

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

App. No. 2020-000925

RECEIVED

Jul 06 2020

SC Court of Appeals

J. DANIEL MAHONEYPlaintiff / Respondent,

v.

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

APPELLANTS' RESPONSE IN OPPOSITION
TO MOTION TO DISMISS

The Muhler Company, Inc. and Henry Hay, III (“Appellants”) filed a Motion to Confirm an arbitration award in a case brought against them by J. Daniel Mahoney (“Mahoney”), No. 2019-CP-10-00178, the subject of this appeal. The trial court denied Appellants’ Motion to Confirm, and Appellants timely appealed. Mahoney has moved to dismiss the appeal on the ground that this is an interlocutory appeal as the denial of the confirmation was not a final order. **Motion to Dismiss** at 4–7. Appellants respond as follows.

Mahoney filed two separate lawsuits against Appellants stemming from his termination as CEO of Muhler. In each lawsuit, Appellants’ defense was that Mahoney breached his

fiduciary duties of loyalty so that the agreements upon which he sued were unenforceable.

Appellants stated their defense in the arbitration as follows:

This panel is called upon to decide whether Mahoney's actions in the course of his ten-year tenure [at Muhler] were in keeping with his fiduciary obligations to Muhler, or whether Mahoney was engaged in self-dealing acts.

Exh. A (Pretrial Arbitration Brief of Appellant) at 5 & n.5. The arbitration panel issued a unanimous ruling upon the issue, stating:

We find Mahoney's admission at trial that Exhibits 1 and 2 [employment and stockholder agreements] 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.

Exh. B (Arbitration Award) at 6.

Appellants moved to confirm the panel's award in this case, as it is dispositive of the issues in this case. The trial judge denied the motion, and that denial is immediately appealable, as "[a]n appeal may be taken from . . . [a]n order confirming or denying confirmation of an award" S.C. Code Ann. §5-48-200(a)(3).

Mahoney chose to file two separate lawsuits stemming from the same event in which the parties were identical and the defenses were the same; he agreed to try and did try to the Panel the issue dispositive in both cases and lost.¹ This does not entitle him to a redo. His motion to dismiss must be denied.

CONCLUSION

Mahoney cannot, by filing two separate lawsuits, try issues dispositive of both suits in the first suit in order to ask for a redo in the second. Mahoney attempts to appoint separate panels,

¹ Mahoney's own party-appointed arbitrator ruled with Appellants as well.

despite the arbitration clause providing a method of appointment,² avoid a result tried and lost, and defeat an immediate appeal founded in these words: “An appeal may be taken from . . . [a]n order confirming or denying confirmation of an award.”

The order is immediately appealable, and the motion to dismiss must be denied.

EPTING & RANNIK

This 6th day of July, 2020
Charleston, S.C.

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ATTORNEY FOR DEFENDANTS/APPELLANTS

² Because the S.C. and Federal arbitration acts require that arbitrator selection clauses be enforced, the trial court’s failure to do so means that any award by the court-configured panel will be reversed. Rather than try this case to an improperly constituted panel, only to have it reversed and two years hence, Appellants asked this Court to this case now. App. No. 2019-001237]

EXHIBIT A

IN ARBITRATION WITH THE AMERICAN ARBITRATION ASSOCIATION

J. DANIEL MAHONEY,)
)
 Claimant,)
)
 v.) **RESPONDENTS' TRIAL BRIEF**
)
 THE MUHLER COMPANY, INC. and)
 HENRY M. HAY, III, in his individual)
 Capacity,)
)
 Respondents.)
 _____)

I. The Parties

The Muhler Company, Inc. (“Muhler”) is engaged in the sale of, *inter alia*, windows, doors, sunrooms, and storm protection. Mr. Henry M. Hay (“Hay”) is the founder of the company. Mr. Dan Mahoney (“Mahoney”) became the chief executive officer in 2008. He was terminated on September 18, 2018.

