EXHIBIT C

STATE OF SOUTH CAROLINA COUNTY OF ORANGEBURG	)	IN THE COURT OF COMMON PLEAS FOR THE FIRST JUDICIAL CIRCUIT C/A No.: 2020-CP-38-00545
The Carolina Appraisal Group, Inc. and The Carolina Appraisal Group-Residential, LLC, Plaintiffs, v. Wagener Insurance Agency and Realty, Inc.; Douglas Appraisal, LLC; and Robert D. Douglas, Defendants/Third-Party Plaintiffs, v. Harris Benjamin Davis, Jr., The Carolina Appraisal Group-Residential W-2, LLC, Third-Party Defendants.	)	Business Court: The Hon. Maite Murphy **ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

This matter is before the Court on a Motion for Temporary Restraining Order and Preliminary Injunction filed by Plaintiffs The Carolina Appraisal Group-Residential, LLC ("TCAG-R") and The Carolina Appraisal Group, Inc. ("TCAG") (collectively "Plaintiffs"), on May 12, 2020. The parties have filed extensive briefing, including: Plaintiffs' Memorandum in Support, filed June 26, 2020; Defendants' Memorandum in Opposition, filed August 5, 2020; and Plaintiffs' Supplemental Memorandum in Support, filed August 7, 2020. A hearing was held on November 19, 2020, at which time the Court heard oral argument from counsel.

After reviewing the pleadings, exhibits, affidavits, and documents on record, and carefully considering arguments of counsel for the parties, the Court hereby grants the motion.

FINDINGS OF FACT

1. TCAG is a South Carolina limited liability company specializing in commercial and residential real estate evaluations and appraisals.[1] Robert Douglas ("Douglas"), an individual licensed as an individual appraiser, began performing appraisals for TCAG in 2006.[2]

2. In 2008, TCAG developed a plan to form a subsidiary and contribute it to TCAG's residential real estate evaluation and appraisal business. TCAG offered Douglas, and several other appraisers, the opportunity to acquire an ownership interest in the new entity.[3] On or about January 13, 2009, TCAG formed TCAG-R.

3. Douglas agreed to acquire an interest in TCAG-R through Wagener Insurance Agency and Realty, Inc. ("Wagener"), an entity wholly owned and controlled by Douglas.[4] On or about January 1, 2009,[5] Wagener acquired a 5% membership interest in TCAG-R for $26,000.[6] On July 28, 2010, Wagener acquired an additional 5% interest in TCAG-R for $26,000.[7] Wagener remains a minority member of TCAG-R, owning ten percent (10%) of its total outstanding membership interests. Accordingly, TCAG owns the remaining ninety percent (90%) of TCAG-R's total outstanding membership interests.[8]

4. In December 2010, TCAG engaged attorney Eugene Ott to prepare an operating agreement for TCAG-R ("the 2010 Draft Operating Agreement").[9] The 2010 Draft Operating

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[1] Verif. Compl. at ¶ 1; First Affidavit of Ben Davis (filed May 12, 2020) ("First Davis Aff.") at ¶ 1.
[2] Verif. Compl. at ¶ 7; First Davis Aff. at ¶ 5.
[3] Verif. Compl. at ¶ 19; First Davis Aff. at ¶ 6; Affidavit of Robert Douglas (filed June 24, 2020) at ¶ 13.
[4] Verif. Compl. at ¶ 20; First Davis Aff.at ¶¶ 7-10; Douglas Aff. at ¶ 3.
[5] *Compare* Douglas Aff. at ¶ 15 *with* Verif. Compl. at ¶ 21. The Court finds that the date of Wagener's investment in TCAG-R is not relevant to the conclusions of law in this order.
[6] Verif. Compl. at ¶ 21.
[7] *Id.*; *see also* Douglas Aff. at ¶ 16.
[8] Verif. Compl. at ¶¶ 21-22; First Davis Aff.at ¶¶ 8-10.
[9] Second Affidavit of Ben Davis (filed August 7, 2020) ("Second Davis Aff.") at ¶ 6.

Agreement was not satisfactory to either TCAG or Wagener and was not signed.[10] As such, TCAG-R initially operated without an operating agreement pursuant to the default provisions found in the South Carolina Uniform Liability Company Act of 1996, S.C. Code Ann. §§ 33-44-101, *et seq.* (the "LLC Act").

5. In 2014, TCAG engaged attorney Will Umbach with the law firm of Adams and Reese LLP to prepare an operating agreement for TCAG-R (the "2014 Operating Agreement").[11]

6. Douglas received a version of the 2014 Operating Agreement on November 5, 2014.[12] After receiving the draft, Douglas sent an email to Davis agreeing with the terms of the 2014 Operating Agreement, stating: "Looks good."[13] Douglas requested "clarification on valuing the company in section 8.5.1."[14] On November 25, 2014, Douglas received another version of the 2014 Operating Agreement, along with communications (email messages forwarded to Douglas) between Davis and attorney Umbach, regarding valuation provisions in Paragraph 8.[15] In response to the revised draft and emails, Douglas asked: "[Accounts receivable] is not used to value the company anywhere else in the agreement. Why here?"[16] Nevertheless, he agreed with the draft, stating: "look[s] good."[17]

7. On December 12, 2014, Douglas signed the 2014 Operating Agreement on behalf of Wagener, thirty-two days after receiving a first draft on November 5, 2014. There is no evidence that the 2014 Operating Agreement has since been rescinded or amended.

