THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Jean Hoefer Toal, Chief Justice of the
South Carolina Supreme Court (Retired),
Acting as Circuit Court Judge

Case No. 2008-CP-23-3665

William F. Tomz and Francis W. Tomz,
Individually and as Class Representatives, Respondents,

v.

Capital Investment Funding, LLC, by and through its Receiver, Jerry T. Saad,
And Arthur M. Field, Defendants,

Of Which Capital Investment Funding, LLC, by and through its Receiver,
Jerry T. Saad is a Respondent and Arthur M. Field is the Appellant.

In Re: Kathryn Taillon, Appellant.

FINAL BRIEF OF APPELLANT KATHRYN TAILLON

Jeffrey P. Dunlaevy (SC Bar No. 16978)
Dunlaevy Law Firm
37 Villa Road, Suite 440
Greenville SC 29615
864.208.9305
Counsel for Appellant Kathryn Taillon

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err by retaining jurisdiction in this matter where the sole basis for jurisdiction was a contractual choice of judge provision and the chosen judge was recused?

II. Did the trial court err by deciding a cause of action under the South Carolina Uniform Declaratory Judgments Act without service of an initial pleading on all parties to the contract at issue, an opportunity to conduct discovery on contested issues, or a jury trial on disputed issues of material fact?

III. May a party to a settlement agreement who releases all claims later sue to enforce a post-settlement judgment arising from one of the released claims?

IV. Did the Trial Court err in assessing a penalty against Arthur Field in the amount of $250,000 without conducting any inquiry into whether the imposition of such penalty or its amount complied with the legal rules applicable to liquidated damages clauses?

STATEMENT OF THE CASE

This case arises out of the winding up of Capital Investment Funding, LLC (CIF), a South Carolina investment firm that was managed by Arthur Field. Field was prosecuted by the South Carolina Attorney General for alleged acts and omissions contributing to losses suffered by CIF noteholders. Field pled guilty to some of the charges and was sentenced in 2013. His sentence included restitution to the noteholders. (R. pp. 80-89.)[1]

Parallel with the criminal prosecution of Field, the above-captioned matter was filed as a class action against CIF in 2008, with the class defined as CIF's noteholders, of which there were roughly 650, less eight who opted out. (R. p. 309.) Several other civil actions were brought in various jurisdictions. (R. p. 155.) All were settled pursuant to a Global Settlement Agreement (GSA) in 2017. (Id.)

This appeal concerns the settling parties' attempt to pursue a civil judgment against Field in Florida despite releasing all their claims in the 2017 settlement. Appellant Kathryn Taillon is Field's wife, a party to the GSA, a defendant in one of the cases dismissed pursuant to the GSA, and an owner of the homestead residence in Florida, the attempted seizure of which is the basis for the case in Florida.

---

[1] Because this matter involves the construction of a settlement agreement settling various state and federal cases, and because it arises from a pending proceeding in the United States District Court for the Middle District of Florida, several references are made herein to filings in the settled cases and in the Florida federal action. Such documents are included in the Record on Appeal and Taillon requests that the Court take judicial notice of them. Rule 201, SCRE; *Sloan v. Greenville Cty.*, 380 S.C. 528, 537, 670 S.E.2d 663, 668 (Ct. App. 2009) (taking judicial notice of docket and records of prior appeal); *Sea Star Line, Ltd. Liab. Co. v. Emerald Equip. Leasing, Inc.*, 648 F. Supp. 2d 626, 639 (D. Del. 2009) (taking judicial notice of docket and filings in related proceeding); *United States v. S. Cal. Edison Co.*, 300 F. Supp. 2d 964, 973 (E.D. Cal. 2004) (taking judicial notice of "proceedings in other courts" where such proceedings "have a direct relation to the matters at issue").

A. Background – CIF's Receivership

On August 24, 2009, Jerry Saad was appointed by the trial court to serve as Receiver for CIF and as its Manager pursuant to the LLC statute. Although receivers are supposed to be supervised by the Court, the Honorable Edward W. Miller's Order provided that in this case the lawyers representing the Plaintiff class who sued CIF would "oversee the activities of the Receiver." (R. p. 65, ¶ 6.) Thus, at all times relevant to this appeal, the Receiver, the lawyers working for him, CIF, and class counsel, have admitted being strategic partners, filing joint motions and briefs and coordinating litigation strategy in the several cases.

There is no public record of the fees the Receiver or his lawyers have been paid since December 31, 2011. It appears that at some point the Receiver stopped sending reports to the noteholders and CIF's members, and instead limited his reporting to *ex parte* submissions to the Honorable Edward W. Miller. The Receiver stated under oath that he "reported my activities and findings as Receiver directly to the Court through Judge Miller." (R. p. 456, ¶ 6.) Likewise, class counsel Stan Case submitted an affidavit opposing Field's 2020 motion to recuse Judge Miller, claiming that the Receiver "has continued to provide reports to South Carolina Circuit Court Judge Edward W. Miller in this case." (R. p. 464.) Judge Miller acknowledged such communications as well:

> I'm in fairly regular communication with the receiver in this case. Mr. Field has alleged that that is improper *ex parte* communication, which, in my mind, demonstrates a fundamental lack of understanding of what a receivership is.

(R. p. 369, lines 12-17.) According to the Receiver, Judge Miller served as gatekeeper concerning what information would be provided to the noteholders. (R. p. 483, ¶ 4 (asserting he submitted "several written reports" to Judge Miller, "some of which were authorized by Judge Miller to be disseminated to CIF Noteholders").)

In September 2020, Field filed a motion to recuse Judge Miller. (R. pp. 351-58.) Judge Miller notified the parties by email a month later that he was recused from the case and retired Chief Justice Toal would be appointed as a Special Circuit Court Judge to take his place. That appointment was made on November 12, 2020. (R. p. 20.) Since then, there have been no public reports from the Receiver, class counsel or Judge Toal, as to the status of the Receiver's plans to distribute any funds or otherwise complete the job he was hired to do almost twelve years ago.

The Receiver has only made one distribution to the noteholders in eleven years. In 2014, with Judge Miller's approval, he disbursed $1 million to the noteholders and $333,333.00 to class counsel. (R. p. 42.) Based on the limited reports made to noteholders, these figures are likely to be far less than the sum of the Receiver's and attorneys' fees paid out over the past eleven years.[2] So far as the public record reflects, none of the proceeds of the payments made pursuant to the 2017 GSA have been distributed in the four years since it was approved. With the pendency of the Florida action, it appears the Receiver intends to continue indefinitely, utilizing the proceeds of the 2017 settlement to fund the ongoing litigation.

[2] The Receiver provided reports to the noteholders with some regularity during the first couple years after being appointed. The last such report covered the period from the inception of the receivership in August 2009 until December 31, 2011. (R. pp. 277-94.) In that 25-month period, the Receiver paid himself $137,000 in fees and paid out an additional $694,882 in legal fees and costs. (R. p. 278.) These figures equate to $5,480 per month in Receiver fees and over $25,000 per month in legal fees. The period in which those amounts were paid is less than one-fifth of the total length of the receivership to date. Most of the lawsuits settled pursuant to the GSA had not even been filed when the report was submitted.

B. The 2017 Global Settlement Agreement

Class counsel and counsel for CIF prosecuted actions in various state and federal courts against Field, his family members, former business partners and colleagues, and CIF's former attorneys for more than a decade. After many efforts to negotiate a global settlement that would bring about an end to all the pending litigation, the parties reached an agreement on basic terms in February 2017. They memorialized their agreement in the GSA in March 2017.

Although the GSA involved a complicated set of transactions involving dozens of interested parties and corporate entities, the core of the bargain was relatively simple, and typical of litigation settlements: the parties agreed to a set of defined payments over a fixed time period in place of the risk and uncertainty of litigation that might have resulted in a larger recovery, a smaller recovery, or no recovery at all. (R. pp. 154-69.) Because Field personally lacked the resources to fund a settlement large enough to satisfy the Receiver, numerous parties affiliated with him contributed to the settlement. For example, Taillon paid cash and tendered real property interests; Allyson Field and Kirsten White tendered real property interests; and Bart and Brad Kelly surrendered ownership interests in CIF. (R. pp. 158-65, ¶14(A)-(H).)

