THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM THE CIRCUIT COURT
FIFTH JUDICIAL CIRCUIT

Alison Renee Lee, Circuit Court Judge

Appellate Court Case No. 2023-00858
Circuit Court Case No. 2022-CP-40-2586

Capella Capital, LLC, Capella Carolinas, LLC, and Michael Lindley, ... Respondents,

v.

Donivon Glassburn, ... Appellant.

RECORD ON APPEAL

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October 9, 2023

Charleston, South Carolina

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INDEX

ROA Page

ORDERS, JUDGMENTS, DECISIONS

PLEADINGS

TRANSCRIPTS

EXHIBITS AND OTHER MATERIALS AND DOCUMENTS

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2022CP4002586

Capella Capital Llc et al
PLAINTIFF(S)

Donivon Glassburn
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

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

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

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

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

☐ **STAYED DUE TO BANKRUPTCY**

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

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

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

This matter came before the Court on Defendant's motion to dismiss or to compel arbitration. The parties submitted various exhibits including various governing documents. The parties signed a Subscription for Membership governing the two Plaintiff corporations. These two documents require arbitration and are signed by both parties. The document states that the subscription is "governed by the laws of the State of South Carolina and the Operating Agreement for [the two corporations] which [are] incorporated herein by reference, and hereby agrees to be bound by the same." The requirement for arbitration states that "any claim or dispute arising out of or related to this agreement or breach thereof ... shall be settled by arbitration... ." The language requiring arbitration does not clearly apply to the Operating Agreement. The Subscription Agreements do not appear to substantively govern the issues raised in the Complaint.(see page 2)

ORDER INFORMATION

This order ☐ ends ☑ does not end the case. ☑ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 04/25/2023 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

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

Additionally, the Operating Agreement produced to the Court was only signed by Defendant. No Operating Agreement with Plaintiff's signature was provided to the Court. This Court also notes that the Operating Agreement submitted does not have any provision requiring or referencing arbitration.
This motion was filed in lieu of an Answer to the Complaint. Based upon the information presented at this point in the litigation, the motion to dismiss or compel arbitration is DENIED.
AND IT IS SO ORDERED.

Richland Common Pleas

Case Caption: Capella Capital Llc , plaintiff, et al vs Donivon Glassburn

Case Number: 2022CP4002586

Type: Order/Electronic Form 4

IT IS SO ORDERED!

s/ Alison Renee Lee

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2022CP4002586

Capella Capital Llc et al
PLAINTIFF(S)

Donivon Glassburn
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

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

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

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

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

☐ **STAYED DUE TO BANKRUPTCY**

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

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

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

This matter is before me on a motion by Defendant Donicon Glassburn to alter or amend the order denying his motion to dismiss or to compel arbitration. After considering the arguments of counsel for Defendant, this Court finds no basis to reconsider the decision. Therefore, the motion is DENIED.

ORDER INFORMATION

This order ☐ ends ☑ does not end the case. ☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 05/18/2023 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

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

Richland Common Pleas

Case Caption: Capella Capital Llc , plaintiff, et al vs Donivon Glassburn

Case Number: 2022CP4002586

Type: Order/Electronic Form 4

IT IS SO ORDERED!

s/ Alison Renee Lee

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)))	IN THE COURT OF COMMON PLEAS IN THE FIFTH JUDICIAL CIRCUIT
Capella Capital, LLC, Capella Carolinas, LLC and Michael Lindley Plaintiffs, vs. Donivon Glassburn, Defendant.	))))))))))	Civil Action No. 2022-CP-40-_____ **COMPLAINT** (JURY TRIAL REQUESTED)

The Plaintiffs, by and through their undersigned attorney, respectfully complain of the Defendant, allege and say:

PARTIES AND JURISDICTION

1. Capella Capital, LLC ("Capital") is a South Carolina limited liability company formed and doing business in the County of Richland, State of South Carolina.

2. Capella Carolinas, LLC ("Carolinas") is a South Carolina limited liability company formed and doing business in the County of Richland, State of South Carolina. Collectively, these entities may be referred to as "the LLCs."

3. Michael Lindley ("Lindley") is a citizen and resident in the County of Travis, State of Texas and is a member of the LLCs.

4. Upon information and belief, Defendant Donivon Glassburn ("Glassburn") is a citizen and resident of the County of Charleston, State of South Carolina and is a member of the LLCs.

GENERAL ALLEGATIONS

5. On July 7, 2012, Lindley and Glassburn formed Capella Capital, LLC to, among other business, purchase commercial real estate properties and commercial retail centers, develop commercial retail centers, purchase partnership interests in other real estate

developments, purchase and service ATM machines, purchase and operate bingo video equipment manufacturers, and invest alongside other investment companies in opportunistic real estate and business opportunities.

6. On March 23, 2013, Lindley and Glassburn formed Capella Carolinas, LLC, for the sole purpose of purchasing 100% of the stock and membership interests in twelve (12) South Carolina entities/corporations which closed on May 1, 2013 to continue the operation of various charitable bingo facilities with South Carolina Bingo Promoters licenses issued by South Carolina Department of Revenue ("SCDOR") in the State of South Carolina.

7. Lindley and Glassburn each own a 50% interest in Capella Capital, LLC and Capella Carolinas, LLC

8. Additional limited liability companies were formed in South Carolina, Texas, Alabama, and Colorado which again reflected that Lindley and Glassburn each held a 50% interest in the LLCs and each were contributing to the operations of the businesses as needed.

9. As a South Carolina resident at the time of the closing of the acquisition of the stock from twelve (12) South Carolina entities/corporations, Mr. Glassburn was identified as the individual on the Bingo Promoters licenses with SCDOR to legally continue to operate the bingo halls post-acquisition by Capella Carolinas, LLC.

10. Mr. Lindley's 50% interest in both Capella Capital, LLC and Capella Carolinas, LLC are shown by and through executed Subscription for Membership Agreements, communications of the parties, agreed upon draft of corporate documents, limited liability company documents formed for individual or groups of bingo halls or sub-businesses for which Carolinas was a member, through the course of dealing of the parties in contributing to the management of Carolinas, the sharing of the profits and losses in the entity, the tax handling of

the entity and other operational aspects of the LLCs.

11. In the initial years following the formation of the LLCs, Lindley and Glassburn had each participated in the operational planning and financial decisions involving the bingo halls and related businesses, and their membership interests were reflected in the tax filings for the entities.

12. In recent years, Glassburn, among other things, has operated the LLCs for his personal benefit without regard to Lindley's membership interest nor in furtherance of the best interest of the business of the LLCs.

13. Glassburn has refused to include Lindley in decisions related to material financial expenditures, start-up expenses of investments, substantial operational issues and transfers of property owned by the LLCs.

14. Glassburn has failed to provide or provided Lindley limited or fraudulent financial information related to the LLCs

15. Without the knowledge and consent of Lindley, Glassburn unilaterally paid himself on December 31, 2020, all the salary which the members had agreed to reduce during the COVID19 pandemic.

16. Without the knowledge and consent of Lindley, Glassburn sold property owned by the LLCs and Mr. Lindley.

17. Without the knowledge and consent of Lindley, Glassburn directed proceeds from the sale of property owned by the LLCs to an account which is not utilized nor controlled by the LLCs or Lindley, and he provided no accounting of the transaction.

18. Without the knowledge and consent of Lindley, Glassburn utilized proceeds from the LLCs to pay unauthorized personal expenses and fraudulently accounted for those monies for the purpose of concealing the actions from the Plaintiffs.

19. Without the knowledge and consent of Lindley, Glassburn made distributions to himself for which he did not properly account and did not include Lindley.

20. Without the knowledge and consent of Lindley, Glassburn personally directed and approved wrongful accounting transactions of the LLCs and created potential adverse tax consequences.

21. Without the knowledge and consent of Lindley, Glassburn has embezzled money from the LLCs.

22. Without the knowledge and consent of Lindley, Glassburn has wrongfully usurped corporate opportunities for his personal gain and at the exclusion of the Plaintiffs.

23. Upon information and belief, Glassburn has wrongfully converted the LLCs property and money for his own benefit without the knowledge or consent of the Plaintiffs.

FOR A FIRST CAUSE OF ACTION
(INJUNCTIVE RELIEF)

24. Each and every allegation of the Complaint is reiterated as though fully stated herein and are specifically incorporated by reference hereto.

25. Upon information and belief, Glassburn has control of accounts and the LLCs' property that he has diverted to his personal control and benefit.

26. Without the consent of Plaintiffs, Glassburn, upon information and belief, has done and is doing the following:

a. Unilaterally converted the LLCs' property and proceeds to an unknown account for his own use;
b. Using the LLCs' money to pay personal expenses;
c. Embezzling from the LLCs and Lindley; and,
d. Directing and conducting an accounting scheme to conceal his embezzlement and wrongfully account to tax agencies.

27. Injunctive relief is necessary to ensure the operation of the LLCs' business, to ensure the security of the LLCs' money and to limit the personal exposure of Lindley.

28. An injunction is warranted to preserve the business, its assets and to pay its creditors.

29. Plaintiffs are likely to succeed on the merits of these claims and the unknown status of the LLCs' assets and Defendants actions in embezzling money, concealing the wrongful use of the LLCs' money for his personal benefit make it most probable that Plaintiffs will prevail in the litigation and have no adequate remedy at law if the litigation proceeds without an injunction.

FOR A SECOND CAUSE OF ACTION
(ACCOUNTING)

30. Each and every allegation of the Complaint is reiterated as though fully stated herein and are specifically incorporated by reference hereto.

31. An accounting of the LLCs business and Glassburn personally is necessary to ensure the viability of the business, the unjust enrichment of the Defendant and Lindley's interest in the LLCs.

32. Lindley has been denied his right to inspect the full accounting of the business, the transfer of LLCs assets, the bank accounts, records, and books of the LLCs. Therefore, Plaintiffs are entitled to an accounting to determine the value, the amount of monies embezzled, the rights of any creditors and the potential liability from tax agencies.

FOR A THIRD CAUSE OF ACTION
(APPOINTMENT OF RECEIVER)

33. Each and every allegation of the Complaint is reiterated as though fully stated herein and are specifically incorporated by reference hereto.

34. Pursuant to S.C. Code Ann. § 15-65-10(1) and (4), for an order appointing a receiver for the LLCs, with authority to take possession of the LLCs' assets, books, accountings, financial records, and management of the operations, collect the rents, profits, and revenues, to hold such rents, profits, and revenues pending further Order of this Court, to otherwise preserve the LLCs.

35. Defendant has not provided Plaintiffs with a full accounting of the LLCs, has provided fraudulent financials for the purpose of concealing his embezzlement the LLCs proceeds for his personal use and gain, he has transferred LLC property without authorization and directed the proceeds to accounts which only he controls.

36. Unless and until the Court orders a receiver to be appointed, the LLCs assets and the rights of Lindley are in imminent danger of insolvency from fraud and forfeit of its corporate rights.

FOR A FOURTH CAUSE OF ACTION
(CONVERSION)

37. Each and every allegation of the Complaint is reiterated as though fully stated herein and are specifically incorporated by reference hereto.

38. Defendant has wrongfully converted LLCs monies to his personal use and did deny Lindley his membership interest in those proceeds.

39. Defendant's conversion of Plaintiffs' property was deliberate, willful, wanton and in reckless disregard of the Plaintiffs' rights.

40. The Plaintiffs are informed and believe that for the Defendant's conversion of the property, Plaintiffs are entitled to actual and punitive damages in an amount to be determined by the trier of fact.

FOR A FIFTH CAUSE OF ACTION
(FRAUD)

41. Each and every allegation of the Complaint is reiterated as though fully stated herein and are specifically incorporated by reference hereto.

42. Glassburn did devise and intend to devise a scheme and artifice to defraud Plaintiffs and to obtain money and property from Plaintiffs by means of false and fraudulent pretenses, representations, and promises.

43. These false representations were intentional and deliberate on the part of the Defendant.

44. The Defendant knew that selling the LLCs property for which Lindley had an interest and authority for his own benefit and charging personal expenses to the company and concealing the nature of the expense through fraudulent accountings was in violation of the membership interest of Lindley and did harm to the LLCs.

45. The Defendant wrongfully and fraudulently used property and proceeds from the LLCs for his own benefit while denying a member access to and an accounting of the assets.

46. Defendant intended that Lindley would rely on Defendant abiding by the duties he had to the LLCs and Plaintiff and that Defendant would secure the LLCs assets without providing false accountings, and his denials that he was wrongfully managing LLC assets.

47. Plaintiff Lindley did in fact reasonably rely on the representations of the Defendant to his detriment.

48. Plaintiffs were justified and reasonable in relying on such representations and were without knowledge that such representations were false.

49. As a result of Defendant's false and fraudulent actions, Plaintiffs have suffered damages, attorney fees, and other expenses and costs resulting from Defendant's fraud.

Plaintiffs are informed and believe they are entitled to actual and punitive damages for Defendant's willful, wanton, intentional, and reckless conduct in an amount to be determined at trial.

FOR A SIXTH CAUSE OF ACTION
(BREACH OF FIDUCIARY DUTY)

50. Plaintiff re-alleges each and every preceding paragraph of this Complaint as if specifically set forth herein.

51. As members of the LLCs, Lindley and Glassburn were in a fiduciary relationship whereby each owes the other a mutual trust and confidence and the duties of loyalty and good faith and fair dealing.

52. Defendant owes to Lindley a fiduciary duty as a fellow member of the LLCs.

53. Defendant breached the fiduciary obligation of utmost good faith and integrity owed to Plaintiff by:

a. Unilaterally converting the LLCs' property and proceeds to an unknown account for his own use;
b. Using the LLCs' money to pay personal expenses;
c. Embezzling from the LLCs and Lindley; and,
d. Directing and conducting an accounting scheme to conceal his embezzlement and wrongfully account to tax agencies

54. Defendant consciously failed to exercise due care in his fiduciary duty to Plaintiffs.

55. Defendant's breach of his fiduciary duty was a reckless, willful, wanton, and malicious attempt to deprive Lindley of his membership rights.

FOR A SEVENTH CAUSE OF ACTION
(BREACH OF DUTY WARRANTING DISASSOCIATION)

56. Each and every allegation of the Complaint is reiterated as though fully stated herein and are specifically incorporated by reference hereto.

57. Glassburn, as a member of the LLCs, had a fiduciary duty to Lindley, the only other member of the LLCs, and to the entity itself.

58. The fiduciary duty owed, included but was not limited to, a mutual trust and confidence, a requirement to act with loyalty, in good faith and fair dealing.

59. Glassburn breached his duty by unilaterally taking possession of the company assets, excluding Lindley from operations and an accounting of the business, usurping LLC rights and opportunities for his own use, and embezzling the LLCs proceeds.

60. Glassburn's breach was reckless, willful, wanton and a malicious attempt to deprive Plaintiffs.

61. As a result of Glassburn's breach, Plaintiffs ask the Court to judicially disassociate Glassburn for his wrongful conduct that materially affected the company's business and did undertake action which makes it not reasonably practical to continue business with Glassburn and to award Plaintiffs both actual and punitive damages.

