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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

The Honorable Bentley Price, Circuit Court Judge

Case No. 2019-CP-10-00178
Supreme Court Case No. 2020-000370

J. Daniel Mahoney……………………………………………………………………………Respondent,

v.

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

RESPONDENT'S RETURN TO PETITIONERS' MOTION TO STRIKE

McCULLOUGH KHAN, LLC
Clayton B. McCullough, Esq. (SC Bar #13722)
359 King Street, Suite 200
Charleston, SC 29401
(843) 937-0400
(843) 937-0706 (fax)
Clay@mklawsc.com

ATTORNEY FOR RESPONDENT

The Respondent disagrees with the Petitioners' Motion to Strike portions of the brief filed in this court on December 8, 2020. Respondent asserts that the arguments and documents referenced in the brief are relevant to this case and should be included in the record on appeal because the documents and information referenced in the Brief is relevant to this Appeal as it gives context to Judge Price's decision to amend the arbitration provision.

To reiterate, the denial of the provision did not deprive Petitioners of a substantial right to arbitrate, which is the reason for this Appeal. Although the validity of the provision is not at issue, Respondent provided context to this Court to understand why its alteration was necessary. These documents do not present any additional questions of law before the Court, they provide relevant information as to why Judge Price made the procedural choice to alter the arbitration provision, rather than allow Petitioners to implement an unfair arbitration provision.

I. THE VALIDITY OF THE ARBITRATION PROVISION WAS PRESENTED TO THE TRIAL COURT AND IS RELEVANT TO THIS APPEAL

Petitioners state in the Motion to Strike that the validity of the arbitration provision is not before this Court. However, the reason the trial court altered the arbitration selection method is because it is clearly biased. The arguments contained in Respondent's brief regarding the enforceability of the arbitration agreement is relevant and provides context to Judge Price's [order] compelling arbitration but altering the arbitrator selection method to make it fair. This context provides a foundation that explains why the court amended the language in the arbitration provision, and why it did not deprive Petitioners of the substantive right to arbitrate, but rather made the provision fair.

Petitioners move to strike Sections 2.a and 2.b of Respondent's Brief and assert that Respondent is barred from presenting these arguments to the Supreme Court. Respondent's argument §2.a states the "Arbitration Provision is Unenforceable Because it Was Never Agreed to

in Writing" and §2.b states that the "Arbitration Provision is Unenforceable as Written Because it Was Biased and Unconscionable."

a. Section 2.a of Respondent's Brief

Respondent directs this Honorable Court to its Summons and Complaint filed with the trial court on January 14, 2019. As for Section 2.a, Respondent argued Breach of Contract because the Petitioners failed to follow the Shareholder Agreement provisions, which required that any dispute be adjudicated in Court in South Carolina. The basis for this argument is explained in paragraphs 15-22 of the Complaint. To paraphrase, because a change to the Shareholder Agreement required the approval of both Shareholders, Hay "attempted an end-run around the Agreement's expression stating all claims should be litigated in Court" and instead "[used] his position as the majority shareholder…to amend the bylaws of the Muhler Company, Inc." The arbitration provision expressly violates the Shareholder Agreement, would never have been approved in a vote by Mahoney if his (minority) vote counted for anything, and arguably is not enforceable. (Summons & Complaint, Paragraph 18). Respondent specifically states that the Shareholder Agreement, and all of its provisions, govern the relationship between Hay and Mahoney, and supersedes the amended bylaws. This is a clear representation to the trial court that the Respondent did not believe the arbitration provision was valid.

Further, Petitioners quote from only a portion of the May 31, 2019 Hearing Transcript with Judge Price which fails to accurately reflect the nature of Respondent's presentations to the trial court. During this hearing, counsel for Respondent argues to Judge Price "I do not believe that he has entered a written agreement pursing a non-judicial remedy" (hearing tr. (May 31, 2019) at 18: 14-18.) Thus, Respondent asserts that the issue regarding the enforceability of the arbitration

provision was in fact argued at the trial court, was preserved for appeal, and should not be struck from the Respondent's Brief pursuant to Rule 210 S.C.R.C.P.

b. Section 2.b of Respondent's Brief

Petitioners seek to strike §2.b of the Respondent's Brief, claiming the Respondent is barred from arguing that the arbitration provision is *unconscionable* rather than *unfair*. Unconscionability requires "terms that are so oppressive that no reasonable person would make them, and no fair and honest person would accept them." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669. In the Motion to Strike, Petitioners claim that "no evidence was presented to the trial court that would support a finding that the terms of the provision were even unfair, let alone oppressive."

