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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas
Business Court: The Honorable Maite Murphy

Appellate Case No. 2021-000225

The Carolina Appraisal Group, Inc. and The Carolina Appraisal Group-Residential, LLC……………………………………………………………………………Respondents,

v.

Wagener Insurance Agency and Realty, Inc.; Douglas Appraisal, LLC, And Robert D. Douglas……………………………………………………………………………Appellants,

v.

Harris Benjamin Davis, Jr., The Carolina Appraisal Group W-2, LLC
……………………………………………………………………………………Third-Party Defendants.

APPELLANTS' EMERGENCY PETITION FOR *EX PARTE* ORDER GRANTING WRIT OF SUPERSEDEAS OR, IN THE ALTERNATIVE, FOR AN EXPEDITED ORDER GRANTING A WRIT OF SUPERSEDEAS

Wagener Insurance Agency and Realty, Inc.; Douglas Appraisal, LLC and Robert D. Douglas (collectively, "Appellants"), pursuant to Rule 241, *South Carolina Appellate Court Rules*, respectfully petition this Court, or the first available Judge of this Court, for an immediate, *ex parte* Order granting a writ of supersedeas to suspend the effect of the Orders

of the Honorable Maite Murphy, dated December 3, 2020[1] and February 18, 2021[2], enjoining Appellants from working for an indefinite period. Appellants support this request for immediate relief with the Affidavit of Robert D. Douglas, attached hereto as **Exhibit C**, as well as the Certification of Counsel filed herewith in accordance with Rule 241(d)(6)(B). If no writ of supersedeas issues from this Court, these Orders will effect immediate and irreparable harm on Appellants and, further, moot contested issues in this case. Supersedeas is therefore necessary and appropriate to preserve this Court's jurisdiction to hear and decide the merits of Appellants' appeal.

SUMMARY OF EMERGENCY AND RELIEF REQUESTED

The lawsuit underlying this appeal and emergency petition has somewhat complex claims, defenses and facts. It nonetheless is effectively a partnership dispute over the rights and obligations of Respondents, 90% owners, and Appellants, 10% owners, which dispute will be resolved by a determination of those rights and obligations, as well as a determination of whether any party must pay damages to another. Before and for more than a year after the commencement of the underlying case, the *status quo* was that both Appellants and Respondents continued to conduct their respective businesses.

More than six (6) months after the filing of the underlying case, however, the lower court issued a Preliminary Injunction which profoundly upsets the *status quo* that undisputedly existed since May 2019. The Preliminary Injunction is an immediate threat to Appellants' ability to make a livelihood now or in the future.

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[1] Attached as **Exhibit A** hereto.
[2] Attached as **Exhibit B** hereto.

By its Order, dated December 3, 2020, granting the Preliminary Injunction, the Business Court enjoined Appellants from performing residential real estate appraisals; required Appellants to fund a substantial escrow account based on past earnings; and required Respondents to post a minimal bond. This Order abruptly and completely upset the *status quo* which existed when this action and Respondents' motion for a preliminary injunction were filed on May 12, 2020.

Appellants do not take lightly their obligation to comply with the Business Court's Orders, but as set forth below, Appellants' compliance with the Preliminary Injunction's provisions directing them to cease performing their day-to-day business will moot much of the relief sought in the claims, counterclaims and third-party claims in the underlying action by permanently damaging or ending Appellant Robert Douglas' businesses and his own career.

Further, the Preliminary Injunction mandates that Appellants create and fund a substantial escrow account based on past earnings; no evidence was put forth that Appellants had any ability to fund such an account, and they do not. The Preliminary Injunction therefore puts Appellants in the dire position of being immediately and continuously in violation of an Order with which Appellants cannot comply.

For these reasons, as well as based on applicable law and rules discussed below, Appellants respectfully ask that the first available Judge of this Court immediately issue an *ex parte* temporary Order suspending the Business Court's Preliminary Injunction pending the filing of responses and this Court's ultimate decision on this Petition. Alternatively, Appellants ask that this Court expedite responses to this petition and grant a writ of

supersedeas on the most accelerated schedule possible to avoid or minimize the irreparable harm the Preliminary Injunction is causing Appellants.

BACKGROUND

Respondents brought this action against Appellants to seeking damages and enforcement of certain obligations Respondents allege they are owed by Appellants. The underlying facts are rather complex and mostly contested regarding the relationships and obligations among the parties, as well as the propriety of both Appellants' and Respondents' conduct. Because of the emergency nature of this Petition, Appellants do not recite the factual or procedural history of this matter in any detail. Respondents' motion for a preliminary injunction and Appellants' return thereto are attached as **Exhibit D** and **Exhibit E**, respectively, and set forth the parties' respective summaries of this case and the facts underlying it. The merits of these issues as they relate to the pending appeal will be fully briefed in the normal course of filings in the appeal, but only the facts immediately relevant to Appellants' request for emergency relief are recited, with supporting document attached.

The facts relevant to emergency consideration of this Petition are:

1. Respondents are businesses which manage real estate appraisals by receiving appraisal orders, distributing these orders to individual appraisers, offering administrative support and facilitating payment to the appraisers. Respondents do not perform appraisals.[3]

2. Appellant Robert Douglas is a licensed real estate appraiser and has worked with Respondents since 2006. During his work with Respondents, he was invited to join the Veterans' Administration appraisal panel, which would not work through companies like Respondents. Respondents therefore provided no management services for the appraisals Appellant Douglas has performed for the VA.[4]

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[3] *See* **Exhibit F**, Aff. Douglas, dtd. 6/24/20, ¶¶6-8.
[4] *See* Exhibit F, ¶¶6, 11, 27.

3. Respondents became aware that Appellant Douglas was performing appraisals as part of the VA's appraisal panel, which Respondents regarded as "violating certain restrictive covenants, including covenants against competition and solicitation, and breaching and aiding and abetting in the breach of [Appellant] Wagener, Inc.'s fiduciary duties under the LLC Act" in or around May 2019.[5]

4. This action was commenced approximately a year later on May 12, 2020, and the motion for a preliminary injunction[6] was filed at the same time.[7]

5. Between May 2019 and the present, Appellant Robert Douglas's primary means of earning a living has been performing residential real estate appraisals.[8] Currently, real estate appraisals are Mr. Douglas' sole source of income.[9]

6. The existence, extent and enforceability of the "restrictive covenants" Respondents allege that Appellants have violated, as well as whether any Appellant has breached any fiduciary duty to any Respondent, are hotly contested issues in the underlying litigation.[10]

7. The effect of the Preliminary Injunction, if not immediately superseded by this Court, will halt Appellants' work abruptly and threaten Appellants' ability to ever resume or rebuild its business after the resolution of this appeal and underlying litigation.[11]

8. The Preliminary Injunction grants the ultimate relief Respondents seek against Appellants insofar as it will permanently discontinue Appellants' business before the lower court finally determines whether Respondents' claims have merit.[12]

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[5] Exhibit D, p. 5; Verif. Compl. At ¶¶33-49; Davis Aff. ¶¶21-24. (Respondents incorrectly note the date as 2018, rather 2019)
[6] Respondents' motion also sought a temporary restraining order, but none was granted.
[7] Exhibit D, p. 2.
[8] Exhibit C, ¶11.
[9] Exhibit C, ¶11.
[10] Exhibits D and E, generally.
[11] Exhibit C, ¶¶7-11.
[12] Exhibit A, p. 22, wherein the Court enjoins Appellant Wagener, Inc. from "violating its statutory fiduciary obligations under the LLC act" and enjoining Appellants Douglas and Douglas Appraisal from "aiding and abetting of such breaches of fiduciary obligation" by specifically enjoining any Appellant from performing any real estate evaluation and appraisal services." In effect, the Court has proceeded to find that Appellants' work *is a violation of the obligations under the LLC Act.*

After the entry of the Preliminary Injunction, Appellants complied therewith by suspending their business while seeking reconsideration of the Preliminary Injunction. Only weeks later, when Respondents advised that they had not complied with the bond requirement of the Preliminary Injunction and did not believe it took effect pending resolution of Appellants' timely Rule 59(e) motion, did Appellants resume their business in an effort to minimize the substantial damage the Preliminary Injunction had already caused them.[13]

The Business Court denied Appellants' Rule 59(e) motion on February 18, 2021, but allowed Respondents more time to obtain and file the bond. The Business Court further directed that the Injunction would become effective upon Respondents' filing of the bond.[14] Appellants promptly filed and served their Notice of Appeal herein on February 25, 2021. Respondents filed notice of the bond on Friday, February 26, 2021, after 6:00 p.m.

After the close of business on March 2, 2021, Respondents wrote Appellants' counsel, asserting that Appellants would be held in contempt of the Preliminary Injunction if they did not immediately escrow over $140,000.[15] Lacking any alternative to discontinuing and causing immediate, irreparable harm to their businesses, as well as being under threat of being held in contempt of an Order with which Appellants cannot comply (as to funding the escrow account), Appellant promptly prepared, filed and served this emergency petition.

[13] Exhibit C, ¶¶3-4.

[14] Exhibit B.

[15] **Exhibit G**, Ltr. of Bryant, dtd. 3/2/21.

ARGUMENT

I. This Court's Immediate, *ex Parte* Grant of a Writ of Supersedeas is Necessary and Appropriate to Avoid Mooting of Issues before this Court and the Lower Court, as well as Irreparable Harm to Appellants.

The Supreme Court has recognized that "it is difficult, if not impossible, to unring a bell." *State Record Co. v.* State, 332 S.C. 346, 356 n. 19, 504 S.E.2d 592, 597 n. 19 (1998). As set out above and in the attached Affidavit of Robert D. Douglas, the Preliminary Injunction will certainly cause massive losses to Appellants; likely cause permanent discontinuation of substantial parts of their business; and place upon them an obligation to fund a substantial escrow account which they do not have the money to fund. If the Preliminary Injunction remains in effect, both the merits of this appeal and certain claims in the underlying case will be mooted. The bell will have rung.

A primary issue in this case is Appellant's argument that no relationship with Respondents precludes Appellants from doing appraisal work not routed through Respondents, and Appellants do not owe Respondents any portion of the earnings on appraisals which do not come through Respondents. Specifically, Appellant Douglas' work for the VA, which is his largest client, does not and could not work through Respondents.[16] If this Court does not grant immediate relief from the Preliminary Injunction, Appellants will lose the VA as a client.[17] Respondents will have prevailed on these claims before a hearing on the merits. Likewise, the Preliminary Injunction effectively directs Appellants to prepay damages based on past work, despite Respondents not having proved any claim to such damages.

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[16] Exhibit F, ¶¶26-32; Exhibit C, ¶9.
[17] Exhibit C, ¶10.

Pursuant to Rule 241(b)(8), the Preliminary Injunction is not automatically stayed by the service of the Notice of Appeal herein. In order to avoid the irreparable harm caused by the Preliminary Injunction, Appellants must bring this petition seeking a writ of supersedeas pursuant to Rule 241(c). Appellants bring this emergency petition before this Court, because they previously sought a stay of the Preliminary Injunction before the Business Court.[18] By its February 18, 2021 Order denying the motion for reconsideration, the Business Court specified that the Preliminary Injunction would be effective upon Respondents' obtaining an injunction bond. This Order, by its terms, not only declined to stay the Preliminary Injunction as requested by Appellants but placed the keys to Appellants' prison *in the hands of Respondents.*

If a writ of supersedeas is not immediately granted, the merits of this appeal and contested issues below will be mooted. As set out in Appellants' Motion for Reconsideration below, Appellants respectfully submit that the Preliminary Injunction is substantively flawed, and the factual and legal bases for Appellants' arguments will be fully briefed in the course of this appeal. As set out in Mr. Douglas' affidavit filed herewith, however, Appellants will not be able to resume the business they have today if they have been enjoined for weeks, months or longer. Even an expedited briefing and decision on the merits of this appeal would result in Appellants' business being ruined.

"A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy. *Brown v. Harper*, 409 S.C. 470, 474, 761 S.E.2d 779, 781 (Ct. App. 2014), *aff'd sub nom* 410 S.C. 446, 766 S.E.2d 375 (2014). Supersedeas should be

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[18] **Exhibit H**, Motion to Alter/Amend Injunction and Motion to Stay, dtd. 12/14/20.

granted "to preserve the status quo pending the determination of the appeal . . ., and to preserve to [the] appellant the fruits of a meritorious appeal where they might otherwise be lost to him." *Graham v. Graham*, 301 S.C. 128, 130, 390 S.E.2d 469, 470 (1990) (quoting C.J.S. Appeal & Error § 662 at 494-95 (1957)). Appellate Courts should exercise their power to "supersede an order of a circuit judge. . . when it is made to appear to be necessary to prevent irreparable injury or a miscarriage of justice." *Andrews v. Sumter Commercial & Real Estate Co.,* 87 S.C. 301, 304, 69 S.E. 604, 606 (1910).

As laid out herein, the circumstances of this case are exigent, and leaving the Preliminary Injunction in effect even long enough for responses to be filed and considered stands to irreparably harm Appellants. Appellants' counsel certify that Respondents' conduct and communications make clear that they intend the Preliminary Injunction to cause just the irreparable harm Appellants seek to avoid or minimize by the filing of this Petition.[19]

Pursuant to Rule 241(d)(6), Appellants have provided substantial evidence that the Preliminary Injunction will likely be permanently destructive; coupled with the certification by Appellants' counsel that the time to give notice to Respondents will likely result in the irreparable harms discussed herein, Appellants submit that it is appropriate and necessary for this Court to grant *ex parte* supersedeas pending full consideration of the matters addressed below.

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[19] *See* Exhibit G.

If the Court does not grant immediate, *ex parte* supersedeas, Appellants ask that the Court require an immediate response from Respondents and consider this matter as immediately as possible.

II. Supersedeas is Necessary to Maintain the Status Quo as it Existed Prior to the Issuance of the Preliminary Injunction.

The granting of a temporary injunction is traditionally implemented to maintain the *status quo*, in the nature of injunctive relief *quia timet*[20]. "[T]he *sole purpose* of a temporary injunction is to preserve the *status quo*..." *Powell v. Immanuel Baptist Church*, 261 S.C. 219, 221, 199 S.E.2d 60,61 (1973) (Emphasis added). "[A] temporary injunction is [used] to preserve the subject of controversy in the condition which it is *at the time of the Order* until opportunity is offered for full and deliberative investigation and to preserve the existing status during litigation. *County Council of Charleston v. Felkel*, 244 S.C. 480, 483-484, 137 S.E. 2d 577, 578 *1964) (Emphasis added). Prohibitory injunctions are generally used to prohibit a defendant from acting to change or alter the *status quo*. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 601 (2001); *Mailsource, LLC, v. M.A. Bailey & Assoc., Inc.*, 356 S.C. 363, 368 (Ct. App. 2003). Injunctive relief is an extreme remedy and should be cautiously applied. *Scratch Golf Co. v. Dunes Residential Golf Props, Inc.*, 361 S.C. 117 (2004); *LeFurgy v. Long Cove Club Owners Assoc. Inc.*, 313 S.C. 555, 558 (Ct. App. 1994).

