

**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.<sup>1</sup>

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**

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<sup>1</sup> 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 12<sup>th</sup> 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