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[10] *Id.*; Douglas Aff. (filed June 24, 2020) at ¶¶ 17-18.
[11] Davis Aff. at ¶ 6.
[12] *See* Second Davis Aff. at ¶¶ 7-8.
[13] *Id.*
[14] *Id.*
[15] *Id.* at ¶ 10.
[16] *Id.*
[17] *Id.*

8. From December 12, 2014 until May of 2018, the parties operated without controversy pursuant to the 2014 Operating Agreement. Douglas (through his sole ownership and control of Wagener) took part in various aspects of TCAG-R, including performing consulting services with TCAG-R's appraisers as to individual appraisals (in exchange for which Wagener received a monthly management fee in the amount of $100). Wagener also performed residential real estate appraisals and valuations for TCAG-R.

9. Beginning in May of 2018, Wagener requested that TCAG-R make commission payments, management fees, membership distributions, and any other remuneration owed to Wagner payable instead to a new entity created by Douglas: Douglas Appraisal, LLC ("Douglas Appraisal").[18] TCAG-R complied with Wagener's request, paying to Douglas Appraisal all subsequent commissions, reimbursements, management fees, and membership distributions owed to Wagener.[19]

10. In late April or early May of 2019, TCAG and TCAG-R learned that Douglas had been providing appraisal work outside of TCAG-R to its customers. Davis confronted Douglas,[20] and, in response, Douglas admitted performing jobs for various customers of TCAG-R, including the U.S. Department of Veterans Affairs ("VA")[21] and said he would continue to do so in the future unless TCAG purchased Wagener's interest in TCAG-R. The amount demanded by Wagner was more than that required by the 2014 Operating Agreement.[22]

11. Beginning in May of 2019, the parties attempted to resolve their dispute regarding Defendants' appraisal work outside of TCAG-R as well as the valuation of Wagener's membership

[18] Verif. Compl. at ¶ 30; Davis Aff. at ¶ 16.
[19] *Id.*
[20] Verif. Compl. at ¶ 39; First Davis Aff. at ¶ 21; Second Davis Aff. at ¶ 14.
[21] Douglas Aff. at ¶ 30.
[22] Verif. Compl. at ¶ 39; First Davis Aff. at ¶ 21; Second Davis Aff. at ¶ 14; Douglas Aff. at ¶ 31.

interest, without success.[23] They hired attorneys and exchanged demand letters from the Fall of 2019 through the Spring of 2020.[24] In those letters, Defendants' counsel acknowledged Defendants had performed appraisals outside of TCAG-R, without Plaintiffs' consent from April 25, 2019 to December 12, 2019, resulting in Defendants' receipt of fees totaling at least $56,450.[25]

12. The parties participated in an unsuccessful pre-suit mediation on April 29, 2020. This lawsuit was filed on May 12, 2020.

CONCLUSIONS OF LAW

A. *Legal Standard*

13. "Actions seeking relief by injunction are equitable in nature." *City of Myrtle Beach v. Juel P. Corp.*, 344 S.C. 43, 522 S.E.2d 153 (Ct. App. 1999), *rev'd other grounds*, 543 S.E.2d 538 (2001). Whether a temporary injunction should be granted rests in the sound discretion of the judge to whom the application is addressed. *Seabrook v. Carolina Power & Light Co.*, 159 S.C. 1, 156 S.E. 1 (1930); *Brandt v. Gooding*, 630 S.E.2d 259 (2006).

14. "An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm . . . ." *Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 907 (2004). To obtain an injunction, a party must demonstrate: (1) irreparable harm, (2) likelihood of success on the merits, and (3) an inadequate remedy at law. *Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 626 S.E.2d 34 (Ct. App. 2006); *County of Richland v. Simkins*, 348 S.C. 664, 560 S.E.2d 902, 904 (Ct. App. 2002).

15. Injunctive relief may be sought upon the filing of a summons and complaint by submitting an affidavit or verified complaint showing, with specific facts, that the applicant will

[23] Second Davis Aff. at ¶¶ 14-17.
[24] Verif. Compl. at ¶¶ 43-49; Second Davis Aff. at ¶ 17.
[25] Verif. Compl. at ¶ 45; Davis Aff. at ¶¶ 22-23.

sustain immediate and irreparable injury, loss, or damage if relief is not granted. S.C. R. Civ. P. 65(b). A verified complaint is the equivalent of an affidavit. *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433, 437-38 (2003). When a petitioner's application makes out a perfectly clear case and the petitioner has complied with all the requirements, the petitioner is "entitled to the injunction as a matter of right." *Columbia Broadcasting Sys., Inc. v. Custom Recording Co.*, 258 S.C. 465, 472, 189 S.E.2d 305, 309 (1972) (quotation omitted).

16. The purpose of a temporary injunction is to preserve or restore the *status quo* during litigation and avoid possible irreparable injury pending a full hearing on the merits. *County Council of Charleston v. Felkel*, 244 S.C. 480, 137 S.E.2d 577 (1964). To obtain an injunction, the plaintiff must allege facts sufficient to constitute a cause of action for injunction and demonstrate the injunction is reasonably necessary to protect the legal rights pending in the litigation. *Simpkins*, 348 S.C. at 669, 560 S.E.2d at 904.

17. Although there is no additional requirement to "balance the equities" before issuing an injunction, *Poynter Invs, Inc. v. Century Bldrs of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15, 17 (2010), it is an appropriate inquiry for the Court to make. *Anchorage Plantation Homeowners Ass'n v. Walpole*, 2016-00281, 2018 WL 3575397, *3 (Ct. App. July 25, 2018) (finding circuit court was within its discretion to balance the equities in determining whether Association's requested relief of an injunction was an appropriate remedy) (citations omitted).

