AMERICAN ARBITRATION ASSOCIATION

Commercial Arbitration Tribunal

CASE NO.: 01-21-0017-9580

THE ULTIMATE UMBRELLA COMPANY, INC., a Florida corporation,
Claimant,

v.

THOMAS PARKER, an individual; THOMAS MATTHEW PARKER REVOCABLE TRUST AGREEMENT DATED FEBRUARY 21, 2020, a trust; CHARLES MUNROE, an individual; CHARLES MUNROE FAMILY TRUST DATED FEBRUARY 5, 2020, a trust; CYNTHIA MUNROE SLAT TRUST U/A/D OCTOBER 1, 2019, a trust; EDWARD USMAR, an individual; DOUGAN CLARKE, an individual; and 2019 CLARKE TRUST U/A/D FEBRUARY 26, 2019, a trust,

Respondents.
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THOMAS PARKER, an individual; THOMAS MATTHEW PARKER REVOCABLE TRUST AGREEMENT DATED FEBRUARY 21, 2020, a trust; CHARLES MUNROE FAMILY TRUST DATED FEBRUARY 5, 2020, a trust; CYNTHIA MUNROE SLAT TRUST U/A/D OCTOBER 1, 2019, a trust,
Counterclaim-Claimants,

v.

THE ULTIMATE UMBRELLA COMPANY, INC., a Florida corporation,
Counterclaim-Respondent.

_____/

THOMAS PARKER, an individual; THOMAS MATTHEW PARKER REVOCABLE TRUST AGREEMENT DATED FEBRUARY 21, 2020, a trust; CHARLES MUNROE FAMILY TRUST DATED FEBRUARY 5, 2020, a trust; CYNTHIA MUNROE SLAT TRUST U/A/D OCTOBER 1, 2019, a trust,
Cross claim-Claimants,

v.

DOUGAN CLARKE, an individual,
Cross claim-Respondent.
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FINAL AWARD

We, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the arbitration provision contained paragraph 20 of the parties' Shareholders Agreement dated January 13, 2006 having been duly sworn, and having heard the proofs, arguments and allegations of and from the above-named parties hereby enter our Final Award.

INTRODUCTION

The final hearing in this arbitration was held in Miami, Florida, on June 10-14, 2024, and June 17-19, 2024. The claims, defenses, and counterclaims in this arbitration are prolix, comprehensive, and complex, and the procedural orders numerous. We summarize the claims, defenses, ultimate facts, and procedural orders below.

CLAIMS AND DEFENSES ASSERTED

A. THE DEMAND FOR ARBITRATION

Pursuant to section 20 of the Shareholders Agreement dated January 13, 2006 ("Shareholder Agreement"), Claimant, Ultimate Umbrella Company, Inc. ("UU"), initially brought this arbitration in 2021 against Respondents, Thomas Parker ("Parker"), the Thomas Matthew Parker Revocable Trust Agreement Dated February 21, 2020 (together "the Parker Parties"), Charles Munroe ("Munroe"), the Charles Munroe Family Trust Dated February 5, 2020, the Cynthia Munroe Slat Trust U/A/D October 1, 2015 (together "the Munroe Parties "), Edward Usmar ("Usmar"), Dougan Clarke ("Clarke") and the 2019 Clarke Trust U/A/D February 26, 2019 (the "Clark Trust") (Clarke and the Clark Trust together as the "Clark Parties"). All Respondents asserted various defenses, counterclaims and cross-claims for relief, although the Clarke Parties are aligned with UU.

The Demand for Arbitration states that it is an action for declaratory relief between UU

and its current and former shareholders. It sought a declaration that the Parker Parties, the Munroe Parties, and Usmar (collectively, the "Redeemed Respondents") ceased to be shareholders of UU on October 8, 2021, when UU allegedly redeemed their shares in accordance with section 7 of the Shareholder Agreement. The remaining shareholders of UU, that is Clarke and the Clarke Trust, were included as Respondents so that all shareholders of UU would be named in the arbitration and because their interests in UU could be affected by the declaration. Counts against Respondents are:

a. Count I: Declaratory Judgment (against all Respondents) that the Redeemed Respondents ceased to be shareholders of UU on October 8, 2021, when UU allegedly redeemed the UU shares held by the Redeemed Respondents, and how the Clarke Parties' shares are impacted by the alleged redemption on the Redeemed Respondents' shares;

b. Count II: Specific Performance (In the First Alternative, against Redeemed Respondents), that the Redeemed Respondents, if the alleged redemption on October 8, 2021 was ineffectual, (i) be ordered to immediately tender their shares for redemption and closing on the redemption transaction is prescribed by section 7 of the Shareholder Agreement; and (ii) that a constructive trust on the Redeemed Respondents' shares be imposed for the benefit of UU;

c. Count III: Breach of Fiduciary Duty (In the Second Alternative, against Parker) that if the shares were not subject to redemption on October 8, 2021 and were secretly eliminated, Parker violated his duty of due care as general counsel, director and officer of UU and should be held personally liable to UU for damages to compensate it for the value of the redemption rights secretly eliminated and a constructive trust should be imposed on Redeemed Respondents' shares for the benefit of UU;

d. Count IV: Constructive Fraud (in the Second Alternative against Parker), if the shares were not subject to redemption on October 8, 2021 and were secretly eliminated, Parker abused his position to benefit himself by engineering and advising on the transaction that created UU's operating subsidiary, causing UU secretly to forfeit valuable redemption rights for the benefit of minority shareholders including himself, and should be held liable to UU for damages to compensate it for the value of the redemptive rights secretly eliminated.

B. PARKER RESPONDENTS' AMENDED ANSWERING STATEMENT

The Parker Parties' Amended Answering Statement alleges several defenses to the Demand for Arbitration. The most relevant are:

a. The Demand for Arbitration fails to state a claim against the Parker Respondents because the referenced redemption rights expired in 2009 when Parker left the employ of UU due to a reorganization of UU into TUUCI Worldwide LLC ("WW"), thereby causing all of UU's employees, including Parker, to leave UU's employ and to be hired by the newly formed entity; and because the employees, including Parker, thereafter had no duties or compensation with UU and because the Shareholder Agreement states: "[Claimant] must give notice of its intent to purchase shares under the terms of this Paragraph 7 within 90 days of the event of termination or the purchase option will expire."

b. UU's claims are barred by its unclean hands through its own inequitable conduct and that of its agents and representatives, including its controlling director and shareholder Clarke by coercing Parker into resigning as UU's officer.

c. UU's claims are barred by the doctrine of waiver because when its majority shareholder Clarke directed and acquiesced in the reorganization in 2009 and Parker's

continued employment in the separately formed entity WW, and UU waived its rights to redeem any of Parker's shares in 2009 after the reorganization was completed and Parker was no longer employed by UU.

d. UU's declaratory relief Count is barred by the statute of limitations because that cause of action would have begun to accrue in 2009 and a claim based on a written instrument must be brought within five years; the specific performance Count is barred because it would have accrued no later than the third quarter of 2020 and the statute of limitations for specific performance of a contract is one year; claims for breach of fiduciary duty (Count III) and constructive fraud (Count IV) are barred by the applicable statute of limitations since they would have accrued in 2009 and run in two years (professional malpractice), four years (negligence) and four years (fraud).

e. Claimant's claims for breach of fiduciary duty (Count III) and constructive fraud (Count IV) against Parker are barred by Florida's statute of repose.

e. The claims of breach of fiduciary duty and constructive fraud against Parker are barred by the business judgment rule.

C. THE PARKER AND MUNROE PARTIES' AMENDED COUNTERCLAIMS AGAINST UU AND AMENDED CROSS-CLAIM AGAINST CLARKE

The Parker and Munroe Parties, in their Amended Counterclaim against UU and Amended Cross claim against Clarke, assert several claims. They are:

a. Count I: (Declaratory Relief Against Clarke and UU) seeking the entry of an award declaring that:

1) Each of these parties is the rightful owner of the allegedly redeemed shares of UU and for damages; with declarations that UU's claimed contractual redemption rights

expired on or about April 1, 2009, 90 days after Clarke, Parker, Munroe, and Usmar left the employ of UU as part of the 2009 reorganization and UU thus had no right to redeem shares owned by the Redeemed Respondents.

2) UU's contractual redemption rights that were exercisable within 90 days after Parker and Munroe left the employ of shares expired by their terms and, additionally, the rights do not apply to shares belonging to Permitted Transferees or to the shares transferred by Clarke to Parker and Munroe in 2008; that the letter dated October 8, 2021 sent by Clarke to the Redeemed Respondents entitled Action Taken by Written Consent of the Majority Shareholders of the Ultimate Umbrella Company Inc. purporting to have UU call and redeem all of the minority shareholders' shares is invalid, null and void.

3) Parker's resignation from his employment and officer positions was coerced by Clarke and submitted under duress from Clark's threats.