Muhler spun off its commercial glass business in 2014 into Glasscorp, LLC (“Glasscorp”). Glasscorp’s president, a long time Muhler employee, was and is Michael Herlocker (“Herlocker”), and the shareholders at the company’s inception were Herlocker, 44%, Hay, 42%, and Mahoney, 14%. Glasscorp’s charter provides its business is “commercial glass installation and repair” and business “ancillary” to the same (§ 3.1 of Glasscorp Operating Agreement (not attached)); the charter insured Glasscorp would not compete with Muhler.

II. The Litigation

In addition to Mahoney’s suit before this panel for wages, through separate counsel, he has sued Muhler and Hay for other benefits he claims from Muhler; this suit is likewise in arbitration but with no panel or trial date. In a third action, Hay has sued Glasscorp, Herlocker

and Mahoney on account of their efforts to enlarge the scope of Glasscorp's products and services and compete with Muhler.¹

III. A Brief History

A. Prior to 2008

In the period 2004-2006, Muhler suffered substantial losses as it was diversifying and enlarging its footprint in this market; the market softened, and Muhler suffered financial losses. Hay worked to right the books and the business by bringing in consultants and obtaining an approved plan forward with his lenders, including Wells Fargo. Hay had largely turned Muhler around when, in 2007, the real estate market began to tighten, as did the lending in this market.

Hay owned considerable real estate, the value of which began to deteriorate, and the lenders tightened their credit at a time when tenant defaults increased. Hay, using his and his father's assets, continued to fund Muhler. However, Hay recognized that further management in Muhler would be beneficial to continuing the turn around and allowing Hay more time to continue to resolve his troubled real estate portfolio. Hay sought out and found Mahoney. Mr. Bill Boyd ("Boyd"), a CPA, was brought in as Muhler's comptroller.

B. 2008 to 2015

Mahoney began work in January 2008, and his attorney prepared an employment agreement and stockholders agreement. While dated January 15, 2008, these agreements were executed at a later date. *See* **Exh. 1** (Employment Agreement); **Exh. 2** (Stockholders' Agreement); *see also* **Exh. 2** at 23 (Action of Stockholders, executed November 4, 2008).

¹ While there are likely multiple explanations of the difference in Glasscorp and Muhler's scope of products and services, in its simplest form, Muhler supplies finned windows but not labor. Glasscorp provides storefronts and curtain walls, which it builds and then installs, and its business is labor intensive.

From 2008 to 2015, Hay's involvement in Muhler was directed at research and development, product development and marketing a patented glass product. Hay submitted and obtained patents—six issued, four allowed, and 15 pending—involving windows and storm protection. Hay's efforts were to design products that would distinguish Muhler in the marketplace from Pella and Anderson and yet compete pricewise with the lower end of the window market, *e.g.*, Ply Gem. The patented glass allowed Muhler to distinguish itself in the market at this time and facilitate Muhler's profitability. Mahoney's job was to execute the marketing, sales, and financial plans; *i.e.*, to run Muhler.

In late 2013, Hay recognized the margins in its commercial glass business. Muhler was transitioning out of the millwork business. Herlocker was the Muhler employee running the millwork division, so Hay transferred Herlocker to the commercial glass division. Glasscorp began business in January 2014 with Herlocker as president. Glasscorp succeeded and has exceeded, so much so that, at a later date, Mahoney and Herlocker chose to forget Hay's pivotal role and their agreed-upon product and services differentiation.

Hay continued to put what money he had into these ventures. In December 2015, Hay closed a loan which refinanced his real estate holdings, and his issues with Wells Fargo concluded. In and about this time, Hay was freed up to take an ever greater management role in Muhler.

C. 2016 to September 2018

The above narrative is overly simplistic, as Hay has worked diligently on behalf of Muhler and Glasscorp in whatever capacity he was needed. However, Hay's involvement began to increase in 2016 and continued to increase over the next several years. This led to conflict with Mahoney.