On the other hand, if an injunction compels the performance of an act in order to undo an alleged wrong, it changes the *status quo*, rather than preserving it. Such an injunction is a *mandatory injunction*, which is "an *especially drastic remedy* and is *rarely granted*." *Johnson v. Phillips*, 315 S.C. 407, 417 (Ct. App. 1993) (rev'd in part on other grounds by *Smith v.*

[20] *Quia timet injunction*. An injunction granted to prevent an action that has been threatened but has not yet violated the plaintiff's rights. *Blacks Law Dictionary 7th Ed.*

Phillips, 318 S.C. 453 (1995) (citing *Forest Land Co. v. Black*, 216 S.C. 255 (1950)) (Emphasis added).

The unusually high bar to obtaining a preliminary mandatory injunction that alters the status quo is best illustrated in *Mailsource, LLC, v. M.A. Bailey & Assoc., Inc.*, 356 S.C. 363, 368 (Ct. App. 2003). In *Mailsource,* the Court stated,

> "While we are troubled by the Baileys' continued insistence they are able to conduct business which is strikingly similar to the business they sold and with which they agreed not to compete, *we agree with the trial court that an injunction would alter the status quo*. Mailsource apparently knew that the retained List Right business was closely related, if not complementary, to the business it purchased, having sought and received a right of first refusal to purchase List Right if the Baileys decided to sell. Additionally, Michael Bailey states in his affidavit that List Right continues to conduct business as it did before the sale."
> Mailsource at 7 (Emphasis added).

Despite the *Mailsource* Court's seeming acknowledgment that competition in violation of the non-compete provisions was occurring as supported by the affidavits of the Defendants, given the drastic nature of injunctive relief that alters the status quo, the injunction was denied. Here, however, unlike the *Mailsource* case, Appellants have steadfastly denied competing with Respondents.

Despite language in the Order to the contrary, the Court entered a *preliminary mandatory injunction* that drastically disrupts the *status quo*. Not only does the Preliminary Injunction fail to preserve the *status quo*, it fails to narrowly tailor the relief provided to Respondents by restoring the *status quo* to the state immediately before to difficulty between the parties (as set out above, the issues between the parties in this case arose in early 2018). Rather, it grants substantially all relief requested by Respondents in their complaint by prohibiting Douglas from performing appraisals, which he has done since 2006, and ordering Appellants to deposit 35% of the revenue they have received since May, 2019, into an escrow

account tantamount to prepaying damages for breach of fiduciary duty. *All* of the aforesaid injunctive relief granted in the Order disrupts the *status quo* and is granted in light of disputed issues of fact in the record.

III. Appellants cannot comply with the preliminary injunction's mandate that they create and fund a substantial escrow account with past earnings, and supersedeas is immediately necessary to avoid Appellants' being in contempt of an order with which they cannot comply.

The Business Court, as part of the Preliminary Injunction, ordered Appellants to create and fund an escrow account with 35% of certain *past* earnings spanning a period of years. Respondents offered no evidence that Appellants have any ability to raise those funds, and Appellants have confirmed in the affidavit filed herewith that they cannot.

Respondents have already taken the position that Appellants will be in contempt of the Preliminary Injunction if the escrow account is not funded with over $140,000 by March 5, 2021, despite the fact that Appellants have no ability to comply. The Preliminary Injunction is quite obviously not issued to *preserve* funds or assets, as no evidence has been put before the Court to suggest such assets exist – even in the unlikely event Respondents are ultimately awarded damages in the lower court.

In *Grosshuesch v. Cramer*, 367 S.C. 1 (2005) the Court held that an injunction could be an appropriate remedy to *preserve* certain property of the Defendants until the matter had been fully adjudicated.[21] Unlike here, however, the Defendants in the Grosshuesch case were in control of Plaintiffs' money and had been transferring money to themselves while serving as their caregivers. Eventually, the Defendants were arrested for financial exploitation of

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[21] "We find that the Breedlovers lack an adequate remedy at law to ***preserve*** the [money] and any assets purchased therewith. *Grossheusch* at 9." (Emphasis added)

vulnerable adults and conspiracy violations. The facts of this case are starkly different from the *Gossheusch* case.

Nevertheless, even if the Court were compelled to find the Defendants had acted in a similarly nefarious manner as in *Grosshuesch*, the Order does not preserve the assets sought. There is no pot of money in the possession of Appellants that the Court is trying to preserve. Quite to the contrary, Preliminary Injunction requires that the Appellants pay its monetary damages whether they are able to pay them or not. Appellants stand in the difficult position of violating a Court Order if they can't pay damages as ordered by the Court. The remedy of ordering a Defendant to pay damages for breach of fiduciary duty prior to a hearing on the merits would be the first of its kind in South Carolina. Neither the finding in the *Grosshuesch* case or the statutory remedy of attachment would be able to provide the relief granted in the Preliminary Injunction, which is to compel the payment of monetary damages.

CONCLUSION

For the foregoing reasons, Appellants respectfully ask that the first available Judge of this Court immediately grant an *ex parte* writ of supersedeas suspending the Preliminary Injunction at issue herein until further Order of this Court, so that the responses to this petition may be filed and considered. Thereafter or in the alternative, Appellants ask that this Court consider the merits of this petition on an expedited basis and issue a writ of supersedeas pending the disposition of this appeal on the merits.

Respectfully submitted,

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March 4, 2021

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VERIFICATION

I, Robert Douglas, individually, and as the sole owner of Wagener Insurance Agency and Realty, Inc. and Douglas Appraisal, LLC, state that I, in my individual capacity and as sole owner of the entity Defendants, have read the petition for supersedeas, know the contents thereof, and the same are true to the best of my knowledge, information and belief.

Robert Douglas, individually and as the sole owner of Wagener Insurance Agency and Realty, Inc. and Douglas Appraisal, LLC

March 4, 2021

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EXHIBIT A

ELECTRONICALLY FILED - 2020 Dec 03 4:05 PM - ORANGEBURG - COMMON PLEAS - CASE#2020CP3800545

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
Business Court: The Hon. Maite Murphy

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.

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.

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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.

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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.*

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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.

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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

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[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.

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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.")).

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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.

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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,

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[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

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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).

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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.

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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.
>
> 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.
>
> 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

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[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.").

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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.

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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.

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[38] *Id.* at ¶ 24.

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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

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(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.

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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.

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(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.

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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

Electronically signed on 2020-12-03 16:00:34

EXHIBIT B

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Orangeburg
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2020CP3800545

Carolina Appraisal Group, Inc. et al
PLAINTIFF(S)

Wagener Insurance Agency And Realty, Inc. et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled);
☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☑ Statement of Judgment by the Court:

After careful consideration, the Defendants' Motion to Alter, Amend, or Reconsider the Order Granting Plaintiff's Motion for Preliminary Injunction, heard February 10, 2021, is denied, except that the ordered injunctive relief is effective only after the Plaintiffs obtain an injunction bond in the amount of $55,000, as required by Rule 65(c) of the South Carolina Rules of Civil Procedure.

ORDER INFORMATION

This order ☐ ends ☑ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 02/18/2021 .

Harrison Benjamin Davis, Jr
Douglas Appraisal, Llc for Douglas Appraisal, Llc
Robert D Douglas for Robert D Douglas
Wagener Insurance Agency And Realty, Inc. for Wagener Insurance Agency And Realty, Inc.
Douglas Appraisal, Llc for Douglas Appraisal, Llc
Robert D Douglas for Robert D Douglas
Wagener Insurance Agency And Realty, Inc. for Wagener Insurance Agency And Realty, Inc.
Harrison Benjamin Davis, Jr
The Carolina Appraisal Group-Residential W-2, Llc

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

ELECTRONICALLY FILED - 2021 Feb 18 3:11 PM - ORANGEBURG - COMMON PLEAS - CASE#2020CP3800545

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ELECTRONICALLY FILED - 2021 Feb 18 3:11 PM - ORANGEBURG - COMMON PLEAS - CASE#2020CP3800545

ELECTRONICALLY FILED - 2021 Feb 18 3:11 PM - ORANGEBURG - COMMON PLEAS - CASE#2020CP3800545

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/Electronic Form 4

So Ordered

s/ Maite Murphy 2166

Electronically signed on 2021-02-18 14:09:15

EXHIBIT C

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

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 and Third Party Plaintiffs,

v.

Harrison Benjamin Davis, Jr., The Carolina Appraisal Group-Residential W-2, LLC

Third Party Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE FIRST JUDICIAL CIRCUIT

C/A NUMBER: 2020-CP-02-00545

AFFIDAVIT OF ROBERT DOUGLAS

Robert Douglas, being duly sworn, deposes and says as follows:

1. I am an adult person with no disabilities that prevent me from giving truthful testimony in this affidavit and I make this affidavit to the best of my knowledge and belief.

2. I am a licensed South Carolina real estate appraiser that performs residential appraisals for a living.

3. On December 3, 2020, the Business Court Judge ordered me to stop working 7 days from the date of the Order and ordered the Plaintiffs to obtain an injunction bond within 30 days from the date of the Order. So, I stopped working.

4. After I stopped working, opposing counsel conceded in an email and in a brief they filed with the Court that the December 3, 2020 Order was ineffective. So, I went back to work.

5. By Order dated February 18, 2021, in response to my attorneys' request for the Judge to reconsider her December 3 Order, the Judge reversed her position on when I was required to stop working. So, I have now stopped working twice.

6. The Order also ordered me to deposit 35% of the money I have earned performing appraisals since 2019 into an escrow account within fifteen (15) days. I have no financial ability to deposit that much money into an escrow account.

7. I am fortunate to be on the appraisal panel for the Veteran's Administration and regularly perform appraisals for them. The Veteran's Administration is a very unique client that produces a good volume of work with reliable payments. The Veteran's Administration is one of my two biggest clients.

8. My appraisals for the Veteran's Administration did not go through The Carolina Appraisal Group – Residential, LLC.

9. Only select, individual appraisers (not companies like The Carolina Appraisal Group – Residential, LLC) are on the appraisal panel for the Veteran's Administration.

10. I understand if I stop working for the Veteran's Administration, I will be removed from their appraisal panel and I would hate to lose one of my biggest clients.

11. My only source of income is what I receive performing appraisals.

[EXECUTION ON FOLLOWING PAGE]

[EXECUTION PAGE FOR ROBERT DOUGLAS AFFIDAVIT]

FURTHER AFFIANT SAYETH NOT.

This 4TH day of MARCH, 2021.

_______________(L.S.)
Robert Douglas

Sworn to and subscribed before me)
this 4TH day of MARCH,)
2021.)
)
_______________)
Notary Public)
)
My Commission Expires:)

PAUL SIMONS JR.
Notary Public for South Carolina
My Commission Expires June 4th, 2024

01457456-1

EXHIBIT D

ELECTRONICALLY FILED - 2020 May 12 6:13 PM - ORANGEBURG - COMMON PLEAS - CASE#2020CP3800545

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG) FOR THE FIRST JUDICIAL CIRCUIT

C/A NUMBER: 2020-CP-38-_____

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.

MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Pursuant to Rule 65 of the *South Carolina Rules of Civil Procedure*, The Carolina Appraisal Group-Residential, LLC ("TCAG-R") and its majority member, The Carolina Appraisal Group, Inc. ("TCAG") (collectively "Plaintiffs"), respectfully move this honorable Court for issuance of a temporary restraining order and preliminary injunction against Wagener Insurance Agency and Realty, Inc. ("Wagener Inc."), Douglas Appraisal, LLC ("Douglas Appraisal"), and Robert D. Douglas ("Douglas") (collectively "Defendants").

Plaintiffs seek to enjoin Wagener Inc.'s ongoing, admitted violations of statutory fiduciary duties owed pursuant to the South Carolina Limited Liability Company Act of 1996, S.C. Code Ann. §§ 33-44-101, *et seq.* (the "LLC Act") and Douglas' and Douglas Appraisal's aiding and abetting of Wagener Inc.'s violations. Plaintiffs respectfully request a temporary restraining order be issued until the Court sets a hearing on Plaintiffs' motion for a preliminary injunction based on the grounds set forth herein. This motion is supported by the verified complaint filed by Plaintiffs on May 12, 2020, and the attached affidavit.

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BACKGROUND

This motion arises from Plaintiffs' civil lawsuit, filed May 12, 2020, arising out of Defendants' breaches of contractual agreements, including non-compete, non-solicitation, and non-disclosure covenants contained in a contract executed by Douglas in 2006 and an operating agreement executed by Wagener Inc. in connection with its membership in TCAG-R. *See* Verif. Compl. at Exhibits 1 and 2. In addition, Plaintiffs seek damages arising out of Wagener Inc.'s breaches of fiduciary duties, Douglas and Douglas Appraisal's aiding and abetting such breaches of fiduciary obligations, all Defendants' conversion of Plaintiffs' profits and corporate opportunities, and Defendants' civil conspiracy. In addition to injunctive relief, Plaintiffs seek to recover actual and consequential damages, imposition of a constructive trust over funds in Defendants' possession belonging to and/or wrongfully diverted from Plaintiffs, expulsion of Wagener Inc. as a member of TCAG-R pursuant to S.C. Code Ann. § 33-44-601, attorneys' fees and costs available under as a matter of contract and/or statutory law, and punitive damages as may be supported by the evidence and awarded by the trier of fact.

Through this motion, Plaintiffs request an order temporarily restraining, preventing, and enjoining, *pendent lite*, Wagener Inc. from further violations of its statutory fiduciary obligations and Douglas and Douglas Appraisal's aiding and abetting of such breaches of fiduciary obligations. Plaintiffs seek an order requiring:

(1) Defendants to account to Plaintiffs and to hold as trustee for Plaintiffs any property, profit, or benefit derived by Defendants from their appropriation of TCAG-R's business opportunities pursuant to the statutory mandate in S.C. Code Ann. § 33-44-409(b)(1);

(2) Defendants to refrain from dealing on behalf of each other and any third person having an adverse interest to TCAG-R pursuant to S.C. Code Ann. § 33-44-409(b)(2); and

(3) Defendants to refrain from competing, directly and indirectly, with TCAG-R in the provision of residential real estate evaluation and appraisal services pursuant to S.C. Code Ann. § 33-44-409(b)(3).

Plaintiffs have a high likelihood of succeeding on the merits of their claims for expulsion of Wagener Inc. as a member of TCAG-R, breaches of fiduciary duty by Wagener Inc., and aiding and abetting Wagener Inc.'s breaches of fiduciary duty by Douglas and Douglas Appraisal, all of which forms the basis for Plaintiffs' request for injunctive relief at this time. Plaintiffs will be irreparably harmed without the injunction and, without such relief, Plaintiffs have an inadequate remedy at law. *See Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 626 S.E.2d 34 (Ct. App. 2006). Because Plaintiffs meet all requirements for injunctive relief pursuant to Rule 65, S.C. R. Civ. P., and applicable law, a temporary restraining order and preliminary injunction are both appropriate and necessary to restore and preserve the status quo until a final determination of the merits of this action by the trier of fact.