Again, Respondent directs this Court to the January 14, 2019 Complaint and the May 31, 2019 Hearing. In both, Respondent explains why the terms of the arbitration provision in the Muhler Amended Bylaws was unfair, one-sided and could only have been jammed into the company's Bylaws through a majority shareholder vote, where he knew the minority shareholder's vote had no influence over the final adoption of the provision. The May 31, 2019 hearing transcript contains pages of Respondent's counsel explaining to Judge Price why the "vote" to adopt the arbitration provision was unconscionable—Mahoney would never had voted for it, vehemently opposed it, and the terms were oppressive because Hay "stacked the deck" in his favor. (hearing tr. (May 31, 2019) at 14-15.)

In paragraphs 21 and 22 of the Complaint Respondent sets forth the elements of unconscionability of the arbitration provision explaining that the "provision is clearly intended to ensure that two of the three arbitrators are friendly to Hay/Muhler and is contrary to the SC Uniform Arbitration Act.

The proof of the oppressive nature of the arbitration agreement is written into the provision itself. The process of appointing the arbitrators was clearly one-sided and unfair on its face. (See Amended Bylaws, Exhibit 2 of Summons & Complaint). The Arbitration Provision is unconscionable because Mahoney had no choice but to be bound by it, despite his clear opposition to the provision and his recorded vote against it. In the May 31, 2019 hearing Judge Price recognized this lack of choice and the oppressive terms of the provision and agreed with Respondent that it needs to be altered. (hearing tr. (May 31, 2019) at 27-28).

Therefore, Respondent asserts that the arguments raised in §2.a and §2.b were represented to the trial court, was preserved for appeal and therefore should not be struck from the Brief.

II. EXHIBITS INCLUDED IN RESPONDENT'S BRIEF ARE RELEVANT TO THE APPEAL AND SHOULD BE INCLUDED IN THE RECORD

Petitioners seek to strike materials that are not included in the Appendix to the appeal and claims they are not before the Court. There has not yet been a trial deciding the allegations in the January 14, 2019 Complaint, but only a series of motions, appeals and the Petition for Cert to this Court. Rule 209(b) governs contents of the record, and requires "references to the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal to support the salient facts alleged…The only matter which should not appear in the record are those items a party believes to be 'not relevant to the appeal.'" *Forner*, 319 S.C. at 276, 460 S.E.2d at 426.

Respondent believes the documents Petitioners move to strike are relevant and should be included in the Record on Appeal, which is still being compiled and bare, as there has not yet been a trial. Petitioners omitted relevant information from the existing Record on Appeal and Appendix. It is the responsibility of the Petitioners to furnish an adequate record on appeal, and Respondent does not believe Petitioners have done that. *Johnson*, 372 S.C. at 283, 641 S.E.2d at 897. The

documents Petitioners seek to strike from the Brief add context to the oppressive nature of the arbitration provision, how it was adopted, and mistreatment of the minority shareholder.

If the Court chooses to strike them from the record because they were not provided to the Trial Court, the Petitioners' Appendix contains the relevant Shareholder Meeting Transcript from November 16, 2016, in which Mahoney states his opposition to the arbitration provision. (Petitioners Appendix, Page 190, Muhler Company Inc., Shareholder Meeting Transcript, November 16, 2016, at 6:6-10).

III. CONCLUSION

Respondent asks this Honorable Court not to strike information relevant to the appeal from its Brief.

Respectfully Submitted,

McCULLOUGH KHAN, LLC

s/Clayton B. McCullough
Clayton B. McCullough, Esq. (SC Bar #13722)
359 King Street, Suite 200
Charleston, SC 29401
(843) 937-0400
(843) 937-0706 (fax)
Clay@mklawsc.com

ATTORNEY FOR RESPONDENT

December 24, 2020

TABLE OF AUTHORITIES

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