The consideration in exchange for all this was simple: an end to all litigation by CIF and the class members. To effectuate this promise, the parties agreed to broad and comprehensive language in the release and covenant not to sue:

> This Agreement settles with prejudice all claims of every kind and nature which were raised or could have been raised in any above-identified litigation, including any and all causes of action, direct claims, cross-claims, counter-claims, rights of offset, **grievances, complaints, and any other rights and actions otherwise derived from such**, between and among all undersigned parties and all identified parties herein . . .
>
> The parties to this Agreement do hereby release all other parties and their respective officers, directors, employees, agents, attorneys, and affiliates, of and from any and all suits, legal actions or **claims of any nature whatsoever, known**

> **or unknown**, up to and including the present time, including, but not limited to, claims described in Paragraph 4 of this Agreement . . .
>
> . . .
>
> The parties agree that any payment made by Taillon, Allyson Field, Arthur Field, or any entity or trust related to any of them, in cash or in kind, tangible or intangible . . . shall serve as sufficient consideration for (1) all releases running to all of the named parties or entities under Paragraphs 3, 4 and 5; and (2) all dismissals with prejudice of **any past, pending or future matter**, other than those related solely to enforcement of the obligations of this Agreement, as specifically set forth immediately above.

(R. p. 155, ¶¶ 4, 5; p. 166, ¶ 14(I)(v) (emphasis added).)

Due to the many persons and entities with an interest in the settlement, the GSA required signatures of twenty-one separate persons representing themselves and various entities. (R. pp. 167-69.) Moreover, pursuant to SCRCP Rule 23(c), notice of the settlement and approval hearing was sent to some 640 class members.[3] (R. p. 309.)

At the core of the parties' bargain was the premise that the litigation was over for good. Obviously, it would have been pointless for Field and others to make settlement payments to the class in exchange for releases, only to then face liability for the same alleged damages via restitution ordered in the criminal case. As such, the GSA was made contingent on the elimination of Field's restitution obligations. (R. p. 156, ¶ 8(A), (B).) The GSA authorized Field to seek such relief from the sentencing judge in the criminal case, the Honorable Cordell Maddox. (Id.) If Judge Maddox declined, the entire deal was off. (R. pp. 156-57, ¶¶ 8, 10.)

The GSA was duly executed by all twenty-one parties and submitted to Judge Miller for approval. Judge Miller elected to withhold approval pending the outcome of Field's attempt to have his restitution modified by Judge Maddox.

---

[3] Eight class members previously opted out and thus were not notified of the settlement. (R. p. 309.)

C. Judge Maddox's Ruling on Restitution

On November 1, 2017, Judge Maddox held a hearing on Field's request to modify his restitution. Although all parties to the GSA supported the elimination of Field's restitution obligations, the South Carolina Attorney General opposed it. (R. pp. 81-82.) Judge Maddox adjourned the hearing to allow the parties to the GSA and the Attorney General to seek a compromise so as to avoid the collapse of the settlement. (R. p. 82.)

Following lengthy discussions off the record, the parties reached a compromise. The basic deal between the parties to the civil case would remain the same – CIF and the class would waive all claims, as they did in the original GSA. However, the GSA would be modified to remove language to the effect that payment pursuant to the GSA would satisfy all restitution obligations. (R. pp. 86-87.) Instead, the Attorney General retained the right to convert any unpaid restitution to a civil judgment pursuant to S.C Code Sec. 17-25-323. (R. p. 87.)

Judge Maddox approved the compromise reached by the parties in an order signed on November 27, 2017, and entered into the record the following day. He explained in some detail why the change was necessary despite the parties to the civil action having already agreed that CIF and the class would not pursue any future claims. First, Judge Maddox explained that while the Receiver had concluded he was better off with the more immediate and certain consideration provided by the GSA than the alternative of continuing to seek the entire amount of alleged losses, the Attorney General disagreed. (R. pp. 81-82.) Second, he observed repeatedly that the civil plaintiffs and the parties to whom restitution was owed **were not the same groups**. (R. p. 80 ("some" of civil plaintiffs "are the victims in this criminal action"); p. 81 (the civil plaintiffs "represent some of the victims").)

Pursuant to Judge Maddox's order, Field's restitution payments would be suspended in lieu of payments to Saad as provided in the GSA, which would be credited against the balance of Field's restitution. (R. pp. 86-88.) Once those payments were completed, and the term of probation ended, the Attorney General would be entitled to convert any balance of restitution to a civil judgment, provided that he did so "pursuant to statutory law" and the judgment was "payable to Defendant Field's criminal victim(s)." (Id.) In other words, Saad and the class would receive precisely the payments they had bargained for in the GSA, with any remaining restitution subject to being converted to a civil judgment in favor of the victims in the criminal case, which group Judge Maddox repeatedly noted was distinct from CIF and the other civil plaintiffs.

D. Creation of the Addendum and Judge Miller's Approval of the GSA

Judge Miller held a hearing on November 27, 2017, at which one of CIF's lawyers explained that he expected Judge Maddox's Order to be signed imminently. (R. p. 238, lines 6-20.) He went on to explain that Judge Maddox's Order required revisions to the GSA and acceptance of such revisions by all original signatories:

> **Mr. Brandt:**
>
> The addendum to the global settlement agreement needs to be circulated and signed by the same 21 parties that originally signed the global settlement agreement, and I would ask for a copy of that so I can pass it up to the Court. When it's found, I'll pass it up.
>
> **The Court:**
>
> Has that been circulated to everyone else?
>
> **Mr. Brandt:**
>
> No.

(R. p. 251, lines 5-13.) The referenced Addendum did not alter or revise any part of the original GSA's release language reproduced above. Rather, it replaced the language from Paragraph 8 of the GSA making the entire deal contingent on Field's restitution being changed with language confirming that the deal would go forward even if a civil judgment was eventually entered for unpaid restitution. (R. pp. 170-84.) The core bargain remained: litigation between the Receiver and the released parties was over for good.

Following the hearing, Judge Miller signed an order dated December 1, 2017, approving the GSA as amended by the Addendum. The order included Judge Miller's finding that the Addendum (which was not appended to the order or otherwise put into the record)

> modifies the GSA solely to the issue of restitution order to be paid by Arthur Field in the matter: State of South Carolina v. Arthur M. Field, C.A. 2012-GS-47-08 (State Grand Jury of South Carolina), and **does not affect any other party to the GSA other than Arthur Field**.

(R. p. 31 (emphasis added).) Judge Miller did not conduct another fairness hearing, order a second notice be provided to the class members, or seek the agreement of numerous other parties to the GSA, who were not present at the hearing before Judge Maddox and never saw the Addendum. He ordered each of the 21 original parties to the GSA to sign the Addendum no later than 5:00 p.m. on November 30, 2017 (the day before Judge Miller signed the order). (R. p. 32.) Not all of the parties were represented by counsel and most were not parties to the above-captioned case. Because there was no prior notice that an Addendum would be circulated, much less notice as to the contents of the Addendum, many of the original signing parties had no reason to attend the hearing.

Most of the 21 signatories, including all of the Class Representatives, were absent from the November 27 hearing. Not surprisingly, Judge Miller's retroactive deadline for obtaining all 21 signatures was not met. A week later, Judge Miller held another hearing regarding various

issues surrounding compliance with the GSA. He then issued an Order dated December 21, 2017, which provided in pertinent part:

> Any signatures missing from the Addendum attached[4] to the December 1, 2017 order shall be provided to CIF no later than December 13, 2017. If any signatures have not been received by CIF by that time, CIF is instructed to notify this Court of such so that the matter may be dealt with accordingly.

(R. p. 27.) No additional signatures were received in response to the second retroactive deadline. (R. pp. 170-84.) The Addendum remained unsigned by most of the parties aligned with Field as well as Gene Connell, co-lead counsel for the class. (Id.) It is unclear whether the Receiver or his attorneys complied with Judge Miller's directive to notify him if anyone failed to sign the Addendum. There is no public record of any such notice, but as described above, Saad regularly communicated *ex parte* with Judge Miller, and thus it is possible he provided notice off the record. In any event, the Addendum remained unsigned by several parties.

E. The Receiver Procures a Criminal Contempt Finding Against Field and then Obtains a Civil Judgment

Following the approval of the GSA in December 2017, the Receiver did not turn his attention to winding up CIF. Instead, he vigorously litigated a contempt of court action against Field. (R. pp. 470-81.) Judge Miller had previously found Field in contempt, which finding was on appeal to this Court at the time the GSA was approved. The Receiver's first step was to seek dismissal of the pending appeal. He did so by filing a motion on February 1, 2018, to which he attached the original GSA but not the partially executed Addendum. (R. pp. 311-50.) This Court dismissed the appeal shortly thereafter, finding that the GSA settled all claims. (R. p. 93.) The

[4] In fact, the Addendum was not "attached" to the December 1 order approving the GSA. It still was not a part of the public record and does not appear to have been provided to the 640 class members who had been notified of the original GSA some eight months earlier.

Receiver then turned his attention to prosecuting the new contempt action against Field. (R. pp. 470-81.)