4) Assuming UU had a right of redemption as to any minority shareholders' stock, the redemption price must be properly reflective of the pro rata value for all shares of UU as intended by the parties to the Shareholder Agreement; constructive trust should be imposed over the shares of UU owned by all of the Redeemed Respondents with disgorgement of those shares from UU and Clarke the Redeemed Respondents; and

5) That UU shares sought to be redeemed by UU and Clarke be delivered to the Parker and Munroe Parties.

b. Count II: (Breach of Fiduciary Duty Against Clarke) alleges that Clarke, as director of UU with rights to control UU's Board pursuant to the Shareholder Agreement, had a fiduciary duty to the minority shareholders and could not place his own personal interests ahead of the interests of the minority shareholders or engage in acts of self-dealing or

misuse of corporate assets and funds, but he did breach that fiduciary duty to the minority shareholders and is liable to the Parker and Munroe Parties for the damages.

c. Count III: (Breach of Contract--Against Clarke and UU) alleges that shares of stock in UU are not to be subject to redemption except in special circumstances; the right of redemption expired in the year 2009; and the right to redemption is not applicable to shares of UU that were transferred by Parker and Munroe to family trusts or which were acquired from Clark in an excluded transaction; and that Clarke and UU breached the UU Shareholder Agreement by wrongfully pursuing redemptions of minority shareholders' stock and the Parker and Munroe Parties must be compensated in damages, jointly and severally by UU and Clarke.

d. Count IV (Breach of Covenants of Good Faith and Fair Dealing against Clarke and UU) alleges Clark and UU's acts and conduct in wrongfully pursuing redemptions of minority shareholders' stock in UU and wrongfully threatening Parker and Munroe redemption of their shares and termination of their employment constitute a breach of implied covenant of good faith and fair dealing with respect to the Shareholder Agreement.

e. Count V: (Unjust Enrichment—Parker Against Clarke) Parker alleges Clarke has been unjustly enriched by retaining all of the benefits Parker conferred at the expense of, and to the detriment of, the minority shareholders and demands damages in his favor.

f. Count VI: (Imposition of Constructive Trust and Disgorgement against Clarke and UU) demands that a constructive trust be imposed upon shares of stock in UU originally issued to or owned by UU's minority shareholders and that the shares wrongfully redeemed by Clarke and UU be returned to the Parker and Munroe Parties and that earnings and profits distributed to UU to which the rightful owners of the minority shares are entitled be

disgorged *pro rata* to them.

g. Count VII: (Accounting—Parker and Munroe Parties Against UU and Clarke) demands a complete and accurate accounting of the financial affairs of Clarke and UU relevant to the misconduct alleged.

h. Count VIII (Indemnification and Advancement of Expenses), alleging that the Articles of Incorporation of UU provides broad indemnification and advancement of expenses to UU officers and directors and Parker as an officer and director is entitled to indemnification entitles him to indemnification and advancement of expenses under Article VII (a) in connection with this arbitration.

In the Parker Parties' closing statement, their counsel noted that the Parker Parties were standing on only three of the above Counts: Count III, breach of contract against Clarke and UU; Count II, breach of fiduciary duty against Clarke; and Count VIII, indemnification and advancement of expenses in this arbitration.

D. UU AND CLARKE'S SECOND AMENDED ANSWERING STATEMENT TO COUNTERCLAIM AND CROSS-CLAIM AND RESTATEMENT OF ADDITIONAL CLAIMS ASSERTED BY CLARKE

In response to the amended counterclaim against UU and cross-claim against Clarke filed by the Parker Parties and the Munroe Parties, UU and Clarke interposed defenses. The Tribunal lists the defenses that it finds are most relevant below:

a. First Defense: that the claims asserted or claims are barred, as there was no pre-suit demand nor an allegation of futility.

b. Second Defense: that all of the claims should have been asserted as derivative claims.

c. Third Defense: that the claims that UU's redemption rights expired in 2009 do not apply to shares held in trust, or that do not apply to shares transferred between UU shareholders, are all foreclosed by the doctrine of estoppel since Parker represented to UU's shareholders that UU still had redemption rights upon which representations Clarke and UU relied.

d. Fifth Defense: any claim that UU's redemption rights expired is foreclosed by the doctrine of waiver when Claimants failed to tender their shares in, or since, 2009 and because of Parker's statements that the redemption rights still existed.

e. Seventh Defense: that the claims against Clarke for breach of fiduciary duty in exercising UU's redemption were allowed by the Shareholder Agreement and were made in the best interests of UU.

f. Eighth Defense: any breach of fiduciary duty claim fails to state a cause of action under Florida law because such claims only belong to the corporation;

g. Ninth Defense: any breach of fiduciary duty claim fails because Clarke performed his duties under, and in compliance with, section 607.0830, Florida Statutes, in that he acted in good faith and in the best interests of UU.

h. Tenth Defense: any breach of contract or breach of implied covenant of good faith and fair dealing claims fail because Clark is immune to liability under section 607.0831 as he would have breached or failed to perform his duties as a director and because any alleging breach does not fall into one of the five categories listed in 607.031 (1) (b) (1-(5);

i. Eleventh Defense: the breach of contract or breach of implied covenant of good faith and fair dealing fails because it is not alleged that UU received any consideration for any modification of UU's redemption rights.

j. Twelfth Defense: to the extent that the breach of contract or breach of implied

covenant of good faith and fair dealing is based upon mutual mistake, the contract should be reformed to reflect the true agreement of the parties.

k. Fourteenth Defense: the unjust enrichment claim fails because there is an express written contract among Clarke, UU, Parker, Munroe and Usmar.

l. Fifteenth Defense: since Parker, Munroe and Usmar are no longer shareholders of UU, they lack standing to impose a constructive trust, disgorgement or an accounting of the financial affairs of UU.

m. Sixteenth Defense: imposition of constructive trust, disgorgement and accounting all fail because they are not causes of action recognized under Florida law but are remedies;

n. Seventeenth Defense: the imposition of constructive trust, disgorgement and accounting fail because Redeemed Respondents have an adequate remedy at law, including monetary damages.

o. Eighteenth Defense: imposition of constructive trust and disgorgement fail because UU has no obligation of such funds to its shareholders.

p. Twenty-first Defense: all claims fail because Parker, Munroe and Usmar have unclean hands because they secretly eliminated UU's redemption rights.

q. Twenty-fifth Defense: to the extent Parker, Munroe and Usmar left the employ of UU in 2009, or at any time thereafter, they failed to tender their shares for redemption; UU still has the right to redeem them and seeks to be restored to the position it would be in at the shares been tendered properly.

r. Twenty-sixth Defense: to the extent that Parker, Munroe and Usmar left the employ of UU or any time thereafter, but failed to tender their shares, UU seeks to be restored to the position it would have been in the event of proper tenders and demands that any monetary recovery

in favor of Redeemed Respondents be set off by those amounts.

s. Twenty-seventh Defense: Parker and Munroe Parties' transfer of shares to their family trusts was improperly done and the transfers are void.

t. Twenty-eighth Defense: the indemnification claim fails because the Amended Articles of Incorporation were not adopted in accordance with the Florida Business Corporations Act.

u. Twenty-ninth Defense: the indemnification claim fails because there is no mandatory indemnification coverage for first-party claims.

v. Thirtieth Defense: UU is prohibited from providing Parker relief because he did not act in good faith or in a manner he reasonably believed to be in the best interests of the Corporation.

w. Thirty-first Defense: the claim for indemnification fails because Parker acted with a conscious disregard for the best interests of the corporation in a transaction in which he derived an improper personal benefit.

x. Thirty-second Defense: the claim for indemnification fails because it would not be fair and reasonable.

UU and Clarke also interposed four additional counts against Redeemed Respondents:

a. Count I: (Declaratory Judgment, 2009 Separation against All Redeemed Respondents), alleging that if Parker, Munroe and Usmar left the employ of UU in 2009, they never tendered their shares to UU and thus the Tribunal should declare that the 90-day window for UU to exercise its option to redeem their shares never was triggered and UU still has the option to redeem their shares as of the date to be determined;

b. Count II: (Continuing Breach of Contract, 2009 Separation by UU against Parker, Munroe and Usmar) alleging that if Parker, Munroe and Usmar left the employ of UU in 2009,

UU suffered a continuing breach of contract and should be restored to the position it would have been had they properly tendered their shares when they left UU

c. Count III (Declaratory Judgment, 2017 Separation by UU and Clark against Usmar), alleges that if Usmar left the employ of UU on November 1, 2017, based on his transfer to another division of UU, then he never tendered his shares to UU, UU's 90-day window to redeem his shares was never triggered and UU should be restored to the position it would have been in had Usmar tendered his shares in UU.

d. Count IV (Continuing Breach of Contract, 2017 Separation by UU against Usmar), alleging that if Usmar left the employ of UU in 2017, he should be estopped from asserting limitations periods as a defense.

e. Count V (Declaratory Judgment Void Transfers to Munroe's permitted transferees, by UU and Clarke against Munroe), alleging that the transfers of shares of UU to Munroe's wife, Munroe Family Trust and Munroe SLAT Trust were improper and thus void.

