. Mich. May 31, 2016) (arbitration clause enforceable even when the contract containing it also contained a forum selection clause). If there is any doubt as to whether a later arbitration provision controls a dispute relating to a prior employment agreement that does not refer to arbitration, that doubt must be resolved in favor of arbitration. *Volt*, 489 U.S. at 476; *Zabinski*, 346 S.C. at 585.

The corporation itself is bound by the arbitration provision in the bylaws; Mr. Mahoney is likewise bound. This would be true even were Mr. Mahoney not effectively a signatory to the bylaws amendment by virtue of his continued status as an officer claiming a 25% interest in the corporation. *See Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 290 (2012) (“A nonsignatory is estopped from refusing to comply with an arbitration clause when it receives a direct benefit from a contract containing an arbitration clause.” (internal quotation marks omitted)); *Episcopal Housing Corp. v. Fed. Ins. Co.*, 273 S.C. 181 (1979).

2. The Arbitration Clause Applies to This Dispute

Plaintiff’s second argument also fails. The arbitration provision applies to “[a]ny 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” **Exh. E** (emphasis added). Plaintiff’s claim satisfies both of the cited types of disputes above.

Plaintiff's claim "relates to the corporation," and Mr. Mahoney claims a 25% share in Muhler and, as an employee, is a "third party" whose claims are covered by the arbitration clause.

A dispute is arbitrable in South Carolina unless the Court can say "with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute." *Zabinski*, 346 S.C. 580 (Ct. App. 2009). Here, there is no interpretation of the arbitration clause that does not cover the dispute. The matter is, with positive assurance, arbitrable.

3. The SCPWA Cannot Negate Defendants' Arbitration Right

Defendant argues that the South Carolina Payment of Wages Act ("SCPWA") guarantees a right to pursue alleged violations of that act via a "civil action" and urges that this language means in court rather than arbitration. This argument must fail on several grounds.

Defendant misconstrues the purpose and effect of two sentences in the SCPWA. First, the language regarding a "civil action" seeks to establish a private cause of action for alleged violation of the statute; it is not a forum selection provision specifying that such actions must be brought in court rather than in arbitration. But, even if the arbitration itself were not considered a "civil action," the award would be subject to confirmation or modification in this Court. Therefore, should this matter be referred to arbitration, Plaintiff would not be deprived of a "civil action."

Second, the language that "[n]o provision of this chapter may be contravened or set aside by a private agreement" is not remotely intended to defeat an arbitration provision; rather, it guarantees the substantive (as opposed to procedural) rights of employees under the statute, prohibiting deprivation of benefits owed to an employee in an employment agreement.

Similar language is found in federal statutes that have been found appropriate for arbitration. *E.g., Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 227 (1987) (Securities Exchange Act provision giving district court exclusive jurisdiction over claims of violations of the Act was not a bar to arbitrability of those claims); *Seney v. Rent-A-Ctr., Inc.*, 909 F. Supp. 2d 444, 451 (D. Md. 2012), *aff'd*, 738 F.3d 631 (4th Cir. 2013) (holding that, while ERISA “§ 2310(d)(1) [. . .] grants a right to sue in either state or federal court for damages or other relief,” “ERISA’s text and legislative history do not support a conclusion that Congress intended to preclude arbitration of claims brought pursuant to it”).

Moreover, if the Court were to disagree with Defendants’ interpretation of the language from the SCPWA, that would mean the act would be preempted by the Federal Arbitration Act (“FAA”), which prohibits state law from invalidating a right to arbitrate a dispute under the FAA. *See infra; Volt*, 489 U.S. at 478; *see also B & S Ltd. v. Elephant & Castle Int’l, Inc.*, 388 N.J. Super. 160, 906 A.2d 511 (2006) (presumptive invalidation of arbitration act and forum selection clause under state franchise protection act preempted by FAA).

4. **The FAA Applies to This Dispute and Preempts Any State Law That Would Negate Defendants’ Arbitration Right**

Finally, failure to observe the notice provisions of the SCUAA does not render an arbitration provision unenforceable if the FAA also applies to the dispute. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538 n.2 (2001). The FAA preempts state law when state law would deny a party its arbitration rights under the FAA; the South Carolina Supreme Court has explicitly stated that the South Carolina Act is preempted to the extent that noncompliance with the S.C. act’s notice provision would invalidate a party’s arbitration right under the FAA. *Id.*

The United States Supreme Court has held that the FAA applies to any agreement “involving commerce,” interpreted to mean the broadest exercise of Congress’ commerce clause power, and that most employment contracts fall within the ambit of the FAA. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *see also* 9 U.S.C. § 2. “To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts,” and routinely relies on affidavits in making this determination. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 594 (2001).