WHEREFORE, Plaintiffs pray for a judgment against the Defendant as follows:

a. To enjoin the Defendant from managing, controlling, transferring, or otherwise operating in any way the LLCs monies and assets for any purpose.

b. For and Order requiring Defendant to immediately give Lindley access to all bank accounts and books related to the business as well as Order that an accounting of the business be done at Defendant's costs so as to ensure the viability of the business, its liabilities and where the LLCs proceeds were used;

c. For an Order appointing a receiver to manage, operate, control, account for and direct the

LLCs' business during the course of the litigation or until such time as the Court orders otherwise;

d. For an Order disassociating Glassburn from the LLCs; and,

e. For an award of Plaintiffs' actual and punitive damages, for attorney's fees and costs, and such further relief as the Court deems just and appropriate.

LAW OFFICE OF TODD ELLIS, P.A.

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ATTORNEY FOR PLAINTIFFS

Irmo, South Carolina

May 17, 2022

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	CASE NO.: 2022-CP-40-2586
Capella Capital, LLC, Capella Carolinas, LLC and Michael Lindley,	)	
Plaintiffs,	)	
v.	)	**NOTICE OF MOTION AND MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO COMPEL ARBITRATION**
Donivon Glassburn,	)	
Defendant.	)	

PLEASE TAKE NOTICE THAT Defendant Donivon Glassburn ("Defendant"), by and through undersigned counsel, will move before the Presiding Judge in the Richland County Court of Common Pleas in Columbia, South Carolina, as soon as the parties may be heard, for an Order dismissing Plaintiffs' Complaint pursuant to Rule 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure or, in the alternative, for an Order staying this matter and compelling Plaintiffs to engage in arbitration pursuant to South Carolina Code Section 15-48-20 and the Federal Arbitration Act, 9 U.S.C. Section 3, in accordance with the Subscription for Membership in Cappella Carolinas, LLC ("Subscription Agreement") attached hereto as Exhibit A, and any arbitration agreements in the agreements referenced in the Complaint, including without limitation paragraph 10.

The grounds for this motion are that this Court lacks subject matter jurisdiction over the controversy described in the Complaint and the Complaint fails to state a claim upon which relief may be granted because the Subscription Agreement contains the following arbitration provision:

> Any claim or dispute arising out of or relating to this agreement or the breach thereof shall be settled by arbitration in the State of South Carolina in accordance with the rules and regulations then applicable to the American Arbitration Association governing three-member panels. The parties hereto agree to be bound by the award in such arbitration and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof.

This dispute arises from and relates to the Subscription Agreement and the Operating Agreement of Cappella Carolinas LLC which is specifically referenced in the Subscription Agreement and is thus subject to the arbitration provision. The Complaint also alleges that Plaintiff Lindley acquired his claimed interest in the Cappella Carolinas LLC and Cappella Capital in various ways including through "executed Subscription for Membership Agreements." South Carolina law favors arbitration provisions. See Towles v. United HealthCare Corp., 338 S.C. 29, 34, 524 S.E.2d 839, 842 (Ct. App. 1999). A motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to any interpretation which would cover the asserted dispute. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 553 S.E.2d 110 (2001). The parties should be compelled into arbitration as the parties have a dispute concerning their rights and obligations under the subscription agreements referenced in the Complaint. Nothing in this motion should be construed as an admission of any substantive allegations and claims in Plaintiff's Complaint, all of which are denied.

This motion is further supported by all pleadings, Exhibit A attached to this motion, any additional agreements that are located subsequent to the filing of this motion, reply or supplemental affidavits filed prior to the hearing on this motion and any memorandum of law to be filed as well as all applicable law and such further proof and testimony as may hereafter be offered at a hearing on this motion.

s/John A. Massalon
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ATTORNEYS FOR DEFENDANT

CHARLESTON, SC

August 15, 2022

Exhibit “A”

SUBSCRIPTION FOR MEMBERSHIP
IN
Capella Carolinas, LLC

THIS AGREEMENT IS SUBJECT TO MANDATORY ARBITRATION

The undersigned person does hereby subscribe to take a MEMBERSHIP INTEREST in the above-referenced limited liability company, in the percentage and for the consideration indicated.

This document shall supersede and render null and void any previous membership subscription agreements in Capella Carolinas, LLC.

In taking a membership interest, each member represents and warrants that the member is acquiring an ownership interest for the member's own account, for investment only and not with a view to its sale or distribution. Each member further represents and warrants that no representative of the company has made and will not make any guarantee or representation upon which such member has relied concerning the possibility or probability of profit or loss or the realization of any tax benefits as a result of his acquisition of said membership interest.

Each member represents that the member recognizes that the ownership interests have not been registered under the Securities Act of 1933, as amended (the "1933 Act"), or the securities act of any state in reliance upon an exemption from registration, and agrees not to sell, offer for sale, transfer, pledge or hypothecate the purchased membership interest in the absence of an effective registration statement concerning such shares or interest under the 1933 Act and applicable state securities acts, unless such sale, offer of sale, transfer, pledge, or hypothecation is exempt from registration.

The member further makes the following representations:

(i) the member's financial condition is such that the member is able to bear all risks of holding the membership interest for an indefinite time or a complete loss of the subscriber's investment in the shares;

(ii) the member has been furnished with all information the member deems necessary or appropriate in order to form a decision concerning the acquisition of said membership interest;

(iii) the member has been furnished all additional information which the member has requested in connection with the transactions contemplated by this Agreement;

(iv) the member has investigated the acquisition of the membership interest to the extent the member deemed necessary or desirable and has been furnished with any assistance requested in connection therewith; and

(v) the member has such knowledge and experience in financial and business matters that the member is capable of evaluating the merits and risks of acquisition of the membership interest and in making an informed investment decision with respect thereto.

SUBSCRIPTION FOR MEMBERSHIP
IN
Capella Carolinas, LLC

Each member acknowledges that this subscription shall be governed by the laws of the State of South Carolina and the Operating Agreement for Capella Carolinas, LLC which is incorporated herein by reference, and hereby agrees to be bound by the same. Any claim or dispute arising out of or relating to this agreement or the breach thereof shall be settled by arbitration in the State of South Carolina in accordance with the rules and regulations then applicable to the American Arbitration Association governing three-member panels. The parties hereto agree to be bound by the award in such arbitration and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof.

Name	Percentage of Ownership	Capital Contribution
Donivon Glassburn	50%	
Michael Lindley	50%	

SUBSCRIPTION FOR MEMBERSHIP
IN
Capella Carolinas, LLC

MEMBER'S CONSENT

The undersigned agrees to be bound as a Member by the terms of the Operating Agreement of Capella Carolinas, LLC as if the undersigned were a signatory thereof.

Donivon Glassburn Date: 9/24/14

Michael Lindley Date: 9/24/14

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)))	IN THE COURT OF COMMON PLEAS IN THE FIFTH JUDICIAL CIRCUIT CASE NO.: 2022-CP-40-2586
Capella Capital, LLC, Capella Carolinas, LLC and Michael Lindley, Plaintiffs, v. Donivon Glassburn, Defendant.	)))))))))))	**NOTICE OF SUPPLEMENTAL MOTION AND SUPPLEMENTAL MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO COMPEL ARBITRATION**

PLEASE TAKE NOTICE THAT Defendant Donivon Glassburn ("Defendant"), by and through undersigned counsel, will move before the Presiding Judge in the Richland County Court of Common Pleas in Columbia, South Carolina, as soon as the parties may be heard, for an Order dismissing Plaintiffs' Complaint pursuant to Rule 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure or, in the alternative, for an Order staying this matter and compelling Plaintiffs to engage in arbitration pursuant to South Carolina Code Section 15-48-20 and the Federal Arbitration Act, 9 U.S.C. Section 3, in accordance with the Subscription for Membership in Cappella Carolinas, LLC and in Capella Capital, LLC ("Subscription Agreements") attached hereto as Exhibit A and Exhibit B, respectively, and any arbitration agreements in the agreements referenced in the Complaint, including without limitation paragraph 10.

The grounds for this motion are that this Court lacks subject matter jurisdiction over the controversy described in the Complaint and the Complaint fails to state a claim upon which relief may be granted because the Subscription Agreements contain the following arbitration provision:

> Any claim or dispute arising out of or relating to this agreement or the breach thereof shall be settled by arbitration in the State of South Carolina in accordance with the rules and regulations then applicable to the American Arbitration Association governing three-member panels. The parties hereto agree to be bound by the award in such arbitration and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof.

This dispute arises from and relates to the Subscription Agreements and the Operating Agreements of Cappella Carolinas LLC and Capella Capital LLC. The Operating Agreements of these companies are specifically referenced in each Subscription Agreement and are thus subject to the arbitration provision. The Complaint also alleges that Plaintiff Lindley acquired his claimed interest in the Cappella Carolinas LLC and Cappella Capital in various ways including through "executed Subscription for Membership Agreements." South Carolina law favors arbitration provisions. See Towles v. United HealthCare Corp., 338 S.C. 29, 34, 524 S.E.2d 839, 842 (Ct. App. 1999). A motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to any interpretation which would cover the asserted dispute. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 553 S.E.2d 110 (2001). The parties should be compelled into arbitration as the parties have a dispute concerning their rights and obligations under the subscription agreements referenced in the Complaint. Nothing in this motion should be construed as an admission of any substantive allegations and claims in Plaintiffs' Complaint, all of which are denied.

This motion is further supported by all pleadings, Exhibits A and B attached to this motion, any additional agreements that are located subsequent to the filing of this motion, reply or supplemental affidavits filed prior to the hearing on this motion and any memorandum of law to be filed as well as all applicable law and such further proof and testimony as may hereafter be offered at a hearing on this motion.

s/John A. Massalon
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Carissa J. Steichen (SC Bar #104264)
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jmassalon@wmalawfirm.net
csteichen@wmalawfirm.net

ATTORNEYS FOR DEFENDANT

CHARLESTON, SC

August 30, 2022

Exhibit “A”

SUBSCRIPTION FOR MEMBERSHIP
IN
Capella Carolinas, LLC

THIS AGREEMENT IS SUBJECT TO MANDATORY ARBITRATION

The undersigned person does hereby subscribe to take a MEMBERSHIP INTEREST in the above-referenced limited liability company, in the percentage and for the consideration indicated.

This document shall supersede and render null and void any previous membership subscription agreements in Capella Carolinas, LLC.

In taking a membership interest, each member represents and warrants that the member is acquiring an ownership interest for the member's own account, for investment only and not with a view to its sale or distribution. Each member further represents and warrants that no representative of the company has made and will not make any guarantee or representation upon which such member has relied concerning the possibility or probability of profit or loss or the realization of any tax benefits as a result of his acquisition of said membership interest.

Each member represents that the member recognizes that the ownership interests have not been registered under the Securities Act of 1933, as amended (the "1933 Act"), or the securities act of any state in reliance upon an exemption from registration, and agrees not to sell, offer for sale, transfer, pledge or hypothecate the purchased membership interest in the absence of an effective registration statement concerning such shares or interest under the 1933 Act and applicable state securities acts, unless such sale, offer of sale, transfer, pledge, or hypothecation is exempt from registration.

The member further makes the following representations:

(i) the member's financial condition is such that the member is able to bear all risks of holding the membership interest for an indefinite time or a complete loss of the subscriber's investment in the shares;

(ii) the member has been furnished with all information the member deems necessary or appropriate in order to form a decision concerning the acquisition of said membership interest;

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(iv) the member has investigated the acquisition of the membership interest to the extent the member deemed necessary or desirable and has been furnished with any assistance requested in connection therewith; and

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SUBSCRIPTION FOR MEMBERSHIP
IN
Capella Carolinas, LLC

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Name	Percentage of Ownership	Capital Contribution
Donivon Glassburn	50%	
Michael Lindley	50%	

DDG MDL

SUBSCRIPTION FOR MEMBERSHIP
IN
Capella Carolinas, LLC

MEMBER'S CONSENT

The undersigned agrees to be bound as a Member by the terms of the Operating Agreement of Capella Carolinas, LLC as if the undersigned were a signatory thereof.

Donivon Glassburn Date: 9/24/14

Michael Lindley Date: 9/24/14

Exhibit “B”

EXECUTED

SUBSCRIPTION FOR MEMBERSHIP
IN
Capella Capital, LLC

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SUBSCRIPTION FOR MEMBERSHIP
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Capella Capital, LLC

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Donivon Glassburn — Date: January 1, 2014

Michael Lindley — Date: January 1, 2014

SUBSCRIPTION FOR MEMBERSHIP
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Michael Lindley	50%	

DG ML

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)))	IN THE COURT OF COMMON PLEAS IN THE FIFTH JUDICIAL CIRCUIT CASE NO.: 2022-CP-40-2586
Capella Capital, LLC, Capella Carolinas, LLC and Michael Lindley, Plaintiffs, v. Donivon Glassburn, Defendant.	)	**DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS OR COMPEL ARBITRATION**

Defendant Donivon Glassburn ("Defendant"), through undersigned counsel, hereby submits this memorandum in support of his motion to dismiss the complaint filed by Plaintiffs Capella Capital, LLC, Capella Carolinas, LLC, and Michael Lindley (collectively "Plaintiffs"), or in the alternative, compel arbitration filed on August 15, 2022, as supplemented by his August 30, 2022 motion. For the reasons stated herein, the Court should dismiss the case pursuant to Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure. In the alternative, the Court should issue an Order staying this matter and compelling Plaintiffs to engage in arbitration pursuant to South Carolina Code Section 15-48-20 and the Federal Arbitration Act, 9 U.S.C.

BACKGROUND

This lawsuit is a derivative action filed by Mr. Lindley on behalf of the two companies Capella Capital, LLC ("Capital") and Capella Carolinas, LLC ("Carolinas"). Capital was formed in July 2012 by Glassburn and Lindley to be the ownership company of future bingo hall acquisitions and/or real estate. Carolina owns and operates about eighteen bingo halls in South

Carolina. Capital owns 20% of two halls in Colorado and also owns some real estate here in South Carolina and in Alabama.

Glassburn has performed all the work to operate the South Carolina bingo halls. For the most part, Lindley has been silent and his contact with Glassburn has been sporadic. Over the years, issues arose between Glassburn and Lindley over the management of the business and operations of the bingo halls. Among other things, Lindley has misrepresented the amount that he has worked and accused Glassburn of using company assets for himself. After some time, the issues between Lindley and Glassburn came to a head. Lindley filed this lawsuit on behalf of Capital and Carolinas, on May 17, 2022, requesting an injunction, an accounting, and appointment of a receiver and alleging claims of conversion, fraud, breach of fiduciary duty, and breach of duty warranting disassociation. Glassburn denies any and all allegations that he is liable to the Plaintiffs.