On July 2, 2018, those efforts paid off, as Judge Miller held Field in criminal contempt for statements made at the hearing on November 27, 2017 – the same hearing at which the Receiver first circulated the Addendum – four days before Judge Miller's December 1 order approving the GSA. (R. pp. 21-24.) Judge Miller's contempt order required Field to choose between reporting the following day for a six-month stint in the Department of Corrections (plus the potential for additional time for violating his probation in the criminal case) or paying the Receiver $1 million. (R. p. 23.) Having just paid the Receiver the consideration called for in the GSA, and with a 24-hour deadline to report and begin serving his sentence, Field was obliged to serve the prison term rather than paying a bounty to the Receiver.

Despite missing out on the $1 million, the Receiver ended up benefiting from Field's incarceration through the end of 2018. Judge Maddox held a probation revocation hearing on September 8, 2018, and sentenced Field to additional jail time. (R. p. 77.) On September 15, 2018, the Receiver wrote to Judge Maddox with an accounting of the amounts paid pursuant to the GSA. (R. p. 79.) On October 30, 2018, without holding any further hearings, without finding that Field failed to meet the restitution payment schedule, and without allowing him to complete his sentence, Judge Maddox issued an order converting unpaid restitution into a civil judgment in the amount of $1,767,634.71, which amount was derived from the calculations provided by the Receiver. (R. pp. 77-79.) Without discussion or explanation, Judge Maddox issued the civil judgment in the name of "Receiver Jerry Saad." (Id.)

F. The Receiver Seeks to Enforce the Civil Judgment

The Receiver attempted to enforce the civil judgment in Florida state court. (R. pp. 690-93.) After removal to federal court, Field defended the case in part on the ground that the Receiver waived the right to enforce any judgment arising from the claims settled in the GSA. (R. pp. 515-29.) The Honorable Timothy J. Corrigan permitted the parties to brief the matter of whether to hold the case in abeyance pending a ruling from Judge Miller as to whether the GSA barred the action.

Without waiting for a ruling from Judge Corrigan, the Receiver used the above-captioned 2008 case to invoke South Carolina's Declaratory Judgments Act via a "Motion for Declaratory Relief Related to CIF's Judgment Collection Action in Florida." (R. pp. 147-53.) The 2008 case was supposed to have been dismissed pursuant to the GSA. (R. p. 155, ¶¶ 3, 4, 5.) Moreover, the Receiver's filing was not really a "motion," but a new pleading demanding two forms of relief: (1) a declaratory judgment to the effect that the release in the GSA did not apply to the enforcement of the civil judgment and (2) a damages award pursuant to the GSA in the amount of $250,000. (R. pp. 147-53.) Ultimately, Judge Corrigan agreed to the Receiver's request to stay the Florida proceedings pending a ruling from Judge Miller as to whether the GSA bars the Florida action. (R. pp. 102-04.)

Field removed this case to federal court. Thereafter, it was remanded back by United States Magistrate Judge Jacquelyn D. Austin. (R. pp. 94-99.) Judge Austin noted that the 2008 case was closed, having been dismissed with prejudice pursuant to the GSA. (Id.) A closed case cannot be removed to federal court. *Benjamin v. Brice*, No. 0:07-641-JFA-JRM, 2007 U.S. Dist. LEXIS 29528 (D.S.C. Apr. 19, 2007). Thus, she concluded the matter was not removable.

In September 2020, Taillon filed a response opposing the "motion." (R. pp. 185-91.) Field filed a motion to dismiss along with a motion to recuse Judge Miller. (R. pp. 192-203; pp. 351-58.) Shortly thereafter, Judge Miller was recused and the case was assigned to the Honorable Jean H. Toal, former Chief Justice. (R. p. 20.) Judge Toal ruled in favor of the Receiver on both claims without holding a hearing or conducting any discovery. (R. pp. 13-17.) Both Field and Taillon filed motions to reconsider, to which the Receiver responded. (R. pp. 207-11; pp. 217-28; pp. 229-36.) On March 1, 2021, Judge Toal denied the motions to reconsider but issued an amended order in place of her prior ruling. (R. pp. 1-12.) Both Field and Taillon appealed the amended order to this Court.

STANDARD OF REVIEW

This appeal concerns a declaratory judgment as to the construction of a written contract. A declaratory judgment is neither legal nor equitable, so the standard of review must be determined by the nature of the underlying issues. *Felts v. Richland County*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). An action to construe a contract is an action at law. *Duncan v. Little*, 384 S.C. 420, 424, 682 S.E.2d 788, 790 (2009). The question whether a contract is ambiguous is a matter of law reviewed *de novo*, as is the construction of an unambiguous contract. *Williams v. Gov't Emples. Ins. Co.*, 409 S.C. 586, 594, 762 S.E.2d 705, 710 (2014); *Lee v. Univ. of S.C.*, 407 S.C. 512, 517, 757 S.E.2d 394, 397 (2014). If a contract is found to be ambiguous, determination of the parties' intent becomes a question for the fact-finder. *Id.*

ARGUMENT

A. Judge Miller's Recusal Divested the Trial Court of Jurisdiction

The dispute that led to this appeal did not begin in South Carolina court. Rather, the Receiver attempted to enforce the civil judgment in Florida. (R. pp. 690-93.) After the matter was removed to the United States District Court for the Middle District of Florida, the Receiver had misgivings about his choice of forum and asked that the matter be held in abeyance so he could obtain what amounts to an advisory opinion from Judge Miller. (R. pp. 531-37.) The Receiver asked Judge Miller to declare that his pending Florida action was "just and proper under the terms of the Global Settlement Agreement (GSA)" and to tack on $250,000 as a penalty for Field's "filings and conduct" in the Florida case. (R. p. 147.)

The basis for the stay in the Florida case was not that there is some inherent right for the parties to get a home court ruling on South Carolina law. Federal courts exercising diversity jurisdiction regularly interpret state law. Judge Corrigan is more than capable of doing so in this case. Rather, the reason for the stay was that, according to the Receiver, Judge Miller is uniquely qualified to decide matters affecting the GSA:

> All parties previously agreed that interpretation and enforcement of the GSA would be within the sole jurisdiction of the South Carolina Circuit Court, and more particularly Judge Edward Miller . . . Judge Miller has already considered multiple motions to enforce the agreement. Further, Judge Miller is familiar with all parties involved and extensively familiar with the facts of these claims and the procedural history of the GSA.

(R. pp. 533-34.) For precisely these reasons, Judge Corrigan granted a stay and allowed the Receiver to pursue this claim in front of Judge Miller. (R. p. 102 (finding that deference was appropriate because Judge Miller personally retained "sole and exclusive jurisdiction" over matters arising under the GSA).) When Field and Taillon subsequently sought to have the stay lifted and proceed with the Florida litigation, the Receiver insisted that any delay in that case was

worth the wait in light of Judge Miller's history with this case: "Judge Miller has already considered multiple motions to enforce the agreement. Further, Judge Miller is familiar with all parties involved and extensively familiar with the facts of these claims and the procedural history of the GSA." (R. p. 556.)

When Judge Miller recused himself in October 2020, the only reason for litigating this matter in South Carolina disappeared. It is inappropriate for Judge Toal to be assigned to provide what is clearly a mere advisory opinion to the Middle District of Florida. (R. p. 102 (Corrigan Stay Order) ("it would be premature to determine how [the South Carolina courts'] views will affect this litigation"). Federal courts sit in diversity regularly. State trial courts do not give advisory opinions to their federal counterparts. If such opinions are needed, they are provided by the South Carolina Supreme Court pursuant to the certified question procedure, not provided on request by trial courts. SCACR 244.

Even if it were otherwise appropriate for this matter to continue after Judge Miller's recusal, there is no jurisdictional basis for the tacking on of a $250,000 penalty. As explained above, this matter was stayed by the Middle District of Florida for determination of a discrete issue of contractual interpretation. The Receiver did not disclose to the Middle District of Florida that it also planned to seek a $250,000 penalty, much less that the ostensible basis for such penalty was Field's alleged misconduct in the Florida courts. The Middle District of Florida's Order clearly contemplates only that Judge Miller would rule on the contractual interpretation issue. (R. pp. 102-04.) It did not delegate to Judge Miller the authority to penalize Field for alleged acts and omissions under its exclusive jurisdiction. (Id.)