E. RESPONDENT EDWARD USMAR'S ANSWERING STATEMENT AND DEFENSES

Usmar submitted defenses to the Demand for Arbitration. Notably, Usmar never brought his own affirmative claims. His defenses included in relevant part:

a. UU's claims are barred for failure to state a claim since the Notice of Redemption states that UU is redeeming Usmar's shares due to his reported termination of employment at WW, not UU.

b. UU's claims are barred since he was not an employee of UU on August 26, 2021, when he is alleged to have been terminated by UU; pursuant to the Shareholders Agreement, his shares can be redeemed only when he leaves the employ of UU.

c. UU's claims are barred by the doctrines of waiver and estoppel since Usmar left the employ UU at the end of 2008 and UU did not notify Usmar of its intent to redeem his shares at that time.

d. UU's claims are barred due to UU's prior material breach of the Shareholder Agreement by intentionally understating the redemption price to be paid for Usmar's shares and based upon the breach of implied covenant of good faith and fair dealing.

e. UU's claims are barred by its clean hands and unfair conduct, through Clarke's unfair and unreasonable pressure and by UU's failure to tender earned distributions and its commencing this arbitration.

F. RESPONDENT USMAR'S ANSWERING STATEMENT AND DEFENSES TO ADDITIONAL CLAIMS BY UU AND CLARKE

In addition to the prior eight defenses Usmar asserted to the additional claims asserted by UU (*see* F above), Usmar asserted additional defenses, the most relevant of which:

a. UU and Clarke's claims are barred because the allegations in the Demand for Arbitration contradict the Shareholder Agreement in that the Agreement refers solely to Usmar's leaving the employ of UU, which failed to exercise its option to redeem within 90 days.

b. UU and Clarke's claims are barred because UU failed to redeem Usmar's shares in 2009 after Usmar had left the employ of UU.

c. UU and Clarke's claims are barred due to the doctrine of estoppel since Usmar left the employ of UU at the end of 2008 and UU did not notify him that he had to tender his shares so that UU could redeem his shares.

d. UU and Clarke's claims are barred because of their unclean hands since they knew Usmar had left the employ of UU yet delayed redemption of his shares until it would be more

advantageous to them.

G. RESPONDENT CHARLES MUNROE PARTIES' RESPONSE TO AMENDED ANSWERING STATEMENT TO RESPONDENTS' COUNTERCLAIM AND CROSS-CLAIM AND ADDITIONAL CLAIMS ASSERTED BY UU AND CLARKE

The Munroe Parties asserted various affirmative defenses to the Claimants' cross-claim and additional claims by UU and Clarke. Most relevant hereto:

a. UU failed to pursue its rights under the Shareholder Agreement when Munroe left UU's employ in January 2009; it did nothing and thus is estopped from claiming Munroe failed to tender his shares.

b. UU and Clarke failed to state claims for relief because their redemptive rights expired on January 1, 2009, when Munroe left UU's employ.

c. UU does not have the right to redeem shares held by the Munroe Family Trust or the Munroe SLAT Trust because the Shareholder Agreement does not apply to a Permitted Transferee.

d. UU and Clarke's claims are barred by their unclean hands through Clarke's pressuring the minority shareholders to sell their shares were significantly less than the shares were worth and by Clarke's breaches of fiduciary duty to Munroe.

e. UU and Clarke's claims are barred by the doctrine of waiver, due to the failure of UU and Clarke to redeem Munroe's shares upon the reorganization effective January 1, 2009.

f. UU and Clarke's damages, if any, must be reduced to the extent UU and Clarke received benefits from the 2009 reorganization and Munroe's employment with UU.

g. UU and Clarke's claims are barred by their material breach of the UU Shareholder Agreement when they intentionally understated the redemption price to be paid to the Munroe

Parties; they also breached the implied covenant of good faith and fair dealing.

PROCEDURAL HISTORY

The Demand for Arbitration and the Statement of Claim were filed in December 2021. For the entire period of the arbitration, it was contested robustly. The parties filed motions to dismiss, motions for summary judgment, and discovery and other prehearing motions throughout the history of the arbitration.

The Tribunal entered 16 Procedural Orders, the first of which addressed the typical case-management topics, but which also addressed motions to dismiss and motions to bifurcate (Scheduling Order #1). In that order, the Tribunal set the Final Arbitration Hearing for November 28, 2022. Amended Procedural Order #1 also contained rulings on various motions. Procedural Order #2 addressed motions regarding alleged untimely amendments to pleadings and a motion by Munroe to determine that the Redeemed Respondents and their "Permitted Transferees" shares are not subject to the redemption restrictions and procedures set forth in the Shareholder Agreement and thus were exempt the redemption obligations in that Agreement. The Tribunal ruled that the shares were not exempt from all provisions of the Shareholder Agreement.

In Procedural Order #3, the Tribunal decided motions regarding documents in dispute pursuant to the parties' Redfern schedules and a motion the Parker and Munroe Parties brought to overrule UU and Clarke's assertions of privileges. In Procedural Order #4, the Tribunal addressed motions for leave to amend certain answering statements and for advancement of litigation expenses.

Procedural Order #5 addressed and denied (with one exception, against Parker and Munroe on Count V Unjust Enrichment of their Counterclaim) dueling motions for summary judgment; and a motion to determine whether communications with Mediator Bruce Greer were protected by

the mediation privilege (also addressed in Procedural Order #6).

Just prior to the Final Hearing set for November 28, 2022, the parties informed the Tribunal that the Parker Parties and the Munroe Parties had settled their dispute with Claimants UU and Clarke and that only the claims against Respondent Usmar would remain pending. The Tribunal set the final hearing for those claims for February 21-22, 2023. In Procedural Order #8, the Tribunal noted that there was a disagreement among the parties as to whether a settlement actually had been reached between the Claimant and any Redeemed Respondent. Thus, the Tribunal reset the final hearing to address all parties' claims for June 2023. The Tribunal set the final hearing date in Procedural Order #9.

However, as noted in Procedural Order #10, the Munroe Parties' Counsel had fallen ill and thus parties had retained replacement counsel and a stay of the final hearing was necessary. Procedural Order #11 set the final hearing for October 25-November 1, 2023. In Procedural Order #12, the Tribunal, in ruling on a motion to compel, noted that it had appeared that the final hearing would be going forward.

In the meantime, the Tribunal ruled upon Parker and Munroe Parties' Motion to Strike UU and Clarke Parties' Deposition Designations in Procedural Order #13. There, it noted again that no party had provided any reasons why the final hearing should not go forward in October and November 2023.

However, in October 2023, Respondent Usmar filed an emergency motion due to a medical condition, asking for a continuation of the final hearing. The Tribunal granted that motion and set the final hearing for June 2024 in Procedural Order #14. The Tribunal then set new procedural deadlines in Procedural Order #15, in which the Tribunal also denied UU and Clarke's motion *in limine* to exclude the expert testimony of Michael P Elkin.

FINAL HEARING

A. PARTIES AND COUNSEL WHO APPEARED

The Tribunal heard evidence in the matter at the final hearing held on June 10-19, 2024. During the final hearing, the following parties appeared with their counsel:

1. UU was represented by the law firm of Swift-Perez PA, Chris Swift-Perez, Esq.
2. The Clarke Parties were represented by the law firm of White & Case LLP, Evan Goldenberg, Esq. and Jason Zakia, Esq.
3. The Parker Parties were represented by the law firm of Shutts & Bowen, LLP, David O. Batista, Esq. and Jennifer Fields, Esq.
4. The Munroe Parties were represented by Ramon Abadin, Esq. and Caldera Law PLLC, Christina Himmel, Esq.
5. Edward Usmar was represented by Adam J Steinberg, Esq. and Vanessa Fonts, Esq.

B. WITNESSES WHO TESTIFIED

The witnesses who testified at the final hearing in order of appearance were:

1. Dougan Clarke
2. Tania Pages
3. Robertus Planken
4. Joshua Rader
5. Scott Smith
6. Jeff Hicks
7. Thomas Parker
8. Michael Elkin
9. Charles Baum
10. Charles Munroe
11. Edward Usmar
12. David Schutte

FINDINGS OF ULTIMATE FACT

Based upon the evidence and the arguments presented, the Tribunal makes the following

findings of ultimate fact:

Clarke formed UU in 1998 as a Florida corporation. Parker joined UU as a shareholder, officer and director in 1999, and was issued shares of UU stock. Usmar initially joined UU in 2002 as an employee. In 2005, Clarke caused UU to issue shares of UU stock and he was appointed as an officer and director of UU. Also in 2005, Munroe joined UU as an officer, director and shareholder with his payment of $839,000 in return for shares of UU shares of stock.