On August 15, 2022, Glassburn filed the present motion to dismiss or compel arbitration. The Parties executed Subscription for Membership Agreements for both Capital and Carolinas ("Subscription Agreements") in 2014. The Subscription Agreements, attached hereto as Exhibits A and B respectively, contain the following arbitration provision ("Arbitration Provision"):

> Any claim or dispute arising out of or relating to this agreement or the breach thereof shall be settled by arbitration in the State of South Carolina in accordance with the rules and regulations then applicable to the American Arbitration Association governing three-member panels. The parties hereto agree to be bound by the award in such arbitration and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof.

This provision is found on page 3 of the Capital Subscription Agreement and on page 2 of the Carolina Subscription Agreement.

ARGUMENT

South Carolina law favors arbitration provisions. See Towles v. United HealthCare Corp., 338 S.C. 29, 34, 524 S.E.2d 839, 842 (Ct. App. 1999). "There is a strong presumption in favor of

the validity of arbitration agreements because of the strong policy favoring arbitration." Hall v. Green Tree Servicing, LLC, 413 S.C. 267, 274, 776 S.E.2d 91, 95 (Ct. App. 2015) (citing Cape Romain Contractors, Inc. v. Wando E., LLC, 405 S.C. 115, 125, 747 S.E.2d 461, 466 (2013) (internal citations omitted)). Any doubt as to whether this claim is subject to arbitration must be resolved in favor of arbitration. Hall, 413 S.C. 267, 275, 776 S.E.2d 91, 96. A motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to any interpretation which would cover the asserted dispute. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 553 S.E.2d 110 (2001).

The Court should dismiss this action pursuant to Rules 12(b)(1) and 12(b)(6) for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted due to the Arbitration Provision requiring resolution of any claim or dispute to take place in arbitration and not in the Court of Common Pleas. In the alternative, the Court should issue an Order staying this matter and compelling Plaintiffs to engage in arbitration pursuant to South Carolina Code Section 15-48-20 and the Federal Arbitration Act, 9 U.S.C.

Under S.C. Code Ann. Section 15-48-10, “a written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable.” See S.C. Code Ann. 15-48-10(a). “Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration.” Id. Here, the Subscription Agreements are executed by both Glassburn and Lindley. Each Subscription Agreement contains a provision on the first page of each document stating that the contract is subject to mandatory arbitration in accordance with S.C. Code Ann. 15-48-10(a).

Furthermore, each Subscription Agreement is clear "Any claim or dispute arising out of or relating to [the agreements] or the breach thereof shall be settled by arbitration…" See page 3 of Capital Subscription Agreement and page 2 of Carolinas Subscription Agreement. Based on the allegations of the Complaint, this dispute arises from and relates to the Subscription Agreements and Operating Agreements of Capital and Carolinas. The Operating Agreements of these companies are specifically referenced in each Subscription Agreement and are thus subject to the arbitration provision. Further, the complaint specifically alleges that Lindley acquired his claimed interest in Carolinas and Capital, which Defendant denies, in various ways including through "executed Subscription for Membership Agreements." See Complaint, para 10. Therefore, the claims in this lawsuit are subject to mandatory arbitration.

CONCLUSION

For the reasons stated herein and argument of counsel at a hearing on this matter, Defendant respectfully requests the Court dismiss the case pursuant to Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure or, in the alternative, issue an Order staying this matter and compelling Plaintiffs to engage in arbitration.

s/John A. Massalon
John A. Massalon (SC Bar #10279)
WILLS MASSALON & ALLEN LLC
Post Office Box 859
Charleston, South Carolina 29402
(843) 727-1144
jmassalon@wmalawfirm.net

ATTORNEYS FOR DEFENDANT

CHARLESTON, SC

January 18, 2023

Exhibit “A”

EXECUTED

SUBSCRIPTION FOR MEMBERSHIP
IN
Capella Capital, LLC

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SUBSCRIPTION FOR MEMBERSHIP
IN
Capella Capital, LLC

MEMBER'S CONSENT

The undersigned agrees to be bound as a Member by the terms of the Operating Agreement of Capella Capital, LLC as if the undersigned were a signatory thereof.

Donivon Glassburn — Date: JANUARY 1, 2014

Michael Lindley — Date: January 1, 2014

SUBSCRIPTION FOR MEMBERSHIP
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Name	Percentage of Ownership	Capital Contribution
Donivon Glassburn	50%	
Michael Lindley	50%	

DG ML

Exhibit “B”

SUBSCRIPTION FOR MEMBERSHIP
IN
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SUBSCRIPTION FOR MEMBERSHIP
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Name	Percentage of Ownership	Capital Contribution
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SUBSCRIPTION FOR MEMBERSHIP
IN
Capella Carolinas, LLC

MEMBER'S CONSENT

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Donivon Glassburn Date: 9/24/14

Michael Lindley Date: 9/24/14

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	CASE NO.: 2022-CP-40-2586
Capella Capital, LLC, Capella Carolinas, LLC and Michael Lindley,	)	
Plaintiffs,	)	
v.	)	**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO COMPEL ARBRITATION**
Donivon Glassburn	)	
Defendants.	)	

INTRODUCTION

The lawsuit involves a dispute between Michael Lindley and Donivon Glassburn over ownership and control of two South Carolina entities, Capella Capital, LLC and Capella Carolinas, LLC (collectively referred to herein as "the LLCs"). On July 7, 2012, Lindley and Glassburn formed Capella Capital, LLC, to, among other business, purchase and potentially develop commercial real estate and retail centers, purchase and service ATM machines, and purchase bingo video equipment. On March 23, 2013, Lindley and Glassburn formed Capella Carolinas, LLC, for the sole purpose of purchasing 100% of the stock and membership interests in twelve (12) South Carolina entities/corporations to continue the operation of various charitable bingo facilities in the State of South Carolina.

In the initial years following the formation of the LLCs, Lindley and Glassburn each participated in the operational planning and financial decisions involving the bingo halls and related businesses, and their membership interests were reflected in the tax filings for the entities. In recent years, Michael Lindley asserts that Mr. Glassburn operated the LLCs for his own personal benefit without regard to Lindley's membership interest nor in furtherance of the best

interest of the business of the LLCs. After attempts at resolving these issues, Mr. Lindley filed this lawsuit and brings claims against Mr. Glassburn for conversion, fraud, breach of fiduciary duty and breach of duty warranting disassociation. The wrongful acts asserted are extensive but generally relate to Glassburn denying Lindley access to LLC records and financial and operational input as well as Glassburn's self-dealing in using LLC proceeds and assets for personal benefit. The damages suffered by Lindley are in the millions of dollars.

DEFENDANT'S MOTION TO DISMISS AND TO COMPEL ARBITRATION

Defendant responded to the Plaintiff's Complaint with a Motion to Dismiss or Compel Arbitration and submitted a memorandum in support. In his Memorandum, Defendant admits that the Parties signed Subscription for Membership Agreements for the LLCs. (The "Subscription Agreements"). See Defendant's Memorandum in Support of Motion to Dismiss or Compel Arbitration, page 2, second full paragraph. The Subscription Agreements are attached hereto as Exhibit A and B.) The Subscription Agreements do contain the following arbitration provision:

> Any claim or dispute arising out of or relating to this agreement or the breach thereof shall be settled by arbitration in the State of South Carolina in accordance with the rules and regulation then applicable to the American Arbitration Association governing three-member panels. The parties hereto agree to be bound by the award in such arbitration and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof.

This provision is found on page 3 of the Capital Subscription Agreement and on page 2 of the Carolina Subscription Agreement.

Lindley admits to signing the Subscription Agreements which also show the Parties intended that both Lindley and Glassburn would own a 50% interest in the LLCs. The Subscription Agreements also incorporate purported Operating Agreements for each of the LLCs requiring that the Parties are bound by the terms as members. See page 3 of the Subscription

Agreement for Capella Capital, LLC and Capella Carolinas, LLC attached hereto as Exhibit A and B. Glassburn does not submit the Operating Agreements for the LLCs as part of his Memorandum in Support of its Motion to Dismiss or Compel Arbitration. Through the limited exchange of materials in this case, Lindley has only received an alleged Operating Agreement for Capella Carolinas, LLC. Attached hereto as Exhibit C. Lindley denies the legitimacy of the Operating Agreement which is signed solely by Glassburn on April 1, 2014. No Operating Agreement for Capella Capital, LLC has been offered, and Lindley asserts that Glassburn, in furtherance of his efforts to control and solely benefit from the LLCs business, never agreed to sign any operating agreements for which the Parties are bound.

Importantly for the Court's consideration, Glassburn is asking the Court to compel arbitration based on the provisions of the Subscription Agreements signed by the Parties at the same time Glassburn is denying the legitimacy of the Subscription Agreements. On page 4 of his Memorandum in Support of his Motion to Dismiss or Compel Arbitration, Glassburn states:

> [t]he Operating Agreements of these companies are specifically referenced in each Subscription Agreement and are thus subject to the arbitration provision. Further, the complaint specifically alleges that Lindley acquired his claimed interest in Carolinas and Capital, **which Defendant denies**, in various way including through "executed Subscription for Membership Agreements." See Defendant's Memorandum in Support of Motion to Dismiss or Compel Arbitration, page 4, refencing Plaintiff's Complaint, para. 10. (emphasis added).

Glassburn is asking the Court to order arbitration on a document he denies binds the Parties and which also references Operating Agreements that either do not exist or are not signed by both Parties.

ARGUMENT

The Court cannot compel arbitration on the Subscription Agreements when the Party seeking arbitration denies the Subscription Agreements bind the Parties or grant the rights set

forth therein. Further, the Subscription Agreements, nor the Defendant, provide the Operating Agreements setting forth the Parties rights in the LLCs. The initial inquiry to be made by the trial court is whether an arbitration agreement exists between the parties. *Hous. Auth. of the City of Columbia v. Cornerstone Hous., LLC*, 356 S.C. 328, 334, 588 S.E.2d 617, 620 (Ct.App.2003). Such rulings are based on the contractual nature of arbitration agreements. *See Towles v. United Healthcare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839, 843–44 (Ct.App.1999) ("Arbitration is available only when the parties involved contractually agreed to arbitrate.").

The South Carolina Uniform Arbitration Act (UAA) generally provides that where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement exists in the first place. S.C. Code Ann. § 15–48–20(a)(2005). If no agreement is found to exist, the court must deny any application to arbitrate. *Id. See Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663, 667, 373 S.C. 14, 22 (S.C., 2007).

The United States Supreme Court has noted that, in limited circumstances, a court should assume that the parties intended the court to decide certain arbitration issues in the absence of "clear and unmistakable" evidence to the contrary. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452, 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003) (quoting *AT & T Techs., Inc. v. Commc'ns Workers of America*, 475 U.S. 643, 649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986)). These limited circumstances typically involve certain "gateway matters," such as whether the parties have a valid arbitration agreement at all, or whether an arbitration clause applies to a certain type of controversy. *Id.* Thus, the prevailing authority supports the notion that courts may have at least a limited role where an arbitration clause otherwise applies. *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663, 667–68, 373 S.C. 14, 23 (S.C., 2007).

In the case at hand, the Court cannot compel arbitration where Glassburn denies the viability of the very document that purports to compel the right. Glassburn denies, in his own memorandum in support of compelling arbitration, the Subscription Agreements grant Lindley interest in the LLCs. See Defendant's Memorandum in Support of Motion to Dismiss or Compel Arbitration, page 4. Glassburn attempts to have the Court compel arbitration while at the same time, presumably in arbitration, retaining his right to argue that the very document purportedly requiring arbitration is invalid. Therefore, the Court cannot compel arbitration or dismiss this case and the Defendant's motion should be denied.

RESPECTFULLY SUBMITTED BY

THE LAW OFFICE OF TODD ELLIS, P.A.

s/Todd R. Ellis
Todd R. Ellis, Esq. (SC Bar No. 08888)
7911 Broad River Road, Suite 100
Irmo, South Carolina 29063
(803) 732-0123 phone
(803) 732-0124 fax
todd@toddellislaw.com

Attorney for The Plaintiffs

January 25, 2023
Irmo, South Carolina

ELECTRONICALLY FILED - 2022 Aug 31 12:05 PM - RICHLAND - COMMON PLEAS - CASE#2022CP4002586

Exhibit “A”

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Michael Lindley	50%	

DDG _____ _____

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Donivon Glassburn Date: 9/24/14

Michael Lindley Date: 9/24/14

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Exhibit “B”

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EXECUTED

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In taking a membership interest, each member represents and warrants that the member is acquiring an ownership interest for the member's own account, for investment only and not with a view to its sale or distribution. Each member further represents and warrants that no representative of the company has made and will not make any guarantee or representation upon which such member has relied concerning the possibility or probability of profit or loss or the realization of any tax benefits as a result of his acquisition of said membership interest.

Each member represents that the member recognizes that the ownership interests have not been registered under the Securities Act of 1933, as amended (the "1933 Act"), or the securities act of any state in reliance upon an exemption from registration, and agrees not to sell, offer for sale, transfer, pledge or hypothecate the purchased membership interest in the absence of an effective registration statement concerning such shares or interest under the 1933 Act and applicable state securities acts, unless such sale, offer of sale, transfer, pledge, or hypothecation is exempt from registration.

The member further makes the following representations:

(i) the member's financial condition is such that the member is able to bear all risks of holding the membership interest for an indefinite time or a complete loss of the subscriber's investment in the shares;

(ii) the member has been furnished with all information the member deems necessary or appropriate in order to form a decision concerning the acquisition of said membership interest;

(iii) the member has been furnished all additional information which the member has requested in connection with the transactions contemplated by this Agreement;

(iv) the member has investigated the acquisition of the membership interest to the extent the member deemed necessary or desirable and has been furnished with any assistance requested in connection therewith; and

(v) the member has such knowledge and experience in financial and business matters that the member is capable of evaluating the merits and risks of acquisition of the membership interest and in making an informed investment decision with respect thereto.

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SUBSCRIPTION FOR MEMBERSHIP
IN
Capella Capital, LLC

MEMBER'S CONSENT

The undersigned agrees to be bound as a Member by the terms of the Operating Agreement of Capella Capital, LLC as if the undersigned were a signatory thereof.

Donivon Glassburn — Date: January 1, 2014

Michael Lindley — Date: January 1, 2014

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SUBSCRIPTION FOR MEMBERSHIP
IN
Capella Capital, LLC

Each member acknowledges that this subscription shall be governed by the laws of the State of South Carolina and the Operating Agreement for Capella Capital, LLC which is incorporated herein by reference, and hereby agrees to be bound by the same. Any claim or dispute arising out of or relating to this agreement or the breach thereof shall be settled by arbitration in the State of South Carolina in accordance with the rules and regulations then applicable to the American Arbitration Association governing three-member panels. The parties hereto agree to be bound by the award in such arbitration and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof.

Name	Percentage of Ownership	Capital Contribution
Donivon Glassburn	50%	
Michael Lindley	50%	

DG MD

EXHIBIT C

CAPELLA CAROLINAS, LLC
OPERATING AGREEMENT

WHEREAS, Capella Carolinas, LLC (the "Company") hereby adopts this Operating Agreement (the "Agreement") intending it to be effective as of the date of the organization of the Company.