The Receiver claimed the $250,000 penalty was warranted "based on the filings and conduct of Field in the Florida action." (R. p. 147.) Without conducting any discovery,

identifying any particular "filings or conduct" in the Florida action that were improper, or making any findings of fact at all, the trial court granted the request for a penalty based in part on a conclusory objection to "Defendant Field's multiple filings within the state of Florida." (R. p. 7.) There is nothing in the record establishing which Florida filings the trial court found objectionable. Thus, even if Judge Toal had authority to police the litigants in Judge Corrigan's court, which of course she does not, Field (and Taillon)[5] will have no way of knowing which future filings are permitted and which may result in another trip to Greenville and another $250,000 fine.

Apart from the problems with the penalty under South Carolina's rules governing liquidated damages clauses (discussed below), it was clearly outside the scope of the contractual interpretation question that formed the basis of the stay in the Florida case. It needlessly interferes with Judge Corrigan's prerogative to police his own docket. *Vibe Micro, Inc. v. Shabanets*, 878 F.3d 1291, 1295 (11th Cir. 2018) (district court has inherent authority to control its own docket and order sanctions against a party as appropriate). The problem was greatly exacerbated by the Receiver failing to disclose his intentions to Judge Corrigan and seeking the penalty without first asking Judge Corrigan to sanction whatever "filings and conduct" he found objectionable. As such, the penalty ruling should be reversed.

---

[5] So confident is the Receiver of his ability to enlist the aid of the trial court at will to punish his opponents that he has taken to overtly threatening same. Referring to the $250,000 penalty imposed against Field for opposing him in Florida, the Receiver stated that he

> has not yet sought the imposition of a similar sanction as to Defendant Taillon herself (although some of the arguments raised in her motion in opposition and the present motion are dubious at best). The Receiver reserves the right to seek such a sanction to the extent her actions attempt to revoke or disqualify any of the terms of the GSA.

(R. p. 235.) This unseemly threat is a stark reminder of how badly this case needs appellate supervision.

B. The South Carolina Uniform Declaratory Judgments Act Does Not Permit Pleading by Motion and Without Notice to Interested Parties

This matter is before the Court on a motion purportedly brought under the South Carolina Uniform Declaratory Judgments Act, SC Code § 15-53-10, *et. seq.* To seek relief under the Act, a plaintiff must satisfy a threshold requirement: "all persons shall be made parties who have or claim any interest which would be affected by the declaration." SC Code § 15-53-80.

The signatories to the GSA included not only Arthur Field and CIF's Receiver Jerry Saad but numerous persons who tendered various forms of consideration, including Taillon, Allyson Field, Davyd Field, Kirsten White, Bart Kelley and Brad Kelley. (R. pp. 168-69.) None of these additional persons were made parties to the case below and none were served with a copy of the Receiver's demand for a declaratory judgment.[6] Even after this issue was raised in the trial court (R. pp. 185-86), the matter was not rectified. As such, the trial court purported to enter a declaratory judgment as to the rights and liabilities of parties to a contract without notifying several essential parties. This is not permitted under the plain language of the Act. SC Code § 15-53-80; *Krupa v. Hilcorp Energy I LP*, C.A. No. 2:13-cv-1542, 2014 U.S. Dist. LEXIS 76034, at *15-17, 30 (W.D. Pa. Apr. 1, 2014); *Nolan v. Jackson National Life Ins. Co.*, 963 P.2d 162, 168 (Or. Ct. App. 1998).[7]

Evidently recognizing that the Receiver has not complied with the Act, the trial court decided simply to ignore it:

---

[6] Taillon appeared in this case in September 2020 for the limited purpose of opposing the Receiver's motion despite not having been a party previously. As a party to the GSA and an owner of the Florida homestead residence the Receiver is attempting to seize, Taillon will be harmed if the Receiver is allowed to violate the release provisions of the GSA.

[7] South Carolina is one of several states which have adopted the Uniform Declaratory Judgments Act. SC Code § 15-53-10. Authorities from other states that have adopted the Uniform Declaratory Judgments Act are therefore relevant here.

> Although the Receiver couched his motion as being brought under the Declaratory Judgments Act ("SCUDJA"), this Court is not bound by the title of the Receiver's motion, but by its contents and its request. The Receiver's Motion merely seeks to clarify the contents of the GSA which, in essence, is to seek an interpretation of the GSA as it relates to the restitution.

(R. p. 5.) Even if the trial court was free to disregard the stated jurisdictional basis for this case and supply another basis *post hoc*, the essential problem remains. All parties to the GSA should have been given notice. If the trial court retained some sort of perpetual jurisdiction to interpret and settle disputes regarding the GSA, it nevertheless must give proper notice to the parties to the underlying contract. Taillon, Allyson Field, Kirsten White and Bart and Brad Kelly provided valuable consideration in exchange for what they thought was a complete release of all claims, known and unknown, without limitation, as to all parties. They were entitled to notice and a right to be heard before the trial court ruled that such release was actually subject to an unstated exception that renders the release practically meaningless.

C. The Release Language in the GSA Bars the Receiver from Enforcing the Civil Judgment

A South Carolina contract is to be read as a whole, so as to give effect to each provision thereof. *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009). It is not appropriate to read particular clauses in isolation and out of context, without regard to their effect on the instrument as a whole. *Alexander's Land Co., L.L.C. v. M&M&K Corp.*, 390 S.C. 582, 598, 703 S.E.2d 207, 215 (2010). It is presumed that all portions of a contract are inserted for a purpose and should be given appropriate weight in determining the meaning of the contract. *Yarborough v. Phx. Mut. Life Ins. Co.*, 266 S.C. 584, 592, 225 S.E.2d 344, 348 (1976).

The core of this dispute concerns the interplay of the Addendum to the GSA and the release provisions in the original agreement. The Addendum provided that the Attorney General (not a party to the GSA) was entitled to convert Field's unpaid restitution into a civil judgment at

the end of the period of probation. (R. pp. 170-84.) However, the Receiver released all claims against Field, including future causes of action based on pre-settlement events. The release language appears in paragraphs 4, 5 and 14(I)(v) of the GSA, none of which were altered in any way by the Addendum. (R. p. 155, ¶¶ 4, 5; p. 166, ¶ 14(I)(v).) The only way to harmonize a plain reading of these provisions in light of the purpose of the GSA as a whole is to conclude that the Receiver is not permitted to enforce the civil judgment.

If this Court finds that the two aforementioned provisions are in conflict, creating an ambiguity, such ambiguity should be resolved against the Receiver based on extrinsic evidence of the intent of the contracting parties and the rule of *contra proferentem*. Finally, if the GSA is found to be ambiguous and the evidence is not sufficient for a determination in Field's and Taillon's favor on this record, the matter should be remanded for discovery concerning the surrounding facts and circumstances and a jury trial on the merits.

1. The GSA and Addendum Unambiguously Bar the Receiver from Enforcing the Civil Judgment

a. The Release Language Covered All Claims, Including Unripe, Contingent and Future Claims

The term "claim" does not contemplate merely those rights which have ripened into viable causes of action. Rather, the term "claim" has been construed as encompassing legal rights even if they are contingent on future events. *See, e.g.,* 11 U.S.C. § 101(5)(A) (defining "claim" as "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured"). *Accord, Beach First Nat'l Bank v. Gurnham (In re Estate of Gurnham)*, 407 S.C. 194, 208-09, 754 S.E.2d 875, 882-83 (2014) (under the Probate Code, the definition of "claim" includes assertion of rights "dependent on some future event that may or may not

happen" and that are "uncertain in amount or unenforceable until the happening of the event"); *Abu-Shawareb v. S.C. State Univ.*, 364 S.C. 358, 362-63, 613 S.E.2d 757, 759-60 (Ct. App. 2005) (upholding release of future claims). The GSA release language embraced this broad definition:

> This Agreement settles with prejudice all claims of every kind and nature which were raised or could have been raised in any above-identified litigation, including any and all causes of action, direct claims, cross-claims, counter-claims, rights of offset, **grievances, complaints, and any other rights and actions otherwise derived from such**, between and among all undersigned parties and all identified parties herein . . .
>
> The parties to this Agreement do hereby release all other parties and their respective officers, directors, employees, agents, attorneys, and affiliates, of and from any and all suits, legal actions or **claims of any nature whatsoever, known or unknown**, up to and including the present time, including, but not limited to, claims described in Paragraph 4 of this Agreement . . .
>
> . . .
>
> The parties agree that any payment made by Taillon, Allyson Field, Arthur Field, or any entity or trust related to any of them, in cash or in kind, tangible or intangible . . . shall serve as sufficient consideration for (1) all releases running to all of the named parties or entities under Paragraphs 3, 4 and 5; and (2) all dismissals with prejudice of **any past, pending or future matter**, other than those related solely to enforcement of the obligations of this Agreement, as specifically set forth immediately above.

(R. p. 155, ¶¶ 4, 5; p. 166, ¶ 14(I)(v) (emphasis added).)