As of the date of the final hearing, the ownership of UU's shares of stock was as follows:

Clarke Parties	56.01%
Parker Parties	20.07%
Monroe Parties	19.66%
Usmar	4.26%

Parker and Clarke executed that certain Shareholder Agreement (the "Shareholder Agreement") effective December 31, 2005, and dated January 13, 2006, which is the subject-matter of this proceeding. Monroe and Usmar later signed a separate joinder in the Shareholder Agreement on January 13, 2006 and March 7, 2006, respectively. All shares of stock in UU are governed by the Shareholder Agreement, including all shares transferred to the parties' trusts.

The Shareholder Agreement defines the "Corporation" to be solely UU and there is no reference to any subsidiaries or affiliates of UU. Recital (B) of the Shareholder Agreement states that the purpose of the Shareholder Agreement is to "preserv[e] harmony and continuity with respect to the management of the Corporation, and that such goal can best be attained by retaining stock ownership of the Corporation in its active employees, directors, officers, and Shareholders." Paragraph 7 of the Shareholder Agreement provides:

> In the event any Shareholder leaves the employ of the Corporation for any reason, he or the legal representative of his Estate shall immediately tender his shares to the Corporation and the Corporation shall have the right, but not the obligation to redeem (Corporation must give notice of intention to redeem within ninety (90)

days of the tender of the shares) the shares as follows ...

The Shareholder Agreement states three formulas for the redemption prices depending on the reasons for a Shareholder's leaving the "employ" of UU. Pursuant to paragraph 7.1, the Shareholder is entitled to a redemption price only equal to book value if the termination is "the result of a discharge for cause by" UU. If the termination is voluntary by the Shareholder with 4 ½ months prior written notice, the redemption price is book value plus 5 times "the average adjusted operating earnings" of UU pursuant to paragraph 7.2.1. If the termination results from a discharge of employment by UU without cause, the redemption price is book value plus 6.5 times "the average adjusted operating earnings" of UU pursuant to paragraph 7.2.2. That paragraph defines "adjusted operating earnings" to mean the "net earnings" of UU.

Paragraph 5.1 of the Shareholder Agreement permits any shareholder to "transfer a portion of his Stock, at any time, to a Permitted Transferee, provided, however, that such Permitted Transferee(s) and the trustee of any trust for a Permitted Transferee have undertaken, or do undertake, in writing to be bound by the provisions of this Agreement," including paragraph 7. A "Permitted Transferee" is defined in paragraph 2.6 of the Shareholder Agreement as "a trust for the benefit of a Shareholder, a Shareholder's spouse, a trust for such spouse's benefit, a Shareholder's issue, or a trust for the benefit of such issue." Paragraph 17 states that the Shareholder Agreement "shall be binding upon any person to whom any Stock is transferred whether in violation of the provisions of this Agreement or pursuant to its terms," and voids transfers if a Permitted Transferee "shall fail to execute a signature page."

Effective January 1, 2009, UU underwent a corporate reorganization, whereby UU ceased active operations and became the holding company for its subsidiaries. As part of the corporate reorganization, a new, separate entity with separate legal ownership was created WW. WW

became the owner of a newly created subsidiary called TUUCI, LLC ("LLC"). As of January 1, 2009, Clarke, Munroe, Parker and Usmar became employed by LLC, but, as will be explained, they each remained officers and directors of UU.

While disputed by the parties, the Tribunal finds it has been clearly established that both Clarke and Parker were employed by UU until 2021. Usmar's employment is admittedly less clear but, for reasons detailed herein, he also remained employed by UU. It is clear that the parties did not "clean up" the documents as they should have after the re-organization. However, after reviewing the testimony and evidence, the Tribunal, as explained more fully below, finds that all three Redeemed Respondents remained as officers and employees of UU and that, consistent with the Shareholder Agreement, the redemption rights were not triggered until 2021. *See infra.*

On or about October 8, 2021, UU provided notices to the Redeemed Respondents of UU's intent to redeem their shares of stock in UU pursuant to the Shareholder Agreement. The Redeemed Respondents did not take that tender and, as of today, all remain shareholders of UU.

CONCLUSIONS OF LAW

Interpretation of 7.2 of the Shareholders Agreement

Paragraph 7.2 of the Shareholders Agreement provides, in certain circumstances, redemption of any Shareholders' stock based on difference multiples of "average adjusted operating earnings" of UU. This term is defined in paragraph 7.2.2 mean "net earnings" as determined by UU's accounting firm retained to prepare UU's tax returns and financial statements.

"Net earnings" is not defined in the Shareholders Agreement, but is synonymous under GAAP to mean "net income." Thus, the proper calculations for any redemption under paragraph 7.2 should be multiples of net income and the Tribunal determines that there is insufficient evidence to find that the parties intended "net earnings" or "average adjusted operating earnings" to mean "earnings before interest, taxes, depreciation and amortization", *i.e.,* EBITDA or "earnings before interest and taxes" *i.e.,* EBIT. There is also no evidentiary basis to find that the parties intended to permit a redemption under 7.2 to be at fair market value or fair value. The parties contractually agreed what the redemption price was to be under 7.2, and the Arbitrators will not re-write the Shareholders Agreement to provide otherwise. Indeed, Munroe admitted that pursuant to GAAP, net earnings means net income.

The redemption calculations, including the calculations of net earnings, were to be done pursuant to the Shareholder Agreement by "then certified public accounting firm serving the Corporation"—Appelrouth, Farah & Co., P.A. ("Appelrouth") in 2021[1]—by UU's accounting firm, Appelrouth. While UU engaged Appelrouth only to prepare UU's taxes, UU did not engage another outside accounting firm to prepare financial statements for UU.

[1] Appelrouth also served as UU's CPA when the parties executed the Shareholders Agreement.

Nevertheless, Appelrouth failed to properly calculate the redemption prices correctly, which caused UU to tender the incorrect down payments and promissory notes for the Redeemed Respondents. Appelrouth ultimately corrected its calculations, which were provided by UU's counsel to counsel for the Redeemed Respondents while this arbitration was pending.

Two significant points on this issue. First, UU indisputably did not tender the correct down payment and promissory notes to the Redeemed Respondents in 2021. It is undisputed that the original calculation and tender were in error and were not corrected for an extended period of time and then only apparently as part of the settlement. *See infra.* Second, by the same token, there was no evidence that Appelrouth's final calculations were in error as calculated based upon a redemption of the shares in 2021.

UU did not forfeit redemption rights by tender of incorrect redemption price but it did breach Shareholder Agreement

In order for UU to exercise the option to redeem pursuant to paragraph 7 of the Shareholders Agreement, UU was required to provide Redeemed Respondents with a "notice of intention to redeem." Shareholders Agreement § 7. UU did so on October 8, 2021, by sending redemption notices to Redeemed Respondents. While UU attempted to close by tendering checks for 20% of the redemption prices as Appelrouth originally calculated, Redeemed Respondents rejected the redemption tenders and made clear that they were unwilling to accept any redemption regardless of the price if it was based on any of the formulas set forth in the Shareholder Agreement.

For the following reasons, the Tribunal finds that, while UU did not forfeit the right to redeem, it did breach the Shareholders Agreement by tendering the incorrect amount. UU argues that, until a closing occurs, UU was not required to tender 20% of the redemption price or to make

annual payments. *Id.* § 7.3. Yet, it is undisputed that UU tendered the wrong amount. That Redeemed Respondents would have not accepted such a tender even if correct does not change UU's failure to tender the correct amount.

UU also argues it attempted to close on the redemption by permitting Parker and Munroe to retain the settlement funds that accounted for 20% of the updated corrected redemption prices and offered to send a check for the updated amount to Usmar, which he rejected. It should be noted that evidence was not presented on that point. The evidence simply was that a payment was made and the Tribunal was to make a reduction. And, the point is moot, as the Tribunal finds that that payment to Usmar was wrong in any event. *See infra.* What is critical on this point, however, is that UU attempted to enforce the agreement and the Tribunal does not find a forfeiture.

UU argues that, even if UU was obligated to tender the correct 20% down payment with the redemption notice, performance of this obligation was excused under the doctrines of futility and anticipatory repudiation. "[T]he law does not require that a party to a contract take action that would clearly be futile."[2] The law also does not require performance after an anticipatory breach by the counterparty.[3] For over two years before the redemption, Redeemed Respondents were clear that they would not accept any redemption that used the formulas set forth in the Shareholder Agreement, they insisted that UU's option to redeem expired, and they made clear that any effort to redeem their shares would result in a lawsuit or arbitration. The Tribunal agrees that these doctrines do mean that UU did not forfeit the right to redeem.