By this time Hay had curtailed Mahoney's control over the finances because of questions surrounding Muhler's finances as they involved Mahoney. When Mahoney suffered a stroke in early 2017, Hay became more involved in the day-to-day workings of the business. Further, and importantly, Hay had received patents that would allow for the manufacture of windows with storm protection measures built in. Hay and Mahoney hired Craig Shippe to begin "testing the water" to manufacture windows that provided a competitive advantage over its competitors. Hay believed his proposed products would be disruptive in the coastal hurricane rated window and door market nationwide.²

Mahoney, for reasons that will be developed at trial,³ would not pursue the shareholder's directives to pursue the All American Windows objective, and this became a source of additional conflict between Hay and Mahoney.

IV. Product Delineation

In 2017, Hay became concerned that Glasscorp was selling into Muhler's "space" and asked that the companies neatly define their scope of the market. Discussions ensued but did not yield the agreement of Mahoney and Herlocker, who controlled the majority of shares in Glasscorp. When negotiations failed, Hay called a Muhler meeting to address this issue. Attending were Mahoney and Hay. At this meeting on July 10, 2018, Mahoney as CEO voted for the product delineation sought by Hay. **Exh. 3** (notes from meeting).⁴ The resolution accepted by Hay and Mahoney provided:

² All American Window is this company and has begun operations and with success. Its present window capacity is 50% of what is needed to serve near term demand locally and a fraction of what is needed nationwide.

³ And developed briefly at the conclusion of this brief.

⁴ Each meeting that is discussed herein was preceded by notice, in some cases continuation of the date of the hearing, an agenda and a transcription of the meeting. These are attached, but in the

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.

Id.

A Glasscorp meeting was subsequently held in August of 2018 to have the same exact delineation accepted by Glasscorp. Hay, believed that Mahoney, the CEO of Muhler, would be in favor of protecting Muhler. Hay was wrong. Mahoney voted with Herlocker and refused to restrict Glasscorp in a way to prevent conflict and competition. **Exh. 4.** The exact language before the Glasscorp shareholders was:

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.

Id.

V. The September 18, 2018 Meeting

Hay, after Mahoney's vote in the Glasscorp meeting, called a further Muhler meeting for the purpose of terminating Mahoney. The meeting was held on September 18, 2018, and Mahoney was terminated. **Exh. 5.**

VI. The Issue

This panel is called upon to decide whether Mahoney's actions in the course of his ten-year tenure were in keeping with his fiduciary obligations to Muhler, or whether Mahoney was engaged in self-dealing acts.⁵

interest of a streamlined narrative not discussed. *See Exhs. 3a* (Muhler, July 10, 2018), **4a** (Glasscorp, August 14, 2018), **5a** (Muhler Termination, September 18, 2018).

⁵ This Brief addresses largely the product differentiation issue with a passing reference to Muhler's attempt to pursue the All American Window opportunity. There are other instances of Mahoney's self-dealing that will be addressed at trial.

Mahoney, in his deposition, accepts what is loyalty and what is self-dealing. He states:

Q. What's your definition of fiduciary duty?

A. That's the responsibility of an individual to do the right thing for those they have responsibility to.

Q. To work in the best interests of those that they have a responsibility to, correct?

A. Yes.

[. . .]

Q. Can we agree, Mr. Mahoney, that self-dealing is not working in the best interests of those to whom the fiduciary obligation is owed?

A. Yes.

Deposition of J. Daniel Mahoney 4:14-21, 5:4-7.

VII. Discussion

A. Mahoney's Defenses

i. Mahoney was not terminated for cause.

Mahoney attempts to narrow the trial to a discrete issue — which he loses. Mahoney argues that, except for termination for disloyal acts and gross or criminal conduct, he is entitled to ten months of compensation. **Exh. 1**, §§ 8.c and 8.d. As to termination for cause, Hay asked an interrogatory in this case to which Mahoney responded. The entire response is provided (**Exh. 6**) but in most relevant part Mahoney claims:

The corporate Resolution Defendant Hay prepared and provided to Plaintiff indicated Plaintiff's termination was not for cause.

