

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

-----: THE COURT OF COMMON PLEAS
J. DANIEL MAHONEY, : NINTH JUDICIAL CIRCUIT
PLAINTIFF, :
: DOCKET NO.
: 2019-CP-10-00178
VS :
: MOTIONS HEARING
: TRANSCRIPT OF RECORD
:
MUHLER COMPANY, INC.,:
DEFENDANT, :
-----:

Friday, May 31, 2019

B E F O R E:
The Honorable BENTLEY PRICE, Courtroom 2E

APPEARANCES:

CLAYTON B. MCCULLOUGH, ESQUIRE
Attorney for the Plaintiff

JAAN G. RANNIK, ESQUIRE
Attorney for the Defendant

Jowandaly Graham
Charleston County
Charleston, South Carolina

EXHIBIT A



1 INDEX TO PROCEEDINGS

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3 WITNESSES DIRECT CROSS REDIRECT RECROSS

4 (NONE) -- -- -- --

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16 CERTIFICATE OF THE REPORTER PAGE

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1 INDEX TO EXHIBITS

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3 NO. DESCRIPTION IDENTIFICATION IN EVIDENCE

4 (NONE)

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1 P R O C E E D I N G S

2 THE COURT: This is position NØ. 105.
3 This is the case of J. Daniel Mahoney versus
4 Muhler Company, Incorporated. This is the
5 defendant's motion to stay and the defendant's
6 motion to quash.

7 MR. RANNIK: Yes, Your Honor.

8 Good morning, Your Honor. Jaan Rannik on
9 behalf of the Muhler Company and Mr. Henry Hay.

10 If it may please the court, I think, it
11 probably makes more sense to start with the
12 motion to stay the arbitration because our
13 motion to quash the subpoena is based on our

14 motion to stay.

15 THE COURT: Okay.

16 MR. RANNIK: Your Honor, we were before
17 you about two weeks ago on the same arbitration
18 issue. And, this is a second dispute between
19 the ex-CEO, Muhler, on one side and its
20 shareholder on the other.

21 This dispute arises from the termination by
22 Muhler of Mr. Mahoney, he was the CEO, and his
23 alleged entitlement to a buyout of the shares by
24 virtue of his termination. We moved to compel
25 arbitration under their division in the bylaws,

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1 which if I can hand up to Your Honor.

2 Here is the bylaws. And, this is the motion
3 for the memorandum that we filed in the previous
4 matter on the same issue.

5 THE COURT: Let me figure out where we
6 are. I remember this. Was it the last one about
7 some issues of wages or something?

8 MR. RANNIK: That's correct, Your Honor.
9 That was an employment dispute. And, this is a
10 dispute under the shareholder agreement instead

11 of under the employment agreement.

12 THE COURT: But it is the exact same set
13 of facts, the exact same plaintiff and
14 defendant.

15 MR. RANNIK: Yes, Your Honor.

16 Originally, the idea was to have the motions
17 heard together. Administratively that did not
18 happen. And, then it was a matter of how do we
19 get this heard most quickly. And, the way to do
20 it most quickly was to have them heard
21 separately.

22 THE COURT: I got you. Because you did
23 not get A, you are going to B. You filed them
24 together. It's just that both of them are being
25 heard now. Okay. Go ahead.

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1 MR. RANNIK: Your Honor, when we were
2 last before you, there were four defenses raised
3 to arbitration. And, they are reflected in the
4 brief that I have handed up.

5 One was the agreement at issue, which in that
6 case was the employment agreement, did not
7 contain an arbitration division.

8 The next one was that the wage claim was
9 outside of the scope of the arbitration division
10 and the bylaws.

11 The next argument was that there was a
12 statutory right to a jury trial. And, the final
13 argument was that the arbitration division in
14 the bylaws was not enforceable because it did
15 not comply with the notice and requirements of
16 the South Carolina Act.