However, the doctrines do not excuse UU's original breach. Futility does not excuse UU's

[2] *Waksman Enters., Inc. v. Or. Props., Inc.*, 862 So. 2d 35, 43 (Fla. 2d DCA 2003).
[3] *Alvarez v. Rendon*, 953 So. 2d 702, 709–10 (Fla. 5th DCA 2007) ("An anticipatory breach of contract occurs before the time has come when there is a present duty to perform as the result of words or acts evincing an intention to refuse performance in the future.").

original failure to tender the correct amount. And, for purposes of calculating the proper award amount, the Tribunal's award simply takes into account the amount owed had UU tendered the correct amount in 2021. With respect to anticipatory repudiation, this doctrine simply means that UU had the choice to terminate the Shareholder Agreement or perform the agreement and seek the proper relief later. UU chose to perform, and the Tribunal simply calculated the amounts owed had UU properly tendered the correct amount.

For their part, the Redeemed Respondent's rejection of UU's attempted redemption was not based on the mistake in calculating the price offered. As such, any underpayment of the 20% down payment or the incorrect redemption prices was not considered a material breach of the Shareholder Agreement, or if it was, a material breach the Redeemed Respondents waived by failing to declare a breach on that basis instead of their insistence on an amount *not* owed. Moreover, any prejudice to Redeemed Respondents is otherwise cured by this award of the correct redemption prices, plus pre-award interest.

In sum, the Tribunal agrees with UU and finds that there was no forfeiture of the Shareholder Agreement by its failure to initially pay the correct redemption price with a tender of the 20% down payment with the balance paid in the form of a promissory note. The Tribunal does find, however, that the improper redemption constituted a breach, but not a material breach that forfeited UU's right to redeem. That finding affects the calculation of the award. *See infra.* To be clear, the Tribunal is not making a finding of bad faith on UU's part but is only addressing the ramifications of the incorrect amount.

The 2009 reorganization did not trigger redemption rights

Respondents claim that they left the "employ" of UU in 2009 when it was restructured to include WW and LLC. As a result, Respondents argue that this restructuring triggered UU's

redemption rights under the Shareholder Agreement in 2009. Respondents further argue that, because UU did not exercise its right of redemption at that time as required by paragraph 7, those rights expired and Redeemed Respondents' shares of stock are no longer subject to UU's redemption rights. These issues turn on the parties' intent of the phrase "leaves the employ of" UU under paragraph 7 of the Shareholder Agreement.

As a matter of law, an officer of a Florida corporation is an employee of the corporation.[4] The evidence was clear that Redeemed Respondents remained officers of UU after the 2009 reorganization. In fact, Parker and Munroe admitted they remained officers of UU until 2021. Usmar also admitted he remained an officer of UU until at least 2017.

Notably, UU's annual reports in and after 2017 stopped identifying Usmar as an officer of UU. However, as UU's controlling Board member, Clarke had and has exclusive authority to remove UU officers.[5] Clarke testified without contradiction that he did not remove Usmar as an officer until 2021. UU's corporate records also include a 2014 Statement of Action re-appointing Respondents as officers of UU. Consistent with Clarke's testimony, there is no document in evidence showing any corporate action by UU's Board to remove any officer, including Usmar, before 2021.

The parties' course of conduct also supports this conclusion. Respondents each acted as if UU's option to redeem remained in full force and effect after the 2009 reorganization. Moreover, Usmar did not think the option to redeem was triggered in 2017 when he was transferred to Pavilion. It was only until 2017 that Parker and Munroe took the position that the right of

[4] § 607.01401(10), *Fla. Stat*. (2006).
[5] § 607.0842, Fla. Stat. ("An officer may be removed at any time with or without cause by: (a) The board of directors; [or] (b) The appointing officer, unless the bylaws or the board of directors provide otherwise . . . .").

redemption was triggered in 2009. Prior to that date, Parker and Munroe admitted that they believed and acted as if UU's redemption rights had not expired, including by (i) not providing notice of their supposed departures; (ii) not tendering their shares for redemption; (iii) not taking any action as officers or directors of UU to consider exercising the option to redeem; (iv) asking Clarke in September 2012 to change the Shareholder Agreement and the "existing exit clauses"; (v) asking Planken in April 2012 and again in June 2013 to subject his membership interest in WW to the same option to redeem that applied to the UU shareholders;[6] (vi) reiterating to Planken in May 2016 that the UU shareholders were subject to the same option to redeem that applied to him; and (vii) asking Clarke in March 2017 to increase the redemption prices while conceding "[Clarke's] continued right to hire and fire executives and the right of the company to buy our shares should we be fired/resign/die."

Other evidence confirms the parties intended a broad interpretation of "leaves the employ" to mean whether the Shareholder ceased to be active in UU's business operations. Recital (B) of the Shareholders Agreement states that its purpose is to "preserv[e] harmony and continuity with respect to the management of the Corporation, and that such goal can best be attained by retaining stock ownership of the Corporation in its active employees, directors, officers, and Shareholders."[7] Clarke's testified that the parties agreed the option would be triggered when a Shareholder "stopped working for the business." This is consistent with the notes of John Strickroot, who drafted the Shareholder Agreement and selected "leaves the employ" to effectuate the parties'

[6] Parker believed the agreements with Planken contained the "EXACT same" option to redeem even though the word "Corporation" was replaced with "Company or any of its subsidiaries" or "Company (or any of its affiliates)." Respondents clearly remained in the employ of a subsidiary or affiliate of UU until 2021.

[7] *City of Homestead v. Johnson*, 760 So. 2d 80, 83 (Fla. 2000) ("[T]he agreement must be interpreted in light of its stated purpose.").

intent that "nobody who does not work in the business is to own shares."

Respondents took various actions on behalf of UU until 2021 as well, including (i) managing the affairs of the entire TUUCI corporate family until 2013 as officers of UU, which was the managing member of WW, which was the managing member of LLC; (ii) managing the affairs of TUUCI OG, BV until 2021; (iii) consenting to the investment of two outside investors in 2013; (iv) administering UU's 401(k) plan until 2013 or later; and (v) executing various other documents on behalf of UU until 2021, such as business loan agreements, unlimited guarantees, and corporate tax returns. Respondents consistently worked for the ultimate benefit of UU until 2021 to maximize its distributions, which is how they each received most of their compensation.

Contemporaneous documents further confirm the parties' intent, that the 2009 reorganization effectively was a "conversion" to a limited liability operating company for the primary purpose of allowing Planken (a nonresident alien) to own an interest in UU (an S-corporation).

For their part, Redeemed Respondents rely on documents—tax forms and letters from Parker indicating that UU had no employees after 2009, and HR forms indicating Usmar was terminated in 2017 — but Redeemed Respondents' own conduct never implied any understanding that the option to redeem had been triggered in 2009.

Additionally, Redeemed Respondents argue that a multi-factor employment test should be considered to determine whether any shareholder was an employee of UU. This test leads to the same conclusion. The primary factor is whether there is "control and direction by the employer over the conduct of the employee," which is "never more forcefully demonstrated than by the

discharge of an employee" because "[t]he power to fire is the power to control."[8] Redeemed Respondents admit that they were at-will employees and that Clarke, through UU, had the power to fire them. Pursuant to Section 3.2 of the Shareholders' Agreement and Section 607.0842(2), Florida Statutes, the Board of Directors of UU, which Clarke controlled, has the right to appoint and remove officers of the corporation. Pursuant to Section 7.1.1 of the Shareholders' Agreement, such termination could be "for cause" and result in a redemption at book value if they failed to abide by the Board's reasonable directives or to devote substantially all their business time and attention exclusively to the business and affairs of UU.

In 2021, UU exercised its control over Redeemed Respondents Usmar and Munroe by discharging them. In addition, all other factors of the test favor a determination that Redeemed Respondents were employees of UU because they (i) were not engaged in a distinct business; (ii) were executives, an occupation normally done at the direction and supervision of a board; (iii) were not tradesmen; (iv) were supplied with the offices, computers, and automobiles necessary to perform their jobs; (v) worked in the business for nearly two decades; (vi) were paid salaries; (vii) clearly understood they were employees when they joined; (viii) and were the principals of the company.

Finally, Redeemed Respondents argue that a strict interpretation should be used for the phrase "leaves the employ" that turns on what entity actually funded Respondents' paychecks. But there is no evidence that the parties intended such a standard to apply, and it is not consistent with the plain meaning and the parties' manifested intent of the phrase "leaves the employ."

In sum, the evidence overwhelmingly shows that the 2009 reorganization did not trigger

[8] *Cantor v. Cochran*, 184 So. 2d 173, 174 (Fla. 1966).

any redemption rights pursuant to paragraph 7 of the Shareholder Agreement.