Exh. 6 (Plaintiff's Responses to Defendants' First Set of Interrogatories at p. 2–3, ¶ 1). Now juxtapose the actual resolution that was passed at the meeting terminating Mahoney (**Exh. 5**) which states:

It is hereby recognized and resolved by the Shareholders of The Muhler Company, Inc. ("Muhler") that the employment of J. Daniel

Mahoney, CEO of Muhler, be terminated with immediate effect **and for cause**, on the following grounds:

1. As CEO of Muhler, Mr. Mahoney **breached his duty of loyalty** and fiduciary duty to Muhler by:

- a. At a recent meeting of Glasscorp LLC's shareholders, Mr. Mahoney voted against a proposal by Mr. Hay which would have more clearly establish [sic] product delineation between Muhler and Glasscorp. His vote was contrary to the best interests of Muhler.
- b. At a recent meeting of Glasscorp's shareholders, Mr. Mahoney voted for a budget proposal presented by Mr. Herlocker which reduced the expense allocation from Muhler to Glasscorp. His vote was contrary to the best interests of Muhler.

In both of these votes, Mr. Mahoney did so without consulting Muhler's shareholders. To amplify the above, given the facts, circumstances, and history of Glasscorp and Muhler. Glasscorp can never enter into competition with Muhler. The proposed delineation of products put forth at the Glasscorp meeting was made necessary by Mr. Mahoney's actions to ensure Glasscorp (who has access to all Muhler's information regarding vendors, customers, banking relationships, products, secrets, patents, and all other proprietary information) would not attempt to operate in competition with Muhler. Mr. Mahoney voted against it, contrary to Muhler's best interests.”

Exh. 5 (Resolution of the Shareholders of The Muhler Company, Inc. (emphases added)).

Mahoney absolutely was terminated for cause. It absolutely was conduct disloyal to Muhler and the grounds of termination set forth in the Resolution clearly state just this.

ii. Mahoney's Safe Harbor Defense

While the interrogatory response of Mahoney is uneven, it appears to have a “fall back” that Mahoney can take positions that are in conflict with or disloyal to Muhler's interests.

Mahoney calls attention to §3 of his employment agreement, which states:

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.

Exh. 1.

Mahoney's alternative theory conflicts with his own testimony under oath. First, however, some context. A review of §3 above leads inevitably to the conclusion that Mahoney wanted to continue with other consulting activities as existed at the time of the execution of the employment agreement. He confirms this in his deposition and sets forth the consulting services he was rendering, stating that none conflicted with Muhler's business interests:

Q. Okay. Were any of them [his consulting clients] in the window supply business to the construction market?

A. Not that I'm aware of.

Deposition of J. Daniel Mahoney, 24:14-16.

But in his full interrogatory answer above, Mahoney's "fall back" position appears to advance that he could, after beginning as CEO of Muhler, take a consulting job with Muhler's competitor whenever he wanted and it would be allowable under §3. This is wrong for two reasons.

First, Mahoney signed a non-disclosure agreement (dated the same day as his employment agreement, January 15, 2008, that addresses confidential information and its protection from competitors:

1. That during the course of my employ there may be disclosed to me certain trade secrets of the Company; said secrets consisting of but not necessarily limited to:

(b) Business information: Customer lists, pricing data, sources of supply, financial data and marketing, production, or merchandising systems or plans.

2. I agree that I shall not during, or at any time after the termination of my employment with The Muhler Company, use for myself or other, or disclose or divulge to other including future employees, any trade secrets, confidential information, or any other proprietary data of The Muhler Company in violation of this agreement.

Exh. 7.

Secondly, when pressed in his deposition, Mahoney stated emphatically that the section referenced in his interrogatory answer was never intended to allow him to take actions that conflict with his fiduciary obligations to Muhler. He states:

A. There's no way that I intended in 2008, when I negotiated that agreement [§ 3 of the Employment Agreement] that I would serve on the boards of competitors. There's no way that I intended that, and the agreement does not say that.