B. *Plaintiffs will suffer irreparable injury if injunctive relief is not issued*

18. "Irreparable injury means that the injunction is reasonably necessary to protect the rights of the plaintiff pending the litigation." JAMES F. FLANAGAN, *South Carolina Civil Procedure* 508 (2nd ed., 1996) (citing cases). The Court must decide whether a wrong is irreparable, in the sense that equity may intervene, and whether there is an adequate remedy at law, and these

questions are not decided by narrow and artificial rules. *Peek*, 367 S.C. at 455, 626 S.E.2d at 37. Irreparable harm is, by its very nature, harm that is difficult, if not impossible to quantify. *See, e.g., Columbia Broad. Sys.*, 258 S.C. at 477-78, 189 S.E.2d at 311 (holding that the mere uncertainty of fixing the measure of damage may be sufficient to justify equitable jurisdiction).

19. Plaintiffs assert that they will suffer immediate and irreparable harm unless the Court restrains, prevents and enjoins (1) Wagener from further violations of Wagener's statutory fiduciary duties to TCAG-R under the LLC Act, and (2) Douglas and Douglas Appraisal from directly or indirectly aiding and abetting such violations and benefitting therefrom. Plaintiffs assert that absent an injunction, they will suffer irreparable harm because Defendants could disclose Plaintiffs' confidential information, usurp corporate opportunities, and sell, destroy, or waste Plaintiffs' assets, including profits and substantial good will.

20. In *Peek*, 367 S.C. at 455, 626 S.E.2d at 37, the Court of Appeals held that the plaintiff established irreparable harm when a hospital terminated her privileges to practice at its facilities, noting that the plaintiff's loss of privileges would cause severe and permanent economic loss. In coming to its conclusion, the court cited several cases that found irreparable harm for economic loss and loss of business good will. *Id.* at 455 n. 2, 37 n. 2 (citing *District of Columbia v. E. Trans-Waste of Md. Inc.*, 758 A.2d 1, 15 (D.C. 2000) ("While economic loss does not, in and of itself, constitute irreparable harm, such harm will be found if economic loss threatens the very existence of [plaintiff's] business."); *IAC, Ltd. v. Bell Helicopter Textron, Inc.*, 160 S.W.3d 191, 200 (Tex. App. 2005) ("Loss of business goodwill or loss that is not easily calculated in pecuniary terms is sufficient to show irreparable injury for purposes of obtaining a temporary injunction."); *Campbell Inns, Inc. v. Banholzer Turnure & Co.*, 527 A.2d 1142, 1146 (Vt. 1987) ("The potential loss of a business satisfies the irreparable harm requirement for the issuance of an injunction.")).

21. Further, federal courts have recognized that the loss of relationships with customers, goodwill, or the market share constitute irreparable harm. *Industrial Packaging Supplies, Inc. v. Martin*, CA 6:12- 713-HMH, 2012 WL 1067650, at *1 (D.S.C. Mar. 29, 2012) (citing *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F. 3d 546, 552 (4th Cir. 1994); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048, 1055 (4th Cir. 1985); *Standard Register Co. v. Kerrigan*, 238 S.C. 54, 119 S.E.2d 533, 538-39 (1961); *Peek*, 367 S.C. 450, 626 S.E.2d 34, 37 & n. 2).

22. Although TCAG-R is seeking the expulsion of Wagener as a member pursuant to S.C. Code Ann. 33-44-601,[26] as of the date of this order, Wagener remains a member of TCAG-R and a party to the 2014 Operating Agreement and, therefore, may still owe contractual and fiduciary obligations to TCAG-R and its other member, TCAG. Like *Peek* and the cases cited therein, the Court finds that Plaintiffs have submitted sufficient evidence to establish the likelihood of suffering irreparable harm through severe economic loss, including significant destruction of good will, if Defendants are able to usurp TCAG-R's corporate opportunities by performing or allowing others to perform residential real estate appraisal services in violation of Wagener's statutory fiduciary obligations under S.C. Code Ann. § 33-44-409(b). Plaintiffs submit that such loss will harm their businesses as well as the value of TCAG-R and should be enjoined, especially given Defendants' admissions that competitive activity has already taken place and is likely to continue. Plaintiffs' potential inability to recover its customer good will and lost opportunities, constitutes severe potential economic loss and irreparable injury.

23. Courts in other jurisdictions and a federal court in South Carolina have similarly held that "even where a harm could be remedied by money damages at judgment, irreparable harm

[26] Verif. Compl. at ¶¶ 83-95.

may still exist . . . where '[d]amages may be unobtainable from the defendant because he may have become insolvent before a final judgment can be entered and collected.'" *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 386 (7th Cir. 1984); *see also Wellin v. Wellin*, 2013 WL 6175829, *5 (D.S.C. 2013) (observing that "irreparable harm may exist where the moving party's business cannot survive absent a preliminary injunction, or where damages may ultimately become unobtainable because the defendant may become insolvent before a final judgment can be entered"); *Hughes Network Systems, Inc. v. InterDigital Communications Corp.*, 17 F.3d 691, 694 (4th Cir. 1994); *U.S. ex rel. Taxpayers Against Fraud v. Singer Co.*, 889 F.2d 1327, 1330 (4th Cir. 1989) (noting injunction could be appropriate where the principal defendant was "insolvent" and its assets were "in danger of dissolution and depletion."); .

24. Based on the pleadings[27] and testimony of record,[28] the Court accepts Defendants' admission that they are performing residential real estate appraisals for TCAG-R's customers and finds such activity is competitive and usurping TCAG-R's corporate opportunities,[29] as well as interfering with Plaintiffs' business good will and customer relationships. Plaintiffs' business good will established with customers and other appraisers in the industry, established over more than two decades, may be incapable of being quantified and could be permanently destroyed by the actions Defendants have indicated they intend to continue to take absent an injunction.[30] Further,

[27] Verif. Compl. at ¶¶ 39-40, 44-45, 46; Defendants' Answer at ¶ 144 (admitting Douglas "consistently appraised real estate exclusively for [Plaintiffs]" prior to this dispute); ¶¶ 18, 38 (admitting "Douglas began appraising for others," including "the VA"), and ¶ 39 (admitted "Douglas told Davis he would continue to appraise for the VA").