Any requirement to physically tender shares was waived or is moot

The Clarke Parties and UU contend that UU's option to redeem did not expire because Respondents never tendered their shares in UU. They argue that a "tender" requires both delivery and an offer to sell. Paragraph 7 of the Shareholder Agreements states that any shareholder who "leaves the employ of the Corporation for any reason … shall ***immediately tender his shares to the Corporation***." The Clarke Parties and UU argue that provision means that Respondents were each obligated to both offer for sale and physically deliver their shares to UU in order to trigger any 90-day deadline for UU to give notice of its intent to purchase their shares.

The Tribunal finds this point moot given it found that UU did not forfeit the right to redeem the shares. *See infra.* However, to the extent relevant, the Tribunal finds that any issues with tender were waived.

For their part, Clarke and UU never believed a strict "tender" was required to trigger any redemption right. Rather, they waived any such requirement by their own conduct. In Clarke and UU's redemption letters of October 8, 2021, UU sought to redeem Respondents' shares without demanding an actual tender of the shares by Respondents. Also, UU did not claim that an actual "tender" was necessary to trigger UU's right of redemption.

The language of the Shareholder Agreement further confirms that "tender" does not mean both deliver and an "offer to sell." The word "tender" is used only in paragraph 7 to describe what is supposed to happen immediately after a Shareholder leaves the employ of UU - "immediately tender his shares to the Corporation." There is no mention that the Shareholder must also offer to sell his shares at that time. In contrast, paragraphs 7 and 7.3 of the Shareholder Agreement describe what UU is required to do to redeem the shares, none of which is predicated

on a Shareholder's offer to sell those shares.

More importantly, the evidence was uncontracted that the physical shares of stock at issue were at all times in UU's possession. As a result, Redeemed Respondents were not capable of tendering their shares to UU -- meaning the physical delivery of the share certificates to UU. Hence, the requirement for Redeemed Respondents to have physically tendered their shares to UU was met since UU already had possession of the shares.

Parker resigned in 2021

Parker claims his resignation was coerced and that he wanted to remain general counsel. He thus argues that he was terminated without cause instead of resigning. The Tribunal disagrees.

For this point, Parker relies mainly on Clarke's warning that resigning without written notice could result in a redemption at book value. But, this threat, while perhaps ill-conceived, does not change the evidence presented.

Parker actually resigned twice. In May 2020, he tendered two letters of resignation—one to UU and one to UU's subsidiaries—resigning from all his positions. He included a cover letter indicating he had made "a firm decision." He cited many reasons: "stress," "perceived slights," "questions of loyalty and respect" regarding "how to run the company," and his thoughts about his own "weaknesses and strengths." In August 2020, Parker rescinded his resignations but continued to express his desire to step down and even assisted with finding his replacement, David Schutte, who joined in March 2021.

One month before Schutte started, Parker still had not formally resigned and began arguing that Clarke had changed the terms of his employment by permitting Schutte to replace him without triggering the option to redeem. Clarke disagreed and told Parker that, under the Shareholder Agreement, if Parker did not provide written notice of his resignation, his shares could be

redeemed at book value.

One week later, Parker confirmed his decision to resign and again tendered two letters of resignation resigning from all his positions in the business, including general counsel. In his cover e-mail, Parker indicated he "had a moment of clarity," thanked Clarke for his creativity in attempting to resolve their disagreement, acknowledged "it's not possible" to stay on as general counsel, and expressed his intention to "comply with the spirit of the UU agreement, including the 5 times multiple for resigning."

When Usmar asked, "Am I reading it right that you are willing to get out now at 5x earnings plus book?," Parker confirmed, "That is correct. I have had enough."

Days later, he told Munroe that he was "sticking to [his] resignation," and he did so. Unlike his first resignation, Parker never rescinded this second resignation. Instead, months later, he extended the effective date of his resignation to July 15. And, days before the new effective date, Parker conceded he could not remain as general counsel: "If you don't trust your consiglieri, it just seems like it's time for me to go."

Claims of coerced resignations sometimes arise when an employer gives an employee a choice between resignation and termination, and then, after resigning, the employee alleges employment discrimination and must prove that the employer forced the employee's resignation by coercion or duress. None of that applies here. Parker has made no such claims of discrimination.

Even assuming such discrimination cases were analogous, they provide no help to Parker. Florida courts consider whether: (1) the employee was given some alternative to resignation; (2) the employee understood the nature of his choice; (3) reasonable time was given to make the choice; (4) the employee was permitted to select the effective date of the resignation; and (5) the

employee had the advice of counsel.[9]

All those factors weigh in favor of a finding that Parker's resignation was not coerced. His first resignation in May 2020, was clearly voluntary. Even after rescinding his first resignation, he expressed his desire to step down, instead of remaining as President and General Counsel, and formally resigned again in March 2021. Parker decided to provide written notice and selected the effective date of his resignation as June 15, which he later extended to July 15. Throughout, Parker, who is himself a lawyer, had the advice of experienced litigation counsel, who had been advising him since 2017 and drafted his resignation notices.

Usmar was not properly terminated from UU for cause, but is deemed terminated without cause

On August 26, 2021, Clarke sent an email to Usmar attaching a written notice asserting that his employment was terminated for cause effective immediately ("August 26th Notice"). Clarke communicated to Usmar that "[o]ur senior management, company officers, and board of directors are 100% aligned and in complete agreement" to terminate Usmar for cause. Clarke testified that "Tom Parker, Charles Munroe, Jeff Hicks, Mike Moran, and myself, we all agreed to terminate [Usmar] for cause." The Tribunal does not find this evidence persuasive given the other evidence presented.

The evidence shows that, although there was a general consensus at the WW level that Usmar should be formally terminated, the WW and UU boards were not aligned to terminate Usmar ***for cause***. Munroe testified that he did not agree to have Usmar terminated for cause or to Clarke sending the August 26th Notice, and advised that a labor attorney should be consulted. Munroe continued that there was "zero discussion about the [S]hareholder[s] [A]greement" or what was required for "cause" under the Shareholder Agreement.

[9] *Fla. Dep't of Child. & Families v. Askew*, 365 So. 3d 1211, 1216–17 (Fla. 1st DCA 2023).

Hicks, who has brought no claim here, testified that he also never expressed to anyone or voted to have Usmar terminated for cause, and specifically recollected that he also advised the WW board to obtain employment counsel as there potentially may be a disability issue for terminating Usmar for cause.

Parker similarly testified that he did not agree to terminate Usmar for cause. Further, Claimants have failed to present any written documentation, other than the August 26, 2021 email from Clarke, which shows this alleged unanimous decision to terminate Usmar for cause.

Moreover, the August 26th Notice does not even state from which entity Usmar was being terminated or to which singular "company" is being referred. Indeed, the August 26th Notice does not mention the Shareholders Agreement or that Usmar was being terminated for cause pursuant to it.

Usmar, for his part, and the Clarke Parties and UU, for their part, provided their positions as to whether in fact Usmar *could have* been terminated for cause. It is very possible that had the WW board or the UU board decided to terminate Usmar for cause, the board may have found grounds to do so. However, other than Clarke, no other director or officer of either board testified that that happened. It is not the place of the Tribunal to recreate history. What is clear is that Usmar was terminated, and, on this record, the Tribunal deems Usmar's termination to have been without cause.

Shares held in family trusts are not exempt from redemption

Parker and Munroe transferred some or all of their shares to family trusts. As noted above, in Procedural Order #2, the Tribunal already ruled that these shares were not exempt from all provisions of the Agreement. For avoidance of doubt, the Tribunal re-affirms that ruling herein.

Parker and Munroe claim that UU's option to redeem expired for the shares held in their family trusts because the transferred shares are exempt from the redemption rights pursuant to the Shareholders Agreement. Paragraph 7 does not include any exceptions for shares held in family

trusts. Rather, paragraph 5.1 permits a shareholder to "transfer a portion of his Stock, at any time, to a Permitted Transferee, provided, however, that such Permitted Transferee(s) and the trustee of any trust for a Permitted Transferee have undertaken, or do undertake, in writing to be bound by the provisions of this Agreement," including paragraph 7. In addition, Section 17 confirms that the Shareholders Agreement "shall be binding upon any person to whom any Stock is transferred whether in violation of the provisions of this Agreement or pursuant to its terms." Thus, all shares transferred to the parties' family trusts remained bound by and subject to all terms and conditions of the Shareholders Agreement, including the redemption rights under paragraph 7.

Parker and Munroe's interpretation would allow a shareholder to avoid UU's option to redeem by signing the Shareholders Agreement on January 13, 2006 and then transferring his shares to a family trust the next day. That is illogical, and the Tribunal will not so read the Shareholders Agreement in that manner.[10] Munroe himself wrote that the fact that his shares "are owned by two trusts . . . does not impact our shareholder agreement, since a trust or family benefit is a permitted transferee, and the permitte[d] transfer[ee] has agreed to be bound by the terms of the shareholder agreement."

Parker is not entitled to indemnification

Parker seeks contractual indemnification under Article VII(a) of UU's Amended Articles dated June 11, 2007. The Tribunal finds that Parker is not entitled to indemnification for two reasons.