17 In the face of all of those defenses, Your
18 Honor ordered arbitration and retained
19 jurisdiction to hear any post arbitration
20 matters.

21 Here, the outcome should be the same. It
22 makes no difference that it is an employment
23 agreement in one case and a shareholder
24 agreement in the other case. The bylaws are
25 binding on corporate officer and corporate

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1 shareholder for the corporation.

2 Mr. Mahoney was the CEO at the time that the
3 bylaws were adopted and the amendment of the
4 bylaws was adopted. He was actually at the

5 meeting where they were adopted, so there is no
6 surprise. And, as a shareholder and CEO he's
7 bound by the bylaws. It's quite as simple as
8 that.

9 And again, Your Honor, the context of the
10 court's decision is the overwhelming presumption
11 in favor of arbitration, and that is in Federal
12 and State cases, unless the court can say with
13 positive insurance that there is no
14 interpretation of the arbitration division that
15 applies to the dispute, the court has to order
16 arbitration.

17 Judge, that is true, if there are multiple
18 forum selection provisions at issue as well. If
19 you have a forum selection clause on one hand
20 that says we are going to court, and you have an
21 arbitration provision on the other hand, the
22 courts have said that the presumption, in favor
23 of arbitration, has to win and then the case has
24 to be arbitrated. And, Judge, I would like to
25 hand up a case on that, if you will bear with

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2 And, Judge, I have just handed up a Fourth
3 Circuit Case called, Sandford versus Provincial
4 Batch Securities, Incorporated. If the court
5 will turn with me to the fourth page of the PDF
6 that I have just passed up.

7 In the bottom, right hand column, under
8 Section (A), there is a sentence that says;
9 "when a party is seeking to avoid arbitration
10 contends that the clause providing for
11 arbitration has been superseded by some other
12 agreement, the presumptions favoring
13 arbitrability must be negated expressly or by
14 clear implication. And, it sites a United
15 States Supreme Court case.

16 What that means, Judge, is if you have an
17 arbitration right, and then some other agreement
18 comes up and says, nope, we don't want to do
19 that, we want to go to court, the other
20 agreement has to, specifically, or by very clear
21 implication, say we are waiving the right to
22 arbitration, this is the dispute to the court.

23 The shareholders' agreement does, in this
24 case, have a forum selection clause that says,
25 "disputes arising under the shareholders'

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1 agreement will be resolved in court". That was
2 from 2008. It's superseded by the arbitration
3 agreement.

4 And, in any event, under the Sandford case,
5 because it does not say we will go to court in
6 waiver of any arbitration rights that may exist
7 now or in the future, it cannot overcome the
8 presumption in favor of arbitrability.

9 THE COURT: With all due respect, I
10 agree. You have made this argument, I remember
11 it, previously, and I have already ruled on it.

12 So, Mr. McCullough, I will be happy to hear
13 from you. Give me something to work with.

14 MR. MCCULLOUGH: Thank you, Your Honor.
15 Clay McCullough here for Daniel Mahoney, the
16 plaintiff.

17 Your Honor, may I approach you with some
18 materials?

19 THE COURT: Yes, sir.

20 MR. MCCULLOUGH: Your Honor, I would not
21 come in here and try to argue two weeks later
22 and try to convince you that you were wrong two
23 weeks ago, and I am not going to.

24 THE COURT: It's okay.

25 MR. MCCULLOUGH: I would like to just

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1 back up a touch. Dan Mahoney was hired by the
2 Muhler Company in 2008 to work as a CEO. The
3 Muhler Company, in the first half, is a
4 statutory closed Corporation. And, I think,
5 that is an important distinction in this case.

6 And, when it was incorporated, Henry Hay was
7 the sole shareholder. When Mr. Mahoney was
8 hired in 2008, January 2008, he and Mr. Hay
9 entered into the shareholder agreement which is
10 in the second half. So now there are two
11 shareholders in a closely held corporation, with
12 Mr. Hay having all voting rights and interests,
13 because he owns three fourths of the company and
14 has three fourths of the shares.