[28] First Davis Aff. at ¶¶ 19-24.

[29] At the November 19, 2020, hearing, Defendants admitted they have not served discovery requests on Plaintiffs. Yet, Defendants speculated that discovery would reveal that Plaintiffs "have not lost any business" as a result of Defendants' competitive activity. The Court does not place any weight on Defendants' argument as there is no evidence to support their assertion.

[30] First Davis Aff. at ¶ 25 ("I am concerned that Douglas' ability to engage in a competing business for himself or on behalf of Douglas Appraisal and/or Wagener ... will substantially undermine the business I created more than twenty years ago and have grown into a thriving appraisal company. Douglas and his affiliated businesses have had access to [Plaintiffs'] confidential customer lists, pricing

the Court finds that any future determination in Plaintiffs' favor could result in an award that may not be recoverable because the severe economic loss is incapable of being restored and/or Defendants may be insolvent to pay a money judgment.[31]

25. Defendants contend that Plaintiffs "waited over a year to request a preliminary injunction," asserting such delay evidences that Plaintiffs will not suffer irreparable harm and/or that Plaintiffs should be barred by laches from pursuing injunctive relief. Laches is defined as a "negligent failure to act for an unreasonable period of time" constituting "abandon[ment] or surrender[ing] [of] [a known] right." *Provident Life and Acc. Ins. Co. v. Driver*, 317 S.C. 471, 451 S.E.2d 924 (Ct. App. 1994). In order to prove laches, Defendants must prove Plaintiffs "neglect[ed] for an unreasonable and unexplained length of time under circumstances affording [Plaintiffs] [an] opportunity for diligence, to do what should have been done. *Emery v. Smith*, 361 S.C. 207, 215, 603 S.E.2d 598, 602 (Ct. App. 2004) (quotations omitted). Defendants must show more than mere "delay," but also "unreasonable delay," and "prejudice." *Id.* (citations omitted).

26. The Court disagrees with Defendants' position as to the circumstances giving rise to Plaintiffs' claims and finds no basis for applying laches. The evidence shows that Plaintiffs confronted Defendants as soon as they had actual knowledge of Defendants' competitive activity (in April or May of 2019) and thereafter attempted to negotiate the dispute for a period of at least two to three months before retaining counsel. The parties also attempted to mediate the dispute on April 29, 2020, before ultimately reaching an impasse at which point Plaintiffs filed a verified

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information, adjuster and appraiser data, and other business operations and financial documents since at least 2006. ... [Defendants] have the ability and opportunity to take business opportunities and corresponding profits from [Plaintiffs], and in addition, substantially undermine [Plaintiffs'] reputation, good will, and relationships with customers, referral sources, and other appraisers in the industry, all of which have taken decades to build. If [Plaintiffs] are successful in the civil action, damage to good will, reputation, and relationships may be impossible to ascertain, quantify, and recover.").

[31] *Id.* at ¶ 18 ("Counsel for Douglas, Wagener ... , and Douglas Appraisal have represented to counsel for [Plaintiffs] that Wagener ... discontinued business operations in 2018).

complaint and this motion, on the same day, on May 12, 2020. Defendants have not presented any evidence that indicates that Plaintiffs negligently failed to act for an unreasonable period of time, nor have they alleged or substantiated any detrimental change in position attributable to Plaintiffs' alleged delay.

C. ***Plaintiffs are likely to succeed on the merits of their relevant claims***

27. A party seeking an injunction is "not required to prove an absolute legal right when seeking a preliminary injunction, but must present a reasonable question as to the existence of such a right." *AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 674 S.E.2d 505, 509 (Ct. App. 2009); *see also Williams v. Jones & Amerman*, 92 S.C. 342, 75 S.E. 705 (1912) ("This does not mean an absolute legal right or certainty of success but rather that he has a fair question to raise as to the existence of such a right.") Courts have broadly construed this element and a litigant is required to do little more than state a cause of action to make a *prima facie* showing. *Simpkins*, 348 S.C. 664, 560 S.E.2d 902; *Levine v. Spartanburg Reg'l Servs. Dist, Inc.*, 367 S.C. 458, 465-66, 626 S.E.2d 38, 42 (Ct. App. 2005).

28. Though the Court is required to examine the merits of the case to the extent necessary to determine whether the moving party's application has set forth facts sufficient to justify issuance of a temporary injunction, it may not make a final determination or decide the ultimate merits. *See Transcontinental Gas Pipe Line Corp. v. Porter*, 252 S.C. 478, 167 S.E.2d 313 (1969); *Roberts v. Union Cnty Bd. of Sch. Trustees*, 284 S.C. 299, 326 S.E.2d 163 (Ct. App. 1985). "Once a prima facie showing has been made entitling the plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits." *Helsel v. Cty of N. Myrtle Beach*, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992).

29. The Court finds that Plaintiffs have shown a likelihood of success on the merits as to the relevant claims underling their Motion for Temporary Restraining Order and Preliminary Injunction, specifically: judicial expulsion of Wagener as a member of TCAG-R pursuant to S.C. Code Ann. § 33-44-601; breach of fiduciary duties by Wagener; and aiding and abetting breach of fiduciary duty by Douglas and Douglas Appraisal.[32]

30. Under the LLC Act, a member is dissociated from a limited liability company on application by the company or another member, upon

> the member's expulsion by judicial determination because the member: (i) engaged in wrongful conduct that adversely and materially affected the company's business; (ii) willfully or persistently committed a material breach of the operating agreement or of a duty owed to the company or the other members under Section 33-44-409; or (iii) engaged in conduct relating to the company's business which makes it not reasonably practicable to carry on the business with the member. . . .