First, the Amended Articles have been rescinded as *ultra vires* and void because they were

[10] *BKD Twenty-One Mgmt. Co., Inc. v. Delsordo*, 127 So. 3d 527, 530 (Fla. 4th DCA 2012) ("[T]he contract should be interpreted in the rational manner.").

not approved by a majority shareholder vote at a properly noticed meeting.[11] Parker relies on a Statement of Action in lieu of a Special Meeting of the Shareholders and Board of Directors. But, the articles of incorporation of a corporation cannot be amended by written consent without a meeting.[12] In addition, Clarke denied signing the Statement of Action, and there is no evidence that he did sign. Instead, Parker admitted that it is "very possible" that Parker signed Clarke's name to the document, that the signature above Clarke's name looks like how Parker would sign Clarke's name, and that Parker did not have a specific recollection of discussing the issue with Clarke or that Clarke authorized him to sign. There is no credible evidence that Clarke approved Parker to sign for him or that Clarke signed it himself.

Second, even if the Amended Articles were valid, to avoid the default rule that an indemnification provision applies "only to third-party claims," a provision must "clearly and unambiguously show[] an intent to extend indemnity to first-party claims" and even a broad indemnification provision that "that is silent or unclear whether it applies to first-party claims will normally be interpreted to apply only to third-party claims."[13] Article VII(a) does not clearly and unambiguously extend coverage to first-party claims. It extends coverage "to any action, suit or proceeding" brought against someone because he "is or was" a director of UU or a director and officer of UU, but Florida courts have held that similar, general language is not enough.[14] Parker

[11] § 607.1003, Fla. Stat. (2007).
[12] *Levine v. Levine*, 734 So. 2d 1191, 1195 n.4 (Fla. 2d DCA 1999) (written consent statute does not prevail over section 607.1103(4), which requires shareholder approval and "sets forth specific requirements for shareholder meetings noticed for that purpose").
[13] *MVW Mgmt., LLC v. Regalia Beach Devs. LLC*, 230 So. 3d 108, 112 (Fla. 3d DCA 2017); *see also Penthouse N. Ass'n, Inc. v. Lombardi*, 461 So. 2d 1350, 1352–53 (Fla. 1984).
[14] *Lombardi*, 461 So. 2d at 1353 (indemnification provision did not extend to first-party claims, notwithstanding its broad application to "any proceeding to which he may be a party, or in which he may become involved, by reason of his being or having been a director or officer of the

relies on *Wendt v. La Costa Beach Resort Condo. Ass'n, Inc.*, which involved a prior version of the indemnification statute no longer in effect that included unequivocal language expressing a clear and unambiguous intent to extend indemnification to first-party claims.[15] The Third District recognized as much in *MVW Mgmt., LLC v. Regalia Beach Devs. LLC*.[16]

While not the basis for its ruling, the Tribunal notes that Parker did not present any evidence as to the amount of or reasonableness of his legal expenses and confirmed, before the close of evidence, that he had no additional witnesses or evidence to present. Thus, the Tribunal has no evidence to award fees even if they were warranted, which they are not.

Due to these rulings, the Tribunal need not reach the Clarke Parties and UU's alternative arguments that, even if they were to apply to these claims, Parker did not act in the best interests of the company.

Amounts owed to each Redeemed Respondent

Because Parker resigned voluntarily, pursuant to the terms of the Shareholders Agreement, the Parker Parties' shares were redeemed at book value plus five times (5x) net earnings, a redemption price of $20,044,338. With interest due through July 19, 2024, of $1,570,598 minus payment of $6,129,007 made in the failed settlement, the total sum due to the Parker Parties is **$15,485,929.**

Because Munroe was terminated without cause, pursuant to the Shareholders Agreement, the Munroe Parties' shares were redeemed at book value plus six and one-half times (6.5x) net earnings, a redemption price of $24,590,025. With interest due through July 19, 2024, of

Association"); *MVW*, 230 So. 3d at 113–14 (indemnification provision did not extend to first-party claims, notwithstanding its broad application to "any action, suit or other proceeding").
[15] 64 So.3d 1228, 1230 (Fla. 2011).
[16] 230 So. 3d at 113–14.

$1,926,780, minus payment of $10,560,000 made in the failed settlement, the total sum due to the Munroe Parties is **$15,956,805.**

Because Usmar was terminated without cause, pursuant to the Shareholders Agreement, Usmar's shares should have been redeemed at book value plus six and one-half times (6.5x) net earnings, a redemption price of $6,172,695. With interest due through July 19, 2024, of $504,694, the total sum due to Usmar is **$6,677,389**.

DETERMINATIONS OF CLAIMS

I. UU's and Clarke's claims

COUNT I- Declaratory Judgment. This count seeks to have the Tribunal declare Redeemed Respondents deemed no longer shareholders. The Tribunal grants this relief for the reasons set forth above.

COUNT II- Specific Performance. This count alternatively seeks to require Redeemed Respondents to comply with Section 7. This count is denied as moot.

COUNT III- Breach of Fiduciary Duty Against Parker. This count alternatively seeks to hold that Parker breached his duty to the Company if his redemption rights were eliminated. This count is denied as moot.

COUNT IV- Constructive Fraud. This count alternatively seeks to hold Parker liable for damages if his redemption rights were eliminated. This count is denied as moot.

To the extent that any other claims remain, they are denied as moot or for lack of proof.

II. Parker and Munroe claims

At closing argument, counsel for Parker on behalf of Parker and Munroe, noted that he sought relief on only the following counterclaims: Breach of Contract (Count III), Breach of Good Faith and Fair Dealing (Count IV), Breach of Fiduciary Duty (Count II), and Indemnification

(Parker only). To the extent that any of the other claims nonetheless remain, they are denied for lack of proof.

COUNTS III and IV -Breach of Contract and Breach of Good Faith and Fair Dealing Against UU. Parker and Munroe argue that UU breached the Shareholder Agreement by wrongfully pursuing redemption rights that expired in 2009. For the reasons set forth above, the claim is denied.

COUNTS II -Breach of Fiduciary Duty against Clarke. Parker and Munroe claim Clarke breached his fiduciary duty in seeking to put his own interests in amending the Shareholder Agreement to protect his own interests and by threatening to terminate the employment of Parker and Munroe if he did not get his preferences.

The claim is denied. First, the Tribunal is not convinced that there is a duty to minority shareholders by the majority shareholders under these circumstances. Second, even if one exists, the evidence shows that UU and Clarke simply were seeking to enforce UU's contractual rights which cannot be a violation of such a duty. Parker and Munroe are receiving the full relief to which they agreed in the Shareholders Agreement.

III. Parker's Claim for Indemnification. Parker seeks to be reimbursed his attorney's fees for defending the alternative claims. The claim is denied for the reasons set for above.

SET OFF CALCULATION

The Parties have informed the Tribunal that payments had been made in November 2022 after the mediation failed. The Parties stipulated that these advance amounts should be deducted from the final award. The Tribunal does so in its calculations below.

PAYMENTS AWARDED ARE CONSISTENT WITH THE SHAREHOLDER AGREEMENT

UU and the Clarke Parties argue that the Shareholders' Agreement permitted UU to pay over five years with interest—not in a lump sum, which, according to them, might subject UU to financial distress or a forced sale. They argue that making them pay a lump sum would be rewriting the Shareholders Agreement. They would have the Tribunal order UU to pay the Redeemed Respondents over three equal installments starting from the entry of this Award.

The Tribunal disagrees. The irony of the UU and the Clarke Parties' proposal is that, if accepted, that would be a rewrite of the Shareholders Agreement. Make no mistake, as noted above, UU breached the Shareholders Agreement on this payment issue for multiple reasons—1) by its own admission, it failed to pay the correct down payment in 2021 and provided the incorrect promissory note to the Redeemed Respondents; 2) it then apparently provided the correct payments only as part of a settlement and again without the promissory notes; and 3) it failed to make the two installment payments that it should have made by now in October 2022 and October 2023 even under its own interpretation of the facts and the agreement. The Tribunal would assume that UU would have reserved the funds it had accrued on the amounts it admits it owed (the current financial status of UU was properly excluded as evidence). But, that is not of the Tribunal's concern. The Tribunal is well within its power under these facts to award a lump sum of the amount owed immediately.

The Tribunal, however, in the interests of ensuring the parties' expectations despite UU's breach, will order UU to make the payments owed with the missing the first two installment payments within 30 days (adjusted by the payments already made), and the remaining three installments payments due beginning on October 8, 2024. No party should complain about such

a payment schedule as it matches what the parties intended.