RECITALS

The Members desire to share in the risks, benefits, profits, and losses of the Company's activities, in the manner indicated in the Agreement. However, nothing herein shall be interpreted so as to bind or make any Member personally liable for the expenses, liabilities or obligations of the Company except as otherwise required by law.

SECTION 1
Name and Term

1.1. Name. The Company's name is Capella Carolinas, LLC.

1.2. Term. The Company shall be at will and thus will not expire until such time as all members deem appropriate or at such time as a court of competent jurisdiction so rules. (All members shall mean the percentage of ownership which it takes to perform an extraordinary corporate action; See below).

SECTION 2
Nature of Business, Designated Office, and Agent

2.1. Business. The Company may carry on any lawful business, purpose or activity.

2.1.1. Ratification of Articles. The Articles of Organization attached hereto as Exhibit A are hereby ratified by the Members and confirmed as the Articles of Organization for the Company.

2.1.2. Qualification to do Business. The Company shall take any and all action necessary to qualify to do business in any state where such qualification is required.

2.2. Designated Office and Principal Place of Business. The Company's Designated Office and Principal Place of Business is 1799 Meeting St., Suite C, Charleston, SC 29405 . The Members may change the Company's Designated Office to another location and add additional places of business.

2.3. Agent. The Company's agent for service of process shall be Dylan W. Goff, Esq. at 1422 Laurel Street, Columbia, South Carolina 29201.

2.4. Construction. If and to the extent the provisions of this Agreement conflict with the Act and the Act permits modification of such default rule, this Agreement shall control. If and to the extent the provisions of this Agreement do not conflict with the Act, the Act shall control.

SECTION 3
Capital and Company Interests

3.1. Membership Units. Each Member's respective Membership Units and Initial Capital Contributions are set forth in the Membership Agreement which is attached hereto as Exhibit A and incorporated herein by reference. The Company is hereby authorized to issue up to 100 Membership Units on the terms and conditions provided in this Agreement. The Company may authorize additional Membership Units for future issuance upon the approval by a majority vote of the Members. A person may acquire a Membership Interest directly from the Company upon a majority vote of the Members.

3.2. Deficit Capital Accounts. Notwithstanding anything to the contrary contained in this Operating Agreement, and notwithstanding any custom or rule of law to the contrary, to the extent that the deficit, if any, in the capital account of any Member results from deductions and losses of the Company (including non-cash items such as depreciation) or distributions of money pursuant to this Operating Agreement to all Members in proportion to their respective shares of profits, upon dissolution of the Company such deficit shall not be an asset of the Company and such Members shall not be obligated to contribute such amount to the Company to bring the balance of such Member's capital account to zero.

3.3. Adjustments. Each Member's Capital Account shall be adjusted as necessary to reflect the economic conditions of their respective Membership Units. These adjustments shall include, but are not limited to, the following:

3.3.1. Adjustments to reflect each Member's distributive share of Company profits and losses, including capital gains and losses, and tax-exempt income;

3.3.2. Adjustments to reflect each Member's additional contributions to the Company;

3.3.3. Adjustments to reflect distributions made by the Company to each Member;

3.3.4. Tax-Sensitive Adjustments.

3.4. Loans. A Member's loans to the Company shall not be added to its Capital Account.

3.5. Amount of Contributions. The amount of a Member's contributions of property to the Company and of the Company's distributions of property to a Member, shall be reflected in the Member's Capital Account at the fair market value of the property on the date of the contribution or distribution, reduced by any liabilities secured by that property, if those liabilities are treated under applicable federal income tax laws as being assumed by or taken subject to by the transferee.

3.6. No Interest Paid. Other than as specifically provided in this Agreement, a Member shall receive no interest on its capital contributions or Membership Units.

3.7. Withdrawals. A Member may not withdraw its Capital Account except as expressly authorized in this Agreement.

3.8. Voluntary Additional Capital Contributions. If the Members or a majority thereof determine that the Company needs additional funds and that the Company should request additional capital contributions from all the Members, then each Member shall be notified by the Company, in writing, of the need for additional capital. The notice shall set forth the total amount (the "Capital Amount") of funds that the Company needs to raise, each Member's pro rata portion of the Capital Amount in accordance with the Members' respective percentages of issued and outstanding Membership Units, and the date on which such additional contributions are due. The Company may accept additional capital contributions under this Section only if every Member notifies the Manager in writing of such Member's agreement to contribute a pro rata portion of the Capital Amount within the time limit prescribed in the notice. A Member must make the capital contribution that such Member has agreed to make within the time limits set in the notice in cash. No additional Membership Units will be issued for voluntary additional capital contributions made in accordance with this Section. No Member shall be otherwise obligated to make additional capital contributions.

3.9. Member Loans. If the Members determine that the Company needs additional funds and that the Company should borrow those funds from the Members, then the Company shall send to each Member a written notice ("Loan Notice"), which shall set forth the total amount (the "Loan Amount") of funds that the Company needs to raise, the interest rate and other terms pursuant to which the Company will agree to borrow such funds, and the date on which such funds are due. A Member desiring to contribute a portion of the Loan Amount shall notify the Company in writing of such Member's agreement to make a loan (and the amount of such loan), within the time limit prescribed in the Loan Notice. If Members agree to loan funds in excess of the Loan Amount requested, the loans shall be reduced pro rata. A Member must make the loan that such Member has agreed to make within the time limits set in the Loan Notice in cash. If the Company receives a loan from a Member, that lending Member shall receive no additional Membership Units as a result of such loan. Notwithstanding Section 4.2 of this Agreement, the Company shall repay outstanding loans from Members or be current under the terms of the loans before making any distributions to Members and shall repay Member loans in the order in which such Member loans were made (with repayment of all Member loans made with respect to a particular Loan Notice being made pro rata among the Members who made such Member loans) unless the terms of particular loans provide otherwise.

3.10. Additional Membership Units or Members. If the Members determine that the Company needs additional funds and that the Company should secure those funds through the issuance of additional, authorized Membership Units, then the Company may offer and admit additional Members in accordance with Section 10 of this Agreement, upon such terms and conditions as the Manager shall determine appropriate; provided, that the Company may only offer additional Membership Units under this Section to third parties or fewer than all existing Members if all Members have been offered the opportunity to make additional capital contributions as provided in Section 3.8 above and the Company has not succeeded in raising the additional funds that are needed. The Members hereby acknowledge that the issuance of additional Membership Units under this Section may result in the dilution of their interests and

that, other than as specifically provided herein, they do not have a preemptive of other similar right or option to acquire additional Membership Units.

3.11. Limited Liability. No Member shall be bound by, or be personally liable for, the expenses, liabilities or obligations of the Company except as otherwise provided in this agreement or as required by law.

SECTION 4
Allocations and Distributions

4.1. Allocations of Profits and Losses. The Company's net profits and losses (and each individual item of income, deduction, gain, loss, and credit that makes up net profits and losses) shall be computed in accordance with professionally accepted accounting principles, consistently applied and appropriate for the method of accounting selected by the Manager for use by the Company, and shall be allocated, pro rata, among the Members solely according to their proportion of Membership Units.

4.1.1. Allocations Attributable to Particular Periods. For purposes of determining profits, losses or any other items allocable to any period, such items shall be determined on a daily, monthly, or other basis, as determined by the Members using any permissible method under Code Section 706 and the Regulations thereunder.

4.1.2. Tax Consequences. The Members are aware of the income tax consequences of the allocations made by this Section 4.1 and hereby agree to be bound thereby as reflected on the income tax returns of the Company in reporting their respective shares of Company profits and losses for federal income tax purposes.

4.2. Distributions.

4.2.1. Distributions of Net Cash Flow. Subject to the provisions of Sections 4.3 and 4.4 hereof, the Members shall have the right to make distributions of cash and property to themselves on a pro rata basis in the amounts specifically described below and at such a time as shall be determined by the Members:

4.2.1.1. Second, to all Members in amounts determined appropriate in the sole discretion of the Manager; provided that all such discretionary distributions are paid in accordance with each Member's proportion of Membership Units in the Company.

4.3. Limitations on Distributions. No distribution shall be declared and paid if payment of such distribution would cause the Company to violate any limitations on distributions provided in the Act.

4.4. Assignment or Death. When a Member dies, retires, or assigns their Membership Units, profits and losses shall be allocated based on the number of days in that year during which each Member owned Membership Units, or on any other reasonable basis selected by the Manager, as long as it is consistent with applicable United States tax laws and regulations.

SECTION 5
Members and Management

5.1. Management. The business of the Company shall be managed by its members. The members shall have the full power and authority to manage the affairs of this business, to make all decisions, and to take all actions for the LLC

5.2. Reserved.

5.3. Appointment of Officers. The Members may appoint one or more officers from time to time. Officers shall hold office until their successors are chosen and qualified. Subject to any employment agreement entered into between an officer and the Company, an officer shall serve at the pleasure of the Members. The current officers of the Company are listed on Exhibit B.

5.4. Voting Rights. Members shall have the right to vote on all matters with respect to this agreement or wherever the laws of this state require or permit such Member action. Voting shall be based on total number of Membership Units. Unless otherwise stated in this agreement or under the laws of this state, the vote of the Members holding a majority of the Membership Units shall be required to approve or carry an action.

5.5. Meetings. Members may call such meetings as are deemed necessary by the Members for the reasonable management of the Company.

SECTION 6
Financial Reports and other Accountings

6.1. Within ninety (90) days after the close of each fiscal year, the Managing Member shall, at the Company's expense, give a written report to each Member indicating that Member's share of the Company income or loss and any changes in that Member's Capital Account. This requirement may be satisfied by giving each Member a copy of any tax form that includes such information.

6.2. Accounts. Complete books of account of the Company's business shall be kept at the Company's principal office and shall be open to inspection and copying on reasonable notice by any Member during normal business hours. The costs of such inspection and copying shall be borne by the Member.

6.3. Records. At all times during the existence of the Company the Members shall keep:

(a) A current list of the full name and last known address of each Member, together with the total Capital Contribution, the amount and terms of any agreed upon future Capital Contribution and Membership Interest of each Member;

(b) A copy of the Articles of Organization and Certificate of Existence;

(c) An executed copy of this Agreement;

(d) Copies of the Compnay's Federal, State and local tax records for the five most recent taxable years; and

SECTION 7
Banking

All Company funds shall be deposited in the Company's name in such accounts as the Members may designate. The Members may authorize other persons to draw checks on Company bank accounts, but such authority must be in writing. Each bank in which a Company account is maintained is relieved of any responsibility to inquire into the Member's authority to deal with such funds.

SECTION 8
Transfers of Membership Units

8.1. Limitations on Transfer. A Member shall not Transfer any Membership Unit except in accordance with the terms of this Section 8 or with the prior written consent of all of the other Members. An attempted Transfer of any Membership Unit that is not in accordance with the terms of this Section shall not be valid and shall not be reflected on the Company's books.

8.2. Right of First Refusal. A Member who wishes to Transfer any Membership Unit, or who has reason to believe that an involuntary Transfer or a Transfer by operation of law is reasonably foreseeable (an "Offering Member"), shall first give each other Member written notice of the intent to Transfer such Membership Unit (the "Offered Units") or of the knowledge that an Involuntary Transfer or Transfer by operation of law is reasonably foreseeable. This notice must contain a description of the number of Membership Units to be Transferred, the consideration (if any) to be paid, the terms of Transfer and of the payment of consideration (including but not limited to the relative percentages of cash and debt, and the terms of any debt instruments), and the name, address (both home and office), and business or occupation of the person to whom the Offered Units would be transferred, and any other facts which are or would reasonably be deemed material to the proposed Transfer.

8.2.1. Upon the receipt of such notice, each other Member shall have a right to buy that share of the Offered Units having the same proportion to all of the Offering Member's Membership Units as the buying Member's Membership Units bears to the Membership Units held by all Members (except the Offering Member).

8.2.2. Each Member may exercise this purchase option by giving the Offering Member written notice within thirty (30) days after receipt of the latter's notice.

8.2.3. If the Members do not agree to buy all of the Offered Units, the Offering Member may complete the intended Transfer. If this Transfer is not completed within thirty (30) days after expiration of the option period, any attempted Transfer shall be deemed made under a new offer and this Section shall again apply.

8.3. Agreement Price. The purchase price that the Members must pay for the Offered Units under Section 8.2 shall be either (a) that of any proposed Transfer if the proposed Transfer for which notice was given is a bona-fide, third-party transaction with consideration to be paid in cash, notes payable in cash, or any combination thereof, or (b) an amount equal to the proportion that the Offered Units bears to all issued and outstanding Membership Units, multiplied by the fair market value of the Company's assets reduced by any liabilities of the Company if the proposed Transfer for which notice was given is not a bona-fide, third-party transaction with consideration to be paid as described above. The fair market value of the Company's assets shall be determined by an independent appraisal performed by a professional appraiser selected by the Manager. The Company and the Offering Member shall share the cost of the appraisal.

8.4. Agreement Terms. The terms upon which the Members must acquire the Offered Units under Section 8.2 shall be either (a) the purchase terms of any proposed Transfer if the proposed Transfer for which notice was given is a bona-fide, third-party transaction described in Section 8.3(a) above, or (b), if the proposed Transfer is not as described in Section 8.3(a) above, payment of one third (1/3) of the purchase price in cash or by good personal check at the closing for the sale of such Offered Units with the balance of the purchase price paid in two (2) equal, annual installments commencing one (1) year from the date of the closing. Interest shall accrue on the outstanding principal balance from the date of closing at a simple, fixed rate equal to the "Prime Rate" as published in the Wall Street Journal on the date of closing and shall be paid with each installment. The buyer shall give the Offering Member a promissory note secured by the Offered Units as evidence of this debt and shall execute and consent to filing of appropriate a security agreement and UCC filing with respect to the Offered Units. The buyer may prepay all or any part of the principal balance of the note at any time without penalty or premium.

8.5. The Closing. The purchase of Offered Units under this Section shall take place at a closing to be held not later than the thirtieth (30^{th}) day after the earlier of the date on which the Members' purchase options have all expired, or the earliest date on which the Members in the aggregate exercise their purchase options, if any, to buy all of the Offered Units. The closing shall be held during normal business hours at the Company's principal business office, or at any other place to which the parties agree. If the Offering Member is not present at the closing, then the buyer shall deposit the purchase price by check, note, or both, as this Section requires, with any state or federally chartered bank with which the Company has an account, as escrow agent, to be paid to the Offering Member as soon as is reasonably practicable, less an appropriate fee to the Company (not to exceed one thousand dollars ($1,000.00)) to cover additional administrative costs, and the Company shall adjust its books to reflect the transfer of these Membership Units.

SECTION 9
Amendments

This Agreement shall be amended by the Manager without Member consent or approval to reflect any valid Transfers of Membership Units or any periodic revisions or corrections to Exhibit A. Otherwise, this Agreement shall be amended only with the approval of a Super-Majority Vote of the Members.