ALLEGED VERIFIED FACTS

TCAG is a South Carolina corporation specializing in commercial and residential real estate evaluations and appraisals. Verif. Compl. at ¶ 1; Davis Aff. at ¶ 1. TCAG's principal place of business at 1107 Doyle Street, Orangeburg, South Carolina 29115. *Id.* By affiliating with individual appraisers, who work for TCAG as independent contractors, TCAG is able to perform real estate evaluations and appraisals in multiple jurisdictions. *See id.* Douglas began working for TCAG as an independently contracted residential real estate appraiser in 2006. Verif. Compl. at ¶

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7; Davis Aff. at ¶ 5. After several years of loyal service to TCAG, TCAG developed a plan to form a new subsidiary and contribute it to TCAG's existing residential real estate appraisal business and offered Douglas, and several other appraisers, the opportunity to acquire an equity interest in that new entity. Verif. Compl. at ¶ 19; Davis Aff. at ¶ 6. Of the handful of appraisers offered the opportunity to purchase a membership interest, only Douglas agreed. Verif. Compl. at ¶ 20; Davis Aff. at ¶ 7.

On or about January 13, 2009, TCAG formed TCAG-R to serve as this new subsidiary and contributed it to TCAG's existing residential real estate business. Douglas informed TCAG that he would prefer to acquire his interest in TCAG-R by and through Wagener Inc., which he wholly owns and controls. Verif. Compl. at ¶ 20; Davis Aff. at ¶¶ 7-10. Wagener Inc. is the minority member of TCAG-R, owning ten percent (10%) of the membership interests in TCAG-R. TCAG is the majority member of TCAG-R, owning the remaining ninety percent (90%) of its membership interests. Verif. Compl. at ¶¶ 21-22; Davis Aff. at ¶¶ 8-10.

On December 12, 2014, TCAG and Wagener Inc. entered into an Operating Agreement to govern the terms of their membership in TCAG-R and the entity's operations. Verif. Compl. at ¶ 23; *id.* at Exhibit 2; Davis Aff. at ¶ 12. Prior to executing the Operating Agreement, all parties consulted with separate legal counsel. Verif. Compl. at ¶ 24; Davis Aff. at ¶¶ 13-15. Douglas and Wagener Inc. were represented by counsel with respect to their rights and obligations under the proposed Operating Agreement. *Id.* Upon receiving legal advice, Wagener Inc. knowingly and willingly entered into the Operating Agreement by agreeing to its terms and executing the contract. *Id.* TCAG has performed all of its obligations under the Operating Agreement since the parties' execution thereof. *See* Verif. Compl. The Operating Agreement has not been rescinded or amended. *See id.*

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Beginning in or around 2018, Douglas and Wagener Inc. requested TCAG and TCAG-R make any commission payments, management fees, membership distributions, and any other remuneration payable to Douglas and Wagner Inc. to a new entity created by Douglas: Douglas Appraisal, LLC ("Douglas Appraisal"). Verif. Compl. at ¶ 30; Davis Aff. at ¶ 16. Douglas Appraisal was formed on or about May 10, 2018. Verif. Compl. at ¶ 31. Plaintiffs complied with Defendants' request, by paying all appraisal commissions and reimbursements, ordinarily due from TCAG to Douglas, and management fees and membership distributions, ordinarily due from TCAG-R to Wagener Inc., to Douglas Appraisal. Verif. Compl. at ¶ 30; Davis Aff. at ¶ 16. Around that same time, Plaintiffs discovered Defendants were violating certain restrictive covenants, including covenants against competition and solicitation, and breaching and aiding and abetting in the breach of Wagener Inc.'s fiduciary duties under the LLC Act. Verif. Compl. at ¶¶ 33-49; Davis Aff. at ¶¶ 21-24.

Plaintiffs confronted Defendants about their wrongful competition, breaches of contract, and breaches of fiduciary duty in or around the Spring of 2019, through TCAG's shareholder and officer and TCAG-R's manager, Ben Davis. Verif. Compl. at ¶ 39; Davis Aff. at ¶ 21. In response, Douglas admitted performing competing jobs in violation of Defendants' contractual obligations and Wagener Inc.'s fiduciary duties, said he would to continue to do so in the future, and demanded that TCAG purchase Wagener Inc.'s interest in TCAG-R for more than required by the plain and unambiguous language in the Operating Agreement or otherwise reasonable under any circumstance. *Id.* Through subsequent negotiations between counsel for the parties, Defendants admitted performing competitive work without Plaintiffs' consent from April 25, 2019 to December 12, 2019, totaling at least $56,450. Verif. Compl. at ¶ 45; Davis Aff. at ¶¶ 22-23. Plaintiffs have obtained Defendants' financial records revealing significantly higher amounts

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of competitive business performed through at least April 27, 2020 in breach of their contractual obligations and fiduciary duties. Verif. Compl. at ¶¶ 46, 49; *see also* Davis Aff. at ¶ 24.

Based on Defendants' concessions, as well as information and documentation obtained by Plaintiffs, Plaintiffs have personal knowledge that Defendants intend to continue to engage, and are currently engaging, in a competitive business in breach of the terms of certain contractual agreements, *see* Verif. Comp. at Exhibits 1 and 2, and in violation of Wagener Inc.'s fiduciary duties to TCAG-R. Douglas and Douglas Appraisal have knowingly participated in and/or directed Wagener Inc.'s breaches of fiduciary duty and have threatened to continue to do so in the future. Defendants intended to and did in fact wrongfully divert work and profits from Plaintiffs for their own benefit and currently interfering with Plaintiffs' business relationships with appraisers and customers in the industry which will likely substantially destroy Plaintiffs' business good will.

ARGUMENTS

The purpose of a temporary injunction is to preserve or restore the status quo and thus avoid possible irreparable injury to the applicant pending a full hearing on the merits of a controversy. *County Council of Charleston v. Felkel*, 244 S.C. 480, 137 S.E.2d 577 (1964). In South Carolina, to obtain an injunction, a party must demonstrate: (1) irreparable harm, (2) a 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). In addition, courts in South Carolina often balance the equities between the parties to determine if an injunction is warranted. *Kneale v. Bonds*, 317 S.C. 262 S.E.2d 840, 843 (Ct. App. 1994).

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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 System, Inc. v. Custom Recording Co.*, 258 S.C. 465, 472, 189 S.E.2d 305, 309 (1972) (quoting 43 C.J.S. Injunctions § 14 (citing *Metcalf v. Huntley-Richardson Lumber Co.*, 170 S.C. 226, 170 S.E. 162, 168 (1933)).

I. PLAINTIFFS CAN SHOW IRREPARABLE HARM AND A BALANCING OF THE EQUITIES FAVORS PLAINTIFFS.

The only purpose of an injunction is to preserve the status quo to avoid possible irreparable injury to a party pending litigation. *Peek*, 367 S.C. at 455, 626 S.E.2d at 36. "Perhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered . . . ." 11 A WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2948.1. 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. *Id.* at 455, 626 S.E.2d at 37. Further, "[b]efore granting an injunction, the trial court should balance the equities of each party and determine which side, if any, is more entitled to equitable relief." *Id.* at 455, 626 S.E.2d at 36-37.

Plaintiffs will suffer immediate and irreparable harm unless the Court restrains, prevents and enjoins, Wagener Inc. from further violations of Wagener Inc.'s statutory fiduciary duties to TCAG-R, and restrains, prevents and enjoins Douglas and Douglas Appraisal from directly or indirectly aiding and abetting such violations and benefitting therefrom. Absent an injunction, Plaintiffs 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. Based on information and documents obtained by Plaintiffs,

Defendants are already taking corporate opportunities and business from Plaintiffs and interfering with Plaintiffs' business good will. Any future determination in Plaintiffs' favor could result in an award that may not be recoverable. Plaintiffs' substantial business good will established with customers and other appraisers in the industry over more than a decade is incapable of being quantified and impossible to restore and could be destroyed by the actions that Defendants have clearly indicated they intend to continue to take absent an injunction.

In *Peek*, 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. *See, e.g., 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.").

Irreparable harm speaks to transgressions of a continuing nature. Injunctive relief is to preserve the status quo, the situation that currently exists. *See* BLACK'S LAW DICTIONARY (9th ed. 2009). Although TCAG-R is already in the process of expelling Wagener Inc. as a member of TCAG-R pursuant to S.C. Code Ann. 33-44-601, *see* Verif. Compl. at ¶¶ 83-95, like *Peek* and the cases cited therein, Plaintiffs will suffer irreparable harm through severe economic loss,

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including significant destruction of good will, if Defendants are able to usurp TCAG-R's corporate opportunities; wrongfully solicit TCAG-R's customers, employees, and independent contractors; and wrongfully perform appraisal services in violation of certain contractual agreements and statutory fiduciary obligations. Plaintiffs' inability to recover these assets and opportunities, and the resulting loss of good will, constitutes severe potential economic loss. Such loss threatens Plaintiffs' businesses as well as the value of TCAG-R and should be enjoined, especially given Defendants' blatant admissions that wrongful competitive activity and breaches of fiduciary duty have already taken place and are likely to continue.

Plaintiffs can demonstrate irreparable harm because Defendants admittedly took actions to compete against Plaintiffs and such conduct has immediately resulted in lost business opportunities to Plaintiffs, threatened TCAG-R's business and good will, and injured TCAG's financial interest in TCAG-R. Defendants have admitted performing competitive business activities outside of TCAG and without Plaintiffs' knowledge, and have threatened to continue to do so as a tactic to leverage Wagener Inc.'s buy-out from TCAG-R for more than Wagener Inc. is entitled to pursuant to the terms of the Operating Agreement or the LLC Act. Upon information and belief, without the issuance of a preliminary injunction, Defendants will continue to wrongfully and illegally usurp Plaintiffs' business opportunities as well as impair and/or destroy Plaintiffs' business good will and such wrongful conduct should be enjoined.

On the other hand, there is no harm to Defendants if a preliminary injunction is granted. Maintaining the status quo until this Court can properly determine the merits of the lawsuit fails to harm Defendants in any way. Wagener Inc.'s duties to TCAG-R are governed by the LLC Act, S.C. Code Ann. §§ 33-44-101, *et seq.* and the Operating Agreement. Under the Act, Wagener Inc. owes TCAG-R and its members, including TCAG, the duty of loyalty and care.

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S.C. Code Ann. § 33-44-409(a). Wagener Inc. also owes the specific obligation "to account to the company and hold as trustee for it any property, profit, or benefit derived by the member . . . or derived from a use by the member of the company's property, including the appropriation of a company's opportunity." S.C. Code Ann. § 33-44-409(b)(1). Wagener Inc. also owes the statutory duty "to refrain from competing with the company in the conduct of the company's business before the dissolution of the company." *Id.* at 33-44-409(b)(3).

Accordingly, the relief Plaintiffs seek from the Court—to enjoin and restrain Defendants from competing with the company, to account to the company and hold for it any property, profit, or benefit derived from appropriation of the company's opportunities, and to refrain from further violations of fiduciary duties—is consistent with the purpose and scope of the LLC Act and would have no adverse effect on Defendants beyond the statutory requirements Wagener Inc. is already obligated to follow and which Douglas and Douglas Appraisal are legally prohibited from aiding and abetting the breach of. Indeed, such an injunction would maintain the status quo as required by the LLC Act. Even if an injunction were granted and Defendants were to prevail in this case, they would be in the exact position at the lawsuit's end as they are now. No prejudice—or even risk of prejudice—results from the requested interim delay and injunction.

In balancing the equities, Plaintiffs stand to suffer more harm than Defendants by the issuance of a temporary restraining order and preliminary injunction restraining, preventing and enjoining Defendants from competing against TCAG-R, to account to TCAG-R and to hold as trustee for it any property, profit or benefit derived by Defendants from appropriation of TCAG-R's opportunities, and further violations of fiduciary obligations under the law. Therefore, the status quo should remain intact by an injunction issued by this Court.

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II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS.

Plaintiffs can show a high likelihood of success on the merits of their request for expulsion of Wagener Inc. as a member of TCAG-R and claims for breaches of statutory fiduciary duties by Wagener Inc. and aiding and abetting of Wagener Inc.'s breaches of fiduciary obligations by Douglas and Douglas Appraisal. Plaintiffs have asserted other civil claims against Wagener Inc., Douglas, and Douglas Appraisal, including breach of contract, conversion, and civil conspiracy, but is not seeking injunctive relief based on these claims at this time.

Plaintiffs need not prove their entire case but instead must make a *prima facie* showing of entitlement to the relief sought in the complaint. *See Levine v. Spartanburg Reg'l Services Dist., Inc.*, 367 S.C. 458, 465-66, 626 S.E.2d 38, 42 (Ct. App. 2005). Though the Court is required to examine the merits of the case to the extent necessary to determine whether Plaintiffs' 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 County Bd. of School Trustees*, 284 S.C. 299, 326 S.E.2d 163 (Ct. App. 1985). In other words, Plaintiffs "need only present a fair question . . . as to the existence of such" rights. *Levine*, 367 S.C. at 465, 626 S.E.2d at 42 (*quoting Williams v. Jones*, 92 S.C. 342, 347, 75 S.E.2d 705, 710 (1912)). "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. City of N. Myrtle Beach*, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992).

A. Judicial expulsion of Wagener Inc. from TCAG-R.

Plaintiffs can demonstrate a fair question on the merits of Plaintiffs' demand for expulsion of Wagener Inc. as a member of TCAG-R pursuant to the LLC Act, which governs

TCAG-R and the relationship between TCAG and Wagener Inc. TCAG is an undisputed member of TCAG-R and has supported its request for expulsion of Wagener Inc. pursuant to S.C. Code Ann. § 33-44-601 ("Events causing members' dissociation"). Under the Act, a member is dissociated from a limited liability company upon the occurrence of any of the following events, each of which Plaintiffs can prove occurred in this case:

> (1) the company's having notice of the member's express will to withdraw as a member;
> (2) an event agreed to in the operating agreement as causing the member's dissociation;
> . . .
> (5) the member's expulsion by unanimous vote of the other members if:
> . . .
> (iv) a partnership or limited liability company that is a member has been dissolved and its business is being wound up.

TCAG owns ninety percent (90%) of the membership interests in TCAG-R and constitutes the only other member of the company, in addition to Wagener Inc. TCAG has not wrongfully dissociated from TCAG-R. When confronted with evidence of violations of the Operating Agreement and fiduciary obligations, Douglas, as sole shareholder of Wagener Inc., admitted to Wagener Inc.'s breaches of the Operating Agreement and fiduciary obligations. Defendants threatened to continue such wrongful acts or omissions unless TCAG purchased Wagener Inc.'s 10% membership interest in TCAG-R, thereby providing the company with notice of Wagener Inc.'s express will to withdraw as a member.