Q. Okay. All right. So the agreement --

A. Once again, you're putting words in my mouth.

Q. All right. So the agreement doesn't say it because the idea originally was that you'd be allowed to serve on those boards and do the work that you had traditionally done for the people that you described earlier in your deposition, correct?

A. Yes.

Deposition of J. Daniel Mahoney, 60:20–61:9.

iii. Mahoney Can Wear Competitor's Hat

Mahoney defends his Glasscorp vote rejecting a clear delineation designed to protect Muhler by saying he had no choice as, on the date of the Glasscorp meeting, he was “wearing his Glasscorp hat.” Despite recognizing that rejecting the delineation was not in Muhler’s interest and a disloyal act, Mahoney appears to suggest he is relieved of his CEO role and related fiduciary obligations when he wears a “Glasscorp hat.”

Mahoney’s defenses and his underlying actions are more unfathomable because the delineation of products and services was the very foundation of the creation of Glasscorp.

Glasscorp was only in the commercial glass business. Mahoney states he voted at the Glasscorp meeting against product and services differentiation because:

A. I acted in the best interest of Glasscorp because I was wearing my Glasscorp stockholder's hat.

Deposition of J. Daniel Mahoney, 57:9-11.

Consider that Muhler is still owed \$3,500 that Mahoney borrowed to found Glasscorp. And consider that Mahoney, in order to prevent Hay from enforcing the agreed upon product delineation, sold his Glasscorp stock to Herlocker for \$550,000 at a time that Hay had exercised a call option of Mahoney's stock.

VIII. All American Window

This was an opportunity for Muhler as it would dramatically alter Muhler's competitiveness in the market. Mahoney, rather than pursuing it with diligence "slow played" the opportunity for his own self-dealing reasons which will be developed at trial. But he accepts that it is a breach of loyalty not to follow the shareholders' directions and states:

Q. Yes. And if the shareholders and/or board gave you instructions in response to your advice, would you carry out their instructions?

A. I would be expected to. Yes.

Q. All right. And that would be exercising your fiduciary obligations to that company; would you agree?

A. Yes.

Deposition of J. Daniel Mahoney, 27:16-23.

IX. Counterclaims

Dan Mahoney asked for and received permission to sell Muhler products to his neighbor(s) and himself at cost; his neighbor(s) paid and Mahoney directed the comptroller to show his debt as an account receivable. Mahoney has owed over \$14,000 since 2009. He

abused his car rental and allowance and owes money to Muhler to be testified to at trial. Mahoney owes Muhler \$3,500, related to the launch of Glasscorp. The Panel should impose an appropriate interest rate running to the time of the award.

X. Conclusion


In his deposition, Mahoney clung to the notion that his vote against a measure to prevent Glasscorp competing with Muhler was an instance of no harm, no foul as Glasscorp was not “really competing.” At trial, this will prove wrong. Glasscorp *was* competing and wanted to compete more. But the issue is this: Muhler’s CEO, by his vote, could have prevented Glasscorp from even being in Muhler’s space. He did not.

This brief has been narrowly tailored, but the trial will reveal multiple acts of self-dealing and disloyalty.

Mahoney’s relief should be denied. Muhler should be awarded judgment, plus interest, and this Panel should impose the cost of this arbitration and Panel fees to Mahoney.

November 27, 2019
Charleston, SC

Respectfully submitted:



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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.

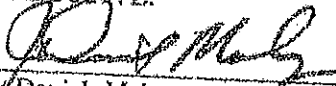
9. **Governing Law.** This Agreement shall be interpreted, construed, and governed according to the laws of the State of South.

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: _____

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.

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.

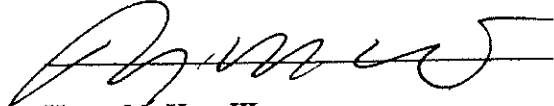
Prevailing Party

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.