SECTION 10
Admission, Retirement, and Resignation of Members

10.1. Admission. A person that is not admitted as an additional Member in accordance with Section 3.10 of this Agreement may be admitted as an additional Member by the Majority Vote of the Members (excluding any Member transferring a Membership Unit to the prospective new Member).

10.1.1. A Member need give no reason for voting not to admit an applicant as a new Member, and a Member may unreasonably withhold its agreement to such admission.

10.1.2. In no event may any person be admitted as a new Member unless that person consents in writing to be bound by this Agreement and pays the Company a fee not to exceed one thousand dollars ($1,000.00) to cover costs of preparing, executing, and recording all pertinent documents. Absent a Majority Vote of the Members, the individual to whom the Membership Unit was Transferred shall be an assignee and shall be entitled to share in the profits and losses and distributions to which the assigning Member would have been entitled, but not to participate in the management and affairs of the Company.

10.2. Retirement and Resignation. A Member may resign, retire, or otherwise dissociate from the Company only with the unanimous consent of the Members.

SECTION 11
Dissolution

11.1. Causes. Neither the death, incapacity, disassociation, bankruptcy or withdrawal of a Member shall automatically cause a dissolution of the Company. The Company shall be dissolved upon any of the following "Dissolution Events":

11.1.1. The affirmative vote of all of the Members;

11.1.2. Any event occurs that makes it unlawful for all or substantially all of the business of the Company to be continued, but any cure of illegality within ninety (90) days after notice to the Company of the event is effective retroactively to the date of the event for purposes of this Section;

11.1.3. On application by a Member or a dissociated Member, upon entry of a judicial decree as provided by Section 33-44-801(5) of the Act; or

11.1.4. The filing by the Secretary of State of a certificate administratively dissolving the Company pursuant to Section 33-44-810 of the Act.

11.1.5. The affirmative vote of those Members holding a majority of the outstanding Membership Interests to dissolve the Company.

11.2. Upon Dissolution. Upon its dissolution, the Company shall end and commence to wind up its affairs. The Members shall continue to share in profits and losses during liquidation as they did before dissolution. The Company's assets may be sold if a price deemed reasonable by the Members can be obtained. The proceeds from liquidation of Company assets shall be applied as follows:

11.2.1. First, all of the Company's debts and liabilities to persons other than Members shall be paid and discharged in the order of priority as provided by law;

11.2.2. Second, all debts and liabilities to Members (including any unpaid Guaranteed Payments and fees payable to the Manager pursuant to the Management Agreement) shall be paid and discharged in the order of priority as provided by law;

11.2.3. Third, any remaining assets shall be distributed proportionately among the Members based on their respective positive Capital Accounts, after taking into account all allocations and distributions required by this Agreement, as necessary to bring the balance of all Capital Accounts to zero.

11.2.4. Fourth, all remaining assets shall be distributed proportionately among the Members based upon their respective proportion of Membership Units.

11.3. Gain or Loss. Any gain or loss on the disposition of Company properties in the process of liquidation shall be credited or charged to the Members in proportion to their respective Membership Units, except that gain or loss with respect to property contributed to the Company by a Member shall be shared among the Members so as to take account of any variation between the basis of the property so contributed and its fair market value at the time of contribution, in accordance with any applicable U.S. Treasury regulations. Any property distributed in kind in the liquidation shall be valued and treated as though it were sold and the cash proceeds distributed. The difference between the value of property distributed in kind and its book value shall be treated as a gain or loss on the sale of property, and shall be credited or charged to the Members accordingly.

11.4. Company Assets Sole Source. The Members shall look solely to the Company's assets for the payment of any debts or liabilities owed by the Company to the Members and for the return of their capital contributions and liquidation amounts. If the Company property remaining after the payment or discharge of all of its debts and liabilities to persons other than Members is insufficient to return the Members' capital contributions, they shall have no recourse therefor against the Company or any other Members, except to the extent that such other Members may have outstanding debts or obligations owing to the Company.

SECTION 13
Miscellaneous

13.1. Notices. Any notice under this Agreement shall be given and served either by personal delivery to the party to whom it is directed, or by registered or certified mail, postage and charges prepaid, and if it is sent to a Member, it shall be addressed with its address as it appears on the signature page of this Agreement.

13.1.1. Any notice shall be deemed given when it is personally delivered, or, if mailed, on the date three days after it is postmarked by the United States Postal Service, if it was addressed as required in this Section 13.1.

13.1.2. Any Member may change its address for purposes of this Agreement by written notice to the Manager, stating its new address. A change of address shall be effective fifteen (15) days after the notice is received by the Manager.

13.2. Non-Waiver. Any party's failure to seek redress for violation of or to insist upon the strict performance of any provision of this Agreement shall not prevent a subsequent act that would have originally constituted a violation from having the effect of an original violation.

13.3. Severability. Every provision of this Agreement is intended to be severable. If any term or provision hereof is invalid for any reason whatsoever, its invalidity shall not affect the validity of the remainder of the Agreement.

13.4. Good Faith. The performance of any act or the failure to do any act by a Member or the Company, the effect of which causes any loss or damage to the Company, shall not subject such Member or the Company to any liability, if the decision to perform or the failure to perform such act was made pursuant to advice of the Company's legal counsel or in good faith to promote the Company's best interests.

13.5 Loyalty. Each member of the LLC owes a duty of loyalty to the LLC. Such duty shall extend to include each members duty to act in the best interest of the company and in furtherance of company goals and policies. Any member involving him or herself in any form or method of competition with the LLC shall be deemed in violation of the duty of loyalty and subject to such penalties as determined by a Court of Competent Jurisdiction.

13.6. Governing Law. This Agreement is to be construed according to the laws of South Carolina.

13.7. Cumulative Rights. The rights and remedies provided in this Agreement are cumulative and the use of any right or remedy does not limit a party's right to use any or all other remedies. All rights and remedies in this Agreement are in addition to any other legal rights the parties may have.

13.8. Other Activities. No Member shall be obliged to refrain from conducting, or to disclose to the Company or any other Member or Manager opportunities or plans for conducting, or to permit the Company or any other Member or Manager to participate in conducting, any activity whatsoever, even if activity is in competition with the business of the Company or any other Member or Manager.

13.9. Confidentiality. No Member may, without every Member's express written consent, divulge to others any information not already known to the public pertinent to the services, clients, customers or operations of the Company, whether before or after the Company's dissolution.

13.10. Counterparts. This Agreement may be executed in any number of counterparts with the same effect as if all parties hereto had all signed the same document. All counterparts shall be construed together and shall constitute one (1) agreement.

13.11. Waiver of Partition. Each Member waives any right to maintain any action for partition with respect to the Company's property or assets during its term.

13.12. Binding Terms. The terms of this Agreement are binding upon and inure to the benefit of the parties and, to the extent permitted by this Agreement, their heirs, executors, administrators, legal representatives, successors and assigns.

13.13. Personal Property. The interests of each Member in the Company are personal property.

13.14. Gender and Number. Unless the context requires otherwise, the use of a masculine pronoun includes the feminine and the neuter, and vice versa, and the use of the singular includes the plural, and vice versa.

13.15. Reserved.

13.16. Indemnity. The Company shall have the power to indemnify any Person who was or is a party, or who is threatened to be made a party, to any proceeding by reason of the fact that such Person was or is a Member, Manager, officer, employee, or other agent of the Company, or was or is serving at the request of the Company as a director, manager, officer, employee, or other agent of another limited liability company, corporation, partnership, joint venture, trust, or other enterprise, against expenses, judgments, fines, settlements, and other amounts actually and reasonably incurred by such Person in connection with such proceeding, if such Person acted in good faith and in a manner that such Person reasonably believed to be in the best interests of the Company, and in the case of a criminal proceeding, such Person had no reasonable cause to believe that the Person's conduct was unlawful. The termination of any proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the Person did not act in good faith and in a manner that such Person reasonably believed to be in the best interests of the Company, or that the Person had reasonable cause to believe that the Person's conduct was unlawful.

To the extent that an agent of the Company has been successful on the merits in defense of any proceeding, or in defense of any claim, issue, or matter in any such proceeding, the agent shall be indemnified against expenses actually and reasonably incurred in connection with the proceeding. In all other cases, indemnification shall be provided by the Company only if authorized in the specific case unanimously by all of the Members.

"Proceeding," as used in this section, means any threatened, pending, or completed action or proceeding, whether civil, criminal, administrative, or investigative.

13.17 Expenses. Expenses of each Person indemnified under this agreement actually and reasonably incurred in connection with the defense or settlement of a proceeding may be paid by the Company in advance of the final disposition of such proceeding, as authorized by the Members who are not seeking indemnification upon receipt of an undertaking by such Person to repay such amount unless it shall ultimately be determined that such Person is entitled to be indemnified by the Company.

"Expenses," as used in this section, includes, without limitation, attorney fees and expenses of establishing a right to indemnification, if any, under this section.

13.18. Entire Agreement. This Agreement embodies the entire understanding and agreement among the parties pertaining to the subject matter hereof, and all prior agreements and understandings of the parties, whether written or oral, are terminated and superseded by this Agreement and shall be deemed merged herein.

SECTION 14

Definitions

14.1. Act. "Act" shall mean the South Carolina Uniform Limited Liability Company Act of 1996, Sections 33-44-101 et. seq. of the Code of Laws of South Carolina (1976), as amended, and any corresponding provisions of future laws.

14.2. Agreement. The "Agreement" is the Collegiate Athletic Resources, LLC Operating Agreement as amended from time to time. The Agreement shall include all exhibits, as they may be amended from time to time.

14.3. Articles. The "Articles" means the Articles of Organization filed on behalf of Collegiate Athletic Resources, LLC, as may be amended from time to time.

14.4. Capital Accounts. The "Capital Accounts" or "Company Capital" is the total of the Members' capital contributions.

14.5. Days and Months. "Day," "days," "month," and "months" refer to calendar days and months, including any days which fall on legal holidays or weekends.

14.6. Initial Capital Contribution. The "Initial Capital Contributions" are each Member's cash contributions to the Company Capital as reflected on Exhibit A and paid by each Member at the time the Member becomes a Member of the Company or at such times otherwise agreed between the parties and recorded on Exhibit A.

14.7. Company. The "Company" is Collegiate Athletic Resources, LLC

14.8. Majority Vote. "Majority Vote" means an affirmative vote of the Members holding more than fifty percent (50%) of the issued and outstanding Membership Units entitled to vote, unless otherwise defined herein.

14.9. Reserved.

14.10. Members. The "Members" shall refer to the individuals and entities executing this Agreement and any persons who later become Members of the Company through the execution and acceptance by the Company of a counterpart to this Agreement.

14.11. Membership Units. The "Membership Units" are the relative interests of the Members in the Company.

14.12. Net Cash Flow. "Net Cash Flow" is the Company's total net income, computed for federal income tax purposes, increased by any depreciation or depletion deductions taken into account in computing taxable income and any nontaxable income or receipts (other than capital contributions and the proceeds of any Company borrowing), and reduced by any principal payments on any Company debts, expenditures to acquire or improve Company assets, any proceeds from the sale or exchange of Company assets, and such reasonable reserves and additions thereto as the Manager shall determine to be advisable and in the best interests of the Company.

14.13. Net Cash Flow from Sale. "Net Cash Flow from Sale" is the net cash proceeds (i.e., gross receipts from any transaction, reduced by debts required to be paid by the Company in such transaction and the Company's expenses incurred in such transaction), less any portion thereof used to establish reasonable reserves as determined appropriate by the Manager, if any, realized by the Company from a sale or other disposition (other than a refinancing) of all or a part of the Company's assets.

14.14. Super-Majority Vote. "Super-Majority Vote" means an affirmative vote of the Members holding sixty percent (60%) or more of the Membership Units entitled to vote.

14.15. Tax Distribution. "Tax Distribution" means and refers to the aggregate amount of federal and state income tax liabilities attributable to the aggregate amount of income and gain allocated to the Members, reduced by the aggregate amount of any current or prior deductions and losses allocated to the Members by the Company, whether or not utilized. The Tax Distribution shall be calculated on a cumulative basis by an accountant selected by the Manager and shall be determined based on the maximum federal and state income tax rates that apply to ordinary income and long-term capital gain, as applicable.

14.16. Tax-Sensitive Adjustments. The "Tax-Sensitive Adjustments" are all adjustments to a Member's Capital Account that are not specifically required under the terms of this Agreement, but that are required by U.S. Treasury Regulations § 1.704-1(b)(2)(iv) ("Maintenance of Capital Accounts"), as amended. These adjustments shall be made annually, unless these regulations require a more frequent adjustment.

14.17. Transfer. A "Transfer" of a Member's interest includes any sale, pledge, encumbrance, gift, bequest, or other transfer or disposition of a Membership Unit, or permitting it to be sold, encumbered, attached, or otherwise disposed of, or changing its ownership in any manner, whether voluntarily, involuntarily, or by operation of law. "Transfer" shall not include any assignment of any Membership Unit to another Member or to any trust that is entirely revocable by the assignor, and such trust shall be treated as the agent of the assignor, and any subsequent disposition of such Membership Unit by such trust shall be deemed to have been made by the trust's settlor or grantor.

IN WITNESS WHEREOF, the undersigned have executed this Operating Agreement, under seal, on the date noted below.

Donivon Glassburn

Capella Carolinas, LLC

Date: April 1, 2014

Exhibit A

Membership Agreement

Exhibit B

Articles of Organization

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)))	IN THE COURT OF COMMON PLEAS IN THE FIFTH JUDICIAL CIRCUIT CASE NO.: 2022-CP-40-2586
Capella Capital, LLC, Capella Carolinas, LLC and Michael Lindley, Plaintiffs, v. Donivon Glassburn, Defendant.	)	**DEFENDANT'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO DISMISS OR COMPEL ARBITRATION**

Defendant Donivon Glassburn ("Defendant"), through undersigned counsel, hereby submits this supplemental memorandum in support of his motion to dismiss the complaint filed by Plaintiffs Capella Capital, LLC, Capella Carolinas, LLC, and Michael Lindley (collectively "Plaintiffs"), or in the alternative, compel arbitration filed on August 15, 2022, as supplemented by his August 30, 2022 motion. For the additional reasons stated herein, the Court should dismiss the case pursuant to Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure. In the alternative, the Court should issue an Order staying this matter and compelling Plaintiffs to engage in arbitration pursuant to South Carolina Code Section 15-48-20 and the Federal Arbitration Act, 9 U.S.C.