The release language is strikingly similar to language in a case on point from the Supreme Court of Wisconsin, *Huml v. Vlazny*, 716 N.W.2d 807 (WI 2006). In *Huml*, the release applied to "past, present and future claims" and "all claims, whether known or unknown." *Id.* at 811. The court found that such language encompassed a civil judgment that was entered based on unpaid restitution after the settlement. *Id.* at 820. The court concluded that "[i]n using such sweeping words as 'any,' 'all,' and 'whatsoever,' the settlement is 'global' in its coverage" and

thus applied to the civil judgment even though the civil judgment was not referenced specifically and did not yet exist as of the date of the settlement. *Id.*

b. The Addendum Did Not Alter the Release

As described above, the parties to the GSA clearly intended for the release to cover all claims up to the date of settlement, whether or not they had been asserted, or even could have been asserted, in any of the then-pending cases. For this reason, it was only logical that any restitution still outstanding after receipt of all payments contemplated in the GSA would not be pursued by any party to the GSA. Thus, the original GSA included a housekeeping step: Field would appear before Judge Maddox to have the restitution modified.

When the parties appeared before Judge Maddox on November 1, 2017, they were all in agreement that any restitution over and above the consideration provided in the GSA was to be eliminated. The Receiver and his lawyers "supported Defendant Field's motion to modify." (R. p. 82.) However, at the hearing before Judge Maddox, the Attorney General opposed the modification of restitution. (R. pp. 82-83.) After an adjournment and negotiations between Field, the Receiver and the Attorney General, they returned with a compromise. Even at that point, Judge Maddox noted that "the civil plaintiffs and Receiver remained in favor of accepting the GSA." (R. p. 83.) None of the parties to the GSA intended to increase the consideration to the Receiver or otherwise alter the parties' bargain, which had been reached after months of protracted negotiations. The compromise was solely intended to mollify the Attorney General. Judge Maddox's Order makes this clear in several ways:

- Conversion of the remaining restitution to a civil judgment would be undertaken "pursuant to the applicable laws under S.C.S.A. §17-25-323," which is a statutory provision having nothing to do with the civil cases being settled. (R. p. 87.)

- Any amount to be converted to a civil judgment was to be calculated by the South Carolina Department of Probation, Pardon and Parole Services, not the Receiver. (R. p. 88.)
- Any civil judgment was "payable to Defendant Field's criminal victim(s)," which Judge Maddox repeatedly noted included, but did not consist entirely of, the civil plaintiffs. (R. pp. 80-81, p. 88.)

There cannot be any reasonable dispute that Judge Maddox's Order left the GSA unchanged as to all material rights and obligations of the parties. While it recognized the Attorney General's right to obtain a civil judgment pursuant to the normal statutory process, it never purported to change the terms of the settlement.

The Receiver's lawyers prepared an Addendum to reflect the compromise reached before Judge Maddox, which they circulated in a hearing before Judge Miller on November 27, 2017. (R. pp. 251-54.) The Addendum replaced or revised only language pertaining to the criminal case. There were no replacements or revisions to any release language. None of the parties present believed, and no reasonable person would have concluded, that the Receiver's settlement value had suddenly increased by more than $1 million.

c. The Only Reasonable Way to Give Effect to Both the GSA's Release Language and the Addendum Is to Acknowledge That the Latter Was Not Designed to Contradict the Former

Applying South Carolina law to the GSA and Addendum requires viewing the agreement as a whole, giving effect to all provisions thereof and the context in which they arose. *McGill; Yarborough.* The changes to restitution were made without any modification to the release language, which covered any and all claims, known and unknown, concerning "any past, pending or future matter." The only logical way to reconcile both the change to restitution and

the unchanged release is to acknowledge two points: (1) the Attorney General had the right to convert the unpaid restitution to a civil judgment, but (2) the Receiver released the right to enforce that judgment.

The trial court's fundamental error was conflating these two very different legal rights – the right of the Attorney General to obtain a civil judgment and the right of the Receiver to enforce that judgment:

> Field and Taillon argue the release in the GSA (paragraphs 4 & 5) "released" the restitution or any collection thereof. This cannot be effective as the State was not a party to the agreement. Additionally, the "release" of the obligation of restitution was specifically deleted from the GSA by the Addendum.

(R. p. 3.) Taillon does not argue that the GSA released the Attorney General's right to convert unpaid restitution to a civil judgment. The Attorney General was free to obtain a civil judgment provided he did so in compliance with applicable law. Taillon's argument is different: the civil plaintiffs released the right to enforce the civil judgment because they released the claims on which the civil judgment is based. Once again, all the Addendum states is that the GSA does not prevent the Attorney General from converting unpaid restitution into a civil judgment. There is no dispute on that point.

Likewise, the trial court opined that "the collection of the judgment is not a 'claim' as contemplated by the GSA, but rather it is the enforcement by an action for collection of what was already owed and ordered." (R. p. 3.) This is true in a sense but irrelevant. The point is that the civil judgment derived from a released claim – the claim that Field caused investment losses to the class of CIF noteholders. It is beyond question that the damage claims in the civil and criminal cases were parallel remedies for the same alleged wrong. What the GSA purported to do, before the Addendum, was release all civil claims and prevent the Attorney General from seeking restitution beyond the consideration provided in the GSA. What it ended up doing, after

the Addendum, was release all the same civil claims while clarifying that the Attorney General was not so bound. This carve-out for the Attorney General[8] cannot operate as a means of wiping out release language that the Addendum did not even address.

d. Relevant Authority on Point Strongly Supports Taillon's Position

The trial court cited only one case in support of its conclusion that the civil judgment was exempted from the scope of the release. (R. p. 3.) In *State v. Morgan*, 417 S.C. 338, 342-44, 790 S.E.2d 27, 29-30 (2016) the South Carolina Supreme Court held that the parties to a civil settlement could not relieve the defendant from his obligation to pay restitution in a criminal case arising from the same events. This point is not in dispute – it is exactly why the parties sought modification of restitution before Judge Maddox and why they eventually revised the GSA when the Attorney General refused to consent to the modification.

Both the timing of relevant events and the positions of the parties distinguish *Morgan* from this case. In *Morgan*, the victim quickly settled with the defendant's insurer. *Id.* at 339-40, S.E.2d at 28. More than two years later, the defendant pled guilty to a criminal charge arising out of the same event. *Id.* at 340, S.E.2d at 29. At his restitution hearing, the defendant argued that his insurer's private settlement should relieve him of the obligation to pay restitution. *Id.* at 340-41, S.E.2d at 29. In other words, he argued that the state was bound by a private settlement reached before the criminal charge was even adjudicated. This Court denied such claim, holding

[8] The trial court objected to Taillon's argument that the civil judgment was essentially an "insurance policy" for the Attorney General in the event the GSA fell through, calling such argument "far from an accurate statement." (R. p. 10.) But Judge Maddox's November 2017 order strongly supports Taillon's argument. He noted the Receiver was willing to waive any future restitution over and above the consideration set forth in the original GSA, but the Attorney General "expressed concern that reliance on performance by Defendant Field, who was convicted of multiple counts of fraud, was a risk in and of itself." (R. p. 82.) Thus, the purpose of the civil judgment was clearly to mollify the Attorney General, not to put additional funds in the Receiver's pocket.

that "a release of liability cannot foreclose the State's ability to seek restitution if the State was not a party to the agreement." *Id.* at 343, S.E.2d at 30.

Here, the private settlement was not reached until more than three years after the restitution amount was set. It did not purport to restrict in any way the state's right to pursue restitution, except to the extent agreed to by the Attorney General. Rather, the GSA merely releases a private party's right to enforce a post-restitution judgment. The Receiver made a choice – he chose to accept a fixed sum payable in the near term rather than gambling on Field's future ability to satisfy a judgment entered after his probation ended. In *Huml*, the court noted the public policy advantages of allowing such an arrangement:

> Allowing a victim to negotiate to extinguish his or her interest in a judgment derived from a restitution order as part of a global settlement is consistent with the legislature's desire to afford respect to the dignity of victims.
>
> . . .
>
> [T]here is considerable value in permitting a victim to release her interest in a judgment derived from a restitution order because it allows the victim to settle the case and replace an uncertain, future recovery with a certain, immediate recovery.

Huml, 716 NW2d at 816, 819. Upholding such a voluntary settlement is fully consistent with the holding in *Morgan*.

There does not appear to be any South Carolina authority addressing whether there is any prohibition on private parties agreeing to accept consideration in exchange for forgoing their right to pursue a civil judgment arising from unpaid restitution. There is no dispute as a general matter that a private party can release the right to enforce a judgment. The question is whether a civil judgment deriving from a restitution order is an ordinary civil judgment or some sort of unique legal right that is incapable of being waived. To Taillon's knowledge, there are two cases addressing this point, and both support her position.