S.C. Code Ann. § 33-44-601(6).

31. The Court finds that Plaintiffs have presented sufficient evidence to create a *prima facie* claim as to their request for judicial expulsion of Wagener as a member of TCAG-R under S.C. Code Ann. § 33-44-601(6). Plaintiffs have presented evidence to create a fair question as to whether Defendants have "engag[ed] in wrongful conduct that adversely and materially affected the company's business[,]" "willfully or persistently committed a material breach of the operating agreement or of a duty owed to the company or the other members" under Section 33-44-409, or "engaged in conduct relating to the company's business which makes it not reasonably practicable to carry on the business . . . ." S.C. Code Ann. § 33-44-601(6). Indeed, when confronted with evidence of such conduct, Douglas, as sole shareholder of Wagener, admitted that Wagener was

[32] Plaintiffs have asserted other civil claims against Wagener, Douglas, and Douglas Appraisal, including breaches of contract, conversion, and civil conspiracy, *see* Verif. Compl., but Plaintiffs are not seeking an injunction based on these other claims at this time. *See* Motion for Temporary Restraining Order and Preliminary Injunction.

performing competitive appraisal services for which it was not accounting to TCAG-R. Plaintiffs contend that such an admission amounts to a conceded violation of the Operating Agreement (Section 13) and the LLC Act (S.C. Code Ann. § 33-44-409). The Court agrees that it creates at least a *prima facie* claim.

32. Wagener asserts that the 2014 Operating Agreement was procured by fraud and was procedurally unconscionable such that the Court should declare it void *ab initio*. Defendants filed an affidavit with the Court on June 24, 2020, in which Douglas testified:

> Davis sent me [the 2014 Operating Agreement] and demanded I sign [it] for management purposes. Davis had previously indicated there were [only] two changes made from the 2010 [Draft] Operating Agreement: (i) the inclusion of an insurance-funded buyout provision upon the death of either Davis or me, and (ii) the inclusion of a $100 weekly payment for me for consulting with members of the appraisal panels who had appraisal-related questions about particular appraisals they were doing.
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> One or two days after Davis first presented me with the 2014 Operating Agreement, he contacted me again and told me he needed to have [it] signed and returned to him that day. Based on Davis' statements that the draft I was signing was the same as the 2010 [Draft] Operating Agreement with the two exceptions indicated above, I signed the 2014 Operating Agreement.
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> Davis never indicated to me that the 2014 Operating Agreement had been prepared by Adams and Reese LLP.[33]

The Court finds that Douglas' testimony is refuted by the emails attached to Davis' Second Affidavit, filed August 7, 2020, and therefore not credible or entitled to any presumptive weight.

33. Instead, the evidence shows that Douglas had actual knowledge of the terms of the 2014 Operating Agreement, and signed the 2014 Operating Agreement after reviewing more than one draft and discussing its terms at length over a period of at least thirty-two days. A competent person is "presumed to have knowledge and understanding of a document he signs." *Floyd v. Nationwide Mut. Ins. Co.*, 367 S.C. 253, 263, 626 S.E.2d 6, 12 (2005) (collecting cases); *Munoz*

[33] Douglas Aff. at ¶¶ 19-21.

v. Green Tree Fin. Corp., 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001) ("[A] person who can read is bound to read an agreement before signing it.") (citation omitted). The only exception is where the person can prove with competent evidence that "his signature was obtained by misrepresentation, fraud, forgery, or duress." *Floyd*, 367 S.C. at 263, 626 S.E.2d at 12. Defendants have come forward with no such evidence.

34. The Court finds that Douglas is a sophisticated person who owns and controls multiple corporate entities, including Wagener and Douglas Appraisal. He runs multiple businesses, including a residential real estate appraisal business, an insurance sales business, and a real estate sales business, potentially among others. Wagener was already a member of TCAG-R at the time the 2014 Operating Agreement was proposed and he had equal bargaining strength with respect to the contract in question, as evidenced by the back and forth flow of correspondence between Douglas and Davis as to the 2014 Operating Agreement's terms. Douglas also benefited from the 2014 Operating Agreement's terms as he received monthly management fees in the amount of $100 from January 2015 through present as well as distributions from TCAG-R in accordance with the 2014 Operating Agreement's terms. There is no evidence that the 2014 Operating Agreement was rescinded, modified, or revoked from December 2014 to present, evidencing Wagner's ongoing assent to its terms.

35. To the extent Douglas alleges the terms of the 2014 Operating Agreement are unconscionable, the mere fact that the terms may favor TCAG does not make it unconscionable or oppressive as a matter of law. Unconscionability is the "absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair or honest person would accept them." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 668 (2007). Further, "[t]he doctrine

[of unconscionability] is not one to be applied to disturb the agreed allocation of risk, even if it should result from superior bargaining power of one party, but rather to prevent oppression and surprise." *Coker Int'l, Inc. v. Burlington Indus., Inc.*, 747 F. Supp. 1168, 1172 (D.S.C. 1990). Defendants have come forward with no evidence of "oppression [or] surprise." Similarly, Defendants have failed to point the Court to any specific provisions in the 2014 Operating Agreement which are "oppressive" or unreasonably "one-sided."

36. Plaintiffs have also shown a likelihood of success on the merits as to their claim against Wagener for breach of its fiduciary duties. In order to establish a claim for breach of fiduciary duty, a plaintiff must prove: (1) the existence of a fiduciary duty, (2) a breach of that duty, and (3) damages proximately resulting from the wrongful conduct of the defendant. *RFT Management Co., L.L.C. v. Tinsley & Adams, L.L.P.*, 399 S.C. 322, 732 S.E.2d 166 (2012); *Gordon v. Busbee*, 397 S.C. 119, 723 S.E.2d 822 (Ct. App. 2012); *Turpin v. Lowther*, 404 S.C. 581, 745 S.E.2d 397 (Ct. App. 2013).