15 The shareholder agreement, and if you will
16 turn to page 4 of the shareholder agreement, it
17 states very clearly, upon the termination of Mr.
18 Mahoney there is a process in place where his
19 shares are purchased. Either Mr. Hay buys
20 them, and if Mr. Hay does not want to buy them,

21 or the company buys them. And there is a
22 valuation in this document that says it is
23 supposed to be done within a certain amount of
24 time. And, it is very clear and concise as to
25 what transpired.

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1 The agreement also states on page 14, "any
2 controversy or claim arising out of or relating
3 to this agreement, or the briefs thereof, shall
4 be settled by the court of competent
5 jurisdiction of the state of South Carolina,
6 County of Charleston".

7 So, you have heard all of that before.

8 THE COURT: Yes. But the issue that they
9 brought up later was that they did this
10 amendment, and I had a concern. I think that
11 you were here for some of it, but you had to
12 leave.

13 MR. MCCULLOUGH: No, sir. I just sat in
14 the back.

15 THE COURT: Okay. I remember you being
16 here. But the concern that I had was that they
17 did this random amendment, and I was like, well,

18 you really just can't do that because he is
19 still operating under the former agreement, the
20 premise, that he does not have to participate in
21 this. But we talked about it later and found
22 out that he actually was apart of the meeting
23 and drafted some of this arbitration agreement.

24 MR. MCCULLOUGH: No, sir. That's what I
25 want to talk about.

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1 THE COURT: Let's talk about that.

2 MR. MCCULLOUGH: So the bottom fell out
3 of these guys' relationship in 2016. Mr. Hay,
4 at the shareholder meeting, sprung this on my
5 client without any notice that he was going to
6 do with. He said, here is the amendment. My
7 client, Mr. Mahoney, said that I would like time
8 to review it. I don't like this. This is
9 unfair. Tough. I voted for it. My client
10 voted against it. Bylaws were changed.

11 The problem with the amendment and the bylaws

12 ---

13 THE COURT: So this meeting that they are
14 alleging that he was in, that they allege that

15 he was participating in, really, he was
16 participating in the fact that he got served and
17 say good luck to you.

18 MR. MCCULLOUGH: Yes. He was there. He
19 said, I don't want to do this.

20 THE COURT: I got you. So that changes
21 things.

22 MR. MCCULLOUGH: So the bylaws are in
23 place. The bylaws are problematic for a variety
24 of reasons. Number one, that they jammed down
25 this arbitration. And, the timing of this is

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1 when these guys' relationship was deteriorating.

2 THE COURT: What is the issue with that,
3 though? Why did the other partner want to amend
4 the bylaws to immediately afford him an
5 arbitration? How is that a benefit to him?

6 MR. MCCULLOUGH: I'll tell you why.
7 Because he stacked the deck. The arbitration,
8 number one, is not three lawyers, three
9 competent individuals. It's three CPA's.

10 And, number two, one of the arbitrators, he
11 gets to pick. One of the arbitrators and my

12 client gets to pick. But the third arbitrator
13 is Henry Hay's personal CPA, Peter Kemp, the guy
14 who has been doing his tax returns for years.
15 And, so, he knew that it was going to be two to
16 one in vote. And, we will get to that in just a
17 second.

18 But it was clear that he did this so he would
19 not have a stacked deck, so he would not have to
20 appear before you, or any other Charleston
21 County Judge, to figure some of this stuff out.

22 THE COURT: Well, it says court of
23 competent jurisdiction. Slippery there.

24 MR. MCCULLOUGH: Right.

25 THE COURT: I'm talking about myself.

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1 MR. MCCULLOUGH: That's for another day.

2 So, anyway, we got this arbitration. Dan
3 voted against it. It's now part of the bylaws.
4 You know what happens next. Dan Mahoney is
5 fired as CEO. His shares are not bought out.
6 And, we filed a lawsuit.