In *Huml*, the Wisconsin Supreme Court held that a criminal victim could bargain away her right to enforce a civil judgment deriving from unpaid restitution even though the civil judgment had not yet been entered at the time of settlement and the release language did not identify the civil judgment or restitution specifically. The trial court attempted to distinguish *Huml* by noting that there was some discussion in that case about the defendant's right to a set-off and that the civil judgment against Field included credit for the payments under the GSA. (R. pp. 9-10.) This was an incorrect reading of *Huml*, which pointedly distinguished the two issues:

> Vlazny does not seek to set off from the settlement agreement the amount of restitution he paid. Rather, Vlazny claims his settlement agreement with Huml precludes her from enforcing the judgment derived from the unpaid restitution.
>
> . . .
>
> [W]e conclude that a civil settlement agreement can have no effect upon a restitution order while the defendant is on probation unless the circuit court first finds that continued enforcement of the restitution order would result in a double recovery for the victim. **After a defendant is released from probation and any unpaid restitution becomes a civil judgment, however, a settlement agreement between the victim and the defendant may preclude the victim from enforcing the judgment.**

Id. at 820 (emphasis added). The trial court's suggestion that *Huml* only stands for the proposition that Field is entitled to an offset is flatly contradicted by the plain language of the opinion. Further, the *Huml* court found that a broad general release, in language indistinguishable from the language of the GSA, was sufficient to bar the judgment creditor from enforcing the civil judgment. *Id.*

The Receiver attempted to distinguish *Huml* on three grounds: (1) the statutory restitution scheme is supposedly different in Wisconsin than South Carolina; (2) the release in *Huml* mentioned future claims but the GSA did not; and (3) Field knew the civil judgment was coming

and failed to insist on language in the GSA addressing it specifically. (R. p. 234.) None of these arguments has any merit.

The Receiver does not identify any differences between the Wisconsin and South Carolina restitution schemes, much less any material ones. Nothing in the *Huml* case suggests the result hinged on some unique feature of Wisconsin law related to restitution. As for the release language, the Receiver only cited paragraph 5 of the GSA, which indeed does not mention future claims specifically. But paragraph 14(I)(v) does. (R. p. 166, ¶ 14(I)(v) (releasing "any past, pending or future matter").) Moreover, paragraph 4 includes "any other rights and actions otherwise derived from" existing claims. (R. p. 155, ¶ 4.) Thus, the post-GSA civil judgment, derived from allegations of Field's misconduct as manager of CIF, was clearly among the claims released.

Finally, *Huml* did not hold that it was incumbent on the defendant to identify the possibility of a civil judgment specifically in the release. To the contrary, the court stated that it was the judgment creditor who should have addressed the issue if she wanted to exempt a civil judgment from a comprehensive release. Observing that the judgment creditor was represented by counsel, the court found that "[p]reserving the right to enforce a judgment derived from a restitution order, therefore, should have been as simple as including an express exception in the settlement agreement." *Huml* at 819.

Here, the Receiver was represented by five attorneys in drafting and executing the GSA and Addendum. (R. p. 167.) His attorneys drafted the Addendum, which surgically modified and replaced various language in the GSA without touching paragraphs 4 or 5, and without altering the scope of the finality language in paragraph 14(I)(ii) or the release language in

paragraph 14(I)(v).[9] Thus, the Receiver cannot now complain that Field should have demanded specific mention of a potential restitution-based civil judgment in the release. Such a provision would have been superfluous, merely reiterating what was already clear.

The bottom line is that *Huml* is directly on point, and neither the trial court nor the Receiver has been able to distinguish it.

Since the trial court's ruling, another case has come out supporting Taillon's position, albeit in dicta. In *United States v. Dimoff*, No. 10-cr-134-pp, 2021 U.S. Dist. LEXIS 101315, at *7-8 (E.D. Wis. May 28, 2021), a defendant in both civil and criminal cases asked the court to modify his restitution based on a civil settlement he had reached with the victim. His motion was denied on the grounds that any decisions regarding restitution were the prerogative of the U.S. Attorney's Office. Nevertheless, the court held that

> [t]he settlement agreement between the defendant and Acuity may well resolve any civil liability between the defendant and Acuity. In other words, if Acuity ever were to try to recover the unpaid balance of the $38,686 [in restitution] from the defendant, the settlement agreement could thwart such an attempt.

Id. at *7. That is precisely the scenario here.

Huml and *Dimoff* reinforce that there are two distinct issues here. The first is whether the parties to the GSA could have the consideration paid pursuant to the agreement extinguish Field's restitution obligations in the criminal case. Based on the Attorney General's position in November 2017, the parties conceded that such an arrangement was not feasible. The second is whether a judgment creditor can waive the right to enforce a judgment when such judgment

[9] The Addendum did excise from paragraph 14(I)(v) the term "return of earned salary." (R. p. 171, ¶ 4.) The reason for this change was the Attorney General's concern that such language could result in Field receiving some sort of tax advantage. (R. p. 84; p. 249, lines 14-20.) Such revision did not affect the release language.

derives from the remaining balance of restitution. The answer to that question is clearly "yes," and neither the trial court nor the Receiver can produce any authority to the contrary.

The bottom line is that the GSA, as modified by the Addendum, represented a full and final settlement of all potential claims arising out of the losses suffered by CIF noteholders. The Addendum did not purport to modify the scope of the release of claims by the civil plaintiffs. This case can and should be resolved based on the unambiguous language of the GSA, which was entered into by the Receiver, CIF, and civil plaintiffs with full knowledge that they would not be able to enforce any future civil judgment. The case should be remanded with instructions to dismiss the Receiver's motion as barred by the release.

2. Even if the GSA and Addendum Are Deemed Ambiguous, The Ambiguity Must be Resolved in Favor of Field and Taillon and Against the Receiver

Even if this Court concludes that the release language and the language of the Addendum create an ambiguity, the record makes clear that such ambiguity should be resolved against the Receiver as a matter of law. The doctrine of *contra proferentem* provides that as the drafter of the Addendum, the Receiver was in the best position to ensure his position on the status of any civil judgment was fairly reflected in the document. He chose not to make a single revision to the broad release language in the original GSA. Thus, any ambiguity must be resolved against him. Moreover, the contemporaneous actions of the parties show that no one intended the Receiver to be entitled to accept the proceeds of the settlement and then turn around and prosecute a claim for the remaining restitution.

a. *Contra Proferentem* Requires That Any Ambiguities Be Resolved Against the Receiver, Whose Lawyers Drafted the Addendum

Ambiguous language in a contract should be interpreted strongly in favor of the non-drafting party. *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 309, 698 S.E.2d 773, 778 (2010); *McGill v. Moore*, 381 S.C. 179, 186, 672 S.E.2d 571, 575 (2009); *S. Atl. Fin. Servs., Inc. v. Middleton*, 356 S.C. 444, 447, 590 S.E.2d 27, 29 (2003). The Receiver's lawyers drafted the Addendum and then showed up at the hearing before Judge Miller on November 27, 2017, with one copy, having never previously circulated it to the other parties. (R. p. 251, lines 5-13; p. 253, lines 8-18.) Judge Miller had copies made for the other parties present and then ordered all parties to sign by November 30 – three days later. (Id.; R. p. 32.) If there ever was a set of facts calling for the application of *contra proferentem* it is this one. The Receiver's lawyers clearly had the best opportunity to ensure the Addendum reflected their preferences. Any ambiguities should be construed strongly in favor of Field and Taillon.

b. The Contemporaneous Actions and Statements of the Relevant Parties Demonstrate that All Understood that the Receiver Released the Right to Enforce Any Civil Judgment for Unpaid Restitution

Field's contemporaneous actions, and those of his family members and associates, reflect that they believed the right to enforce a civil judgment had been released. By the time of the execution of the GSA, the Receiver had been on the job for eight years, during which time he had not been able to convince any court that Taillon, Allyson Field or Kirsten White was responsible for any of the noteholders' losses. Yet in the GSA, all three gave up significant interests, including title to their homes or other substantial property interests. (R. p. 166, ¶ 14(A)-(H).) It defies logic that they would have done so knowing that a year later the Receiver would be back in court seeking to recover again for exactly the same losses. If the GSA was to be so radically altered by the Addendum – a final settlement replaced by a temporary one – the

overall consideration contemplated in the original GSA would have been greatly reduced. If the trial court is affirmed, Field and Taillon will be considerably worse off than if they had not settled at all. They will have relinquished money and property as essentially a down payment on a judgment that they could have contested. It defies logic that they would have agreed to such a profoundly unfair and disadvantageous arrangement.