ARGUMENT

Plaintiffs oppose the motion on the grounds that Defendant cannot rely on the Subscription Agreement to request dismissal or an order compelling arbitration without agreeing that Plaintiff Lindley is an owner of the LLCs. However, it is well settled that "arbitration clauses are separable from the contracts in which they are imbedded." Hous. Auth. of Columbia v. Cornerstone Hous.,

LLC, 356 S.C. 328, 338, 588 S.E.2d 617, 622 (Ct. App. 2003) (quoting Jackson Mills Inc. v. BT Cap. Corp., 312 S.C. 400, 403, 440 S.E.2d 877, 879 (1994)). "The issue of [the arbitration clause's] validity is distinct from the substantive validity of the contract as a whole." Id. (alteration in original) (quoting Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 540, 542 S.E.2d 360, 364 (2001)). "Even if the overall contract is unenforceable, the arbitration provision is not unenforceable unless the reason the overall contract is unenforceable specifically relates to the arbitration provision." New Hope Missionary Baptist Church v. Paragon Builders, 379 S.C. 620, 630, 667 S.E.2d 1, 6 (Ct. App. 2008) (quoting Hous. Auth. of Columbia v. Cornerstone Hous., L.L.C., 356 S.C. 328, 340, 588 S.E.2d 617, 623 (Ct. App. 2003); see also Smith v. D.R. Horton, Inc., 417 S.C. 42, 48, 790 S.E.2d 1, 4 (2016) (noting the "Prima Paint doctrine" required that "in conducting an unconscionability inquiry, courts may only consider the provisions of the arbitration agreement itself, and not those of the whole contract"); (see also Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967). The arbitration provision of the Subscription Agreements is separate and distinct from the provisions addressing ownership. Therefore, this Court should dismiss this case and order the Plaintiffs to arbitration so that the arbitrators can decide the issues alleged in the Complaint in accordance with the arbitration provisions.

Additionally, arbitration should be compelled under the Federal Arbitration Act (FAA). The Supreme Court has repeatedly underscored the "emphatic federal policy in favor of arbitral dispute resolution" embodied in the FAA. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985); see also, e.g., AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011). The FAA provides that written arbitration agreements involving commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the

revocation of any contract." 9 U.S.C. §2. For purposes of the FAA 9 U.S.C. §1 the term commerce is defined as "commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation." A party aggrieved by another's failure to follow such an agreement may petition for an order compelling arbitration. Id. §4. If issues in a pending suit are subject to arbitration, a court "shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement." Id. §3.

A party seeking to compel arbitration must establish: "'(1) the existence of a dispute between the parties, (2) a written agreement that includes an arbitration provision which purports to cover the dispute, (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce, and (4) the failure, neglect or refusal of the defendant to arbitrate the dispute.'" Am. Gen. Life & Accident Ins. Co. v. Wood, 429 F.3d 83, 87 (4th Cir. 2005) (quoting Adkins v. Labor Ready, Inc., 303 F.3d 496, 500-01 (4th Cir. 2002)). Each of those requirements is met here. The existence of a dispute between the Plaintiffs and the Defendant is articulated in the Complaint and Plaintiffs' refusal to arbitrate is detailed in the memorandum opposing arbitration filed earlier today. The agreement to arbitrate contained in both of the Subscription Agreements broadly applies to "[a]ny claim or dispute arising out of or relating to this agreement or the breach thereof …". The interstate commerce component is apparent from the allegations of the Complaint. In paragraph 3 the Plaintiff alleges that he is a resident of the State of Texas and a member of the LLCs that are also named as Plaintiffs. Paragraph 8 alleges that additional LLCs were formed in "South Carolina, Texas, Alabama and Colorado". If there

is any doubt that this dispute is arbitrable under the FAA, "the heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration." Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 867 F.2d 809, 812 (4th Cir. 1989). Accordingly, the Court should "grant [the] motion to compel arbitration" and stay further proceedings in this Court. Adkins, 303 F.3d at 500.

CONCLUSION

For the reasons stated herein and argument of counsel at a hearing on this matter, Defendant respectfully requests the Court dismiss the case pursuant to Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure or, in the alternative, issue an Order staying this matter and compelling Plaintiffs to engage in arbitration.

s/John A. Massalon
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ATTORNEYS FOR DEFENDANT

CHARLESTON, SC

January 25, 2023

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	CASE NO.: 2022-CP-40-2586
Capella Capital, LLC, Capella Carolinas, LLC and Michael Lindley,	)	
Plaintiffs,	)	
v.	)	**DEFENDANT'S NOTICE OF AND MOTION TO ALTER OR AMEND ORDER DENYING MOTION TO DISMISS OR COMPEL ARBITRATION**
Donivon Glassburn,	)	
Defendant.	)	

Defendant Donivon Glassburn ("Defendant"), through undersigned counsel, hereby submits this motion to alter or amend the Order dated April 25, 2023 denying the Defendant's Motion to Dismiss or Compel Arbitration pursuant to SCRCP, Rule 52(b).

ARGUMENT

The court's Order denied the arbitration motion by concluding that the arbitration agreement signed between the parties in two "Subscription for [LLC] Membership" agreements did not apply to the claims being made in this case.

This is an LLC member dispute wherein one member is suing the other member for acts and omissions arising from the operation and management of Capella Carolinas LLC and Capella Capital LLC. Plaintiffs allege claims for breach of fiduciary duty arising from duties between LLC members, claim fraud arising from Defendant's use of the LLCs assets and proceeds, and seek both an accounting and receivership of the LLC business and assets. Plaintiff Lindley alleges that he and Defendant Glassburn both signed certain Subscription to [LLC] Membership Agreements, Compl. para. 10, in 2014. The Subscription Agreements were submitted to the court in the briefing

of the motions, and expressly include an arbitration agreement and a signed consent by both Plaintiff Lindley and Defendant Glassburn stating, in addition to their desire to become 50/50 owners, that each of them agree "to be bound as a Member by the terms of the Operating Agreement of [the respective LLCs] as if the undersigned were a signatory thereof." The undersigned submits that the Order should be altered and amended to grant the Defendant's motion to dismiss and compel arbitration.

Arbitration should be compelled under the Federal Arbitration Act (FAA).[1] The Supreme Court has repeatedly underscored the "emphatic federal policy in favor of arbitral dispute resolution" embodied in the FAA. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985); see also, e.g., AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011). The FAA provides that written arbitration agreements involving commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Under the FAA, a party seeking to compel arbitration must establish: "'(1) the existence of a dispute between the parties, (2) a written agreement that includes an arbitration provision which purports to cover the dispute, (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce, and (4) the failure, neglect or refusal of the defendant to arbitrate the dispute.'" Am. Gen. Life & Accident Ins. Co. v. Wood,

1 For purposes of the FAA 9 U.S.C. § 1 the term commerce is defined as "commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation." A party aggrieved by another's failure to follow such an agreement may petition for an order compelling arbitration. Id. § 4. If issues in a pending suit are subject to arbitration, a court "shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement." Id. § 3.

429 F.3d 83, 87 (4th Cir. 2005) (quoting Adkins v. Labor Ready, Inc., 303 F.3d 496, 500-01 (4th Cir. 2002)).

First, there is no question but that there is a dispute between these two individuals concerning their membership in Capella Capital, LLC and Capella Carolinas, LLC.

Second, the transactions described in the Complaint plainly relate to interstate commerce. Addressing the interstate commerce issue, the court should amend its order to include a finding that the transactions at issue in the complaint sufficiently relate to interstate commerce, and thus the Federal Arbitration Act ("FAA") and cases interpreting the FAA govern this court's analysis. In paragraph 3 of the Complaint, Plaintiff alleges that he is a resident of the State of Texas and a member of the LLCs that are also named as Plaintiffs. Paragraph 8 alleges that additional LLCs were formed in "South Carolina, Texas, Alabama and Colorado." The subject matter of the claims relates directly to the parties' interstate business relationship and conduct.

Third, the court is charged to address whether the parties have a valid agreement to arbitrate, and if so, possibly, whether the arbitration agreement applies to the dispute at hand. The court's role in addressing a motion to compel arbitration is generally limited to the questions of whether the parties made an agreement to arbitrate when viewed under basic principles of contract formation. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944, 131 L. Ed. 2d 985, 115 S. Ct. 1920 (1995). Here, the motion relies upon two Subscription for [LLC] Membership Agreements, signed by both Plaintiff Lindley and Defendant Glassburn wherein the two agreed to become 50/50 members in two LLCs. Those agreements include the following arbitration agreement:

> Any claim or dispute arising out of or relating to this agreement, or the breach thereof shall be settled by arbitration in the State of South Carolina in accordance with the rules and regulations then applicable to the American Arbitration Association governing three-member panels. The parties hereto agree to be bound

> by the award in such arbitration and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof.

It is undisputed that Plaintiff and Defendant signed the two agreements to arbitrate "[a]ny claim or dispute arising out of or relating to this agreement or the breach thereof …". The Subscription Agreements plainly refer to and incorporate the respective LLCs and their Operating Agreements. The fact that no Operating Agreement has been identified that contains a separate arbitration clause is not determinative of this motion.

In Prima Paint, the Supreme Court held that to avoid arbitration, a party must assert a contractual defense to the arbitration agreement itself, and not to the contract as a whole. See 388 U.S. at 406. Thus, for example, a party must allege that the arbitration agreement is unconscionable, not that the entire contract is unconscionable. See S.C. Pub. Serv. Auth., 312 S.C. at 562-63, 437 S.E.2d at 24; Smith v. D.R. Horton, Inc., 417 S.C. 42, 48, 790 S.E.2d 1, 4 (2016). Plaintiff has not asserted the arbitration agreement itself is unconscionable. These are no consumer or adhesion contracts, nor has there been any allegation of undue influence. The agreements were entered into by two adults in sophisticated business ventures for the purposes described by the Plaintiff as "to among other business, purchase commercial real estate properties and commercial retain centers, develop commercial retain centers, purchase partnership interests in other real estate developments, purchase and service ATM machines, purchase and operate bingo video equipment manufacturers, and invest alongside other investment companies in opportunistic real estate and business opportunities," Compl. Para 5 as to Capella Capital, LLC, and "to purchase 100% of the stock and membership interests in twelve (12) South Carolina entities/corporations which closed on May 1, 2013 to continue the operation of various charitable bingo facilities," Compl. Para. 6 as to Capella Carolinas, LLC. Plaintiff has presented no contractual defense to the arbitration clause in the Subscription Agreements, nor is there any indicator of unconscionability.

The court should reverse its finding that the Subscription to [LLC] Membership Agreements do not apply to the Plaintiffs' claims because these parties agreed that the issue of arbitrability is to be decided by the arbitrator. In Simply Wireless, Inc. v. T-Mobile US, Inc., 877 F.3d 522, 528-29 (4th Cir. 2017) (reversed on different grounds in Henry Shein, Inc. v. Archer & White Sales, Inc., 139 S.Ct. 524, 529-30 (2019)), the Fourth Circuit set forth the general rule that when parties to a contract "delegate questions of arbitrability to an arbitrator, then that incorporation constitutes the parties' clear and unmistakable intent to let an arbitrator determine the scope of arbitrability" and the case is sent to arbitration for all arbitrability disputes." See also Doe v. TCSC, LLC, 430 S.C. 602, 608, 846 S.E.2d 874, 877 (Ct. App. 2020) (the parties may, of course, delegate these gateway issues to an arbitrator as long as there is "clear and unmistakable" evidence of such delegation); Henry Shein, Inc. v. Archer & White Sales, Inc., 139 S.Ct. 524, 529-30 (2019) (rejecting a "wholly groundless" exception to the rule that a court may not decide an arbitrability question that the parties have delegated to an arbitrator). The Fourth Circuit in Simply Wireless applied the rule to the JAMS Comprehensive Arbitration Rules and Procedures, very similar to that of the AAA, giving the arbitrator authority to determine arbitrability.

In this case, it is undisputed that the parties' arbitration agreements expressly adopted the American Arbitration Association ("AAA") rules. The court can take judicial notice that the AAA Rules, like many other commercial arbitration rules, delegate the issue of arbitrability to the arbitrator. AAA Rule R-7(a) states that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objects with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim, without any need to refer

such matters first to a court."[2] Under case law interpreting the FAA, an agreement that clearly adopts the AAA rules is clear and unmistakable evidence of an agreement to send issues of arbitrability to the arbitrator. Brennan v. Opus Bank, 796 F.3d 1125, 1128-30 (9th Cir. 2015) (gathering other cases from First, Second, Fifth, Eighth, Federal, Eleventh, and D.C. Circuit Courts of Appeal holding that incorporation of AAA rules constitutes clear and unmistakable evidence that contracting parties agreed to arbitrate arbitrability). The court should omit from its ruling any decision on arbitrability, and compel the parties to arbitrate that issue.

In the alternative, if the court were to retain its prior holding that the court has the power to decide issues of arbitrability in this case, the court should conclude these claims are arbitrable. In determining whether a claim is covered by the arbitration agreement or is arbitrable, the court or arbitrator's function is to determine whether a claim has a "significant relationship to the . . . agreement" containing the arbitration clause. Am. Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88, 93 (4th Cir. 1996); see also Gen. Elec. Capital Corp. v. Union Corp Fin. Grp. Inc., 142 F. App'x 150, 152 (4th Cir. 2005) (concluding that the "scope of an arbitration clause in one contract can extend to a dispute arising under a second contract, provided that the dispute 'significantly relates' to the first agreement"). Plaintiffs argued both that the arbitration clause in the Subscription to Membership Agreements did not apply to their claims, and that arbitration should be denied because an Operating Agreement for Capella Carolinas, LLC, which was filed and attached in briefing, was not signed by Plaintiff, nor contains an additional arbitration

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2 AAA Arbitration Rules https://www.adr.org/sites/default/files/CommercialRules_Web_0.pdf

clause. The scope of an arbitration clause in one contract [the Subscription to Membership Agreements] can extend to a dispute arising under a second contract [the Operating Agreement], provided that the dispute "significantly relates" to the first agreement. In American Recovery, the parties entered into an overarching contract which contained an arbitration clause, 96 F.3d at 90, and a separate, non-compete agreement which did not. Id. When a dispute arose under the noncompete agreement, the court held that the dispute should be arbitrated because "the test for an arbitration clause of this breadth is not whether a claim arose under one agreement or another, but whether a significant relationship exists between the claim and the agreement containing the arbitration clause." Id. at 94; see also Cara's Notions, Inc. v. Hallmark Cards, Inc., 140 F.3d 566, 571 (4th Cir. 1998) (applying an arbitration clause in one contract to a dispute originating from another contract because the arbitration clause purported to apply to all disputes between the parties). Here, Plaintiff Lindley and Defendant Glassburn have two overarching Subscription to Membership Agreements with a broad arbitration clause. The arbitration agreement in the Subscription to LLC Membership Agreements extends to such disputes which might arise under the Operating Agreement or operation of the LLCs because the claims "significantly relate" to the Subscription Agreement and the respective LLC membership duties that those subscription agreements memorialized.

If there is any doubt that this dispute is arbitrable under the FAA, “the heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration.” Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 867 F.2d 809, 812 (4th Cir. 1989).