The Muhler Company, Inc., the Plaintiff, and Mr. Hay are each engaged in interstate commerce, as the corporation and its employees work across state lines; Mr. Mahoney was involved with the Company’s out-of-state business. *See Exh. F* (Affidavit of Henry Hay, III). Mr. Mahoney was also permitted to work remotely, including in other states. *Exh. C*. Accordingly, his employment and his termination involved interstate commerce, and the FAA applies to disputes regarding the same. Further, because the FAA has no similar notice requirement to the S.C. Act, and because Defendants are entitled to arbitrate this dispute under the FAA, the FAA preempts the S.C. Act to the extent application of the latter would deny the arbitration right. *Munoz*, 343 S.C. at 538 n.2.

IV. CONCLUSION

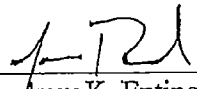
For these reasons, Defendants’ motion to compel arbitration should be granted and the matter referred for resolution via binding arbitration pursuant to the Muhler Company, Inc.’s bylaws as amended.

[signature on following page]

Respectfully submitted:

ANDREW K. EPTING, JR., LLC

On this 15th day of May, 2019
Charleston, SC



Andrew K. Epting, Jr., Esq.
Jaan G. Rannik, Esq.
46A State Street, Charleston, SC 29401
P: 843.377.1871
F: 843.377.1310
ake@epting-law.com
jgr@epting-law.com

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES that true and correct copies of the pleading or paper to which this certificate is affixed was served upon the party(s) to this action in accord with the applicable Court Rules by electronic transmission or by hand delivery or by regular U.S. Mail, postage prepaid, properly addressed to the attorney(s) of record for such party(s).

Signed this 15 day of MAY, 2019
Charleston, South Carolina

*Special Shareholders' Meeting
of The Muhler Company, Inc.*

July 10, 2018, 3:00 p.m.

Call to Order, Introductions, Agenda and Rules of Conduct

Chairperson: Good evening, will the meeting please come to order. I would like to welcome all of you to the annual meeting of shareholders of The Muhler Company, Inc. I am Henry Hay, majority shareholder, and I will be presiding as Chair of this meeting.

Proof of Notice of Meeting

I have a copy of the notice and agenda of this meeting. All shareholders received this notice at least 10 days prior to this meeting. The notice is incorporated into the minutes of this meeting.

Calling of Roll and Quorum

All shareholders of record at the close of business on July 9, 2018 are entitled to vote at this meeting. Our first order of business is to determine whether the shares represented at the meeting, either in person or by proxy, are sufficient to constitute a quorum for the purpose of transacting business. All shareholders of record should declare themselves now by stating their name, starting with Dan Mahoney:

Dan Mahoney
Henry Hay

Dan Mahoney — 25% shareholder — and I — 75% shareholder — are present at this meeting. Therefore, we have a quorum and this meeting is duly convened.

Reading and Disposal of Unapproved Minutes

We will now read and dispose of any unapproved minutes. There are no unapproved minutes.

Reading of Reports

Next on the agenda is the reading of any reports of officers and committees. There are no such reports.



Unfinished Business

We will next dispose of any unfinished business. There being none, we will proceed to new business.

New Business

I have here a proposed resolution regarding the product delineation and expense allocation between The Muhler Company and Glasscorp. A copy has been provided to each shareholder. This resolution proposes the allocation and delineation between the companies that was originally conceived.

As part of a vote on these matters, it is necessary that the CEO of Muhler, Dan Mahoney, speak on the record in response to the following question:

How would it be Muhler's best interest to alter the expense allocation in favor of Glasscorp and allow a conflict between itself and Glasscorp with regard to product offerings?

Thank you.

1. Vote on Product Offerings

We will now conduct an oral vote on whether to adopt the resolution regarding a delineation of product offerings as ~~originally~~ conceived between Muhler and Glasscorp.

All in favor, say "aye."

yes ~~for~~ yes Dan

Aye.

All against, say "nay."

With support of [75% / 100%] of the voting shares, the vote passes.

2. Vote on Expense Allocation

We will now conduct an oral vote on whether to adopt the resolution regarding an allocation of expenses as originally conceived between Muhler and Glasscorp. - here forward.

All in favor, say "aye."

Aye.

All against, say "nay."

RESOLUTION OF THE SHAREHOLDERS OF
THE MUHLER COMPANY, INC.

July 10, 2018

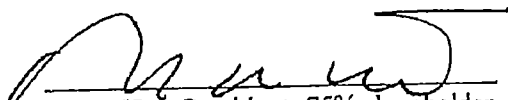
1. It is hereby recognized and resolved by the Shareholders of The Muhler Company, Inc. ("Muhler") that the product offerings by Muhler and Glasscorp LLC ("Glasscorp") be delineated and defined as in conformance with the following:

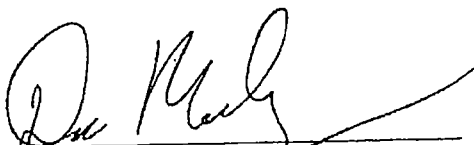
In order to avoid a conflict between Glasscorp and Muhler, Glasscorp shall not offer clad-wood doors or windows, vinyl doors or windows, sunrooms, shutters, replacement vinyl or wood windows, or hurricane protection.