For his part, the Receiver well understood at the time the Addendum was proposed that he was not gaining a new source of future recovery. His lawyers told Judge Maddox that the consideration negotiated under the GSA in March 2017 was "the best they felt they could get from Defendant Field." (R. p. 82.)[10]

In addition, the Receiver did not send a second notice per Rule 23(c), SCRCP to the class members about the Addendum, which would have been inexplicable if he believed he was likely to have the opportunity to pursue another million dollar-plus recovery a year after the settlement was approved.[11] If the Receiver really believed he would be the beneficiary of a million-plus dollar judgment, basic fiduciary principles would have required him to inform the class that they were going to have to keep waiting while he litigated that judgment in Florida. That never

---

[10] Had the Addendum been intended to increase the Receiver's settlement proceeds by the amount of unpaid restitution at the end of Field's period of probation, such a change would have materially altered the GSA. Yet the Receiver provided no new consideration for the Addendum. This would render the Addendum *nudum pactum* – unenforceable for want of consideration. *Sanders v. Bagwell*, 32 S.C. 238, 10 S.E. 946 (1890) (addendum materially changing the original agreement but not supported by consideration was *nudum pactum* and thus unenforceable); *Margeson v. Artis*, 776 N.W.2d 652 (IA 2009) (addendum not supported by new consideration was unenforceable).

[11] While the Receiver and his lawyers have continued to draw down CIF's assets with fees year after year, the noteholders have not seen a penny since 2014. Thus, any class member who attended the March 2017 settlement approval hearing would have been relieved to learn that the receivership, which was already entering its ninth year, would finally end and (presumably) a distribution would soon be made. Such a class member would be none the wiser when the Receiver gave no notice of the Addendum, which was not entered into the record in this case until December 31, 2019. (R. pp. 170-84.)

happened. Instead, the Receiver allowed the 640 class members to assume that the GSA brought about the end of the case, allowing him to finally wind up the affairs of CIF in 2018 and distribute to the noteholders whatever funds he had not spent on himself and his lawyers.

Perhaps the most compelling proof that the Receiver released the right to enforce any future civil judgment is the handling of the approval of the GSA by Judge Miller. Judge Miller expressly stated in his approval order that the Addendum "**does not affect any other party to the GSA other than Arthur Field.**" (R. p. 82 (emphasis added).) He approved the Addendum following a hearing at which several of the original parties were not present, without notice to the class members, and based on an Addendum drafted by the Receiver's lawyers but not circulated in advance to any other parties. Judge Miller literally had to order copies made during the hearing. (R. pp. 251-54.) He then simply ordered all 21 original signatories to the GSA to sign the Addendum. (R. p. 32.) By the time he signed the order, his original deadline had passed. (R. p. 32 (deadline of November 30); p. 37 (Order signed December 1).) He then issued a second order requiring the original signatories to sign the Addendum, but again signed the order well after the deadline. (R. p. 27 (requiring signatures by December 13); p. 28 (Order signed December 21).) He ordered the Receiver to notify him if anyone failed to sign. (R. p. 27.) The Receiver never did so, or at least never did so on the record. Thus, the Addendum remains unsigned by various parties and counsel and was never attached to Judge Miller's Order approving the GSA. (R. pp. 170-84.) This calls its validity and enforceability into question under both Rule 23(c), SCRCP, and Rule 43, SCRCP. *See, S.C. Human Affairs Comm'n v. Zeyi Chen*, 430 S.C. 509, 521, 846 S.E.2d 861(2020).

If this Court accepts the plain language construction of the Addendum advanced by Taillon herein, Judge Miller's perfunctory treatment of the execution of the Addendum makes

sense. The Addendum did not alter the rights of any of the parties to the GSA (including CIF) *vis a vis* any of the other parties; it merely confirmed that the Attorney General was free to pursue the statutory procedure for converting unpaid restitution to a civil judgment. There would be no urgent need to obtain the signatures of any absent parties, given that, as Judge Miller stated in his approval order, no one but Arthur Field was affected. In this context, Judge Miller's failure to have the Addendum approved by all parties and counsel, and the Receiver's failure to provide Rule 23(c) notice to the class, were of no great consequence.

If, however, the Addendum contemplated a new revenue source for the Receiver, and somehow, *sub silentio*, carved out that revenue source from the scope of paragraphs 4, 5 and 14(I)(v), Judge Miller's handling of the approval process is inexplicable. In that scenario, there was a major change in the basic deal reflected in the GSA. Rule 23(c) requires notice to class members of the material terms of a settlement. If the Receiver had not pursued Field's home in Florida, he could have wound up CIF's affairs and distributed funds to the noteholders in early 2018. Instead, three more years have already passed, with untold costs streaming out of CIF to pay the Receiver and his lawyers. The GSA 'defendant' signatories lost most, if not all, of the consideration they bargained for. This is not the sort of change to which Judge Miller could simply demand everyone agree. And when he became aware that several parties did not agree, he would not have been free to proceed as though they had. Thus, Judge Miller's contemporaneous actions in approving the GSA and Addendum strongly indicate that all the parties understood the Receiver was releasing <u>all</u> claims against Field, including the right to enforce any future civil judgment arising from unpaid restitution.

c. Post-Approval Events Are Not Relevant to Evaluating the Parties' Contemporaneous Intent As of the Date of the Addendum

Without any contemporaneous evidence to support the Receiver's position, the trial court leaned heavily on the fact that a year after the GSA was approved, Judge Maddox converted the unpaid restitution to a civil judgment in favor of the Receiver. (R. p. 4.) But this is not proof of what the parties believed the Addendum meant at the time it was executed. The October 2018 judgment was inexplicably entered in favor of the Receiver, contrary to the statements in Judge Maddox's November 2017 Order making clear that the civil plaintiffs and the victims were two distinct groups. (R. p. 80 ("some" of civil plaintiffs "are the victims in this criminal action"); p. 81 (the civil plaintiffs "represent some of the victims").) The Receiver was not the "victim" in the criminal case, nor was CIF.[12] Nothing in the November 2017 Order suggested in any way that the contemplated civil judgment would be entered in favor of the Receiver.

Moreover, the 2018 judgment was plainly entered in violation of the statutory requirements. First, the defendant must be in default in making restitution payments to trigger the civil judgment provision. S.C. Code § 17-25-323(B). Field was not in default. Rather, having been found in violation of his probation due to a contempt citation procured by the Receiver, he was serving a portion of his active sentence. A civil judgment may not be entered when the defendant is serving his active sentence. *State v. Gulledge*, 321 S.C. 399, 405, 468 S.E.2d 665, 669 (Ct. App. 1996). Moreover, Field's monthly restitution payments had been suspended in lieu of paying his obligations under the GSA (R. pp. 85-86), which no party has contended he failed to do. Thus, there was no instance of default as needed to trigger the civil judgment provision of the statute.

[12] In an affidavit submitted in one of his federal lawsuits against Field, the Receiver admitted that restitution was to be paid "to the victims, CIF Noteholders." (R. p. 485, ¶ 20.)

It is also apparent that issuing a civil judgment in favor of the Receiver rather than the actual victims was impermissible under the statute. The relevant language provides that the court must enter "judgment in favor of each person entitled to restitution for the unpaid balance if any restitution is ordered plus reasonable attorney's fees and cost ordered by the court." S.C. Code § 17-25-323(B)(2). The Receiver was not a victim. Judge Maddox should have instructed the South Carolina Department of Probation, Pardon and Parole Services to calculate the amounts due to each victim (i.e., those individuals who actually lost money) and issue judgment in the name of each. *Id.* By instead issuing the entire judgment in favor of the Receiver, Judge Maddox placed the plaintiffs' lawyers[13] in the civil action in a position to control the amount, timing and nature of any recovery by the victims to the criminal case, contrary to the statute. This no doubt will allow counsel to point to a larger number when seeking a fee award, but it is difficult to see how it benefits those victims who now must wait longer for the receivership to end and a final distribution to be made, assuming any assets are left after paying Receiver's and attorneys' fees.

It is not clear why Judge Maddox chose to deviate from both his own November 2017 order and the plain language of the statute. That is a matter to be resolved in another proceeding concerning the validity of the judgment. It is sufficient at this point to recognize that the Receiver had no legitimate claim to the 2018 judgment and thus its entry cannot serve as proof that the parties intended all along for the Receiver to receive and enforce a civil judgment despite releasing all claims in the GSA.

[13] Several potential class members opted out of the class and therefore were not represented by class counsel. (R. p. 309.)