Further, TCAG has also submitted an application to this Court, by and through its filing of a verified complaint filed on May 12, 2020, for expulsion of Wagener Inc. based on the good cause evidence, namely the dissention between TCAG and Wagener Inc., Wagener Inc.'s breaches of the Operating Agreement, Wagener Inc.'s breaches of fiduciary duties under the LLC Act, and all Defendants' wrongful benefit from Wagener Inc.'s wrongful acts or omissions. TCAG, as the sole other member of TCAG-R, unanimously consents to expel Wagener Inc.

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based on these wrongful acts or omissions, together with Wagener Inc.'s dissolution on October 25, 2019, and statement by Wagener Inc., through its legal counsel that Wagener Inc. discontinued operations in 2018.

Although "good cause" is not required for a judicial finding of expulsion of a member under the LLC Act, it is important for the Court to recognize that good cause supports Plaintiffs' requested relief for expulsion of Wagener Inc. in this case. "Good cause" is not defined by S.C. Code Ann. § 33-44-803 and has not been interpreted by our state's courts in the context of the LLC Act. However, courts in other jurisdictions which have likewise adopted the Uniform LLC Act, have applied and interpreted the meaning of "good cause" in cases with similar facts to the case at bar. *See, e.g., Gailey v. Tibbets*, 2003 WL 1995954 (Conn. Super. Ct. April 8, 2013) (unpublished) (finding good cause existed where partner claimed that direction and supervision was necessary to make proper payments and distribution to creditors and partners); *Norris v. Stuart*, No. M2004-01839-COA-R3-CV, 2006 WL 721299 (Tenn. Ct. App. Mar. 20, 2006) (unpub.) (finding good cause where the plaintiff alleged defendant failed to properly account to plaintiff). In *Norris*, the court held: "[The defendant's] actions during the nine months prior to the commencement of this action were sufficient for the [plaintiff] and the [Court] to question his loyalty to the partnership" and therefore, appointment of a receiver was appropriate. *Id.* at *4.

Here, Plaintiffs have evidenced the dissention between TCAG and Wagener Inc., the sole members of TCAG-R. Wagener Inc. has admitted usurping company opportunities, engaging in competitive business enterprises, and has refused to stop unless released from its non-compete and non-solicitation covenants in the Operating Agreement and bought out for its membership interest for an amount more than that required to be paid under the terms of the Operating Agreement or otherwise reasonable. Wagener Inc. has admitted receiving significant sums of

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money for its wrongful competition. The extreme discord between the parties constitutes good cause for expulsion of Wagener Inc. as a member of TCAG-R under the LLC Act.

B. Breach of Wagener Inc.'s fiduciary duties to TCAG-R

Plaintiffs are likely to succeed on the merits of their claim against Wagener Inc. for breaches of fiduciary duty. Under South Carolina law, 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 owed to the plaintiff by the defendant, 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).

It cannot be genuinely disputed that Wagener Inc. is a member of TCAG-R and owes fiduciary duties of loyalty and care to TCAG-R 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 Inc.] . . . or derived from a use by [Wagener Inc.] of [TCAG-R]'s property, including the appropriation of [its business] opportunit[ies]," S.C. Code Ann. § 33-44-409(b)(1), and the duty "to refrain from competing with the company in the conduct of the company's business[.]" *Id.* at 33-44-409(b)(3).

Wagener Inc. has already admitted to breaching its fiduciary duties by engaging in competitive business since at least April 2019 (although Plaintiffs have reason to believe the wrongful activity occurred as far back as 2018) and has threatened to continue to engage in such violations of its fiduciary duties if not bought out for its membership interest in an amount substantially more than what is owed under the terms of the Operating Agreement. Based on Wagener Inc.'s admission of engaging in wrongful competitive business activity outside of

TCAG-R, and failing to account to TCAG-R and hold such profits for TCAG-R's benefit, Plaintiffs have been damaged and are likely to be irreparably damaged in the future if Wagener Inc. is not enjoined.

C. Douglas' and Douglas Appraisal's aiding and abetting Wagener Inc.'s breaches of fiduciary duties

Plaintiffs are also likely to succeed on their claim against Douglas and Douglas Appraisal for aiding and abetting Wagener Inc.'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, it is beyond genuine dispute that Wagener Inc. has breached its fiduciary duties to TCAG-R and Plaintiffs have been damaged.

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). Douglas is an independently contracted appraiser who has worked for TCAG since 2006 and for TCAG-R since it was created in 2009. Douglas is the sole shareholder or member and manager or other officer of both Wagener Inc. and Douglas Appraisal. Douglas has admitted his knowledge of Wagener Inc.'s breaches of fiduciary duty. Indeed, it was Douglas, speaking for Wagener Inc., who threatened to continue to engage in competitive business activities if Wagener Inc.'s interest was not purchased by TCAG for more than that required by the Operating Agreement. In addition, Douglas is the sole shareholder of Douglas Appraisal. Douglas Appraisal's business is inextricably intertwined with that of Douglas and Wagener Inc. As evidenced by the attached affidavits, Douglas and Wagener Inc. requested TCAG and TCAG-R pay to Douglas Appraisal any and all sums due to Douglas and/or Wagener

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Inc., including wages, commissions, distributions, management, fees, and other reimbursement for Douglas and/or Wagener Inc.'s work for TCAG and TCAG-R.

Plaintiffs have adduced sufficient evidence to show that Douglas and Douglas Appraisal not only know of Wagener Inc.'s breaches of its fiduciary duties but also actively participated in and/or directed them. Indeed, based on Defendants' counsel's representations, Wagener Inc. discontinued its operations in 2018, giving Plaintiffs sufficient grounds to believe that Wagener Inc.'s breaches of fiduciary duties are occurring directly and/or indirectly through Douglas and/or Douglas Appraisal.

III. PLAINTIFFS HAVE NO ADEQUATE REMEDY AT LAW.

"[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 (citing *MailSource, LLC v. M.A. Bailey & Assocs.*, 356 S.C. 363, 588 S.E.2d 635 (Ct. App. 2003)). "A temporary injunction is used to preserve the subject of controversy in the condition which it is at the time of the [o]rder until opportunity is offered for full and deliberate investigation and to preserve the existing status during litigation." *Id.* "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). Therefore, an applicant seeking a preliminary injunction must have no adequate remedy at law. *State ex rel. Attorney Gen. v. Kizer*, 164 S.C. 383, 162 S.E. 444 (1931). "However, 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 (citing *Columbia Broadcasting System v. Custom Recording Co.*, 258 S.C. 465, 189 S.E.2d 305 (1972), *cert. denied*, 409 U.S. 1007, 93 S. Ct. 437

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(1972); *Kirk v. Wyman*, 83 S.C. 372, 65 S.E. 387 (1909)); *see also Levine*, 367 S.C. 458, 626 S.E.2d 38.

Plaintiffs have no adequate remedy at law if an injunction is not granted and Wagener Inc. continues violating its statutory fiduciary duties with the help and assistance of Defendants Douglas and Douglas Appraisal. Plaintiffs' ability to obtain money damages if ultimately successful will prove meaningless given the limited ability to recover these amounts where assets have been hidden, sold, or disposed of and Plaintiffs' relationships with customers and good will has been eviscerated. Moreover, Defendants' ongoing violations threaten to irreparably destroy Plaintiffs' business good will in the market, including its relationships with customers and other appraisers. TCAG-R has spent at least the last decade establishing its good will and TCAG has been building its relationships with customers and other appraisers in the industry for significantly more time. Defendants' wrongful acts threaten to destroy this good will and these relationships, which is difficult to quantify and nearly impossible to rebuild.

Courts in other jurisdictions have ordered and upheld injunctive relief to prevent the loss of a business or business goodwill. *See 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.").

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Here, as a specific example of irreparable loss of business and future good will that is not easily calculated in pecuniary terms is Plaintiffs' significant efforts to obtain the appraisal business of the U.S. Department of Veteran's Affairs ("VA"). Beginning in or around mid-to-late 2018, Plaintiffs began negotiating with the VA to perform real estate appraisal services. As a result, Plaintiffs and was processed through an extensive approval process with the VA to be able to perform these services in the future. Douglas was aware of and actively involved with Plaintiffs' negotiations and discussions with the VA about future real estate appraisal services.

Following Plaintiffs' extensive negotiations with and efforts to be approved by the VA to perform real estate appraisal services, no later than 2018, Defendants, for themselves and/or on behalf of others, took advantage of Plaintiffs' relationships and efforts and began performing competing appraisals for the VA for their own benefit and financial gain and in direct competition with Plaintiffs in violation of the restrictive covenants contained in the Non-Compete and Non-Solicitation Agreement and Operating Agreement, as well as and in violation of Douglas' duties of loyalty to TCAG and Wagener Inc.'s fiduciary duties to TCAG-R. By doing so, Defendants have usurped opportunities from Plaintiffs. When confronted about the appraisal work specifically performed for the VA in violation of Douglas' and Wagener Inc.'s duties and covenants, Douglas admitted performing these competing jobs and threatened to continue to do so in the future. Defendants' wrongful acts and omissions as to Plaintiffs' business relationship and future good will with the VA has likely been irreparably destroyed and such damage to Plaintiffs' relationships in the industry and good will is difficult, if not impossible, to quantify.

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CONCLUSION

For the foregoing reasons, Plaintiffs have suffered and will continue to suffer irreparable injury in the form of economic and financial loss and substantial loss of good will, established over more than a decade, if injunctive relief is not granted. Accordingly, Plaintiffs respectfully request the Court enter an order temporarily restraining, preventing, and enjoining, *pendent lite*, Wagener Inc. from further violations of its statutory fiduciary obligations and Douglas and Douglas Appraisal's aiding and abetting of such breaches of fiduciary obligations, requiring:

(1) Defendants to account to Plaintiffs and to hold as trustee for Plaintiffs any property, profit, or benefit derived by Defendants from their appropriation of TCAG-R's business opportunities pursuant to S.C. Code Ann. § 33-44-409(b)(1);

(2) Defendants to refrain from dealing on behalf of each other and any third person having an adverse interest to TCAG-R pursuant to S.C. Code Ann. § 33-44-409(b)(2); and

(3) Defendants to refrain from competing, directly and indirectly, with TCAG-R in the provision of residential real estate evaluation and appraisal services pursuant to S.C. Code Ann. § 33-44-409(b)(3).

Respectfully submitted,

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May 12, 2020.

EXHIBIT E

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STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

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 and Third Party Plaintiffs,

v.

Harrison Benjamin Davis, Jr., The Carolina Appraisal Group-Residential W-2, LLC

Third Party Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE FIRST JUDICIAL CIRCUIT

C/A NUMBER: 2020-CP-38-00545

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

COME NOW Wagener Insurance Agency and Realty, Inc. ("**Wagener Inc**."), Douglas Appraisal, LLC ("**Douglas Appraisal**"), and Robert D. Douglas ("**Douglas**" and together with Wagener, Inc. and Douglas Appraisal collectively, "**Defendants**"), and files this Memorandum in Opposition to Plaintiffs' Motion for a Preliminary Injunction filed by The Carolina Appraisal Group, Inc. ("**TCAG**") and The Carolina Appraisal Group-Residential, LLC ("**TCAG-R**" and together with TCAG collectively, "**Plaintiffs**"). In support of its motion for a preliminary injunction, Plaintiffs are requesting this Court for an "order temporarily preventing and enjoining, *pendente lite,* Wagener Inc. from further violations of its statutory fiduciary obligations." In essence, the basis for their injunction rests on the notion that Wagener Inc. is violating its duties owed to TCAG, the other member of TCAG-R, under South Carolina statute.

FACTS AND PROCEDURAL BACKGROUND

A certain amount of explanation regarding the detailed workings of the appraisal business is necessary before delving into the facts of this case. Following the Great Recession of 2008, much of which was caused by the mortgage business, new limitations were placed on the appraisal industry, particularly on the interplay between lenders and appraisers. As a result, new regulations were placed mandating that lending institutions, rather than using and maintaining their own list of appraisers, employ a method intended to insulate appraisers from the pressures often placed on them by lenders to artificially inflate the values of the homes they appraise. One result of this was to add a 3rd party to act as an intermediary between lenders and appraisers that would keep them at arm's length.

When a lender required that an appraisal be conducted on a particular property, it would turn the process over to an Appraisal Management Company ("**AMC**"), which, in turn, would turn the appraisal order over to one of the independent contractors on its appraisal panel to perform the appraisal. There are hundreds of such AMCs around the country and each has many independent contractors on their appraisal panels. The AMC is responsible for managing the process of having the appraisal performed, including providing administrative duties such as receiving appraisal orders and appraisal reports, submitting completed appraisal reports to lenders and underwriters, collecting fees from the lenders and underwriters for services provided, and reimbursing the appraisers for the appraisals they performed. ***AMCs, like Plaintiffs' Business (as defined below), are not licensed appraisers and do not perform any actual appraisal work.***

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[1]In 2006, Douglas became involved with Harrison Benjamin Davis's ("**Davis**") appraisal management services business ("**Business**") while serving as an apprentice appraiser under Davis. The Business provides appraisal management services and fits the definition of an AMC under South Carolina statute.[2] Douglas eventually became a certified residential appraiser and began performing appraisals for the Business and served, ***as an independent contractor***, on the Business's appraisal panel until recently. In 2008, Davis offered Douglas and other independently contracted appraisers on the Business's appraisal panel the opportunity to invest in the Business. Douglas acquired a 5.0% interest in the business in late 2008 or early 2009 and another 5.0% interest thereafter. In 2009, Davis formed TCAG-R. TCAG-R is a manager-managed limited liability company in the State of South Carolina – Davis is its manager, and Wagener, Inc. is a minority member. The amended articles or organization for TCAG-R where it converted to a manager-managed company is attached hereto as Exhibit "A".

In 2010, Davis presented Douglas with a draft operating agreement for TCAG-R ("**2010 Operating Agreement**") that had been prepared by attorney Eugene Ott. Douglas had his attorney, Jackie Busbee, examine the 2010 Operating Agreement. After discussing the terms of the 2010 Operating Agreement with Jackie Busbee, Douglas was not pleased with the draft, but because he was earning a livelihood as a member of the Business's appraisal panel and expecting

[1] The following factual recitation is taken from the affidavits of Robert Douglas, Jackie Busbee, and Mackey Wood, which are on file with the Court.
[2] "Appraisal management company" means an external third party, in connection with valuing properties…that oversees a network or panel of more than fifteen certified or licensed appraisers in a state or twenty-five or more nationally within a given year in order to:
(a) recruit, select, and retain appraisers;
(b) contract with licensed and certified appraisers to perform appraisal assignments;
(c) ***manage the process of having an appraisal performed, including providing administrative duties such as receiving appraisal orders and appraisal reports, submitting completed appraisal reports to creditors and underwriters, collecting fees from creditors and underwriters for services provided, and reimbursing appraisers for services performed***. S.C. Code Ann. Section 40-60-320 (1) (Emphasis added).