2. It is hereby recognized and resolved by the Shareholders of Muhler that expense allocations for Dan Mahoney and Henry Hay between Muhler and Glasscorp were originally set by Muhler and should be restored to their original form.

3. It is hereby recognized and resolved that any changes with regard to the allocation of expenses between Muhler and Glasscorp will not be effective until they are reviewed and approved by Muhler. *next 60 days from July 10th.*

IT IS SO RESOLVED, this ____ day of July, 2018.


Henry Hay, President, 75% shareholder


Dan Mahoney, CEO, 25% shareholder

#1 yes Dan
yes Henry

#2 yes Henry
yes Dan

#3 yes Dan
yes Hy

With support of [75% / 100%] of the voting shares, the vote passes.

2a. Vote on Changes to Expense Allocation

1. We will now conduct an oral vote on whether to adopt the resolution establishing that any changes with regard to the allocation of expenses between Muhler and Glasscorp will not be effective until they are reviewed and approved by Muhler.

All in favor, say "aye."

Aye.

All against, say "nay."

With support of [75% / 100%] of the voting shares, the vote passes.

Adjournment

We have concluded the business of this special meeting, which is officially adjourned. The July 10, 2018 special meeting of the shareholders of The Muhler Company, Inc. is closed.

SPECIAL MEETING
FOR
GLASSCORP, LLC

DATE: August 14, 2018

TIME: 3:03 PM

LOCATION: Glasscorp
630 Skylark Drive
Suite U
Charleston, SC

CONDUCTED BY: Henry M. Hay, III, Chair

REPORTED BY: Priscilla Nay,
Certified Shorthand Reporter

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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A. WILLIAM ROBERTS, JR., & ASSOCIATES (800) 743-DEPO
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0175



1 APPEARANCES :

2 HENRY M. HAY, III, CHAIR
3 MICHAEL HERLOCKER, SHAREHOLDER
4 DAN MALONEY, SHAREHOLDER
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15 (INDEX AT REAR OF TRANSCRIPT)
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1 MR. HAY: This is the special
2 shareholders' meeting of Glasscorp, LLC on August
3 the 14th. Call to order. Come to order.

4 I would like to welcome all of you
5 to the special shareholders' meeting of Glasscorp.
6 I'm Henry Hay, 42 percent shareholder. I will be
7 presiding as Chair of this meeting.

8 Proof of the notice of the meeting,
9 I'll give you a copy of that. Proof of notice of
10 the meeting, we're good there.

11 (EXH. 1, Documents concerning notice of
12 the meeting, was marked for identification.)

13 MR. HAY: The calling of the roll. The
14 first order of business is shareholders on record
15 should declare themselves by stating their name.

16 MR. MAHONEY: I'm Dan Mahoney.

17 MR. HERLOCKER: Michael Herlocker.

18 MR. HAY: Henry Hay. Dan, Michael,
19 and I are present. So that's a quorum. So we'll
20 convene.

21 So what we're here to talk about is
22 the delineation of products between Muhler and
23 Glasscorp. You know, when I started Muhler Company
24 in 1992 we were doing clad wood windows and doors
25 and vinyl windows and doors.

1 At some point we decided -- I decided
2 to go into retail and we started doing replacement
3 windows and doors, sunrooms, and RV protection. At
4 some later point I decided that we should take up
5 commercial glazing. We hired the people and we
6 formed the commercial glazing division, which y'all
7 are aware of.

8 Eventually we spun off, commercial
9 glazing off into Glasscorp. Since that time Muhler
10 has not done any commercial glazings, storefront,
11 or curtain wall.

12 My motion is that in keeping with
13 Glasscorp and Muhler's conception in order to avoid
14 conflict between Glasscorp and Muhler I propose
15 Glasscorp shall not offer clad wood windows and
16 doors, vinyl doors and windows, sunrooms, shutters,
17 replacement vinyl or wood windows, or hurricane
18 protection, which is basically what Muhler does.

19 That's my motion. So we can now do an
20 oral vote. All in favor?

21 MR. HERLOCKER: I would say no.

22 MR. HAY: Okay.

23 MR. MAHONEY: Well, I think I have some
24 things to say as opposed to the vote. Before we
25 call for a vote usually we say, is there anybody

1 who has any comments. So I have some comments.

2 MR. HAY: Okay.

3 MR. MAHONEY: Just from a historical
4 standpoint, the reason why -- one of the reasons
5 why we're sitting around the table talking about
6 product delineation has to do with a noncompete
7 concern between Muhler and Glasscorp. That
8 noncompete or product delineation was originally
9 asked for as part of an agreement, Henry, between
10 you and me in terms of a buyout.