Finally, the Clarke Parties and UU also argue that Usmar is not entitled to relief as, unlike Parker and Munroe, he brought no affirmative claims. The point is moot because the Tribunal is awarding the relief that the Clarke Parties and UU themselves requested: a redemption pursuant to Section 7 as of October 2021. The Tribunal's divergence from the calculations set forth by the Clarke Parties and UU is that they would have Usmar paid as if he were terminated ***with*** cause. As noted above, the Tribunal finds that UU failed to terminate him with cause as the UU board never agreed to do that. That is not providing relief on an unasserted claim for Usmar but simply the application of the facts to the claims that UU and the Clarke Parties brought.

CALCULATION

For these reasons, the Tribunal awards Redeemed Respondents the updated redemption prices calculated by UU's CPA, Appelrouth, with interest, set off by payments already made to Parker and Munroe under the failed settlement as stipulated in the Amended Joint Stipulation Regarding Settlement Monies Received, and on behalf of Usmar.

The Tribunal calculates interest on the total balance of the redemption price outstanding through August 16, 2024 (the date Tribunal determined the award) with the balance declining for Parker and Munroe in December 2022 when payments were made to them under a failed settlement (applied first to interest outstanding and then to principal) and interest accruing on settlement funds Munroe received from December 2, 2022 through October 8, 2023, when the funds would have been owed to him in connection with the second installment payment that UU never paid. The sums to be awarded herein with pre-award interest and less any setoffs for payments previously made are shown below:

	Munroe Parties	**Parker Parties**	**Usmar**
Redemption Price	$24,590,025	$20,044,338	$6,172,695
Pre-award Interest[17]	$1,926,780	$1,570,598	$504,694
Credit for Failed Settlement Payments	($10,560,000)	($6,129,007)	($0.00)
TOTAL DUE	**$15,956,805.00**	**$15,485,929.00**	**$6,677,389.00**

UU's payments of the "TOTAL DUE" to the Munroe Parties shall be divided 58.73% to the Munroe Family Trust and 41.27% to the Munroe SLAT Trust. UU's payments of the "TOTAL DUE to the Parker Parties shall be divided 95% to the Parker Trust and 5% to Parker. Subject to such percentage divisions, the "TOTAL DUE" (including pre-award interest) as set forth above shall be payable by UU to the Parker Parties, the Munroe Parties, and Usmar pursuant to the terms of Section 7.3 of the Shareholder Agreement in the following manner: (i) two-fifths (2/5) each shall be due and payable within 30 days from the date of this award; and (ii) the remaining balance of the "TOTAL DUE" shall be due and payable in three annual installments due on the 8th of October beginning on October 8, 2024, with interest accruing from the date of this Final Award on the declining balance outstanding at the Prime Rate published by the Wall Street Journal and established quarterly during the period year for each such installment payment.

UU advanced Usmar's portion of the arbitration fees. Those fees will be deducted from the award to him as a credit to UU.

It is, therefore, **AWARDED,** as follows:

1. Respondents/Counter-Claimants, THOMAS PARKER, an individual, and the THOMAS MATTHEW PARKER REVOCABLE TRUST AGREEMENT DATED FEBRUARY 21, 2020, a Trust, shall have and recover of and from Claimant/Counter-Respondent, THE ULTIMATE UMBRELLA COMPANY, INC., a Florida corporation, the total sum of **$15,485,929.00**, payable as set above until paid in full.

2. Respondents/Counter-Claimants, CHARLES MUNROE, an individual, and CHARLES MUNROE FAMILY TRUST DATED FEBRUARY 5, 2020, a trust, CYNTHIA MUNROE SLAT TRUST U/A/D OCTOBER 1, 2019, a trust, shall have and recover of and from Claimant/Counter-Respondent, THE ULTIMATE UMBRELLA COMPANY, INC., a Florida corporation, the total sum of **$15,956,805.00**, payable as set forth above until paid in full.

3. Respondent, EDWARD USMAR, shall have and recover of and from Claimant, THE ULTIMATE UMBRELLA COMPANY, INC., a Florida corporation, the total sum of **$6,633,065.28** ($6,677,389.00-UU payment of $44,323.72 for the Panel's compensation) payable as set forth above until paid in full.

4. Counter-Claimants/Cross-Claimants, THOMAS PARKER, an individual, the THOMAS MATTHEW PARKER REVOCABLE TRUST AGREEMENT DATED FEBRUARY 21, 2020, CHARLES MUNROE, an individual, the CHARLES MUNROE FAMILY TRUST DATED FEBRUARY 5, 2020, a trust, and the CYNTHIA MUNROE SLAT TRUST U/A/D OCTOBER 1, 2019, a Trust, shall take nothing on their counterclaims and cross claims.

5. Based upon the foregoing, none of the parties to this proceeding are deemed the prevailing party for an award of their portion of the arbitration fees, costs and expenses. As a result, each party shall bear the filing fees and administrative fees of the American Arbitration

Association totaling $63,679.47 as incurred and the compensation and expenses of the Arbitrators totaling $269,713.34 as incurred, except as credited above.

6. Should any party fail to fully comply with this Award within thirty (30) days from the date hereof, a court of competent jurisdiction shall confirm the Final Award into a final judgment.

7. This Final Award fully resolves and determines all issues, claims, counterclaims, cross claims and defenses submitted in the above-styled proceeding on their merits. All claims or defenses not expressly granted herein are hereby denied as moot or for lack of proof.

We do hereby affirm upon our oaths as Arbitrators that we are the individuals described in and who executed this instrument which is our Final Award.

DONE AND AWARDED in Florida, this 23 day of August, 2024.

Edward M. Mullins
Edward M. Mullins, Arbitrator Chair

Gary S. Salzman
Gary S. Salzman, Arbitrator

Francis X. Sexton
Francis X. Sexton, Jr. Arbitrator

AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

In the Matter of the Arbitration between:

Case Number: 01-21-0017-9580

The Ultimate Umbrella Company, Inc., a Florida corporation,
-vs-
Thomas Parker, an individual; Thomas Matthew Parker Revocable Trust Agreement dated February 21, 2020, a trust
-vs-
Charles Munroe, an individual; Charles Munroe Family Trust dated February 5, 2020, a trust; Cynthia Munroe SLAT Trust u/a/d October 1, 2019, a trust
-vs-
Edward Usmar, an individual;
-vs-
Dougan Clarke, an individual; and 2019 Clarke Trust u/a/d February 26, 2019, a trust

DISPOSITION OF APPLICATION FOR MODIFICATION OF AWARD

WE, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the arbitration agreement entered into between the above-named parties and dated January 13, 2006, and having been duly sworn, and having duly heard the proofs and allegations of the Parties, and having previously rendered an Award dated August 23, 2024, and Respondents/Counter-Claimants, Thomas Parker, Thomas Matthew Parker Revocable Trust Agreement Dated February 21, 2020 (collectively, "Parker Parties"), and Charles Munroe, Charles Munroe Family Trust Dated February 5, 2020, and Cynthia Munroe Slat Trust U/A/D October 1, 2019 (collectively "Munroe Parties"), having filed an application for Modification of the Final Arbitration Award dated September 12, 2024 ("the Motion"), and The Ultimate Umbrella Company, Inc. ("TUUCI") and Dougan Clarke and the 2019 Clarke Trust u/a/d 2/26/2019 ("Clarke Parties") having responded dated September 20, 2023, do hereby, DECIDE, as follows:

The Motion is **Granted in Part, Denied in Part.** Pursuant to Rule 52(a), the Tribunal has the power to correct clerical, typographical and computational errors. Upon review the Motion, the Tribunal has determined the Final Award has two typographical errors:

1. On page 20 of the Final Award, the sentence "The Redeemed Respondents did not take that tender and, as of today, all remain shareholders of UU"

   Should read and is replaced with

   "The Redeemed Respondents did not take that tender."

2. On page 40 of the Final Award, the sentence "The Tribunal calculates interest on the total balance of the redemption price outstanding through August 16, 2024 (the date Tribunal determined the award) with the balance declining for Parker and Munroe in December 2022 when payments were made to them under a failed settlement (applied first to interest outstanding and then to principal) and interest accruing on settlement funds Munroe received from December 2, 2022 through October 8, 2023, when the funds would have been owed to him in connection with the second installment payment that UU never paid."

Should read and is replaced with

"The Tribunal calculates interest on the total balance of the redemption price outstanding through July 19, 2024 with the balance declining for Parker and Munroe in December 2022 when payments were made to them under a failed settlement (applied first to interest outstanding and then to principal) and interest accruing on settlement funds Munroe received from December 2, 2022 through October 8, 2023, when the funds would have been owed to him in connection with the second installment payment that UU never paid."

In all other respects the Final Award dated August 23, 2024, is reaffirmed and remains in full force and effect.

/s/ Edward M. Mullins DATE: 9/23/24
Edward M. Mullins, Arbitrator Chair

/s/ Gary S. Salzman DATE: 9/23/24
Gary S. Salzman, Arbitrator

/s/Francis X. Sexton, Jr. DATE: 9/23/24
Francis X. Sexton, Jr., Arbitrator