37. It is undisputed that Wagener is a member of TCAG-R. Plaintiffs submit that Wagener owes to TCAG-R and TCAG (as a member of TCAG-R) fiduciary duties of loyalty and care pursuant to the LLC Act (specifically, section 33-44-409(a)). These duties include "to account to [TCAG-R] and hold as trustee for [TCAG-R] any property, profit, or benefit derived by [Wagener] . . . or derived from a use by [Wagener] of [TCAG-R]'s property, including the appropriation of [TCAG-R's business] opportunit[ies]," and "to refrain from competing with [TCAG-R] in the conduct of [TCAG-R's] business[.]" S.C. Code Ann. §§ 33-44-409(b)(1) at 33-44-409(b)(3).

38. Under the LLC Act, in a manager-managed company, "a member who is not also a manager [typically] owes no duties to the company or to the other members solely by reason of

being a member[;]" however, where that member "exercises some or all of the rights of a manager in the management and conduct of the company's business" pursuant to the terms of the company's operating agreement, that member is held to the same standards of conduct as the company's managers. S.C. Code Ann. §§ 33-44-409(h)(1) and (3). Here, the Court finds sufficient evidence that Wagener "exercise[d] some or all of the rights of a manager in the management and conduct of the company's business" pursuant to the 2014 Operating Agreement, and received nearly $7,500 in management fees pursuant to Section 5.4.[34] Therefore, the Court finds that Plaintiffs have shown a fair question as to whether Wagener owes fiduciary duties under S.C. Code Ann. § 33-44-409(h)(3).

39. Plaintiffs contend Douglas' admission that he is performing competitive residential real estate appraisals is tantamount to an admission that Wagener is breaching its fiduciary duties. The Court agrees that Plaintiffs have provided sufficient evidence to create a *prima facie* case of breach of fiduciary duty with such evidence.

40. Defendants assert that their residential real estate appraisal services either do not constitute "competition" or are justified by the evidence. The Court disagrees. First, Defendants contend Defendants are not competing against TCAG-R because TCAG-R "cannot perform appraisals."[35] This argument unnecessarily and illogically places form over substance and would render the terms of Section 33-44-409(b)(3) of the LLC Act meaningless. It is certainly true that TCAG-R operates its "business" through members, officers, employees, independent contractors, and other agents. However, all limited liability companies (and indeed Wagener and Douglas

[34] First Davis Aff. at ¶ 16 and 2014 Operating Agreement (attached thereto) at § 5.4; Douglas Aff. at ¶ 19 (characterizing the fee as payment for "consulting with members of the appraisal panels who had appraisal-related questions about particular appraisals they were doing").

[35] Douglas Aff. at ¶ 8 ("The Business is not a licensed appraiser and does not perform any actual appraisal work.").

Appraisal) must operate in that manner, so it cannot follow that Section 33-44-409(b)(3) of the LLC Act does not apply here. *See* S.C. Code Ann. § 33-44-409(b)(3) (requiring a member to "refrain from competing *with the company* in the conduct of *the company's business*...") (emphasis added).[36]

41. Second, Wagener contends that "it is common practice for appraisers on [Plaintiffs'] appraisal panel" to perform services outside of the business. Defendants rely on an affidavit of Mackey Wood filed by Defendants on June 24, 2020 in which Mr. Wood testifies that as an independent contractor affiliated with TCAG-R, and bound by a similar noncompete agreement to the one Douglas executed in 2006, he still performs appraisals outside of TCAG-R and for which he does not account to TCAG-R in commissions. However, the status of other individuals not similarly situated to Douglas and Wagener is wholly immaterial to the issues in this case. It is undisputed that Mr. Wood is not a member of TCAG-R. Mr. Wood therefore does not owe the same fiduciary duties as Wagener does to TCAG-R under the LLC Act. Nor is Mr. Wood a party to the 2014 Operating Agreement.

42. As to Plaintiffs' burden of proving damages to establish a *prima facie* case, the Court finds that Plaintiffs have provided sufficient evidence to create a fair question as to the injury caused by Defendants' competitive appraisal services. Specifically, Plaintiffs have shown that Defendants have admitted performing such services between from April 25, 2019 and December 12, 2019 and have received at least $56,450 of revenue as a result.[37] Based on Davis' affidavit, it

[36] In addition, the 2014 Operating Agreement prohibits Wagener from performing appraisals outside of TCAG-R in a way that "competes" with the business. First Davis. Aff and 2014 Operating Agreement (attached thereto) at Section 13.

[37] First Davis Aff. at ¶ 23.

appears that this list may represent only a portion of the competitive appraisal services performed by Defendants in breach of Wagener's fiduciary duties.[38]

43. The Court finds that Plaintiffs have also shown a likelihood of success on the merits on their claim against Douglas and Douglas Appraisal for aiding and abetting Wagener's breaches of its fiduciary duties. Under South Carolina law, the elements for a cause of action of aiding and abetting a breach of fiduciary duties are: (1) the breach of a fiduciary duty owed to the plaintiff; (2) the defendant's knowing participation in the breach; and (3) damages. *Vortex Sports & Entm't, Inc. v. Ware*, 378 S.C. 197, 204, 662 S.E.2d 444, 448 (2008). For the reasons stated above, Plaintiffs have shown a fair question as to the likelihood of success as to the elements of breaches of fiduciary duty and damages.