11 You know, we tried to facilitate that.
12 I think we got to a point where, you know, Michael
13 had agreed to some form of noncompete between the
14 two companies in order to help facilitate that. So
15 where are we on that?

16 MR. HAY: Well, this does not have
17 anything to do with that. The purpose of Glasscorp
18 when it was formed was to do commercial,
19 storefront, and curtain wall specifically.

20 It doesn't have anything to do with
21 the buyout or anything. This has to do with the
22 delineation of products.

23 MR. MAHONEY: Okay. My vote is no.

24 MR. HAY: Okay. I vote yes. So the
25 vote does not carry. So it is 44, 42, 14.

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MR. HERLOCKER: Uh-huh.

MR. HAY: So it is 58 percent. So the
motion does not carry. So we are going to conclude
the meeting. The meeting is adjourned.

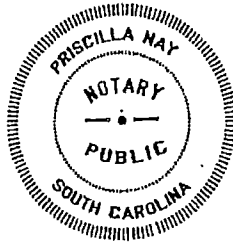
(The meeting was adjourned at 3:08 PM.)

CERTIFICATE OF REPORTER

I, Priscilla Nay, Court Reporter and
Notary Public for the State of South Carolina, do
hereby certify that the foregoing transcript is a
true, accurate, and complete record.

I further certify that I am neither
related to nor counsel for any party to the cause
pending or interested in the events thereof.

Witness my hand, I have hereunto
affixed my official seal this 21st day of August,
2018 at Charleston, Charleston County, South
Carolina.

*Priscilla Nay*

Priscilla Nay,
Court Reporter
My Commission expires
December 2, 2021

EMPLOYMENT AGREEMENT

This Employment Agreement (the "Agreement") is dated effective as of the 15th day of January, 2008 (the "Effective Date"), by and between J. Daniel Mahoney (the "Executive") and The Muhler Company, Inc., a South Carolina corporation (the "Company").

WHEREAS, the Company has hired Executive as Chief Executive Officer of the Company and Executive desires to work for Company in such capacity; and

WHEREAS, the parties desire to enter into this Agreement to set forth certain terms of Executive's employment.

NOW, THEREFORE, in consideration of the promises contained herein, the compensation to be paid to Executive, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties do hereby agree as follows:

1. **Effective Date.** This Agreement is effective as of January 15, 2008 (the "Effective Date"), and shall continue until Executive's employment relationship is terminated by Executive or the Company.
2. **Position and Duties.** Executive is employed as Chief Executive Officer ("CEO") of the Company and shall have such duties as are related to such position. The Company agrees that Executive shall be allowed to perform his duties as CEO on and off Company premises. All of the time spent working by Executive will be considered as part of the time required by this Agreement, even if such time is spent off Company premises.
3. **Other Responsibilities.** The Company acknowledges and agrees that Executive has other business, consulting and board of directors commitments and responsibilities outside of the Company that will continue while he is employed by the Company, and such activities shall not be considered a conflict or distraction from his duties as CEO, nor shall they be viewed in a negative manner by the Company.
4. **Term.** This Agreement shall begin January 15, 2008 and shall continue until December 31, 2008 (said period being referred to as the "Initial Term"). On or before sixty (60) days prior to the end of the Initial Term, the parties shall review the relationship and the financial results of the Company and negotiate in good faith whether to continue Executive's employment beyond the Initial Term (any continuation beyond the Initial Term shall be referred to as the "Renewal Term") and, if so, the new compensation and benefits Executive shall receive and the number of hours Executive shall work during the Renewal Term. If the parties do not continue Executive's employment beyond the Initial Term and into the Renewal Term, the Company shall redeem at the end of the Initial Term all outstanding stock that Executive owns in the Company pursuant to the terms of the



Stockholders' Agreement dated effective January 15, 2008, between Executive and the Company (the "Stockholders' Agreement").

5. **Compensation and Benefits.** During the Initial Term, the Company shall pay Executive the sum of Ten Thousand Dollars (\$10,000) per month, less applicable state and federal withholdings, to be paid the first day of each month. In return, Executive shall work up to 10 days per month in his capacity as CEO of the Company. In addition, the Company shall pay for, and Executive shall receive, health insurance for Executive and his family (at the Company's expense), a car allowance of Four Hundred Dollars (\$400.00) per month, and any other employee benefits afforded to other executive employees. Should the parties agree to continue Executive's employment beyond the Initial Term and into the Renewal Term, Executive's compensation, benefits, and the number of days per month that Executive must work during the Renewal Term will be negotiated by the Company and Executive as set forth in Section 4 hereof.
6. **Reimbursement of Expenses.** The Company shall reimburse Executive for all expenses he incurs in connection with his position as CEO. Executive shall submit invoices or other documentation evidencing the expenses and the Company shall reimburse Executive within thirty (30) days.
7. **Support to Executive.** Executive shall be provided an office, administrative support and appropriate equipment to perform his duties as CEO.
8. **Termination of Employment.** Executive's employment may be terminated only as follows:
 - a. During the Initial Term, either party may terminate Executive's employment, with or without cause, upon thirty (30) days written notice;
 - b. During the Renewal Term, Executive may terminate Executive's employment upon sixty (60) days written notice to the Company;
 - c. During the Renewal Term, the Company may terminate Executive's employment with Cause at any time. As used herein, "Cause" shall be defined as: breach of Executive's duty of loyalty to the Company; gross negligence or willful misconduct of Executive materially damaging to the Company's business; or a violation of state or federal law in connection with Executive's employment;
 - d. During the Renewal Term, the Company may terminate Executive's employment without Cause upon sixty (60) days written notice to the Executive, provided that the Company pays to Executive upon such termination a severance payment equal to ten (10) months of Executive's base salary, minus applicable withholdings.