7 In that lawsuit, we had some specific claims.
8 One thing that was not talked about in the

9 employment lawsuit, that I think is critical in
10 the shareholder lawsuit is the statutory closed
11 Corporation. They are different all together.

12 I would like you to turn to the next half
13 which is the Statutory Closed corporation
14 Supplement. And, if you will, turn to ---

15 THE COURT: Hold on. I am at the tab
16 which says, "Article 26, Communications". I
17 don't have another tab. Yes. I do. It is
18 back here. All right. I am there.

19 MR. MCCULLOUGH: I even tabbed it for
20 you. If you flip to Article 5, Judicial
21 Supervision.

22 THE COURT: I am there.

23 MR. MCCULLOUGH: Basically this
24 shareholder, is a director in control, has acted
25 or will act in a manner that is illegal,

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1 oppressive, fraudulent or unfairly prejudicial
2 as a petitioner, whether in his capacity as a
3 shareholder, director or officer of the
4 Corporation, it is the circuit court. We can
5 petition the circuit court for any of the relief

6 described in 3318 410, 420 and 430.

7 In going down under Subsection D, "A
8 shareholder must commence a proceeding under
9 Subsection A in the Circuit Court of any county
10 where the corporations' principal office, or if
11 not in this state, its registered office, is
12 located. The jurisdiction of the court in which
13 the proceeding is commenced ... and it goes on
14 to say, "a shareholder has agreed in writing to
15 pursue a nonjudicial remedy to resolve disputed
16 matters, he may not commence a proceeding under
17 this section with respect to the matters until
18 he has exhausted the nonjudicial remedy".

19 Your Honor, I do not believe that he has
20 entered a written agreement pursuing a
21 nonjudicial remedy. I'm not going to reargue
22 what happened.

23 THE COURT: Well, what do you allege that
24 the nonjudicial remedy would be?

25 MR. MCCULLOUGH: I assume this would be

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1 the arbitration.

2 THE COURT: That's what I'm assuming.

3 MR. MCCULLOUGH: And, so, my point is
4 this. Before I make my point, I would like to
5 show you a couple more exhibits, and I'll be
6 quick.

7 The next exhibit is a letter from Drew, the
8 counsel, for Muhler, to Peter Kemp and Barry,
9 two CPA's. Henry Hay has selected Barry as one
10 CPA. And, the third arbitrator will be the CPA
11 with the accounting firm, most recently,
12 employed by Muhler, ie, Mr. Kemp.

13 So then the next tab is Henry Hay; send me a
14 letter, to his friend and CPA, Peter Kemp,
15 asking him to perform an evaluation.

16 And, then the last prong or the last document
17 is Peter Kemp writing to Henry Hay saying, I
18 can't do that based on the information that I
19 got before me.

20 Peter Kemp is a witness. He's a fact witness
21 in this dispute. This highlights why it was
22 entirely inequitable for this process to proceed
23 as Mr. Hay has crammed down Dan Mahoney's
24 throat. Essentially he's stacked the deck with
25 his friend who is ultimately a fact witness. I

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1 sent a subpoena to him, which was one of the
2 motions to quash, because Peter Kemp has
3 information, specifically, of the Muhler
4 Company.

5 It is our belief that Henry Hay has,
6 specifically and systematically, frozen my
7 client out of this business. He's fired him.
8 He has not provided any financial information.
9 He thinks that he is taking resources out of the
10 company. He has drawn up lines of credit in
11 violation of the shareholder agreement.

12 We believe this Honorable court has
13 jurisdiction over all of these disputes.

14 THE COURT: Does this bifurcate, I guess,
15 from the previous arbitration order for the
16 wages? This is obviously a separate issue.

17 MR. MCCULLOUGH: I think the employment
18 claim is not part of the shareholder agreement.
19 I think that they are entirely separate.