44. The gravamen of a claim for aiding and abetting "is the defendant's knowing participation in the fiduciary's breach." *Future Group, II v. Nationsbank*, 324 S.C. 89, 99, 478 S.E. 2d 45, 50 (1996). It is undisputed that Douglas is the sole member of both Wagener and Douglas Appraisal. Douglas has acknowledged Wagener is performing residential real estate appraisal services for Plaintiffs' customers and not accounting to TCAG-R for its share of the commissions received therefrom. Indeed, it was Douglas, speaking for Wagener, who threatened to continue to engage in competitive business activities if Wagener's interest was not purchased by TCAG. The Court further finds that Douglas Appraisal's business is inextricably intertwined with that of Douglas and Wagener, as evidenced by the fact that when Wagener ceased doing business, Douglas Appraisal took over that business. Moreover, Wagener specifically requested TCAG-R pay to Douglas Appraisal all sums otherwise due to Wagener, including wages, commissions, distributions, management, fees, and other reimbursement.

[38] *Id.* at ¶ 24.

D. ***Plaintiffs have shown that they have no adequate remedy at law***

45. "[T]he purpose of an injunction is the preservation of the status quo." *Peek*, 367 S.C. at 457, 626 S.E.2d at 37 (citation omitted). "The general rule is that an injunction should be granted only where some irreparable injury is threatened for which there is no adequate remedy at law." *Mailsource* at 370, 588 S.E.2d at 639 (citation omitted). "[A] court should not be constrained by narrow and artificial rules; if imminent and actual harm is threatened, damages appear uncertain, and the available legal remedy reduces itself to a matter of words rather than efficacy, the court should not hesitate to exercise its equitable powers." 27 S.C. Jur. Injunctions § 9 (citations omitted).

46. Plaintiffs have shown that they have no adequate remedy at law if an injunction is not granted and Wagener continues violating its statutory fiduciary duties with the help and assistance of Douglas and Douglas Appraisal. Plaintiffs contend that without an injunction, their ability to obtain money damages if their claims are ultimately successful will be insignificant given the limited ability to recover these amounts where assets have been hidden, sold, or disposed of and that Plaintiffs' relationships with customers and good will has been eviscerated.

47. Courts in South Carolina, as well as other jurisdictions, have ordered and upheld injunctive relief to prevent the loss of a business or business goodwill. *See Peek*, 367 S.C. at 455, n. 2, 626 S.E.2d at 37, n. 2 (Ct. App. 2005) (citing *District of Columbia v. E. Trans-Waste of Md., Inc.*, 758 A. 2d 1, 15 (D.C. 2000) ("While economic loss does not, in and of itself, constitute irreparable harm, such harm will be found if economic loss threatens the very existence of [plaintiff's] business."); *Campbell Inns, Inc. v. Banholzer, Turnure & Co.*, 148 Vt. 1, 527 A. 2d 1142, 1146 (1987) ("The potential loss of a business satisfies the irreparable harm requirement for the issuance of an injunction."); *IAC, Ltd. v. Bell Helicopter Textron, Inc.*, 160 S.W. 3d 191, 200

(Tex. App. 2005) ("Loss of business good will or loss that is not easily calculated in pecuniary terms is sufficient to show irreparable injury for purposes of obtaining a temporary injunction.")).

48. Here, where harm to goodwill is alleged and established by sworn testimony, even where a legal remedy (money damages) exists, injunctive relief to avoid damage to goodwill is appropriate. *See Columbia Broad. Sys., Inc. v. Custom Recording Co.*, 258 S.C. 465, 189 S.E.2d 305 (1972) (rejecting the argument that the availability of money damages was a sufficient basis upon which to deny a motion for temporary injunction, where there may be uncertainty in fixing the measure of damages, business goodwill is at issue, or where the wrongful act may continue).

E. ***A balancing of the equities favors injunctive relief.***

49. In balancing the equities, the Court finds that Plaintiffs stand to suffer more harm than Defendants by the issuance of a preliminary injunction. Plaintiffs have demonstrated the likelihood of irreparable harm caused by Defendants' competitive residential real estate appraisal services, including lost business opportunities, lost good will, and injury to TCAG's financial interest in TCAG-R.

50. On the other hand, there is little harm to Defendants if a preliminary injunction is granted. Restoring the *status quo* that existed prior to Defendants' competition beginning in 2019 until this Court can properly determine the merits of the lawsuit fails to harm Defendants in any material way. Wagener's duties to TCAG-R are governed by the LLC Act, S.C. Code Ann. §§ 33-44-101, *et seq*. and, potentially, the 2014 Operating Agreement. Under the LLC Act, Wagener owes TCAG-R and its members certain fiduciary duties. S.C. Code Ann. § 33-44-409(a). These duties include: "to account to [TCAG-R] and hold as trustee for it any property, profit, or benefit derived by [Wagener] . . . or derived from a use by [Wagener] of [TCAG-R's] property, including the appropriation of [TCAG-R's] opportunity." S.C. Code Ann. § 33-44-409(b)(1). Wagener also

owes the statutory duty "to refrain from competing with [TCAG-R] in the conduct of the company's business before the dissolution of [TCAG-R]." *Id.* at § 33-44-409(b)(3).

51. Douglas testified in his affidavit: "If the Court grants Plaintiffs the relief requested in their pending motion for a temporary restraining order and preliminary injunction, I will not be able to perform *real estate appraisals* and will not be able to earn a livelihood *as an appraiser*." Douglas Aff. at ¶ 32 (emphasis added). Douglas does not allege that he cannot earn *a livelihood.* Indeed, public records reveal that Douglas is the sole owner of Wagener Insurance Agency and Real Estate, LLC, a non-party insurance agency holding an active license with the South Carolina Department of Insurance. Additionally, Douglas holds a real estate license with the South Carolina Real Estate Commission as a broker-in-charge. Defendants argued that these licenses may no longer be active, but there is no evidence of record on which the Court can make such a finding of fact when otherwise refuted by public records.

