# The State of South Carolina
## In the Supreme Court

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S.C. SUPREME COURT

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**APPEAL FROM CHARLESTON COUNTY**
Court of Common Pleas for the Ninth Circuit

The Honorable Bentley Price, Circuit Court Judge

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**Case No. 2019-CP-10-00178**
**Appellate Case No. 2020-000370**

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J. DANIEL MAHONEY……..Respondent,

v.

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

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**PETITIONERS' MOTION TO STRIKE**

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Petitioners The Muhler Company, Inc. and Henry M. Hay, III ("Muhler") move this Court to strike portions of Respondent's Brief that concern matters that are not properly part of or relevant to this appeal (Rule 209(b), S.C.R.A.P.) and cite to materials not included in the Appendix to this appeal. These should be struck.

## I. THE VALIDITY OF THE ARBITRATION PROVISION IS NOT BEFORE THIS COURT

### A. Mahoney's Arguments to This Court

Mahoney's brief is replete with statements that the arbitration provision governing the parties' disputes is invalid and unenforceable. For example:

> [T]here is a strong claim that the Arbitration Provision within the Muhler Bylaws was never enforceable as to Mahoney's minority shareholder claims.

Respondent's Brief at 7. For another, "Respondent **never** agreed to be bound to an arbitration provision." *Id.* For a third:

> There is NO agreement to arbitrate — there is certainly no written agreement.

Respondent's Brief at 8.

These challenges to the validity or enforceability of the arbitration provision are not preserved for appeal. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779–80 (2004) ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court.").

### B. Mahoney's Arguments to the Trial Court

#### *1. Validity of the Provision*

No challenge to the validity of the arbitration provision itself *on any basis* was made to the trial court—which had ruled two weeks earlier in case number 2018-cp-10-05077 that the

provision was enforceable, a ruling that was *res judicata* between these parties. Rather, Mahoney's counsel stated to the trial court:

> Your Honor, I would not come in here and try to argue two weeks later and try to convince you that you were wrong two weeks ago, and I am not going to.

**Exh. A** (hearing Tr. (May 31, 2019) at 9:20–23). Mahoney argued that the arbitrator selection process[1] was unfair and asked the Court to allow each party to appoint an arbitrator, with the Court appointing the third. *Id.* at 18:6-8). The Court agreed and asked Mahoney to prepare the order. *Id.* at 24:7-12. Realizing the impropriety of involving the Court in the selection of arbitrators, the order submitted by Mahoney and signed by the Court instead struck the arbitrator selection provision and substituted a separate provision. **Exh. B**.

However, Mahoney did not argue to the trial court that the arbitration provision was not enforceable or that the dispute should not be arbitrated. He is barred from arguing that now to this Court. Accordingly, the following should be struck from Respondent's Brief:

- § 2.a ("The Arbitration Clause Was Unenforceable Because It Was Never Agreed to in Writing")
- § 2.b. ("The Arbitration Provision Is Unenforceable as Written Because It Was Biased and Unconscionable")

*2. <u>Unconscionability</u>*

Likewise, the question of whether the arbitration provision is unconscionable was not argued before the trial court. Instead, Mahoney argued that the provision was "unfair" and requested the trial court used its "equitable powers" to alter the method of arbitrator selection.

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[1] In which each party selects one arbitrator, and the third arbitrator is the CPA most recently engaged by the Company.

Nor could he have argued unconscionability, as it requires "terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007).

Here, <u>no</u> evidence was presented to the trial court that would support a finding that the terms of the provision were even unfair, let alone oppressive. The uncontested evidence before the trial court establishes the following:

- Mahoney was the CEO of Muhler and owed fiduciary duties to the company;
- as CEO of Muhler, it was Mahoney, and not Hay, who had a working relationship with the CPA (Mr. Kent) who would serve as an arbitrator in this dispute;
- because of Mahoney's strong working relationship with Mr. Kent, Mr. Kent was hired by Mahoney as CPA of a separate company Mahoney and Hay had a controlling interest of; and
- Mahoney remained CEO of Muhler for two years after the arbitration provision was adopted.

**Exh. C**. There is no evidence in the record to the contrary.

Mahoney's arguments regarding unconscionability are not preserved and § 2.b ("The Arbitration Provision is Unenforceable as Written Because it Was Biased and Unconscionable") should be struck for this reason too.

## II. <u>EXHIBITS NOT PART OF THE APPENDIX</u>

In addition, Mahoney cites to the following materials that are not included in the Appendix to this appeal and are not before this Court:

- Muhler Stock Certificate dated October 17, 2008 (Statement of the Case, ¶ 1);
- Shareholder Meeting Transcript dated October 25, 2016 (Statement of the Case, ¶ 3);
- Letter from Mahoney to Hay dated November 15, 2016 (Statement of the Case, ¶ 4);

- Shareholder Meeting transcript dated September 18, 2018 (Statement of the Case, ¶ 6).

In addition to not appearing in the Appendix, these documents also do not appear in the record before the trial court. *See* Rule 210(c), S.C.R.A.P. (the appellate record "shall not . . . include matter which was not presented to the lower court or tribunal").

The arguments relating to these materials appear at the following locations in Respondent's brief:

- Statement of the Case, ¶¶ 1 (beginning with "On January 15, 2008"), 3 (beginning with "This imbalance"), 4 (beginning with "After reviewing the provision"), 5 (beginning with "At the rescheduled"), and 6 (beginning with "This biased").

These paragraphs should be struck.

## III. CONCLUSION

Because these materials and arguments are not preserved for appeal and are not part of the Appendix before this Court, Appellants move this Court to strike them from Respondent's brief.

**Respectfully submitted:**

This 18th day of December, 2020
Charleston, S.C.

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