CONCLUSION

For the reasons stated herein and argument of counsel at a hearing on this matter, Defendant respectfully requests the Court alter and amend its order and grant the motion to dismiss the case pursuant to Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure or, in the alternative, issue an Order staying this matter and compelling Plaintiffs to engage in arbitration.

s/Christy Ford Allen
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ATTORNEYS FOR DEFENDANT

CHARLESTON, SC

May 4, 2023

STATE OF SOUTH CAROLINA	COURT OF COMMON PLEAS
	2022-CP-40-02586
COUNTY OF RICHLAND	
CAPELLA CAPITAL, LLC, ET AL, PLAINTIFF,	
vs.	TRANSCRIPT OF RECORD
DONIVON GLASSBURN, DEFENDANT.	

January 26, 2023
Via Web Conferencing

B E F O R E:

THE HONORABLE ALISON RENEE LEE, JUDGE

A P P E A R A N C E S:

TODD RAYMOND ELLIS, ESQ
Attorney for the Plaintiff

JOHN A. MASSALON, ESQ.
Attorney for the Defendant

CHERYL A. SMITH
Circuit Court Reporter

it, but as a quick refresher, Mr. Ellis filed this lawsuit on behalf of a gentleman named Mike Lindley, Michael Lindley, and derivatively on behalf of two LLCs, Capella Capital and Capella Carolinas, which for shorthand we call Capital and Carolinas. The names are very similar. And we have moved to dismiss and compel arbitration of these claims under both the South Carolina act and the Federal Arbitration Act. Your Honor I'm sure is well-versed in both of those provisions, and as I understand it, the only big difference between them is the Federal act requires there to be some interstate commerce element, which we have here. Based on the allegations of the complaint, Mr. Lindley is a resident of Texas according to that, and there's some allegations that several of these LLCs that are involved in these businesses are out of state, Alabama, Colorado companies. So I think both the state act and the Federal act apply.

Your Honor, if you would like me to, I'd be happy to pull up a copy of the agreement to look at. If you've got it there I won't bother you with that, but I'll jump right into that.

THE COURT: I have pulled up the agreements, and I think I even have a copy of the operating agreement as well as the other documentation, the subscriptions for membership that were attached.

MR. MASSALON: That's great.

And our motion to dismiss and compel is based on the two subscription agreements that you see attached to the motion, one for Capital and one for Carolinas. Both of them are signed by Mr. Lindley. And somehow, Your Honor, I wish I could explain this, but we messed up the order of the first one. So the first one that's attached to ours for Capital goes page 1, page 3 and then page 2, and so the other one goes 1, 2, 3. But in both of them they contain exactly the same agreement, and it says it will be governed by the law of South Carolina and subject to the operating agreement for the companies.

As Your Honor mentioned, we have one operating agreement signed by my client. There is not an operating agreement for both of these entities, but there is one signed by my client.

But I think significantly, both of these subscription agreements are signed by Mr. Ellis's client. Both clearly require arbitration, and both -- or broadly require arbitration. They say any claim or dispute arising out of or relating to this agreement, the operating agreement, and other matters shall be settled by arbitration in South Carolina under the AAA rules. So very broad agreement to arbitrate for both entities.

The nature of this case, as you've seen from what

you've read, is Mr. Lindley claims that he owns half of both of these entities and broadly that my client, Mr. Glassburn, has taken assets, you know, diverted assets from the businesses for his own use and not shared them properly is how I would characterize it.

As Your Honor is well versed, both the state act and the Federal act are construed broadly and favor arbitration. And I won't, unless you would like me to, recite to you cases that you already know well, I'm sure, under both of those cases -- both of those statutes. Forgive me.

The opposition, as I understand it, to arbitration from Mr. Lindley is that because my client disputes the allegations of the complaint, my client doesn't agree that Mr. Lindley is a co-owner, he doesn't agree that funds have been diverted, that because we dispute the substance of the allegations, that we don't get to arbitrate as these parties agreed to way back in 2014. And the supplemental memo that I submitted yesterday, Your Honor, I think speaks directly to that. There are a number of cases that speak directly to that issue, and I think it's pretty well settled that the issue of the enforceability of the arbitration agreement is separate and distinct from the issue about whether the contract itself is enforceable.

And if you look at what the plaintiff has claimed, he's claiming we don't get to arbitrate because we don't agree in advance that the substance of these contracts governs their relationship and defines it. But if that were true, there would be no reason for the arbitration because the Court would basically decide the substance of the case. And so I think the cases pretty clearly say that you decide whether the case is arbitrable and all of the substantive issues get decided by the arbitrator.

And I think if you really dig into this, what is actually going on, and I think it is a very good job of lawyering by Mr. Ellis and Mr. Ecton, is what they want to do is condition their agreement to arbitrate on an agreement that they're right. And typically, what we have in these cases is a plaintiff who says you can't make me arbitrate because our contract is not valid for some reason, you know. It was a contract of adhesion, or its unconscionable, or we didn't have a meeting of the minds or something like that. And a lot of the cases that talk about the enforceability of arbitration say actually, no, that's not right, that unless the issue of enforceability goes directly to the arbitration provision, you still have to arbitrate all those contract issues.

Now, here we have a plaintiff who claims that he is entitled to ownership and money under the contracts that

contain the arbitration clauses but says that he shouldn't have to arbitrate because we don't agree with his substantive claims. So this plaintiff, as I understand it, is not challenging the enforceability or validity of these subscription agreements. This lawsuit is about in part enforcing those. But he doesn't want to comply with the arbitration provision. He just wants to comply with the part that helps him and he likes. And I think, Your Honor, on a very basic level the cases don't allow that.

I think pretty clearly under the South Carolina act and the Federal act, arbitration should be compelled. And we've got a disagreement about the substance, but I believe the cases clearly say those issues get decided by the arbitrator.

I'll be glad to answer any questions at this point, but if you don't have any, I'll turn it over to my colleague.

THE COURT: Mr. Ellis?

MR. ELLIS: Good morning, Your Honor. May it please the Court.

Mr. Massalon is correct in his overview of the dispute and generally the law regarding arbitration provisions whether under the state act or the FAA. I will not dispute that except that all of those cases, Your Honor, say that you are the gatekeeper of whether the case

is appropriate for arbitration when one party has moved to do so under a contract. It really is summed up best on his arguments.

My arguments are what the Court would have to decide today by the Granite Rock. It's a Federal court case in looking at the FAA, but it says appropriate courts must treat the arbitration clause as severable from the contract in which it appears, that's what Mr. Massalon just argued, rightfully so under most points, and thus apply clauses to all disputes within the scope unless the validity challenged is the arbitration clause itself or the party disputes the formation of the contract. And, Your Honor, it's that last portion of the case of Granite Rock vs. International Bhd. of Teamsters, which it summarizes basically many of the other cases in which I bring this to your attention today and ask that you deny their motion to arbitrate.

I have -- Mr. Massalon also rightfully stated that normally, someone who's objecting to the case being arbitrated is stating that there is some unconscionable nature of the contract or otherwise. This is what is unique about this one. It is the party that moved -- moved to arbitrate which is denying the contract itself is valid.

On page 4 of its memorandum, the defendant in this

case, Mr. Glassburn, makes the statement that he is denying the validity of the subscription agreements themselves. Your Honor, this is not a 25 page operating agreement relating to rights and duties of the parties conducting, you know, millions of dollars of business. This is as is before you a three-page document which solely does one thing: it acknowledges 50 percent interest for each of these parties in a subscription agreement. And it also has in one of those three pages an arbitration clause.

And I would tell you that the party that is trying to have it both ways is the defendant. The defendant wants you to order arbitration, at the same time not acknowledging a three-page document that my client has rights. So he's calling it invalid but yet asking that the Court order the arbitration. And that's what's improper, and that is what should deny anybody's right to arbitration in this case.

He states the complaint specifically alleges that Lindley, that's my client, acquired his claimed interest in Carolinas and Capitals, which defendant denies in various ways including the executed subscription agreement from membership agreements. Your Honor, he's not arguing that, you know, all these rights and duties that arise from the relationship are somehow different than the

arbitration clause. The subscription agreement says one thing and one thing only: we each have 50 percent interest. And then there's the arbitration clause. So he can't deny the substantive issues involved in that subscription agreements, both of them, and then ask for arbitration.

So what's different and what you can find today like the Granite Rock case is that the party moving is denying the validity of the contract itself, therefore cannot benefit from the arbitration provision being there and then go to arbitration and say it does not apply. And that's what's going to happen in this case, and that's the good lawyering that's going on. I'll try to take credit, but it's Mr. Massalon. He's trying to have it both ways, Your Honor, and I think that's inappropriate. They can't deny the validity of the contract itself then seek the benefit of the arbitration provision, and I'd ask you to deny their motion.

THE COURT: So then I would presume then that if it were to go to arbitration, and I'm just thinking out loud, that one of the things that would be discussed is whether or not the subscription for membership is a valid agreement and the terms are valid.

MR. MASSALON: And I'm assuming that that is directed to me, Your Honor.

And I would expect that if it goes to arbitration, that one of the issues we will argue about is whether Mr. Lindley acquired a 50 percent interest in these companies under the subscription agreement. There is one operating agreement. What does that mean? And there are also some performance issues since they -- since these businesses got going about who did what and what they were supposed to do. Factually, it's a pretty complex case.

But, again, I would disagree with Mr. Ellis that the subscription agreement says one thing and one thing only, that it actually says several things, it speaks to several issues. One of them is ownership.

But, again, we are moving to enforce the arbitration clause which is separate. And I think as the gatekeeper, Your Honor has to consider as a threshold matter whether they agreed to arbitrate, and if they did, all of these other substantive arguments have to be decided by the arbitrator under the agreement that these folks made. And I think the cases are pretty clear about that.

And as I said earlier, if Mr. Ellis was right, then a number of substantive issues would not be decided by the arbitrator because they'd be decided by you as a condition of arbitration. And I just don't think that's the law.

THE COURT: Well, under the subscription for membership, it is a relatively short document, but it has

-- you know, it has information and it talks about the ownership rights and it talks about the subscription shall be governed by the State of South Carolina and the operating agreement for Capella Capital, and I guess the other one talks about the Carolinas. And so my reading of it is that any and all issues can be raised -- arising out of the documents can be -- are subject to arbitration, and the arbitration is the form in which all of the issues, whether it's the validity of the contract or whether it's the terms of the contract or whether someone's breached the contract, all of that is to be determined by arbitration. And that's your argument, Mr. Massalon; is that correct?

MR. MASSALON: That is correct, Your Honor.

THE COURT: And, Mr. Ellis, you disagree with that because you say he shouldn't be able to disavow that the contract exists or disallow the -- not allow them to be able to go to arbitration and claim that the contract isn't -- wasn't properly signed, or there are some other flaws, or there is no contract.

MR. ELLIS: You're right, Your Honor. I think they would -- with your granting their motion to arbitrate, they would benefit from you as the gatekeeper, which I agree everything you said about what is supposed to be decided regarding that contract.

But I'm not asking Mr. Massalon to deny allegations in our complaint. He has done that himself or his client has by filing a memorandum that denies the validity of the very agreement in which he now seeks arbitration on. And I'm telling you I believe that's your threshold, Your Honor, not to go to arbitration. If they did not say the contract is invalid, then all those things you just said would be decided at arbitration. But they are asserting that the contract itself, which includes a provision related to arbitration, is invalid. They cannot there benefit from that by allowing it to go to arbitration. So you are the gatekeeper of that, and normally you can decide.

If I had raised here today, for instance, that that's not my client's signature, he never entered into this agreement, you could have a threshold hearing on regarding whether that's a valid contract or not. You're the gatekeeper. But when he says it's not a valid contract, he then can't move based on the terms of that contract, and that's why the defendant is trying to get both -- he's getting the benefit of both. He wants both.

THE COURT: So what I hear you saying, Mr. Ellis, basically, is that since it's been filed in Circuit Court and currently the motion is before me, that the Circuit Court has the ability to be able to determine whether it's

a valid contract and therefore whether the arbitration provisions within that contract would then be applicable to the parties.

MR. ELLIS: That's correct. It's not whether it's a proper -- you're not supposed to decide, Your Honor, it's an appropriate arbitration agreement or the terms, if they're going to be decided at arbitration. I agree with you. But you can decide and you're supposed to decide whether it is a valid agreement, a tact over the overall agreement itself. That's done in many stages at the Circuit Court level, and that's what I believe you can determine and why you have to do it, partly because not what -- not what I say, it's what the defendant says.

MR. MASSALON: And if I may, Your Honor, just briefly. Mr. Ellis is overstating our position. Again, we have taken a position that we have a valid agreement to arbitrate. What we see and hear is that we plan to dispute the substantive allegations of Mr. Lindley's complaint, you know, that he owns 50 percent of both of these companies, that money's been diverted, all of those things.

And, again, I think the issue of -- they aren't denying and, in fact, are suing on the agreement that has the arbitration provision in it. And we take the position that we have a valid agreement to arbitrate, but that the

substantive issues have to be decided by the arbitrator, not the Court. And so if the Court decides there is no valid arbitration agreement, then, you know, I'd have to think out what happens after that. But if you decide there is a valid agreement to arbitrate, the substantive issues have to be decided by the arbitrator, in our view. And I don't think that's an inconsistent position.

And as I said, in fact, I think it is Mr. Ellis who wants it both ways. He wants to sue on an agreement that contains an arbitration clause but get a ruling as part of an arbitration motion that he's substantively right in the case, which, again, I think is the arbitrator's decision.

THE COURT: I guess I'm just having a hard time saying that you agree that it's subject to arbitration, but yet the document that makes it subject to arbitration also says that you own 50 percent of each. And you say no, that's not right when it's clearly part and parcel of the entire agreement which is subject to arbitration.

So I guess I'm trying to wrap my head around that particular part because that seems to be inconsistent. It seems to be inconsistent that you can raise that particular issue in light of the fact that it's clearly written and the parties have signed off on it. I mean, I think if there was a question about interpretation of one of the provisions, that would be subject to arbitration.

But just to say outright, no, there's not 50 percent ownership for each one of us and that's clearly in the contract that's subject to arbitration, I'll have to -- I'll have to really think on that one.

MR. MASSALON: Well, and, again, Your Honor, I won't delay. But the cases that we cite in the supplemental memo, I believe, address that issue directly. And they say the issues of arbitration and issues of substance are severable and separate and that, again, if you decide what you just said, you've made a substantive decision in the case about who's right and who's wrong on a motion to compel arbitration. And, again, I think that's what they agreed the arbitrator would do is decide the substance.

THE COURT: And I've read the memorandum. I think it was filed yesterday or was sent to me yesterday. I'll look at the memoranda again and ponder it a little bit more. So I'll take that one under advisement.

MR. MASSALON: All right. Thank you, Your Honor.

MR. ELLIS: Thank you, Your Honor.

THE COURT: Thank you.

(WHEREUPON, proceedings concluded at 11:07 AM.)

EXECUTED

SUBSCRIPTION FOR MEMBERSHIP
IN
Capella Capital, LLC

THIS AGREEMENT IS SUBJECT TO MANDATORY ARBITRATION

The undersigned person does hereby subscribe to take a MEMBERSHIP INTEREST in the above-referenced limited liability company, in the percentage and for the consideration indicated.