52. Defendants assert that it is unreasonable for Plaintiffs to prevent Defendants from competing merely because Defendants made a $52,000 investment in TCAG-R for a 10% ownership interest. The Court disagrees with Defendants' one-sided characterization of the transaction. Wagener is a member of TCAG-R and a party to the 2014 Operating Agreement, which gives it the right to participate in certain management decisions, receive certain financial benefits, and other interests, in accordance with the terms of the 2014 Operating Agreement and LLC Act. This interest has already yielded distributions, management fees, and other benefits since the 2014 Operating Agreement was executed in December 2014. Moreover, this interest itself is worth something, which the Court will have to value at the trial of this case. In exchange for Wagener's investment and the financial benefits that have flowed therefrom, the Court finds it is not unreasonable to hold Wagener to his statutory duties to TCAG-R and its other member, TCAG.

Plaintiffs are within their legally-protected right to protect their businesses from irreparable damage caused by Defendants' conduct.

53. In summary, the Court finds that the narrowly-tailored relief sought by Plaintiffs is appropriate in these circumstances. Plaintiffs seek an order from the Court (i) enjoining and restraining Defendants from competing with TCAG-R, (ii) to account to TCAG-R with respect to all real estate appraisals performed outside of TCAG-R, and (iii) to hold for TCAG-R any property, profit, or benefit derived from appropriation of its opportunities. All of these remedies are statutorily mandated by the LLC Act. The Court finds that such injunctive relief is consistent with the purpose and scope of the LLC Act and would have little adverse effect on Defendants as Wagener is already under a duty to follow the fiduciary obligations in the LLC Act and Douglas and Douglas Appraisal are legally prohibited from aiding and abetting a breach of those duties. The Court concludes that such an injunction would restore the status quo.

CONCLUSION

The Court hereby enters an order restraining, preventing, and enjoining, *pendent lite*, Wagener from violating its statutory fiduciary obligations under the LLC Act and restraining, preventing, and enjoining, *pendent lite*, Douglas and Douglas Appraisal's aiding and abetting of such breaches of fiduciary obligations. Specifically, the Court orders:

> (1) Defendants are prohibited from providing real estate evaluation and appraisal services, or accepting any new orders or requests therefor, as of the date of filing of this order and until a final resolution of this case. Without limiting the generality of the foregoing, Defendants are prohibited from directly performing any real estate appraisal or valuation services, including but not limited to performing any field or desk reviews of appraisal reports and/or supervising or otherwise assisting any other person in performing such services. Notwithstanding the foregoing, if Defendants have accepted but not completed any third party's order or request for residential real estate evaluation and appraisal services prior to the date of filing of this order, Defendants shall be permitted to complete such services (without addition or amendment thereto) for a period of seven (7) days beginning on the date of filing of this order.

(2) Defendants are ordered to provide to Plaintiffs within **fifteen (15) days** of the date of filing of this order an accounting[39] of all residential real estate evaluation and appraisal services performed, directly or indirectly, by or on behalf of any Defendant for which Defendants did not pay TCAG-R its split of the commission. The accounting must be provided in the form of a report that includes the following information:

(a) Date service was ordered;
(b) Date service was performed;
(c) Type of appraisal product[40];
(d) Address of appraised property;
(e) Name of borrower;
(f) Name of lender;
(g) Amount of fee for the service;
(h) Date fee received;
(i) Name of appraiser who performed the service; and
(j) Supervisory appraiser, if applicable.

(3) Defendants are ordered to open an escrow account with a nationally chartered bank and no later than **ten (10)** days from the date of filing of this order deposit into such escrow account thirty-five percent (35%) of all property, profits, or other benefit derived by Defendants for all residential real estate evaluation and appraisal services performed by or on behalf of any Defendant for which TCAG-R has not already received its split of the commission. Defendants are further ordered to deliver to Plaintiffs no later than **fifteen (15) days** from the date of filing of this order evidence that the escrow account has been established and funded in accordance with this order.

(4) Consistent with the rulings in this order, Defendants are ordered to refrain from dealing on behalf of each other and any third person having an adverse interest to TCAG-R with respect to any residential real estate evaluation and appraisal services.

Rule 65(c), SCRCP, provides that no temporary injunction "shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." As set out herein, this Court has received evidence that Defendants admitted performing appraisals outside of TCAG-R and without Plaintiffs' consent

[39] Defendants' counsel conceded at the November 19, 2020 hearing that providing an accounting would be reasonable.

[40] E.g., interior inspection (1004), drive-by or land appraisal (2055), multi-family appraisal (1025), or field or desk review.

from April 25, 2019 to December 12, 2019 (a period of 231 days), and receiving at least $56,450 in revenue. Accordingly, based upon the Scheduling Order issued by the Court that would set this matter for trial after June 20, 2021, which is approximately 200 days from the date of this order, the Court hereby sets the bond at $55,000 and orders that Plaintiffs obtain such a bond and file proof thereof with the Court within **thirty (30) days** from the date of filing of this order.

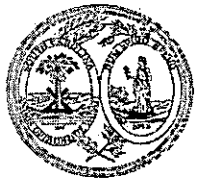
IT IS SO ORDERED.

_____

Maite Murphy, Business Court Judge

December _____, 2020

_____, South Carolina.



Orangeburg Common Pleas

Case Caption: Carolina Appraisal Group, Inc. , plaintiff, et al VS Wagener Insurance Agency And Realty, Inc. , defendant, et al

Case Number: 2020CP3800545

Type: Order/Temporary Injunction

So Ordered

s/ Maite Murphy 2166