Wagener, Inc. to realize a return on its investment, he reluctantly decided he could live with the 2010 Operating Agreement. However, the 2010 Operating Agreement was never signed.

Four years later, in December 2014, Davis sent Douglas another draft operating agreement ("**2014 Operating Agreement**") and demanded Douglas sign it for management purposes.[3] Davis had previously indicated there were two changes made from the 2010 Operating Agreement: (i) the inclusion of an insurance-funded buyout provision upon the death of either Davis or Douglas, and (ii) the inclusion of a $100 weekly payment to Douglas for consulting with members of the appraisal panels who had appraisal-related questions about particular appraisals they were doing. One or two days after Davis first presented Douglas with the 2014 Operating Agreement, Davis contacted Douglas again and told him he needed to have the 2014 Operating Agreement signed and returned to him that day. Based on Davis's statements that the draft Douglas was signing was the same as the 2010 Operating Agreement with the two exceptions indicated above, Douglas signed the 2014 Operating Agreement. The 2014 Operating Agreement was vastly different than the 2010 Operating Agreement and contains numerous, severely onerous provisions in favor of Davis and to Douglas's detriment.

Plaintiffs brought suit on May 12, 2020 alleging breach of contract, breach of fiduciary duties, aiding and abetting breach of fiduciary duties, conversion, and civil conspiracy. Defendants answered on June 22, 2020, bringing counterclaims and third-party claims. On May 12, 2020, Plaintiffs filed their Motion for Preliminary Injunction and are seeking to prevent Douglas from performing appraisals.

[3] Notably, on the very same day the 2014 Operating Agreement was executed, Davis executed amended articles of organization for TCAG-R (See Exhibit "A") naming him the manager with complete control over TCAG-R. Presumably, these were the "management purposes" to which Davis was referring.

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LEGAL AUTHORITY

In order to obtain a temporary injunction, Plaintiffs must show that without the injunction, Plaintiffs will suffer irreparable harm, that they have a likelihood of success on the merits of their claims, and that there is no adequate remedy at law. *Poynter Ivs., Inc. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 586-87 (2010). The Court shall only issue a preliminary injunction upon a showing of the above elements and that an injunction is ***necessary*** to preserve the status quo. *Id.* (Emphasis added). A preliminary injunction is an "extraordinary remedy" and it "should be cautiously applied." *Winter v. Nat. Re. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *LeFurgy v. Long Cove Club Owners Assoc. Inc.*, 313 S.C. 555, 558 (Ct. App. 1994).

I. Plaintiffs Will Not Suffer Irreparable Harm without a Temporary Injunction

To obtain a preliminary injunction, Plaintiffs must show they will suffer irreparable harm without a preliminary injunction. *Hook Point, LLC v. Branch Banking and Trust Co.*, 397 S.C. 507, 511 (2012). Further, since a motion for preliminary injunction is "based on an urgent need for the protection" Plaintiffs' rights, a delay in demanding injunctive relief, "indicates that speedy action is not required." *Quince v. Orchard Valley Citizens Ass'n, Inc. v. Hodel*, 872 F.2d 75, 80 (4th Cir. 1989) (citing *Skehan v. Bd. Of Trustees of Bloomsburg State College*, 353 F. Supp. 542, 543 (M.D. Pa. 1971)) (internal quotations omitted). Courts outside of this jurisdiction, find the "Plaintiffs' own delays to be the most convincing evidence" that plaintiffs will not suffer irreparable harm. *NACCO Indus. v. Applica, Inc.*, 2006 U.S. Dist. LEXIS 91940, at 8-9 (N.D. Oh. December 20, 2006). Further, these courts generally deny injunctive relief in cases when the plaintiff has delayed requesting injunctive relief for more than two months since the plaintiff was aware of the conduct giving rise to the motion. *See, e.g.*, *Galaton v. Johnson*, 2011 U.S. Dist. LEXIS 92125, at 7 (E.D. NC, August 17, 2011) (noting that injunctive relief was requested a month

after the complaint was filed and holding that Plaintiff "waited until the fifty-ninth minute of the eleventh hour to seek an extraordinary equitable remedy"); *Forry Inc. v. Neundorfer, Inc.*, 837 F.2d 259, 267 (6th Cir. 1988) (stating "a substantial period of delay mitigates against the issuance of a preliminary injunction by demonstrating that there is no apparent urgency to the request for injunctive relief").

In this matter, Plaintiffs have delayed requesting injunctive relief since becoming aware of the facts forming their claims since "early 2019." Plaintiffs ***waited over a year*** to request a preliminary injunction which indicates that "speedy action is not required" and that their delay is the "most convincing evidence" that Plaintiffs have not and will not suffer irreparable harm.

Further, Plaintiffs do not show any evidence to actual irreparable harm caused by Defendants. Douglas is an independent contractor for the Business offering his services as an independent contractor on its appraisal panel. It is common practice for appraisers on the Business's appraisal panel to be members of multiple appraisal panels as independent contractors and also to perform appraisals directly for other lenders. (*See* Affidavit of Mackey Wood). The "harm" claimed by Plaintiffs of Douglas completing appraisal jobs directly for other AMCs and Lenders is done by most, if not all, members of the Business's appraisal panel and can hardly be considered irreparable.

II. Plaintiffs are Unable to Show That They Will Likely Succeed on the Merits of their Claims.

A preliminary injunction is not warranted in this case because Plaintiffs cannot show that they will likely succeed on the merits of their claims for breaches of fiduciary duties by Defendants or aiding and abetting of the alleged breaches of breach of fiduciary duties by Defendants. Plaintiffs must make a "clear showing that they are likely to succeed at trial." *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 345 (4th Cir. 2009) (citing *Winter*, 555 U.S. 7, 129 S. Ct. 365-

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76 (2008)) (vacated on other grounds, Parts I and II reissued by *Real Truth About Obama, Inc. v. FEC*, 607 F.3d 355 (4th Cir. 2010)). To show a likelihood of success on the merits of a claim for breach of fiduciary duties, the plaintiff must make a prima facie showing that: there is a duty, a breach of that duty owed, and damages were proximately caused by the alleged breach. *RFT Management Co., LLC v. Tinsley & Adams, LLP.*, 399 S.C. 322 (2012).

As an initial matter, neither Wagener, Inc. nor Douglas is competing with the Business because the Business cannot perform appraisals. However, for the sake of argument, even if Douglas were competing with the Business, it is completely within his right to do so as a passive member of a manager-managed limited liability company ("**LLC**"). Contrary to Plaintiffs' claims, they are not likely to succeed on the merits of their claim of breach of fiduciary duty by Wagener, Inc. because ***Wagener, Inc. owes no duties to TCAG-R to refrain from competing against it***.

The provisions of South Carolina law governing the scope of duties members of LLCs owe each other differentiate between "member-managed" LLCs and "manager-managed" LLCs. In a member-managed LLC, each member has an equal right in the management and conduct of the LLC's business, and matters relating to the LLC's business are decided by a majority vote of the members. In a manager-managed company, each manager has an equal right in the management and conduct of the LLC's business. This distinction matters because the members of a member-managed LLC owe duties to the LLC and the other members, including a duty of loyalty, a duty to act fairly when dealing with the LLC, and a duty not to compete with the LLC. (*See* S.C. Code Ann. Section 33-44-409 (a) and (b)).

On the other hand, a member of a manager-managed LLC "who is not also a manager ***owes no duties to the company or to the other members*** solely by reason of being a member." S.C. Code Ann. Section 33-44-409(h)(1) (Emphasis added). Plaintiffs' base their claims that a duty is

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owed them on statutes that are inapplicable in this case. S.C. Code Ann. §§ 33-44-409(a)-(b) apply ***only*** to member-managed LLCs – "[t]he only fiduciary duties a member owes to a ***member-managed*** company and its other members are the duty of loyalty and the duty of care imposed by subsections (b) and (c)." S.C. Code Ann. § 33-44-409(a) (Emphasis added).

The South Carolina Limited Liability Company Act defines a manager-managed company as "a limited liability company ***which is so designated in its articles or organization***." S.C. Code Ann. Section 33-44-101 (11) (Emphasis added). So, to determine whether an LLC is member-managed or manager-managed, one need only review the articles of organization on file with the Secretary of State's Office. In this case, TCAG-R is a manager-managed company managed by Davis as indicated in its articles of organization. (*See* Exhibit "A".) Therefore, S.C. Code Ann. § 33-44-409(h)(1) provides the duties Wagener, Inc. owes TCAG and TCAG-R, which is no duty. Since Wagener, Inc. owes no fiduciary duties to TCAG-R as a member of a manager-managed LLC, Plaintiffs cannot show a likelihood of success on the merits.

III. Plaintiffs have an adequate remedy at law, which is monetary damages

A preliminary injunction should not be granted where the Plaintiff has an adequate remedy at law. *Hampton v. Haley*, 403 S.C. 395 (2013). Each claim brought by Plaintiffs would allow Plaintiffs to be made whole, if successful, through monetary damages as evidenced by Plaintiffs' requests for actual, consequential, and punitive damages. For the sake of argument, even if Plaintiffs prevail on their claims for breach of fiduciary duty, their damages are very easily capable of calculation. For each appraisal Defendant Douglas performs as a member of TCAG-R's appraisal panel, he receives 65% of the cost of the appraisal and TCAG-R receives 35% of the cost of the appraisal (*See* Affidavit of Robert Douglas). In the unlikely event Plaintiffs can prevail on their claims that Douglas breached a fiduciary duty, then Plaintiffs would be entitled to 35% of the

revenue for all appraisals Douglas performed outside of TCAG-R. Such a calculation can be easily made and affords Plaintiffs a complete remedy at law, which is monetary damages.

IV. Plaintiffs' request for an injunction does not maintain the status quo

The purpose of injunctive relief is to "preserve the status quo." *Poynter* at 586-87. This, naturally, is a prohibitory injunction – an injunction "that forbids or restrains" the Defendant from changing the status quo. *See* Black's Law Dictionary. (9th ed. 2009). Here, however, the Plaintiffs are demanding a change to the status quo, so the injunction requested is a mandatory injunction. A mandatory injunction is "an especially drastic remedy which is rarely granted" and it orders an affirmative act and disrupts the status quo. *Johnson v. Phillips*, 315 S.C. 407 (Ct. App. 1993) (rev'd in part on other grounds by *Smith v. Phillips*, 318 S.C. 483 (1995)); *see* Dan B. Dobbs, Law of Remedies, 163 (2d ed. 1993). Plaintiffs are asking this Court to upset the status quo.

In this case, a preliminary injunction is not necessary to preserve the status quo. Appraisers working for Plaintiffs as independent contractors have worked simultaneously for other appraisal panels, Lenders, and Plaintiffs. (*See* Affidavit of Mackey Wood). Here, the ***status quo will be interrupted*** with the granting of a preliminary injunction because an injunction would detrimentally affect Douglas's livelihood by eliminating the primary source of his income. Plaintiffs make this request without the ability to show that they will succeed on the merits of their claims, that they will suffer irreparable harm, or that there is no adequate remedy at law.

CONCLUSION

"An injunction is a *drastic* remedy" that the Court may grant in order to prevent irreparable harm to the Plaintiff and to maintain the status quo. *Scratch Golf Co. v. Dunes West Residential Golf Props.*, 361 S.C. 117, 121, 603 S.E.2d 905, 907 (2004). Here, Plaintiffs' request is not proper because Plaintiffs cannot show that they will suffer irreparable harm without injunctive relief, are

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likely to succeed on the merits of their claims, or that there is no adequate remedy at law. Defendants respectfully ask the Court to deny Plaintiff's Motion for Preliminary Injunction, and ***preserve*** the status quo, rather than interrupt it.

HULL BARRETT, PC

By: *S/ Robert L. Buchanan, Jr.*

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ATTORNEYS FOR DEFENDANTS

Aiken, South Carolina
August 5, 2020.

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EXHIBIT F

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STATE OF SOUTH CAROLINA COUNTY OF ORANGEBURG	IN THE COURT OF COMMON PLEAS FOR THE FIRST JUDICIAL CIRCUIT
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 and Third Party Plaintiffs, v. Harrison Benjamin Davis, Jr., The Carolina Appraisal Group-Residential W-2, LLC Third Party Defendants.	C/A NUMBER: 2020-CP-02-00545 **AFFIDAVIT OF ROBERT DOUGLAS**

Robert Douglas, being duly sworn, deposes and says as follows:

1. I am an adult person with no disabilities that prevent me from giving truthful testimony in this affidavit.

2. I have read the Answer, Counterclaim, and Third Party Complaint on file with the Court in this action; to the best of my knowledge, the information contained therein is true and correct except as otherwise expressly set forth herein to the contrary and matters stated therein to be alleged upon information and belief; as to matters alleged upon information and belief, I believe them to be true.

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3. I am the sole shareholder of Wagener Insurance Agency and Realty, Inc. ("Wagener Inc.") and the sole member of Douglas Appraisal, LLC ("Douglas Appraisal"), which are defendants in the captioned action.

4. Harrison Benjamin Davis, Jr. ("Davis") and I have a longstanding business relationship.

5. Around 2006, I became involved with Davis's appraisal management services business ("Business").

6. The Business is responsible for managing the process of having appraisals performed, including providing administrative duties such as receiving appraisal orders and appraisal reports, submitting completed appraisal reports to lenders and underwriters, collecting fees from lenders and underwriters for services provided, and reimbursing appraisers for the appraisals they perform.

7. When a lender or other client needs an appraisal performed on a particular property, in many instances they turn the process over to a company like the Business. The Business, in turn, contracts with an appraiser on its appraisal panel to perform the appraisal. When the appraisal is complete, the appraiser splits the cost of the appraisal with the Business based on an agreed upon percentage which typically results in the individual appraiser receiving 65% - 75% of the cost of the appraisal.

8. The Business is not a licensed appraiser and does not perform any actual appraisal work.

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9. Upon information and belief, all appraisers currently serving on the Business's appraisal panel, as independent contractors, also appraise real estate for other companies similar to the Business and their own customers, and such appraisal fees are not shared with the Business.

10. I first became involved in the Business as an apprentice appraiser under Davis.

11. I eventually became a certified residential appraiser and began performing appraisals for the Business and served, as an independent contractor, on the Business's appraisal panel until recently.

12. I have never been an employee of TCAG (as defined below) and/or TCAG-R (as defined below).

13. In 2008, Davis met with me and other members of the appraisal panel and offered us the opportunity to buy an ownership interest in the Business in an effort to raise capital.

