

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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 Hay III,Defendants/Appellants.

RESPONDENT’S RETURN TO APPELLANTS’ MOTION TO STRIKE

The Respondent disagrees with the Appellants’ Motion to Strike materials included in Respondent’s designation of matter filed on January 11, 2021. Respondent asserts that the documents referenced in the designation of matter and brief are relevant to this case and should be included in the Record on Appeal. There has been no trial in this matter. This matter has been on appeal following a ruling by the underlying court on a motion to compel arbitration. Therefore, the underlying record is bare. The materials in question are relevant to the issues in this appeal and should be considered by this Honorable Court.

Rule 209(b) South Carolina Appellate Court Rules (“S.C.A.C.R.”) governs the 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...[t]he only matter which should not appear in the record are those items a party believes to be ‘not relevant to the appeal.’” *Forner v. Butler*, 319 S.C. 275, 276, 460 S.E.2d 425, 426 (emphasis added). Rule 209(b) S.C.A.C.R. requires that all materials in a designation must be relevant to the appeal. Respondent included documents that provide the necessary context indicating the unfairness of the Arbitration Provision, Respondent’s clear opposition to it, and the nature of how it was adopted into the Appellant Muhler Company’s Bylaws. Rule 210(c) S.C.A.C.R. states “the Record shall not, however, include matter which was not presented to the lower court or tribunal.” Each document listed by Respondent supports a claim presented to the lower court prior to this Appeal. Including these documents does not prejudice the Appellants in any way.

It is the responsibility of the Appellants to furnish an adequate record on appeal, and Respondent believes Appellants have omitted or failed to include relevant documents to the case. *Johnson v. S.C. Dep't of Prob.*, 372 S.C. 279, 283, 641 S.E.2d 895, 897, 2007 S.C. LEXIS 69, *4. Further, the documents are included to reinforce and provide context for factual claims and legal arguments already presented to the circuit court in the Complaint, motions, and hearings, rather than serve as new substantive pieces of evidence. All documents included in the Designation of Matter add context to these appeals and are relevant to the case.

The Respondent wishes to include the following documents in the Record on Appeal:

- Muhler Stock Certificate dated October 17, 2008;
- Muhler Shareholder Meeting Transcript dated October 25, 2016;
- Letter from Mahoney to Hay dated November 15, 2016;
- Muhler Shareholder Meeting Transcript dated September 18, 2018; and
- Order Granting Writ of Certiorari in Case Number 20020-000370.

Although not initially included as exhibits, these documents are all referenced in the pleadings and motions, and their relevance was amplified in by this Appeal. First, the Muhler Stock

Certificate offers more proof of Mahoney's 333 1/3 shares granted on October 17, 2008, referenced in the Muhler Company's Common Stock Ledger attached at the end of Exhibit 1 to Respondent's Complaint filed January 14, 2019. The content of the Muhler Shareholder Meeting Transcript from October 25, 2018 is referenced at paragraph 19 of Respondent's Complaint. The Letter from Mahoney to Hay dated November 15, 2016 is referenced in Exhibit C of Appellants' June 14, 2019 Motion to Reconsider, on Page 7, Lines 11-25 of the November 16, 2016 Shareholder Meeting Transcript. The September 18, 2018 Muhler Shareholder Meeting Transcript provides relevant context as to Respondent's termination from his position as CEO. Finally, the 2020-000370 Order granting Writ of Cert further provides relevant context to the regarding the procedural posture of the case and the status of the initial trial court proceeding, and why there has yet to be a decision on the merits.

These documents support both the Respondent's position and the position of Judge Price that modifying the Arbitration Provision to make it fair to both parties does NOT deprive Appellants of the right to arbitrate, it only prevents them from stacking the deck in their arbitration proceeding against the Respondent.

CONCLUSION

Respondent asks this Honorable Court not to strike information relevant to the appeal from its Designation of Matter and Brief, and to include the above referenced documents in the Record on Appeal.

[SIGNATURE PAGE TO FOLLOW]

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

January 13, 2021