3. If this Court is Unwilling to Resolve Any Ambiguities in Favor of Field and Taillon, It Should Remand the Case for Discovery and a Jury Trial

As explained above, this case should be decided in Field's and Taillon's favor based on the plain language of the GSA and Addendum alone or in combination with evidence of the contemporaneous actions and statements of the parties. However, in the event this Court has any doubt as to the enforceability of the release provisions as applied to the civil judgment, it should remand the case for discovery and a jury trial.

Discovery would shed light on several key factual issues. First, testimony concerning the intentions of the parties and Judges Maddox and Miller would be indispensable to a fact-finder attempting to ascertain the intent and purpose of the Addendum. Second, review of the Receiver's contemporaneous actions and communications with the noteholders and *ex parte* communications with Judge Miller would be important to understanding why the Receiver did not announce any intention to pursue any civil judgment at the time of the execution or approval of the GSA. Third, a full accounting of the amounts paid to the Receiver and his lawyers over the eleven-year duration of the receivership would also help the trier of fact to evaluate whether the decision to pursue the civil judgment was truly made at the time the GSA was approved or was made later as a pretext to keep the receivership open and generate the appearance of a larger recovery to justify fees. Finally, discovery is appropriate to evaluate the Receiver's claimed entitlement to a $250,000 penalty (addressed below). While the Receiver blames Field for the many delays in this case, the Receiver himself is responsible for the decision to prosecute a sprawling, multi-jurisdictional legal assault over the course of more than a decade, featuring a massive amount of duplicated (triplicated, quadruplicated . . .) effort across the various cases. The only beneficiaries of this sort of litigation are those that are paid for each hour, day, week and month the litigation – and the receivership – continues. The extraordinarily long tenure of

the receivership in this case has resulted in substantial fees for the Receiver and his attorneys. Discovery into the finances associated with the receivership is long overdue.

The trial court decided this matter as essentially a motion for summary judgment, albeit without following the normal rules such as refraining from weighing the evidence and construing all reasonable inferences in favor of the non-moving parties. *But see, Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011) (summary judgment appropriate only if all reasonable inferences are construed in favor of the non-moving party and there is not a scintilla of evidence establishing an issue of material fact); *Loflin v. BMP Dev., LP*, 427 S.C. 580, 589, 832 S.E.2d 294, 299 (Ct. App. 2019) (at the summary judgment stage, the trial court is not supposed to weigh conflicting evidence on issues of disputed material fact). Even if this Court chooses not to dismiss this case outright or reach the merits of the contract interpretation issue, the defendants are at least entitled to a remand for full discovery on the merits and trial by jury, as contemplated in the Declaratory Judgments Act and the United States and South Carolina constitutions.

D. The Trial Court Erred in Assessing a $250,000 Penalty Against Field Without Following the Law Applicable to Liquidated Damages Clauses or Making Any Factual Findings to Justify Its Conclusion

The trial court granted the Receiver's request to assess a penalty against Field in the amount of $250,000. The trial court first found that Field engaged in an "attempt to disqualify the terms of the GSA," presumably for having the temerity to defend the litigation in Florida and then in the trial court below. (R. p. 7.) The relevant language in the GSA is only triggered "should any party **file any suit or claim** wherein he/she/they/it attempt(s) to revoke or disqualify any term of this Agreement for any reason . . ." (R. p. 166 (emphasis added).) Of course, in this litigation, Field has merely responded in opposition to suits and claims filed by the Receiver and his ever-growing multi-state team of litigators. And he is seeking to enforce the release terms of

the GSA, not attempting to "revoke or disqualify" anything. Thus, a plain reading of the provision makes clear it does not apply. (R. p. 166.) Moreover, the award is made available only to the "prevailing party." Given that this entire proceeding is essentially an attempt to provide the Middle District of Florida with an advisory opinion, determination of who is the prevailing party will have to await the return of this case to Florida. The request is therefore premature at the very least.

In lieu of proof that Field ran afoul of the actual language of the GSA, the trial court falls back on vague assertions that Field's litigation strategy has been somehow improper: "Field's multiple filings within the state of Florida and his repeated efforts to deny this Court's jurisdiction and to delay a speedy and just resolution of the matters pending, amply justify the imposition of the $250,000 liquidated damages assessment." (R. pp. 7-8.) This vague language hinting at some sort of sharp practice[14] by Field is insufficient to establish any actual violation of the GSA. Multiple filings are a feature of every case. Which filings has the trial court reviewed and found unwarranted? As for "efforts to deny the court's jurisdiction," the arguments above and made in Field's brief raise multiple serious questions about the basis for jurisdiction in this case. The language of the GSA cannot be given such an expansive reading as to punish a litigant for raising colorable (indeed, meritorious) defenses. Without some actual finding that Field has taken positions believing them to be without merit, there is no basis to find him in violation of the GSA. And as explained above, to the extent the trial court relied on actions in the Florida case, which the Amended Order clearly reflects she has, such an unwarranted intrusion on another court's sovereignty is inappropriate.

[14] This is odd, as the trial court elsewhere referred to the "well-argued motions of the Defendants." (R. p. 1.)

The trial court's ruling on the $250,000 penalty does not merely clash with the plain language of the GSA, it also conflicts with South Carolina law. South Carolina courts will not enforce a stipulated damages provision if it is designed as a penalty. The standard for enforcing a liquidated damages provision in South Carolina is as follows:

> whe[n] the sum stipulated is reasonably intended by the parties as the predetermined measure of compensation for actual damages that might be sustained by reason of nonperformance, the stipulation is for liquidated damages; and whe[n] the stipulation is not based upon actual damages in the contemplation of the parties, but is intended to provide punishment for breach of the contract, the sum stipulated is a penalty.

DD Dannar, LLC v. SC LAUNCH!, Inc., 431 S.C. 9, 20, 846 S.E.2d 883, 889 (Ct. App. 2020); *quoting ERIE Ins. Co. v. Winter Constr. Co.*, 393 S.C. 455, 462, 713 S.E.2d 318, 322 (Ct. App. 2011). Here, there are clear indications that the provision is designed as a penalty. First, it is easy to determine attorneys' fees arising from litigation over the GSA. Attorneys regularly record and bill their time and it is not unusual to submit such records in support of a request for fees. It would be especially inappropriate for the Receiver's counsel to resist providing accurate records of their time given that they are supposed to be making all efforts to conserve funds on behalf of noteholders, rather than litigating merely for the sake of litigating. Second the GSA purports to provide for an adjustment up, in the event the liquidated damages amount is insufficient, but no corresponding adjustment down. (R. p. 166 ("minimum of $250,000").) This is compelling evidence that the purpose of the provision is to serve as a penalty. The Receiver knows what his legal fees are – he pays them. Although the Receiver certainly has not spared any expense in litigating this matter to date, it is profoundly hard to believe that his legal team has managed to generate $250,000 in legal fees on this matter, which has yet to even reach the discovery stage in the court below or in Florida.

Based on the forgoing, the $250,000 penalty, which the trial court approved without citing any authority, is unenforceable. If the Middle District of Florida wishes to assess attorneys' fees against Field and has a legitimate basis for doing so, that is a step it can take. But the trial court lacked any factual or legal basis for its award of the penalty against Field, and such ruling should therefore be reversed.

CONCLUSION

For the reasons set forth herein, Taillon respectfully requests that this matter be dismissed or remanded with instructions that the trial court enter judgment against the Receiver on all claims. In the alternative, this matter should be remanded for discovery and a trial on the merits of the Receiver's claims.

January 6, 2022

/s Jeffrey P. Dunlaevy
Jeffrey P. Dunlaevy (SC Bar No. 19678)
Dunlaevy Law Firm
37 Villa Road, Suite 440
Greenville SC 29615
864.208.9305
Counsel for Appellant Kathryn Taillon

RECEIVED
Jan 06 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Jean Hoefer Toal, Chief Justice of the
South Carolina Supreme Court (Retired),
Acting as Circuit Court Judge

Case No. 2008-CP-23-3665

William F. Tomz and Francis W. Tomz,
Individually and as Class Representatives, Respondents,

v.

Capital Investment Funding, LLC, by and through its Receiver, Jerry T. Saad,
And Arthur M. Field, Defendants,

Of Which Capital Investment Funding, LLC, by and through its Receiver,
Jerry T. Saad is a Respondent and Arthur M. Field is the Appellant.

In Re: Kathryn Taillon, Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

January 6, 2022

s/ Jeffrey P. Dunlaevy
Jeffrey P. Dunlaevy (SC Bar No. 16978)
Dunlaevy Law Firm
37 Villa Road, Suite 440
Greenville SC 29615
864.208.9305