Upon termination of Executive's employment for any reason, whether during the Initial Term or the Renewal Term, the Company shall redeem all outstanding stock that Executive owns in the Company pursuant to the terms of the Stockholders' Agreement.

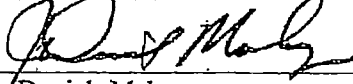
9. **Governing Law.** This Agreement shall be interpreted, construed, and governed according to the laws of the State of South.

10. **Amendments.** No amendments or variation of the terms or conditions of this Agreement shall be valid unless agreed to in writing and signed by the parties.

11. **Entire Agreement.** This Agreement constitutes the entire agreement regarding the subject matter hereof and shall bind and inure to the benefit of Company and Executive and their respective successors, heirs, assigns and legal representatives.

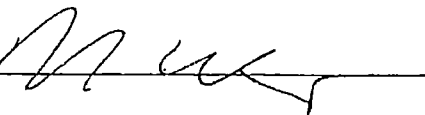
IN WITNESS WHEREOF, the parties hereto set their hands and seals to be effective the day and year first written above.

EXECUTIVE:


J Daniel Mahoney

COMPANY:

The Muhler Company, Inc.

By: 
Its: _____

IN RE: SHAREHOLDERS MEETING

DATE: November 16, 2016

TIME: 5:00 PM

LOCATION: The Muhler Company, Inc.
630 Skylark Drive
Charleston, SC

REPORTED BY: TERRI L. BRUSSEAU, RPR, CRR

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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0185



1 APPEARANCES:

2 Henry M. Hay, III

3 J. Daniel Mahoney

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1 MR. HAY: This is a special meeting of
2 Muhler Company board November 16th, 2016. Proof of
3 notice of meeting, there are actually three in this
4 little pile, there's one original of November 7th
5 which was rescheduled to November 8th which was
6 rescheduled to today and that's all three of those.
7 All right. Calling of roll, pretty easy, Henry Hay
8 and Dan Mahoney.

9 MR. MAHONEY: Right.

10 MR. HAY: Partners. Reading and
11 disposal of unapproved minutes or minutes. You've
12 got a copy of the minutes from last week. I can
13 read them briefly. It's so quick, I can go ahead
14 and do that. Annual shareholders for fiscal 2017
15 Muhler Company held October 25th, 2016, five
16 o'clock, at Muhler's places of business. Purpose
17 of the meeting to elect corporate officers and vote
18 on an amendment to the corporate bylaws.
19 Shareholders present -- representing 100 percent of
20 shares of the company were present at meeting,
21 constituting of a quorum. The following actions
22 were taken by a majority vote of the shareholders,
23 election of Henry Hay as president of Muhler,
24 election of Dan Mahoney as CEO of Muhler, an
25 amendment of the corporate bylaws to include an

1 arbitration provision.

2 MR. MAHONEY: My comment to the minutes
3 is that the minutes are relatively short and they
4 don't reflect the conversation or the fact that
5 there was a vote against the arbitration by the
6 minority stockholder.

7 MR. HAY: Okay.

8 MR. MAHONEY: And I think there was a
9 conversation that took place where the notes do not
10 include the fact that the minority shareholder
11 objected to the fact that he hadn't gotten the
12 information prior to the meeting.

13 MR. HAY: Okay.

14 MR. MAHONEY: And didn't have an
15 opportunity to study that.

16 MR. HAY: Okay.

17 MR. MAHONEY: Prior to the vote.

18 MR. HAY: Okay. Would you like to make
19 a motion to fully -- to amend to fully include the
20 comments from the last shareholders meeting?

21 MR. MAHONEY: I would.

22 MR. HAY: Okay.

23 MR. MAHONEY: And under new business
24 and when we get to it, I'll cover that under --
25 under the old business.

1 MR. HAY: All right. Well, do you want
2 to -- do we want to not accept -- do we want to
3 vote to accept these meetings and then you -- these
4 minutes and then you bring that up as new business?