20 And, in all candor, Mr. Rannik said last week
21 or two weeks ago and threatened everybody in the
22 courtroom that we are going to appeal it
23 immediately if you deny it.

24 So here is what I am proposing, I am not

25 asking you to change your mind from two weeks

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1 ago. What I am asking, number one, is that you
2 use your equitable powers to fix this mess.
3 If you want to arbitrate, it certainly should
4 not be with the fact witness and his friend, the
5 CPA. I don't think it should be with CPA.

6 I would first ask that this Honorable court,
7 select its own arbitrator, and then each side
8 pick one. For instance, the recently retired
9 Honorable Nicholson, I remember, was handling
10 mediations and arbitrations.

11 THE COURT: Judge Early is doing it as
12 well.

13 MR. MCCULLOUGH: So, somebody to fix this
14 mess, point one. Point two, pursuant to the
15 statutory closed corporation, this is just a
16 first piece because it comes right back to this
17 court based on that statute.

18 And, the statute dictates that I get to come
19 back and say the proceeding might possibly be
20 unfair, it's an administrative process and we
21 got to check the box to get back before you.

22 We have pled to have this company resolved;
23 to have a director appointed that oversees the
24 running of this company, and to seek cost, fees
25 attorney fees and everything else, under the

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1 sun, that we can get as a result of this
2 conduct.

3 And, so I'm not asking you to change your
4 mind from a couple of weeks ago. I'm asking
5 you, number one, to help us with this mess in
6 the arbitration and, number two, keep
7 jurisdiction so we can come back to you.

8 THE COURT: Well, I did all of that.
9 And, I think my position was exactly that as to
10 why I ordered the arbitration because you said,
11 I'm going to appeal it. And, I looked over, and
12 I said, "why are we going to sit around for
13 another year and a half and worry about that?
14 Why don't we arbitrate it? If you don't like
15 the award, I will retain jurisdiction, you can
16 come back to me, I'll decide whether it's enough
17 and we will move forward". I think that was my
18 exact quote.

19 MR. MCCULLOUGH: Right. I think that ---

20 THE COURT: All right. Let's do that.

21 We are going to stick with it. Do you want me
22 to pick an arbitrator? Are you going to pick an
23 arbitrator? Do you want to pick an arbitrator?
24 You don't want that. Is that what you want

25 MR. MCCULLOUGH: Yes.

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1 MR. RANNIK: Well, Judge, can I be heard
2 on that briefly?

3 THE COURT: Absolutely. That is what I'm
4 here for.

5 MR. RANNIK: First Mr. McCulloch has
6 argued that there was no notice to Mr. Mahoney;
7 that this all was forced down his throat. That
8 is just not true.

9 THE COURT: I understand all of that. He
10 has a side. Y'all got a side. We're going to
11 let the arbitrators figure it out.

12 MR. RANNIK: I would like to point out
13 the exhibit that I handed up, the bylaws
14 amendment. It contains the notice of the
15 meeting that is going to be decided and going to

16 implement the bylaws. It was given two weeks
17 before hand. There can be no contention that
18 there was surprise.

19 The goal was not to stack the deck. The goal
20 was to minimize expense for the corporation;
21 something that Mr. Mahoney, as the CEO, had a
22 vested interest in as well, in fact, a fiduciary
23 duty, I would say, to get on board with. This
24 happened two years before his termination.

25 THE COURT: Well, all of this is

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1 excellent argument for the arbitrators.

2 MR. RANNIK: And, Judge, I think that's
3 right. I think all of the substance of this
4 goes to the arbitrators. But what is before the
5 court is the validity of the arbitration
6 agreement. And, Mr. McCullough is asking that
7 it be altered. And, we would say that, that is
8 outside of the court's scope of determining
9 arbitrability.

10 The court can say is there a valid arbitration
11 agreement, and does it apply to this dispute.
12 In the context of the motion to compel

13 arbitration, that's where the court's authority
14 ends.