14. Davis's offer was for the investors to buy an ownership interest in the Business valuing the Business at 65% of trailing 12 month revenues.

15. On December 30, 2008, I invested money in the Business by tendering a $26,000 check payable to The Carolina Appraisal Group, Inc. ("TCAG").

16. On or around July 28, 2010, Wagener Inc. acquired an interest in The Carolina Appraisal Group – Residential, LLC ("TCAG-R") by paying ten percent (10%) down, and financing $23,4000 with TCAG-R at an interest rate of seven and one half perfect (7.5%) per annum, for a term of four years, payable in monthly installments of $565.79, which indebtedness has been paid in full.

17. In December 2010, Davis provided me a draft operating agreement ("2010 Operating Agreement") for TCAG-R that had been prepared by attorney Eugene Ott. After

receiving the 2010 Operating Agreement I forwarded it to my longtime attorney, Jackie Busbee, for her review. A true and correct copy of the 2010 Operating Agreement is attached hereto as Exhibit "A" and incorporated herein by reference.

18. After discussing the terms of the 2010 Operating Agreement with Jackie Busbee, I was not pleased with the draft, but because I was earning a livelihood as a member of the Business's appraisal panel and expecting Wagener Inc. to realize a return on its investment, I reluctantly decided I could live with the 2010 Operating Agreement. However, the 2010 Operating Agreement was never executed.

19. Four years later, in December 2014, Davis sent me another draft operating agreement ("2014 Operating Agreement") and demanded I sign the operating agreement for management purposes. Davis had previously indicated there were two changes made from the 2010 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 to me for consulting with members of the appraisal panels who had appraisal-related questions about particular appraisals they were doing.

20. 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 the 2014 Operating Agreement signed and returned to him that day. Based on Davis's statements that the draft I was signing was the same as the 2010 Operating Agreement with the two exceptions indicated above, I signed the 2014 Operating Agreement.

21. Davis never indicated to me the 2014 Operating Agreement had been prepared by Adams and Reese, LLP.

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22. I did not have my attorney, Jackie Busbee, review the 2014 Operating Agreement as I was led to believe I was signing the 2010 Operating Agreement with the two exceptions indicated above.

23. In or around April, 2019, I received a K-1 from TCAG-R indicating I had received a $5,000 distribution from TCAG-R during the 2018 tax year. I never received the $5,000 despite receiving the K-1. When I asked Davis why I never received the $5,000, he became agitated.

24. Shortly thereafter I noticed a drop off in the number of appraisal orders I was receiving from TCAG-R.

25. At some point in time, someone from TCAG-R prepared and submitted a partially completed application for me to become an appraiser on the Veteran's Administration ("VA") appraisal panel.

26. Later, I was contacted directly by the VA and was told that my application was incomplete, so I finished completing the application and personally re-submitted it to the VA.

27. Upon information and belief, the VA has their own appraisal panel of individual appraisers and will not process their appraisals through companies like the Business. So, for VA appraisal orders I perform, neither TCAG nor TCAG-R could provide appraisal management services.

28. In order to be approved as a VA appraiser, the VA reviewed my completed application that included samples of my work product, conducted multiple interviews with me, and requested and reviewed a demo appraisal performed by me to be certain I could comply with the VA scope of work requirements. After conducting the aforementioned due diligence, they asked me to become an appraiser on their appraisal panel, to which I agreed.

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29. At that point, I informed Davis that I had been admitted to the VA appraisal panel.

30. Later, he demanded I pay TCAG-R 35% of all appraisal fees I received from the VA appraisal work. When I refused, we mutually agreed our partnership should be dissolved.

31. I asked Davis to purchase my ownership interest in the Business for an amount less than my total overall initial investments, but Davis refused.

32. 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.

[EXECUTION ON FOLLOWING PAGE]

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[EXECUTION PAGE FOR ROBERT DOUGLAS AFFIDAVIT]

FURTHER AFFIANT SAYETH NOT.

This 24TH day of JUNE, 2020.

_______________ (L.S.)
Robert Douglas

Sworn to and subscribed before me)
this 24TH day of JUNE,)
2020.)
)
_______________)
Notary Public, _______ County,)
State of _______________)
)
My Commission Expires:)
_______________)

PAUL SIMONS JR.
Notary Public for South Carolina
My Commission Expires June 4th, 2024

EXHIBIT G

Attorneys at Law
Alabama
Florida
Georgia
Louisiana
Mississippi
South Carolina
Tennessee
Texas
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March 2, 2021

VIA Electronic Mail and U.S. Mail:
Robert L. Buchanan, Jr., Esquire
Paul K. Simons, Esquire
Hull Barrett, PC
111 Park Avenue, S.W.
Aiken, South Carolina 29801

RE: *The Carolina Appraisal Group, Inc. et al. v. Wagener Insurance Agency and Realty, Inc., et al.*
Civil Action No. 2020-CP-38-00545
A&R File No.: 052854-000004

Dear Bob and Paul:

By orders of the Court filed on December 3, 2020 and February 18, 2021, Judge Murphy granted Plaintiffs' Motion for Preliminary Injunction. The granted injunctive relief is "effective . . . after the Plaintiffs obtain an injunction bond in the amount of $55,000[.]" *See* February 18, 2021 order. Plaintiffs obtained the injunction bond and filed notice of the bond with the Clerk of Court for Orangeburg County on February 26, 2021. The Court's injunction is now effective and Defendants are "prohibited from providing real estate evaluation and appraisal services, or accepting any new orders or requests therefor[.]" *See* December 3, 2020 order at page 22, (1).

Defendants are also required to provide Plaintiffs with an accounting of all residential real estate evaluation and appraisal service performed, directly or indirectly, by or on behalf of any Defendant for which Defendants did not pay TCAG-R its split of the commission. *See* December 3, 2020 order at p. 23, (2). On January 22, 2021, Defendants provided an accounting showing all services from April 29, 2019 through December 7, 2021. We hereby request that Defendants supplement the accounting to include all additional services performed by or on behalf of Defendants from December 7, 2021 through February 26, 2021. If Defendants have performed any services after February 26, 2021, the effective date of the Court's injunction, please advise us immediately.

The Court's order also requires Defendants to open an escrow account with a nationally chartered bank into which Defendants are required to deposit thirty-five (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. *See* December 3, 2020 order at page 23, (3). At least as of the accounting produced on January 22, 2021, the total amount required to be deposited into an escrow account is $141,034.95 (35% of $402,957). However, without an updated accounting, noted above, Plaintiffs are unable to calculate the total amount of the required deposit into the ordered escrow account. Nevertheless, the Court's order required this escrow account to be opened within ten days of the date of filing of the order. *See* December 3, 2020 order at page 23, (3). The Court denied Defendants' Motion to Alter or Amend on February 18, 2021, and we believe the Court's order required Defendants to open and fund the escrow account by February 28, 2021.

The Court's order also requires Defendants to deliver to Plaintiffs evidence that the above-referenced escrow account has been established and funded in accordance with the terms of the Court's Order. *See* December 3, 2020 order at page 23, (3). The Court's order required this account to be opened within fifteen days of the date of filing of the order. *Id.* We calculate this deadline as running from the Court's February 18, 2021 order denying Defendants' Motion to Alter or Amend: Friday, March 5, 2021. We expect Defendants will provide us with the necessary evidence showing that the escrow account has been established and funded by in accordance with this deadline.

We are aware that your clients have appealed the Court's December 3, 2020 and February 18, 2021 orders. However, under Rule 241, SCACR, the filing and service of a notice of appeal does not automatically stay an order granting an injunction or temporary restraining order. *See* Rule 241(b)(8), SCACR. Therefore, unless your clients receive an order staying the injunction under Rule 241(d), SCACR, including the posting of any necessary bond, the Court's December 3, 2020 and February 18, 2021 orders are enforceable and your clients may be held in contempt for failing to follow the Court's directives.

Thank you for your immediate attention to this request.

Sincerely,

Lyndey R. Z. Bryant

cc: Adam Silvernail, Esquire
Ben Davis (via electronic mail only)

EXHIBIT H

ELECTRONICALLY FILED - 2020 Dec 14 5:50 PM - ORANGEBURG - COMMON PLEAS - CASE#2020CP3800545

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	FOR THE FIRST JUDICIAL CIRCUIT
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 and Third Party Plaintiffs, v. Harrison Benjamin Davis, Jr., The Carolina Appraisal Group-Residential W-2, LLC Third Party Defendants.	C/A NUMBER: 2020-CP-38-00545 DEFENDANTS' NOTICE OF MOTION AND MOTION TO ALTER, AMEND, AND/OR RECONSIDER ORDER GRANTING PRELIMINARY MANDATORY INJUNCTION AND MOTION TO STAY

TO: COUNSEL FOR PLAINTIFFS:

YOU WILL PLEASE TAKE NOTICE that Wagener Insurance Agency and Realty, Inc. ("**Wagener**"), Douglas Appraisal, LLC ("**Douglas Appraisal**"), and Robert D. Douglas ("**Douglas**", and together with Wagener and Douglas Appraisal collectively, "**Defendants**") by and through their undersigned counsel, will move before the Court, at such time and place as is convenient to the Court and counsel, for an Order pursuant to Rules 59(e) and 52(b) of the South Carolina Rules of Civil Procedure, altering or amending its Order dated December 3, 2020 ("**Order**"), in the captioned matter in order to (i) preserve the *status quo ante* of this litigation, (ii) correct errors of law contained therein, and (iii) modify the factual findings of the Order in such a manner as to not affect the merits of this case. Additionally, the undersigned will move pursuant

to Rule 62(c) of the South Carolina Rules of Civil Procedure to suspend the effect of the Order until the appeal of this Order can be heard.

SUMMARY OF RELIEF REQUESTED

Defendants respectfully request the Court to alter and/or amend the Court's wide-sweeping preliminary mandatory injunction that not only upsets the *status quo*, but stands to indefinitely and negatively affect the ability of Mr. Douglas and his appraisal company to earn income. Make no mistake, the Court's Order has effectively put Mr. Douglas out of business and unable to earn income. The dire need for relief from the force and effect of the Court's injunction has created exigent circumstances for the Defendants and necessitates an urgent need for expedited review by this Court and our appellate Courts. The onerous and far reaching provisions of the injunction necessitate appellate litigation that will result in further delay and expense to the parties in this matter.

LEGAL STANDARD

Rule 59(e) of the South Carolina Rules of Civil Procedure is a "vehicle to request the trial court "alter or amend the judgment" but also as a vehicle to seek "reconsideration" of issues and arguments." *Elam v. S.C. DOT*, 261 S.C. 9 (2004). "There is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument. It is inherently unfair to disallow such an opportunity." *Id* at 19.

BACKGROUND

The Order grants the following relief:

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(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 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;
(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.

I. Mandatory injunctions versus prohibitory injunctions

The granting of a temporary injunction is traditionally implemented to maintain the *status quo*, in the nature of injunctive relief *quia timet*[1]. "[T]he ***sole purpose*** of a temporary injunction is to preserve the *status quo*..." *Powell v. Immanuel Baptist Church*, 261 S.C. 219, 221, 199 S.E.2d 60,61 (1973) (Emphasis added). "[A] temporary injunction is [used] to preserve the subject of controversy in the condition which it is ***at the time of the Order*** until opportunity is offered for full and deliberative investigation and to preserve the existing status during litigation. *County Council of Charleston v. Felkel*, 244 S.C. 480, 483-484, 137 S.E. 2d 577, 578 *1964) (Emphasis added). Prohibitory injunctions are generally used to prohibit a defendant from acting to change or alter the *status quo*. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 601 (2001); *Mailsource, LLC, v. M.A. Bailey & Assoc., Inc.*, 356 S.C. 363, 368 (Ct. App. 2003). Injunctive relief is an extreme remedy and should be cautiously applied. *Scratch Golf Co. v. Dunes Residential Golf Props, Inc.*, 361 S.C. 117 (2004); *LeFurgy v. Long Cove Club Owners Assoc. Inc.*, 313 S.C. 555, 558 (Ct. App. 1994).

On the other hand, if an injunction compels the performance of an act in order to undo an alleged wrong, it changes the *status quo*, rather than preserving it. Such an injunction is a ***mandatory injunction***, which is "an ***especially drastic remedy*** and is ***rarely granted***." *Johnson v. Phillips*, 315 S.C. 407, 417 (Ct. App. 1993) (rev'd in part on other grounds by *Smith v. Phillips*, 318 S.C. 453 (1995) (citing *Forest Land Co. v. Black*, 216 S.C. 255 (1950)) (Emphasis added).

A mandatory injunction issued prior to the hearing on the merits (a preliminary mandatory injunction) is an anathema to the Courts. "A mandatory injunction, ***especially*** at the preliminary stage of proceedings, should not be granted except in rare instance in which the facts and law ***are***

[1] *Quia timet injunction*. An injunction granted to prevent an action that has been threatened but has not yet violated the plaintiff's rights. *Blacks Law Dictionary 7th Ed.*

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clearly in favor of the moving party." *Gantt v. Clemson Agricultural College*, 208 F. Supp. 416 (1962) (Emphasis added). In fact, providing a mandatory injunction prior to the hearing on the merits is such a drastic remedy the State of Georgia prohibits it.[2]

"Because the remedy of injunction is drastic, the plaintiff has the burden of proving a clear case, reasonably free from doubt." *Mims vs. Yarborough*, 343 F. Supp. 1146, 1161 (D.S.C. 1971), affd, 461 F.2d 1266 (4th Cir. 1972). Even then, injunctive relief should only be granted "when necessary to prevent great and irreparable injury." *Id.* (quoting 42 Am.Jr.2d, Injunctions, Section 26).

In the case of mandatory preliminary injunctions as opposed to prohibitory preliminary injunctions, courts often require a greater showing of need for preliminary relief. *City of Evanston v. Northern Illinois Gas Company*, 381 F. Supp. 3d 941 (N.D. Ill. 2019). A mandatory preliminary injunction should not be granted, absent extraordinary circumstances, where the status quo would be disturbed and the plaintiff would receive the ultimate relief sought, pendente lite. *Spectrum Stamford, LLC v. 400 Atlantic Title*, LLC, 162 A.D.3d 615, 81 N.Y.S.3d 5 (1st Dep't 2018).

The unusually high bar to obtaining a preliminary mandatory injunction that alters the status quo is best illustrated in the *Mailsource* case. In *Mailsource,* the Court stated,

> "While we are troubled by the Baileys' continued insistence they are able to conduct business which is strikingly similar to the business they sold and with which they agreed not to compete, ***we agree with the trial court that an injunction would alter the status quo***. Mailsource apparently knew that the retained List Right business was closely related, if not complementary, to the business it purchased, having sought and received a right of first refusal to purchase List Right if the Baileys decided to sell. Additionally, Michael Bailey states in his affidavit that List Right continues to conduct business as it did before the sale."