5 MR. MAHONEY: Well, yeah, under -- in
6 the last meeting -- I mentioned during the last
7 meeting that I needed an opportunity to look at the
8 suggested arbitration language and that I would
9 make comments, you know, on that at the next
10 meeting.

11 MR. HAY: Okay.

12 MR. MAHONEY: Which I intend to do.

13 MR. HAY: Okay. All right. Well, do
14 you want to vote to accept these minutes or would
15 you like to make a motion I guess to --

16 MR. MAHONEY: Well, I'd like to make a
17 motion to the fact that the minutes don't include
18 all of the comments that were made at the last
19 meeting and they perhaps should.

20 MR. HAY: Okay, I think there's a
21 motion from Dan to amend or more fully include
22 the -- reflect the --

23 MR. MAHONEY: Objections of
24 the minority stockholder --

25 MR. HAY: -- objections of --

1 MR. MAHONEY: -- at the last meeting to
2 not having the information in advance and not
3 having enough time to study before the vote.

4 MR. HAY: Okay. I think that's -- we
5 get that as a motion.

6 MR. MAHONEY: And the minutes
7 doesn't -- the minutes do -- should not -- should
8 reflect the fact that the majority stockholder
9 voted for the arbitration provision and the
10 minority stockholder voted against it.

11 MR. HAY: Okay. I think that could be
12 a motion.

13 MR. MAHONEY: Yeah, I think that's
14 fair.

15 MR. HAY: Do you call it a vote?

16 MR. MAHONEY: Yep. I'm for it.

17 MR. HAY: For it. And I would be for
18 doing that. We can do that. Okay. All right, I
19 think that handles the minutes.

20 MR. MAHONEY: Okay, I think -- can we
21 move, Henry, into the unfinished business, you
22 know, which would be the amendments --

23 MR. HAY: Yeah, well, reading of any
24 annual reports, I don't think we have any --

25 MR. MAHONEY: We don't have any.

1 MR. HAY: -- so we can waive that --

2 MR. MAHONEY: Yep.

3 MR. HAY: -- unfinished business.

4 Okay. Do you have --

5 MR. MAHONEY: Yeah, I have a document
6 that I brought --

7 MR. HAY: Okay.

8 THE MAHONEY: -- for everyone.
9 Actually, I'll give you a copy as well.

10 COURT REPORTER: Thank you.

11 MR. MAHONEY: And basically it's just a
12 letter to you, Henry, that says, you know, as you
13 know, at our last stockholders meeting of October
14 14th, 2016 I presented for the first -- I was
15 presented for the first time at the meeting with an
16 amendment for the bylaws of The Muhler Company
17 October 16th arbitration language. I expressed my
18 objection for the proposed amendment and the fact
19 that I had not been given an advanced copy of the
20 proposed changes to review prior to the meeting. I
21 requested additional time in which to review the
22 arbitration language. You called a vote and as a
23 minority share -- you know, you called a vote and
24 as a minority shareholder in a statutory closed
25 corporation, I voted against the arbitration

1 language.

2 With time to review the arbitration
3 language, my concerns as are follows: Section 1 of
4 the arbitration language addresses any and all
5 disputes, claims or controversies and is not
6 limited solely to the issue related to value of
7 shares. Therefore, I believe it makes no sense to
8 require that three arbitrators be certified public
9 accountants.

10 Certified public accountants would be
11 useful in a strictly valuation situation but this
12 language involves any and all disputes and the
13 arbitrators should be attorneys or some other
14 neutral party with understanding of corporate law.

15 In addition, the arbitration language
16 in Section 2 indicates that the third arbitrator
17 shall be an employee of the corporation's
18 accountant which I feel that these restrictions on
19 the arbitrators would be unfairly prejudicial to me
20 as a minority stockholder.

21 I intend to bring this up in our next
22 stockholders meeting under old business which was
23 rescheduled until today.

24 As usual, I appreciate everybody's
25 understanding but I -- I move the fact that the

1 arbitration should be studied and it should be
2 altered to take into consideration my comments.

3 MR. HAY: Okay. Well, I can take a
4 minute and look at this.

5 MR. MAHONEY: You know, I think,
6 Henry -- I don't think that we should make any kind
7 of decision here today. I think you ought to study
8 this and, you know, I think you probably got advice
9 on it before it, I just suggest that maybe perhaps
10 we go back and take a look at it and explain, you
11 know, the arbitration.

12 MR. HAY: Okay. Do you want to make a
13 motion related to this --

14 MR. MAHONEY: You know, I mean, I can.
15 I'd like to have a motion that my comments be
16 considered and, you know, to the extent that you
17 have an opportunity to look them over and maybe
18 perhaps we talk about amending the arbitration
19 language that was previously voted on.