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

WITNESSES:

STOCKHOLDER:

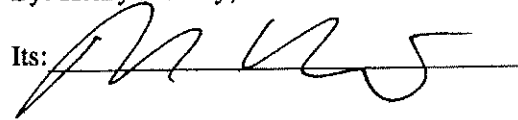

Henry M. Hay, III


Daniel Mahoney

CORPORATION:

The Muhler Company, Inc.

By: Henry M. Hay, III

Its: 

Attest:

Secretary
(Corporate Seal)

THE MUHLER COMPANY, INC.

STOCKHOLDERS' AGREEMENT

EXHIBIT A

Policy Name

Insured

Policy Number

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: _____

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: _____

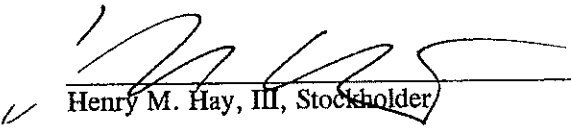
**ACTION OF
THE STOCKHOLDERS
OF
THE MUHLER COMPANY, INC.
WITHOUT A MEETING**

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:

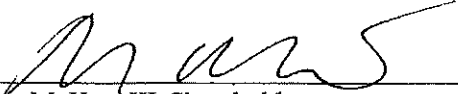
RESOLVED, that the number of authorized shares of the corporation shall be increased from 1,000 to 1,333 1/3; and

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

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:

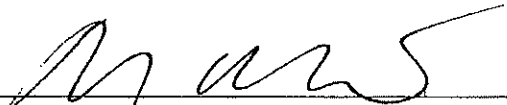
RESOLVED, that the number of authorized shares of the corporation shall be increased from 1,000 to 1,333 1/3; and

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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

EXHIBIT B

**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

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

Jul 06 2020

SC 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
App. No. 2020-000925

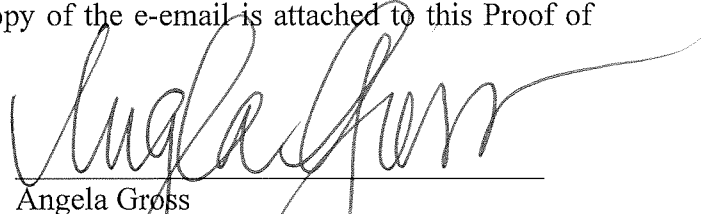
J. DANIEL MAHONEY.....Plaintiff / Respondent,

v.

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

PROOF OF SERVICE

I certify that I have served Appellants' Response in Opposition to Respondent's Motion to Dismiss via e-mail, on July 6, 2020, addressed to Respondent's attorney of record, **Clay McCullough, Esq.**, at clay@mklawsc.com. A copy of the e-mail is attached to this Proof of Service as Exhibit A.



Angela Gross
Legal assistant to Jaan G. Rannik, Esquire
EPTING & RANNIK, LLC
46A State Street, Charleston, SC 29401
P: (843) 377-1871
F: (843) 377-1310

Angela Gross

From: Angela Gross
Sent: Monday, July 6, 2020 11:52 AM
To: Clayton B. McCullough, Esquire
Cc: Jeffrey Domanico; Andrew K. Epting; Jaan Rannik; Katie Nacy; Angela Gross
Subject: J. Daniel Mahoney v. The Muhler Company, Inc. and Henry Hay, III / Case No. 2019-CP-10-00178
Attachments: 2020 07 06 - EX A - Pretrial Brief (Mahoney v. Muhler).pdf; 2020 07 06 - EX B - Arbitration Award (Mahoney v. Mulher).pdf; 2020 07 06 - Opposition to Motion to Dismiss jgr (Mahoney v. Muhler).pdf

Clay,

Attached for service please find Appellants' Response in Opposition to Motion to Dismiss with exhibits in the above-referenced appeal which are being filed with the South Carolina Court of Appeals through the AIS e-filing system today.

Angela

Angela Gross
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