[2] In Georgia, the Courts will not and cannot issue a mandatory injunction prior to the hearing on the merits. See *Georgia Pacific R. Co. v Douglasville*, 75 GA 828 (1885); Nelson v. Billingslee, 187 GA 492 (1939).

Mailsource at 7 (Emphasis added).

Despite the *Mailsource* Court's seeming acknowledgment that competition in violation of the non-compete provisions was occurring as supported by the affidavits of the Defendants, given the drastic nature of injunctive relief that alters the status quo, the injunction was denied. Here, however, unlike the *Mailsource* case, the Defendants have steadfastly denied competing with Plaintiffs.

Despite language in the Order to the contrary, the Court entered a *preliminary mandatory injunction* that drastically disrupts the *status quo*. Not only does the Order fail to preserve the *status quo*, it fails to narrowly tailor the relief provided to Plaintiffs by restoring the *status quo* to the state of the Defendants and Plaintiffs immediately before any difficulty between the parties arose. Rather, it grants substantially all relief requested by Plaintiffs in their complaint by (i) prohibiting Douglas from performing appraisals, which he has done since 2006, (ii) ordering Defendants to deposit 35% of its revenue it has received since May, 2019, into an escrow account tantamount to granting damages for breach of fiduciary duty and (iii) refraining Defendants 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. **All** of the aforesaid injunctive relief granted in the Order disrupts the *status quo* and is granted in light of disputed issues of fact in the record.

a. Plaintiffs failed to show a likelihood of success on the merits necessary to granting injunctive relief because the record shows clear disputes of material fact

Similar to the stringent standards for granting summary judgment, "as a prerequisite to the entrance of an interlocutory injunction, the moving party ***must show a clear right to relief***. ***There must be no disputed issues of fact***." *Gantt v. Clemson Agricultural College*, 208 F. Supp. 416,

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418-419, 1962 U.S. Dist. LEXIS 3602. (Emphasis added) (citing *Citizens Coach Co. v. Camden Horse R.R. Co., E. & A.*, 29 N.J.Eq. 299, 306 (1878); *Ferraiuolo v. Manno*, 1948, 1 N.J. 105, 108, 62 A.2d 141; *Anders v. Greenlands Corp.*, Ch. 1954, 31 N.J.Super. 329, 339, 106 A.2d 361. *Charles Simkin & Sons, Inc. v. Massiah*, 289 F.2d 26, 29 (C.A.3, 1961)) (Emphasis added). If the facts constituting the claim of the complainant for the immediate interposition of the court are ***controverted, under oath***, by the defendant, the court will not interfere at the initial stage of the cause. *Citizens Coach Co. v. Camden H. R. Co.*, 29 N.J. Eq. 299, 302 (1878) (Emphasis added).

While Plaintiffs' counsel artfully attempts to prove there are no disputed issues of facts by alleging numerous "admissions" made by the Defendants and Defendants' counsel, the pleadings on file make clear the facts are very much in controversy sufficient to deny the requested mandatory injunctive relief that alters the status quo.[3] In support of Plaintiffs' request, they provided various affidavits of Benjamin Davis through stand-alone affidavits or by virtue of the verified complaint. In response, Robert Douglas filed numerous stand-alone affidavits and verified his answer filed in this matter. Robert Douglas also provided third-party affidavits from Jacquelyn Busbee and Mackey Wood. In those affidavits, the facts alleged by Benjamin Davis are controverted by Robert Douglas. The granting of any type of injunction, much less a drastic mandatory injunction, is improper given the overwhelming disputed facts.

In its Order, the Court makes the following findings of facts despite their being controverted:

a. "[T]he Court accepts Defendants' admission that they are performing residential real estate appraisals for TCAG-R's customers and finds such activity is

[3] *See generally* Amended Answer verified by Aff. of Robert Douglas (June 24, 2020) ("**Verified Amended Answer**"); and Notes 6,7, and 8 below.

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competitive and usurping TCAG-R's corporate opportunities, as well as interfering with Plaintiff's good will and customer relationships." Order at ¶ 24[4]

b. "Plaintiffs submit that such loss will harm their businesses as well as the value of TCAG-R and should be enjoined, ***<u>especially given Defendants' admissions that competitive activity has already taken place</u>*** and is likely to continue. Order at ¶22 (Emphasis added)[5]

c. "Douglas, as sole shareholder of Wagener, admitted that Wagener was performing competitive appraisal services for which it was not accounting to TCAG-R." Order at ¶31[6]

d. "In those letters, Defendants' counsel acknowledged Defendants had performed appraisal outside of TCAG-R, without Plaintiff's consent from April 25, 2020 to December 12, 2019, resulting in Defendants' receipt of fees totaling at least $56,450." Order at ¶11[7]

e. "[T]he 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." Order at ¶24[i]

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[4] *But See* Verified Amended Answer at ¶ ¶37 where Defendants deny the VA is or could ever be a customer of TCAG-R or TCAG ("Defendants deny that TCAGF-R or TCAG have been approved to serve on the VA appraisal panel for reasons completely unrelated to Defendants."); *See also* Aff. of Robert Douglas (June 24, 2020) at ¶27 ("…the VA has their own appraisal panel of individual appraisers and will not process their appraisals through companies like [TCAG-R].").

[5] *But See* Verified Amended Answer at ¶69 ("”deny…diverting TCAG-Rs customers to itself", "deny…directly or indirectly competed with TCAG and TCAG-R", "deny…soliciting customers and potential customers of TCAG-R directly or indirectly"); *See also* Verified Amended Answer ¶ 75 ("has not competed with TCAG-R in the conduct of any business.").

[6] *But See* Verified Amended Answer ¶39 ("Defendants deny competing with Plaintiffs and Defendants deny Douglas admitted competing with Plaintiffs.").

[7]This position by Plaintiffs is a bit disingenuous since they received the 2019 tax return for Douglas Appraisal, LLC through discovery on September 5, 2020. The 2019 tax return for Douglas Appraisal LLC shows income of $193,712.

f. "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." Order at ¶44[8]

g. "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." Order at ¶44[9]

h. "Similarly, Defendants have failed to point the Court to any specific provisions in the 2014 Operating agreement which are "oppressive" or unreasonably "one-sided." Order at ¶35[10]

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[8] *But see* footnotes 3 and 4 above.

[9] *But see* Aff. of Robert Douglas (June 24, 2020) at ¶¶30 and 31 ("Later, he demanded I pay TCAG-R 35% of all appraisal fees I received from the VA appraisal work. When I refused, we mutually agreed our partnership should be dissolved. I asked Davis to purchase my ownership interest in the business for an amount less than my total overall initial investment, but Davis refused.")

[10] *But See* Verified Amended Answer at ¶ 139 citing provisions in the 2014 Operating that were alleged to be oppressive, unfairly prejudicial, and unconscionable ("The 2014 operating agreement, among other things, effectively:

a. Ratified all actions Davis had taken since the formation of TCAG-R, including all prior decisions related to the business, distributions, profit sharing, profits and losses, made in the almost six years of its existence, contrary to the 2010 operating agreement;

b. Approved any arrangement deemed reasonable by Davis in which the LLC shares "assets, services, payments, expenses and other rights and obligations" with TCAG W2, a new entity formed by Davis, without disclosure to and without the knowledge of Douglas, contrary to the 2010 operating agreement;

c. Provided a more cumbersome formula for calculating profits and losses than the simple calculation of profits and losses to a member based on the 2010 agreement or the Act;

d. Added a distribution provision requiring that, prior to making distributions based on the member's ownership interest, 16% of TCAG-R's gross receipts for the year in which the distributions were made were first paid to TCAG-R, contrary to how distributions are made under the Act; moreover, this additional "twist" on distributions was obfuscated in its presentation by, among other things, a ten page separation in its explanation (paragraphs 4.3, 4.3.1, 4.3.2 and 14.5);

e. Granted Davis the "full and exclusive power" to share profits with any person in any business or venture in which TCAG-R may engage; and to enter into any agreement or instrument with TCAG W2, contrary to the 2010 agreement and the Act (Paragraphs 5.1, 5.1.7 and 5.1.11);

f. Provided that Davis can be removed as manager by himself only (Paragraph 5.2);

g. Provided that Davis can control his compensation by the vote of TCAG, which he controls (paragraph, 5.3);

h. Provided that Wagener, Inc. was a "new member" of TCAG-R (though it had been a member for the almost six years TCAG-R had been formed), thereby restricting Wagener, Inc.'s opportunity and ability to transfer or encumber its interest, but allowing TCAG, controlled by Davis, to transfer and encumber its interest without restriction (Paragraphs 8.3, 8.3.1, 8.3.2, 8.3.3, 8.6.1, 8.6.2, 8.7, 8.8, 8.10 and 14.26);

i. Provided that Wagener, Inc could not retire or resign as a member without the consent of TCAG, controlled by Davis (Paragraph 10.2);

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Given that virtually every factual finding that forms the basis for the Court's Order is disputed by the Defendants, Plaintiffs have failed to show a "clear right to relief" and that there are "no disputed issues of fact" sufficient to grant the preliminary mandatory injunction.

II. Awarding the rarely granted relief in the Order prior to allowing Defendants the right to engage in meaningful discovery deprives Defendants of their right to due process.

This Court has enjoined Defendants from being able to earn a living by performing appraisals for an indefinite period lasting at least until the final disposition of this case. Defendants submit that this Court's injunction violates Defendants' due process by depriving them of their ability to perform the work they had performed for many years prior to the filing of this action.

> "None of the elements involved in the notion of procedural due process has greater importance than the right to be heard." *Miller v. Miller*, 691 So.2d 528, 529 (Fla. 4th DCA 1997). A trial court may not grant a former employer's motion for a temporary injunction against a former employee without first permitting the former employee "to put on its evidentiary case." *JonJuan Salon, Inc. v. Acosta*, 922 So.2d 1081, 1085 (Fla. 4th DCA 2006). *Zodiac Records Inc. v. Choice Envtl. Servs., Corp.*, 112 So.3d 587 (Fla. App. 2013)

This Court has undertaken to make determinative findings of fact prior to Defendants' having had an opportunity to complete discovery and participate in a full, fair hearing on whether any basis exists to enjoin them from continuing to perform appraisals.

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j. Imposed various restrictive covenants on Wagener, Inc. in any county in the United Sates in which TCAG-R does business, but no such restrictive covenants on TCAG (Section 13, Paragraph 13.2.5);

k. Inserted, most unfairly, prejudicially, in violation of Davis' and TCAG's obligation of good faith and fair dealing, and in violation of public policy, a provision by which Wagener, Inc. waived its rights to "defenses to the enforceability of the foregoing restrictive covenants based on time, territory, public policy or other considerations" (Paragraph 13.2.3); and

l. Provided, most unfairly, prejudicially and in violation of Davis' and TCAG's obligation of good faith and fair dealing, that TCAG, but not Wagener, Inc., could recover attorney fees and costs in connection with an action for breach of restrictive covenants (Paragraph 13.4.2).

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III. The plain language of the Court's Order purports to maintain the *status quo ante*. However, the *status quo ante* is being completely frustrated by forcing the closure of Defendants' appraisal business and ordering Defendants to disgorge profits for allegations of breach of fiduciary duty.

The Order reveals an apparent effort by the Court to fashion injunctive relief that would maintain the status quo.[11] As one Court stated, [t]he status quo is not defined by the parties existing legal status; it is defined by the *reality* of the existing status and relationships between the parties, regardless of whether the existing status and relationships may ultimately be found to be in accord or not in accord with the parties legal rights. *SCFC ILC, Inc., v. VISA USA, Inc.*, 936 F.2d 1096 (10th Cir., 1991).

If, as contemplated by the Order, the object of the injunction is to restore the *status quo*, the Order woefully misses the mark. Robert Douglas has been performing residential appraisals since 2006 – a period of 14 years. Accordingly, stopping Mr. Douglas from performing appraisals at this stage of the litigation would completely upset the status quo that has existed for the past 14 years and further grant Plaintiffs the ultimate relief requested in their Complaint.

In its attempt to balance the equities, the Court completely contradicts itself when discussing the status quo. Paragraph 50 of the Order states that "restoring the status quo that existed prior to Defendants' competition beginning in 2019 until this Court can properly determine the

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[11] *See* Order at ¶15 ("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 (1964)) (Emphasis added). Defendants' counsel notes that this statement in the Order materially misstates the language in the *Felkel* case. Nowhere in the *Felkel* opinion does it state the purpose of an injunction is to "***restore***" the *status quo*; *See also* Order at ¶45 ("[T]he purpose of an injunction is the preservation of the status quo." Citing *Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450.); *See also* Order at 50 ("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 the Defendants in any material way.")

merits of the lawsuit fails to harm Defendants ***in any material way***." (Emphasis added). However, the Order **does not restore the status quo as it existed in 2019**. It goes far beyond the status quo at that to the extreme detriment of the Defendants. At the very least, restoring the *status quo* that existed prior to 2019 would entail 35% of Robert Douglas's appraisal revenue from the date of the Order going forward being placed in an escrow account pending the final hearing on the merits.

IV. In the Court's attempt at balancing the equities between the parties, the Court performs an inappropriate "burden-shifting" that effectively shifts the burden to Douglas to (i) prove he will be unable to earn a livelihood if the injunction is granted and (ii) prove that Plaintiffs' businesses have been adversely impacted by Douglas's actions.

The balancing of the equities analysis by the Court involves an inappropriate burden-shifting onto the Defendants. The Court shifts the burden to Douglas to show that he cannot make a living without being able to perform appraisals. In response to Douglas's affidavit where he states "if the Court grants Plaintiffs the relief requested…I will not be able to perform real estate appraisals and will not be able to earn a livelihood as an appraiser." Robert Douglas Affidavit (June 24, 2020) at ¶32, the Order states, "Douglas does not allege that he cannot earn a livelihood. Indeed, public records reveal that Douglas is the sole owner of Wagener Insurance and 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." Order at ¶51. Plaintiffs' only showing here is that Mr. Douglas is licensed and owned active insurance and real estate business – they have proved nothing regarding his income from those entities. In fact, in its discovery responses, Defendants have made it abundantly clear that Douglas does not own an insurance agency.

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There is a similar burden-shifting on the issue of whether Plaintiffs have lost profits or had goodwill destroyed due to Douglas's actions. Footnote 29 of the Order provides, "Defendants speculated that discovery would reveal that Plaintiffs "have not lost any business" as a result of [Defendants' activities]. The Court does not place any weight on Defendants' argument as there is no evidence to support their assertion." This statement similarly shifts the burden to Douglas by observing he has not produced evidence that Plaintiffs' business has been hurt by his work. The Plaintiffs have the burden of proving a negative impact to their business in order to get an injunction. That clearly has not been shown here by uncontroverted facts.

V. The Plaintiffs have offered only generalities and business speculation to establish irreparable injury to obtain a mandatory injunction stopping Defendants from working.