15 THE COURT: And, you don't think that I
16 can order... but what you are saying, Mr.
17 McCullough, you are asking me, in the
18 alternative, for me to pick an arbitrator, y'all
19 get to pick one, and they get to pick one and
20 move forward. Well, how is that not a good
21 idea? Why are you arguing the limitations of
22 the court as to where the arbitration agreement
23 ends.

24 MR. MCCULLOUGH: And, I think, actually,
25 Judge, it's because of the very nature of this

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1 dispute. The dispute is what are the value of
2 Mr. Mahoney's shares. And, that is a
3 calculation under the bylaws, excuse me, under
4 the stockholder agreement. It is not specific
5 as to what time period that is. We got
6 accounting principles that are at issue here.

7 In fact, it is the perfect dispute to be
8 heard by accountants because they are going to
9 understand exactly what is going on.

10 THE COURT: Well, why don't you pick an
11 accountant?

12 MR. MCCULLOUGH: Well, Judge, the point
13 is to have it in front of the accountants who
14 would likely agree and quickly resolve this
15 dispute.

16 THE COURT: Well, I don't see any reason
17 why a former Circuit Court Judge can't sit down
18 with an account and agree. We don't need three
19 accountants sitting here, do we?

20 MR. MCCULLOUGH: You know, Judge, I'm not
21 an accountant myself.

22 THE COURT: Me either.

23 MR. MCCULLOUGH: The fine points of
24 exactly how this all ---

25 THE COURT: I think we need one

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1 accountant to tell two other people what they
2 need to know for all three of them to make an
3 informed decision. I don't think we need all
4 three of them sitting in there fighting over how
5 it's done. That's like putting three lawyers in
6 a room and asking them to agree on something.

7 It ain't going to happen.

8 I appreciate your argument, I really do, but
9 I am going to agree with Mr. McCullough. I'm
10 going to appoint one arbitrator. He is going to
11 pick one. You are going to pick one. And, we
12 are going to arbitrate it. I'm going to take
13 jurisdiction over all of this. So if y'all
14 don't sort it out, y'all can come back to me and
15 we can move forward.

16 My sole purpose, in all of this, is to move
17 this case forward. That is why I even ordered
18 arbitration to begin with, because I did not
19 want this thing to get appealed. You could
20 appeal this, I guess, I don't know, and we will
21 come back here in a year and a half. But if
22 not, I would like to see this move forward and
23 try to get this dispute resolved. That is why
24 I'm doing this.

25 So you can tell your clients that's what I

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1 typically do. That's what I told the other
2 counsel previously. I know she was overly
3 excited about the fact that I ordered it, but I

4 thought that it was in the best interest of
5 everyone to continue to keep the ball moving
6 forward.

7 I do not think that Mr. McCullough's request
8 is unreasonable. Actually, I think that it is a
9 good idea, so we are going to go with it.

10 All right. Who is going to do the order.

11 MR. MCCULLOUGH: I'll do it.

12 THE COURT: Sounds great.

13 (Whereupon, the proceeding was
14 concluded.)

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1 CERTIFICATE OF REPORTER

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3 STATE OF SOUTH CAROLINA

4 COUNTY OF CHARLESTON

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6 I, Jowandaly Graham, Court Reporter, do
7 hereby certify that the foregoing is a true,
8 accurate and complete Transcript of Record of
9 the proceedings and the evidence introduced in
10 the trial of the captioned case, relative to
11 appeal, in the Family Court for Charleston
12 County, South Carolina, on the 31st day of May,
13 2019, and that I am not a relative or employee
14 of any attorney or counsel hereto, nor
15 financially or otherwise interested in the
16 outcome of the action.

17 July 28th, 2019

18

19 Jowandaly Graham
20 Charleston, County
21 Ninth Judicial Circuit
22 Charleston, South Carolina

23

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