20 MR. HAY: Okay. I think I might want
21 to amend that motion a little bit if that's okay.

22 MR. MAHONEY: Sure. That's okay with
23 me.

24 MR. HAY: I think I would say that
25 we -- we did have a motion, it was passed, Dan is

1 voicing concerns and that while it was passed, I
2 will review his concerns --

3 MR. MAHONEY: Yeah, sure, that's fair.

4 MR. HAY: -- and we can address it in
5 the next meeting but I do want to make sure we know
6 that it was passed on the previous meeting over his
7 objection.

8 MR. MAHONEY: Um-hum. Right.

9 MR. HAY: If that works.

10 MR. MAHONEY: Cool.

11 MR. HAY: Okay. New business is
12 repayment of Silverline proceeds to Henry. Dan,
13 you got a copy of that right there and I'll read
14 this. It's memorandum on the disbursement of
15 Silverline proceeds. In 2008, Shareholders Dan
16 Mahoney and Henry Hay agreed that the proceeds
17 expected from a pending lawsuit Silverline
18 settlement between Defendants Silverline Building
19 Company Products, LLC and Anderson Corporation and
20 the Plaintiff Muhler Company would be set aside to
21 be paid to Henry Hay personally. See Mahoney
22 e-mail dated 8/22/08 which is attached back in the
23 back. You have got a copy of that as well. Okay.
24 The total amount of the Silverline settlement was
25 654,059 as shown on the schedule below. In 2008,

1 2009 and several years thereafter, Muhler incurred
 2 operating losses and/or lacked sufficient working
 3 capital to pass the Silverline proceeds on to Hay.
 4 However, Muhler has recently returned to
 5 profitability and has sufficient working capital to
 6 pay Hay the Silverline proceeds including interest.
 7 A five-year schedule is shown below.

8 Below it shows the three Silverline
 9 payments, total of 654, total of the sheet with
 10 interest and totals 856, interest is 4 percent and
 11 propose to pay it. And I think we should note as
 12 long as profitability continues to pay it in five
 13 equal installments starting November 15th or
 14 thereabouts of 189,256 for a total of 856,367. Do
 15 you have a copy of that in there? This. Do you
 16 have this?

17 MR. MAHONEY: This.

18 MR. HAY: Okay.

19 MR. MAHONEY: Comments? Is it time for
 20 my comments?

21 MR. HAY: Yeah, sure.

22 MR. MAHONEY: Okay. I prepared a
 23 comment --

24 MR. HAY: Okay.

25 MR. MAHONEY: -- in anticipation of

1 this although I hadn't seen the information so --

2 MR. HAY: Okay.

3 MR. MAHONEY: -- so that I'm not
4 misquoted. What basically I've said, I have
5 received the notice, you know, of the meeting with
6 Muhler and so forth. The notice indicates the
7 meeting is called for the purpose of a vote on a
8 repayment by Muhler of certain advances made by
9 Henry Hay to Muhler Company and a cash distribution
10 to stockholders.

11 I would like to address the issue
12 concerning repayment of certain advances made by
13 Henry Hay in advance to make the following points.

14 The first point is, as a minority
15 shareholder I have not been provided with any
16 detailed information about the advances such as the
17 dates or amounts prior to today or taking a vote.
18 So I just got it today, no chance to study it or
19 review it.

20 As we have discussed over the last few
21 years, I have not agreed with the -- with the
22 assertion that you've made advances to the company
23 that were not capital infusions to the company.

24 Thirdly, the issue is that the
25 company's reviewed financial statements do not

1 reflect any advances made by Henry Hay. There are
2 no loans due to shareholders, no notes due or any
3 other amounts due to shareholders.

4 Any such debt would have had to have
5 been approved by a hundred percent of the
6 shareholders by the terms and conditions of the
7 stockholders agreement. No such vote or approval
8 has been taken place to my knowledge.

9 The monies that have been referred to
10 in the past stem from the money that was part of a
11 settlement in litigation with Silverline Products.
12 All of the litigation against Silverline was
13 brought by The Muhler Company and not by Henry Hay
14 personally. Therefore, any and all net proceeds
15 from that litigation would have belonged to the
16 Muhler Company.

17 There cannot be a vote on a repayment
18 of personal advances when it's clear that the money
19 is under consideration today for a vote, were not
20 personal advances but were rather revenue from
21 litigation or capital contributions.

22 Again, I feel that treating any company
23 assets or shareholder capital contributions or
24 advances or loans would be unfairly prejudicial to
25 me as a minority shareholder.

1 MR. HAY: Okay. I get that. You got
2 that? All right. I call for a vote on the
3 repayment schedule of the Silverline debts.

4 MR. MAHONEY: In addition -- in
5 addition -- before you do that, in addition to my
6 notes here there has never been to my knowledge any
7 conversation about interest on anything --

8 MR. HAY: Okay.

9 MR. MAHONEY: -- so that's -- that's
10 brand new.

11 MR. HAY: Okay. I again call for a
12 vote on the repayment of the Silverline debt to
13 Henry Hay with interest and I vote yes. Dan?