Other courts that have addressed a preliminary mandatory injunction require more than a party's own business speculation to establish irreparable injury. In *SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096 (10th Cir 1991) the Court eschewed the issuance of a preliminary mandatory injunction where the only evidence to establish irreparable injury was based on generalities and business speculation contained in affidavits as to the potential impact to the business if the injunction where not granted. The Court held "such [generalities and business speculation] falls far short of the proof that is required to make a clear showing of irreparable injury." *Id* at 1115.

The proof provided by Plaintiffs in this case is analogous to the SCFC ILC case. Plaintiffs assert they will suffer immediate and irreparable harm unless the Court restrains, prevents, and enjoins Defendants from performing appraisals. The Order further asserts that absent an injunction, Plaintiffs will suffer irreparable harm because "Defendants ***could*** disclose Plaintiffs' confidential information, usurp corporate opportunities, and sell destroy, or waste Plaintiffs' assets, including

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profits and substantial goodwill." Order at ¶19[12] Nowhere in the record do Plaintiffs' aver profits and goodwill **have** been destroyed. It is based solely on speculation of what ***could*** or ***might*** happen.

This speculative harm by Defendants is consistent with the affidavit of Benjamin Davis.[13] Here, the *only* proof offered in support of its position that Plaintiffs will suffer irreparable harm if the injunction is not granted is the affidavit testimony of Benjamin Davis. They have provided ***no*** other evidence that supports their claim that TCAG-R's business has been adversely impacted or customers diverted by Defendants. Their lack of evidence is quite telling given that they have complete access to the financials of TCAG-R and TCAG. If TCAG-R had its goodwill or profits diminished they would surely be able to show some evidence of such other than through the self-serving statements of Ben Davis. They could have provided financial statements showing that TCAG-R's revenue is down significantly since Mr. Douglas left and that substantial goodwill has been wasted. They could have provided third-party affidavits from the U.S. Department of Veterans Affairs ("VA") stating it was a customer of TCAG-R. They could obtain statements from any of these other "customers" they allege Mr. Douglas took from TCAG-R. So, in other words, the only evidence the Court can rely on that Plaintiffs' will suffer irreparable harm is the self-serving affidavits of Ben Davis. Their silence as to their lack of evidence in this regard is deafening.

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[12]Order at ¶19 ("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 goodwill.") (Emphasis added); Order at ¶46 ("Plaintiffs' relationships with customers and goodwill has been eviscerated."

[13] Ben Davis Affidavit (May 12, 2020) at ¶ 25 ("***I am concerned*** that Douglas's ability to engage in a competing business for himself or on behalf of Douglas appraisal and/or Wagener Inc. will substantially undermine the business I have created more than twenty years ago and have grown into a thriving appraisal company." Emphasis added)

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VI. Granting an injunction disgorging Defendants of 35% of appraisal fees earned since around May 2019 as a remedy for breach of fiduciary duty is not appropriate relief under an injunction or under the provisional remedy of attachment in these circumstances.

With respect to the portion of the injunction ordering the Defendants to deposit 35% of the proceeds, this is a clear error of law. Plaintiffs cite various cases stating that they are entitled to an preliminary mandatory injunction disgorging Defendants of 35% of the aggregate fees from all appraisals performed by Douglas for which TCAG-R has not already received is split of the commissions. However, these cases do not stand for the concept of disgorging the profits of a party. Rather, they stand for the proposition that, in certain rare cases, certain property of Defendants can be ***preserved*** pending a final hearing on the merits.[14]

The basis for this relief is that absent depositing this into an escrow account, Plaintiffs will be unable to obtain money damages from Defendants.[15] As a practical matter, the Defendants are not able to comply with this portion of the injunction. Douglas Appraisal is a "mom and pop" shop and simply does not have the ability to make the ordered escrow deposit.

In *Grosshuesch v. Cramer*, 367 S.C. 1 (2005) the Court held that an injunction could be an appropriate remedy to ***preserve*** certain property of the Defendants until the matter had been fully adjudicated.[16] Unlike here, however, the Defendants in the Grosshuesch case were in control of Plaintiffs' money and had been transferring money to themselves while serving as their caregivers.

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[15] Order at ¶46 ("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...)

[16] We find that the Breedlovers lack an adequate remedy at law to ***preserve*** the [money] and any assets purchased therewith. *Grossheusch* at 9. (Emphasis added)

Eventually, the Defendants were arrested for financial exploitation of vulnerable adults and conspiracy violations. The facts of this case are starkly different from the *Gossheusch* case.

Nevertheless, even if the Court were compelled to find the Defendants had acted in a similarly nefarious manner as in *Grosshuesch*, the Order does not preserve the assets sought. There is no pot of money in the possession of Defendants that the Court is trying to preserve. Quite to the contrary, the Court is ordering that the Defendants pay its monetary damages whether they are able to pay them or not. The Defendants then stand in the difficult position of violating a Court Order if they can't pay damages as ordered by the Court. The remedy of ordering a Defendant to pay damages for breach of fiduciary duty prior to a hearing on the merits would be the first of its kind in South Carolina. Neither the finding in the *Grosshuesch* case or the statutory remedy of attachment would be able to provide the remedy provided by the Court in its Order, which is to compel the payment of monetary damages.

VII. The bond issued by the Court does not comply with the bond requirements set forth in SCRCP 62, nor does it come close to quantifying the loss to the Defendants when the injunction is overturned by an appellate Court.

a. The Court's Order violates SCRCP 62(c) because it becomes effective prior to the giving of security by Plaintiffs.

SCRCP 62(c) provides that "***no restraining order or 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 wrongfully enjoined."

In this case, the Court enjoins the Defendant from performing appraisals, and earning a livelihood, immediately upon the entry of the Order. It then provides that Defendants must deposit

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35% of all property, profits, or other benefit derived by Defendants for all residential appraisals performed by them for which TCAG-R has not already received its split of the commission.

However, the paltry bond sum required to be posted by TCAG-R is not required to be obtained and filed until "within 30 days from the date of the filing of this order." This is contrary to the plain language of SCRCP 62(c) which requires the posting of the bond **before** the issuance of the restraining order. This makes sense because the injury to Defendants will commence immediately upon issuance of this Order, yet when this injunction is overturned by an appellate Court, Defendants will not be able to recover the damages incurred or suffered during the period when the injunction is issued and the bond obtained, if ever. So, Defendants are in the difficult position of being forced to shut down their business with potentially no ability to recover damages they will certainly incur until the bond is posted.

b. The amount of bond issued does not provide security in such amount for the damages and costs that will be incurred and suffered by the Defendants if they are found to be wrongfully enjoined.

In setting the amount of the bond required to be deposited in connection with the injunction, the Court relies on Defendants' admissions as to the fees it received from appraisals from April 25, 2019 to December 12, 2019, and receiving $56,450. This figure was limited to appraisal work for the VA as requested by Plaintiffs. It did not constitute all appraisal work performed by Mr. Douglas. The 2019 tax return for Douglas LLC which was provided to Plaintiffs shows Douglas Appraisal earned revenue in the amount of $193,712 in 2019. After all necessary appeals are had in this case, it will likely be 4 years from now before this case has been finally and fully adjudicated and all appeals heard and decided. In light of the above, a bond in the amount of $760,000 more

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appropriately quantifies the costs and damages as may be incurred or suffered by Defendant if the injunction is overturned.

VIII. The Order gives Plaintiffs all the actual advantage which could be obtained at a final adjudication of this matter.

"The Action of the District Court on a motion for preliminary injunction is not predicated upon an anticipated determination of issues of fact or questions of law which may be involved in the case. Consequently, where the granting of a preliminary injunction would give to a plaintiff all the actual advantage which could be obtained by the plaintiff as a result of a final adjudication of the controversy in favor of the plaintiff, a motion for preliminary injunction ordinarily should be denied." *Gannt v. Clemson Agricultural College*, 208 F.Supp 416 (W.D.S.C., 1962) (quoting *Selchow & Richter Co. v. Western Printing & L. Co.*, 112 F.2d 430, 431 (C.A.7, 1940).

The gravamen of Plaintiff's Complaint is to enjoin Defendants from performing residential appraisals, prevent Defendants from working for another appraisal services company like TCAG-R, and recovering 35% of the appraisal fees performed by Defendants that were not performed as a member of TCAG-R appraisal panel. In its Order the Court grants Defendants substantially all the relief that is requested in its complaint and, as such, the preliminary mandatory injunction should be denied.

IX. There are numerous factual matters found by the Court in the Order that affect the merits of the case and, as such, are improper.

"It would have been improper for the hearing judge who issued the temporary injunction to make a finding upon the facts in such a manner as to affect the merits of the case." *Helsel v. City of North Myrtle Beach*, 307 S.C. 29, 32 (1992). In addition to the controverted facts set forth

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above, the following findings of fact made in the Order affect the merits of the case, and the Order should be amended accordingly to excluded them:

a. "On December 12, 2014, Douglas signed the 2014 Operating Agreement on behalf of Wagener, thirty-two days after receiving the first draft on November 5, 2014. There is no evidence that the 2014 Operating Agreement has since been rescinded or amended" Order at ¶7[17]

b. "The Court finds that Douglas is a sophisticated person who owns and controls multiple corporate entities, including Wagener and Douglas Appraisal. He runs multiple business, including a residential real estate appraisal business, an insurance sale business, and a real estate 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." Order at ¶ 34[18]

[17] Defendants dispute this finding. There is no evidence that Robert Douglas signed the document on December 12, 2014. The only evidence submitted is that the document was dated as of December 14. It is quite possible, and likely, that Mr. Douglas signed the 2014 Operating Agreement many days prior to December 14. Additionally, we are unsure at this early stage of the case what operating agreement Mr. Douglas allegedly viewed on November 5. Without the benefit of Defendants' engaging in discovery, making such a finding of fact is premature and goes to the merits of the case. Additionally, the verified allegations in the complaint provide a prima facie case that the 2014 Operating Agreement was unconscionable and unfairly prejudicial sufficient for this finding of fact to be excluded from the Order.

[18] Defendants maintain this statement in the Order goes to the merits of whether the contract was fraudulently induced as alleged by Defendants. This finding also goes to the merits of whether the 2014 Operating Agreement should be set aside on the basis of being unconscionable. Such statements of fact should be removed from the Order and not be a finding of the Court until such time as Defendants are able to engage in meaningful discovery.

c. “Defendants assert that their residential real estate appraisal services either do not constitute “competition” or are justified by the evidence. The Court disagrees.” Order at 39[19]

PRAYER

Wherefore, Defendants request that this motion be granted and the Court amend and alter its Order as follows:

A. Dissolving the preliminary mandatory injunctions that prohibits Robert Douglas and Douglas Appraisal, LLC from conducting appraisals;

B. Dissolving the preliminary mandatory injunctions that mandates the creation of a trust account in the amount of 35% of appraisal work performed by Defendants where the commission was not split with TCACG-R;

C. Dissolving the preliminary mandatory injunction refraining Defendants from dealing on behalf of each other and any third person having an adverse

D. With the exception of the injunction mandating the accounting, staying the enforcement of the preliminary mandatory injunctions until the appellate Court has had an opportunity to hear and rule on the appeal of this Order;

E. Alter the judgment to increase the bond required to be obtained to $760,000, which more accurately reflects the costs and damages as may be incurred or suffered by Defendant if the injunction is overturned and alter the order to the extent that the Order is not effective until the bond has been posted.

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[19] Defendants maintain this finding by the Court is subject to a genuine issue of dispute based on the record. As such, it is inappropriate to make such a finding of fact and/or conclusion of law on the basis of controverted affidavits.

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F. Alter and Amend the Order to remove factual findings that are either in dispute or otherwise impact the merits of the case as set forth herein.

Respectfully submitted:

HULL BARRETT, P.C.

By: *S/ Paul Simons, Jr.*

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Paul K. Simons, Jr.
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ATTORNEYS FOR DEFENDANTS

Aiken, South Carolina
December 14, 2020.

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RECEIVED
Mar 04 2021
SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas
Business Court: The Honorable Maite Murphy

Case No. 2020-CP-38-00545

The Carolina Appraisal Group, Inc. and The Carolina Appraisal Group-Residential, LLC…………………………………………………………………………………Respondents,

v.

Wagener Insurance Agency and Realty, Inc.; Douglas Appraisal, LLC, And Robert D. Douglas…………………………………………………………………………………Appellants,

v.

Harris Benjamin Davis, Jr., The Carolina Appraisal Group W-2, LLC …………………………………………………………………………………………………Third-Party Defendants.

PROOF OF SERVICE

The undersigned counsel for Appellants hereby certifies that he has served a copy of the Emergency Petition for *Ex Parte* Order Granting Writ of Supersedeas or, in the Alternative, for an Expedited Order Granting a Writ of Supersedeas on counsel for all Respondents on the date shown below by emailing them a copy of the same (pursuant to the current Order of the South Carolina Supreme Court regarding operation of the Appellate Courts during COVID-19), addressed as follows:

Lyndey R.Z. Bryant, Esquire
Jack Pringle, Esquire
Adams and Reese LLP
1501 Main Street, 5th Floor
Columbia, SC 29201
(803) 254-4190
lyndey.bryant@arlaw.com
jack.pringle@arlaw.com
Counsel for Respondents

By: s/Adam T. Silvernail
Counsel for Appellants

March 4, 2021

Law Office of
ADAM T. SILVERNAIL
LLC

RECEIVED
Mar 04 2021
SC Court of Appeals

March 4, 2021

By Email and Hand-delivery:
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: *Carolina Appraisal Group, Inc., et al v. Wagner Insurance Agency and Realty, Inc., et al*
Appellate Case No. 2021-000225

Dear Ms. Kitchings:

Enclosed please find one original of the **APPELLANTS' EMERGENCY PETITION FOR *EX PARTE* ORDER GRANTING WRIT OF SUPERSEDEAS OR, IN THE ALTERNATIVE, FOR AN EXPEDITED ORDER GRANTING A WRIT OF SUPERSEDEAS**, along with a Proof of Service and a check for $50.00 to cover the filing fee.

Please note that this matter is urgent, and we ask that this be reviewed by the first available member of the Court. As set out in the Petition, it seeks relief from an injunction which threatens immediate, severe and irreparable damage to Appellants.

Also enclosed for filing are copies of the transcript requests, along with a copy of the Notice of Appeal bearing filing marks from the lower Court.

Thank you for your time and attention, and please do not hesitate to contact me if you should need anything further.

Sincerely,

Adam T. Silvernail

Enclosures

cc: (By email, with enclosed Petition – other enclosures previously provided)
Robert L. Buchanan, Jr., Esquire
Paul K. Simons, Esquire
Jack Pringle, Esquire
Lyndey R.Z. Bryant, Esquire

1905 Marion St (29201) · PO Box 7995 Columbia, SC 29202 · adam@silvernaillawfirm.com · (803) 779-1770