14 MR. MAHONEY: I vote no. Minority
15 stockholder votes no.

16 MR. HAY: Okay. All right. Next order
17 of business is the vote on the shareholders
18 distribution proposal and I will read that.
19 Shareholder distribution for 2017. It is suggested
20 that shareholders vote for a cash distribution to
21 the shareholders for the year of 2017 in the amount
22 of 250,000 dollars.

23 The company should experience a
24 profitable year for 2017, approximately 430 --
25 463,126 dollars which will mark the fifth

1 consecutive year of profitability for the Muhler
2 Company. The combined profitability for the five
3 years should exceed 2.9 million with no
4 distributions and profits to the shareholders with
5 the exception of those funds necessary to pay
6 federal and state taxes.

7 And would that -- I think that in
8 itself would be a motion, correct?

9 MR. MAHONEY: Correct. Right.

10 MR. HAY: I vote no.

11 MR. MAHONEY: I vote yes.

12 MR. HAY: Okay. That's it.

13 MR. MAHONEY: It's passed. Pretty
14 quick.

15 MR. HAY: And that's it. We're
16 adjourned. Thank you.

17 (WHEREUPON, the proceedings concluded
18 at 5:14 PM.)
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CERTIFICATE OF REPORTER

I, Terri L. Brusseau, Registered Professional Reporter and Notary Public for the State of South Carolina at Large, do hereby certify that the foregoing transcript is a true, accurate, and complete record.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 21st day of November, 2016 at Charleston, Charleston County, South Carolina.

Terri L. Brusseau, RPR, CRR
My Commission expires
April 5, 2026.

~~Notice of Annual Shareholders' Meeting~~
of The Muhler Company, Inc. for Fiscal Year 2017

To: The Muhler Company Inc.; The Stockholders

Notice

You are hereby notified that the annual meeting of the shareholders of The Muhler Company, Inc. (hereinafter "Muhler") for fiscal year 2017 will be held on Tuesday, October 25, 2016, at 5:00 p.m. at 630 Skylark Drive, Suite U, Charleston, SC 29407. This meeting is requested by Henry M. Hay, III, 75% stockholder.

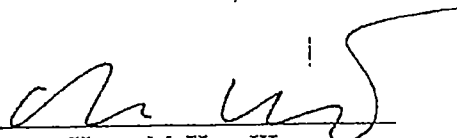
Notice is provided this 14th day of October, 2016.

Agenda

The meeting will be held for the purpose of a shareholders' vote on (i) the election of Muhler corporate officers, and (ii) a proposed amendment to the Muhler bylaws.

The order of business will be as follows:

1. Proof of notice of meeting;
2. Calling of roll;
3. Reading and disposal of any unapproved minutes;
4. Reading of any annual reports of officers and committees;
5. Unfinished business;
6. New business;
 - a. Election of Corporate Officers
 - i. Nomination of corporate officers;
 - ii. Shareholders' vote to elect corporate officers;
 - b. Amendment of Bylaws
 - i. Reading of proposed amendment to Muhler's bylaws by requiring arbitration of claims;
 - ii. Shareholders' vote on adoption of amendment;
7. Adjournment.


Henry M. Hay, III



**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.

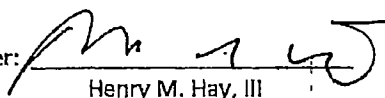
The third arbitrator shall be an employee of the Corporation's accountant. This third arbitrator will be appointed even in the event that the corporation is a claimant or respondent.

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 AND HENRY
HAY, SR., IN HIS INDIVIDUAL
CAPACITY,

Defendants.

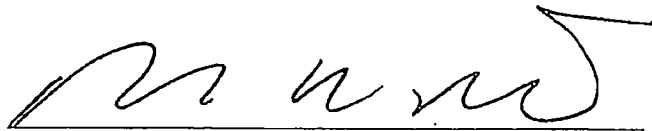
IN THE COURT OF COMMON PLEAS
FOR CHARLESTON COUNTY

CASE NO.: 2018-CP-10-5077

AFFIDAVIT OF HENRY M. HAY, III

PERSONALLY appeared before me Henry M. Hay, III, stating as follows:

1. I am the President and majority shareholder of The Muhler Company, Inc. ("Muhler").
2. J. Daniel Mahoney ("Mahoney") was formerly the CEO of Muhler and claims a 25% ownership of Muhler.
3. Muhler is a South Carolina corporation that does business in other states, including Florida, Alabama, Georgia, Oregon, and Wisconsin.
4. In the course of his duties as CEO of Muhler, Mahoney was involved in Muhler's business dealings in these other states.
5. As part of his compensation, Muhler paid for Mahoney's communication devices, including his cellular phone, and reimbursement of expenses, including those relating to his involvement in out-of-state dealings.
6. Further affiant sayeth naught.



Henry M. Hay, III

SWORN to before me this
15th day of May, 2019.

Cynthia R. Curtis (L.S.)
NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: Feb. 28, 2022