This document shall supersede and render null and void any previous membership subscription agreements in Capella Capital, LLC.

In taking a membership interest, each member represents and warrants that the member is acquiring an ownership interest for the member's own account, for investment only and not with a view to its sale or distribution. Each member further represents and warrants that no representative of the company has made and will not make any guarantee or representation upon which such member has relied concerning the possibility or probability of profit or loss or the realization of any tax benefits as a result of his acquisition of said membership interest.

Each member represents that the member recognizes that the ownership interests have not been registered under the Securities Act of 1933, as amended (the "1933 Act"), or the securities act of any state in reliance upon an exemption from registration, and agrees not to sell, offer for sale, transfer, pledge or hypothecate the purchased membership interest in the absence of an effective registration statement concerning such shares or interest under the 1933 Act and applicable state securities acts, unless such sale, offer of sale, transfer, pledge, or hypothecation is exempt from registration.

The member further makes the following representations:

(i) the member's financial condition is such that the member is able to bear all risks of holding the membership interest for an indefinite time or a complete loss of the subscriber's investment in the shares;

(ii) the member has been furnished with all information the member deems necessary or appropriate in order to form a decision concerning the acquisition of said membership interest;

(iii) the member has been furnished all additional information which the member has requested in connection with the transactions contemplated by this Agreement;

(iv) the member has investigated the acquisition of the membership interest to the extent the member deemed necessary or desirable and has been furnished with any assistance requested in connection therewith; and

(v) the member has such knowledge and experience in financial and business matters that the member is capable of evaluating the merits and risks of acquisition of the membership interest and in making an informed investment decision with respect thereto.

SUBSCRIPTION FOR MEMBERSHIP
IN
Capella Capital, LLC

Each member acknowledges that this subscription shall be governed by the laws of the State of South Carolina and the Operating Agreement for Capella Capital, LLC which is incorporated herein by reference, and hereby agrees to be bound by the same. Any claim or dispute arising out of or relating to this agreement or the breach thereof shall be settled by arbitration in the State of South Carolina in accordance with the rules and regulations then applicable to the American Arbitration Association governing three-member panels. The parties hereto agree to be bound by the award in such arbitration and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof.

Name	Percentage of Ownership	Capital Contribution
Donivon Glassburn	50%	
Michael Lindley	50%	

DG ML

SUBSCRIPTION FOR MEMBERSHIP
IN
Capella Capital, LLC

MEMBER'S CONSENT

The undersigned agrees to be bound as a Member by the terms of the Operating Agreement of Capella Capital, LLC as if the undersigned were a signatory thereof.

Donivon Glassburn — Date: JANUARY 1, 2014

Michael Lindley — Date: January 1, 2014

SUBSCRIPTION FOR MEMBERSHIP
IN
Capella Carolinas, LLC

THIS AGREEMENT IS SUBJECT TO MANDATORY ARBITRATION

The undersigned person does hereby subscribe to take a MEMBERSHIP INTEREST in the above-referenced limited liability company, in the percentage and for the consideration indicated.

This document shall supersede and render null and void any previous membership subscription agreements in Capella Carolinas, LLC.

In taking a membership interest, each member represents and warrants that the member is acquiring an ownership interest for the member's own account, for investment only and not with a view to its sale or distribution. Each member further represents and warrants that no representative of the company has made and will not make any guarantee or representation upon which such member has relied concerning the possibility or probability of profit or loss or the realization of any tax benefits as a result of his acquisition of said membership interest.

Each member represents that the member recognizes that the ownership interests have not been registered under the Securities Act of 1933, as amended (the "1933 Act"), or the securities act of any state in reliance upon an exemption from registration, and agrees not to sell, offer for sale, transfer, pledge or hypothecate the purchased membership interest in the absence of an effective registration statement concerning such shares or interest under the 1933 Act and applicable state securities acts, unless such sale, offer of sale, transfer, pledge, or hypothecation is exempt from registration.

The member further makes the following representations:

(i) the member's financial condition is such that the member is able to bear all risks of holding the membership interest for an indefinite time or a complete loss of the subscriber's investment in the shares;

(ii) the member has been furnished with all information the member deems necessary or appropriate in order to form a decision concerning the acquisition of said membership interest;

(iii) the member has been furnished all additional information which the member has requested in connection with the transactions contemplated by this Agreement;

(iv) the member has investigated the acquisition of the membership interest to the extent the member deemed necessary or desirable and has been furnished with any assistance requested in connection therewith; and

(v) the member has such knowledge and experience in financial and business matters that the member is capable of evaluating the merits and risks of acquisition of the membership interest and in making an informed investment decision with respect thereto.

SUBSCRIPTION FOR MEMBERSHIP
IN
Capella Carolinas, LLC

Each member acknowledges that this subscription shall be governed by the laws of the State of South Carolina and the Operating Agreement for Capella Carolinas, LLC which is incorporated herein by reference, and hereby agrees to be bound by the same. Any claim or dispute arising out of or relating to this agreement or the breach thereof shall be settled by arbitration in the State of South Carolina in accordance with the rules and regulations then applicable to the American Arbitration Association governing three-member panels. The parties hereto agree to be bound by the award in such arbitration and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof.

Name	Percentage of Ownership	Capital Contribution
Donivon Glassburn	50%	
Michael Lindley	50%	

SUBSCRIPTION FOR MEMBERSHIP
IN
Capella Carolinas, LLC

MEMBER'S CONSENT

The undersigned agrees to be bound as a Member by the terms of the Operating Agreement of Capella Carolinas, LLC as if the undersigned were a signatory thereof.

Donivon Glassburn Date: 9/24/14

Michael Lindley Date: 9/24/14

CAPELLA CAROLINAS, LLC
OPERATING AGREEMENT

WHEREAS, Capella Carolinas, LLC (the "Company") hereby adopts this Operating Agreement (the "Agreement") intending it to be effective as of the date of the organization of the Company.

RECITALS

The Members desire to share in the risks, benefits, profits, and losses of the Company's activities, in the manner indicated in the Agreement. However, nothing herein shall be interpreted so as to bind or make any Member personally liable for the expenses, liabilities or obligations of the Company except as otherwise required by law.

SECTION 1
Name and Term

1.1. Name. The Company's name is Capella Carolinas, LLC.

1.2. Term. The Company shall be at will and thus will not expire until such time as all members deem appropriate or at such time as a court of competent jurisdiction so rules. (All members shall mean the percentage of ownership which it takes to perform an extraordinary corporate action; See below).

SECTION 2
Nature of Business, Designated Office, and Agent

2.1. Business. The Company may carry on any lawful business, purpose or activity.

2.1.1. Ratification of Articles. The Articles of Organization attached hereto as Exhibit A are hereby ratified by the Members and confirmed as the Articles of Organization for the Company.

2.1.2. Qualification to do Business. The Company shall take any and all action necessary to qualify to do business in any state where such qualification is required.

2.2. Designated Office and Principal Place of Business. The Company's Designated Office and Principal Place of Business is 1799 Meeting St., Suite C, Charleston, SC 29405 . The Members may change the Company's Designated Office to another location and add additional places of business.

2.3. Agent. The Company's agent for service of process shall be Dylan W. Goff, Esq. at 1422 Laurel Street, Columbia, South Carolina 29201.

2.4. Construction. If and to the extent the provisions of this Agreement conflict with the Act and the Act permits modification of such default rule, this Agreement shall control. If and to the extent the provisions of this Agreement do not conflict with the Act, the Act shall control.

SECTION 3
Capital and Company Interests

3.1. Membership Units. Each Member's respective Membership Units and Initial Capital Contributions are set forth in the Membership Agreement which is attached hereto as Exhibit A and incorporated herein by reference. The Company is hereby authorized to issue up to 100 Membership Units on the terms and conditions provided in this Agreement. The Company may authorize additional Membership Units for future issuance upon the approval by a majority vote of the Members. A person may acquire a Membership Interest directly from the Company upon a majority vote of the Members.

3.2. Deficit Capital Accounts. Notwithstanding anything to the contrary contained in this Operating Agreement, and notwithstanding any custom or rule of law to the contrary, to the extent that the deficit, if any, in the capital account of any Member results from deductions and losses of the Company (including non-cash items such as depreciation) or distributions of money pursuant to this Operating Agreement to all Members in proportion to their respective shares of profits, upon dissolution of the Company such deficit shall not be an asset of the Company and such Members shall not be obligated to contribute such amount to the Company to bring the balance of such Member's capital account to zero.

3.3. Adjustments. Each Member's Capital Account shall be adjusted as necessary to reflect the economic conditions of their respective Membership Units. These adjustments shall include, but are not limited to, the following:

3.3.1. Adjustments to reflect each Member's distributive share of Company profits and losses, including capital gains and losses, and tax-exempt income;

3.3.2. Adjustments to reflect each Member's additional contributions to the Company;

3.3.3. Adjustments to reflect distributions made by the Company to each Member;

3.3.4. Tax-Sensitive Adjustments.

3.4. Loans. A Member's loans to the Company shall not be added to its Capital Account.

3.5. Amount of Contributions. The amount of a Member's contributions of property to the Company and of the Company's distributions of property to a Member, shall be reflected in the Member's Capital Account at the fair market value of the property on the date of the contribution or distribution, reduced by any liabilities secured by that property, if those liabilities are treated under applicable federal income tax laws as being assumed by or taken subject to by the transferee.

3.6. No Interest Paid. Other than as specifically provided in this Agreement, a Member shall receive no interest on its capital contributions or Membership Units.

3.7. Withdrawals. A Member may not withdraw its Capital Account except as expressly authorized in this Agreement.

3.8. Voluntary Additional Capital Contributions. If the Members or a majority thereof determine that the Company needs additional funds and that the Company should request additional capital contributions from all the Members, then each Member shall be notified by the Company, in writing, of the need for additional capital. The notice shall set forth the total amount (the "Capital Amount") of funds that the Company needs to raise, each Member's pro rata portion of the Capital Amount in accordance with the Members' respective percentages of issued and outstanding Membership Units, and the date on which such additional contributions are due. The Company may accept additional capital contributions under this Section only if every Member notifies the Manager in writing of such Member's agreement to contribute a pro rata portion of the Capital Amount within the time limit prescribed in the notice. A Member must make the capital contribution that such Member has agreed to make within the time limits set in the notice in cash. No additional Membership Units will be issued for voluntary additional capital contributions made in accordance with this Section. No Member shall be otherwise obligated to make additional capital contributions.

3.9. Member Loans. If the Members determine that the Company needs additional funds and that the Company should borrow those funds from the Members, then the Company shall send to each Member a written notice ("Loan Notice"), which shall set forth the total amount (the "Loan Amount") of funds that the Company needs to raise, the interest rate and other terms pursuant to which the Company will agree to borrow such funds, and the date on which such funds are due. A Member desiring to contribute a portion of the Loan Amount shall notify the Company in writing of such Member's agreement to make a loan (and the amount of such loan), within the time limit prescribed in the Loan Notice. If Members agree to loan funds in excess of the Loan Amount requested, the loans shall be reduced pro rata. A Member must make the loan that such Member has agreed to make within the time limits set in the Loan Notice in cash. If the Company receives a loan from a Member, that lending Member shall receive no additional Membership Units as a result of such loan. Notwithstanding Section 4.2 of this Agreement, the Company shall repay outstanding loans from Members or be current under the terms of the loans before making any distributions to Members and shall repay Member loans in the order in which such Member loans were made (with repayment of all Member loans made with respect to a particular Loan Notice being made pro rata among the Members who made such Member loans) unless the terms of particular loans provide otherwise.

3.10. Additional Membership Units or Members. If the Members determine that the Company needs additional funds and that the Company should secure those funds through the issuance of additional, authorized Membership Units, then the Company may offer and admit additional Members in accordance with Section 10 of this Agreement, upon such terms and conditions as the Manager shall determine appropriate; provided, that the Company may only offer additional Membership Units under this Section to third parties or fewer than all existing Members if all Members have been offered the opportunity to make additional capital contributions as provided in Section 3.8 above and the Company has not succeeded in raising the additional funds that are needed. The Members hereby acknowledge that the issuance of additional Membership Units under this Section may result in the dilution of their interests and

that, other than as specifically provided herein, they do not have a preemptive of other similar right or option to acquire additional Membership Units.

3.11. Limited Liability. No Member shall be bound by, or be personally liable for, the expenses, liabilities or obligations of the Company except as otherwise provided in this agreement or as required by law.

SECTION 4
Allocations and Distributions

4.1. Allocations of Profits and Losses. The Company's net profits and losses (and each individual item of income, deduction, gain, loss, and credit that makes up net profits and losses) shall be computed in accordance with professionally accepted accounting principles, consistently applied and appropriate for the method of accounting selected by the Manager for use by the Company, and shall be allocated, pro rata, among the Members solely according to their proportion of Membership Units.

4.1.1. Allocations Attributable to Particular Periods. For purposes of determining profits, losses or any other items allocable to any period, such items shall be determined on a daily, monthly, or other basis, as determined by the Members using any permissible method under Code Section 706 and the Regulations thereunder.

4.1.2. Tax Consequences. The Members are aware of the income tax consequences of the allocations made by this Section 4.1 and hereby agree to be bound thereby as reflected on the income tax returns of the Company in reporting their respective shares of Company profits and losses for federal income tax purposes.

4.2. Distributions.

4.2.1. Distributions of Net Cash Flow. Subject to the provisions of Sections 4.3 and 4.4 hereof, the Members shall have the right to make distributions of cash and property to themselves on a pro rata basis in the amounts specifically described below and at such a time as shall be determined by the Members:

4.2.1.1. Second, to all Members in amounts determined appropriate in the sole discretion of the Manager; provided that all such discretionary distributions are paid in accordance with each Member's proportion of Membership Units in the Company.

4.3. Limitations on Distributions. No distribution shall be declared and paid if payment of such distribution would cause the Company to violate any limitations on distributions provided in the Act.

4.4. Assignment or Death. When a Member dies, retires, or assigns their Membership Units, profits and losses shall be allocated based on the number of days in that year during which each Member owned Membership Units, or on any other reasonable basis selected by the Manager, as long as it is consistent with applicable United States tax laws and regulations.

SECTION 5
Members and Management

5.1. Management. The business of the Company shall be managed by its members. The members shall have the full power and authority to manage the affairs of this business, to make all decisions, and to take all actions for the LLC

5.2. Reserved.

5.3. Appointment of Officers. The Members may appoint one or more officers from time to time. Officers shall hold office until their successors are chosen and qualified. Subject to any employment agreement entered into between an officer and the Company, an officer shall serve at the pleasure of the Members. The current officers of the Company are listed on Exhibit B.

5.4. Voting Rights. Members shall have the right to vote on all matters with respect to this agreement or wherever the laws of this state require or permit such Member action. Voting shall be based on total number of Membership Units. Unless otherwise stated in this agreement or under the laws of this state, the vote of the Members holding a majority of the Membership Units shall be required to approve or carry an action.

5.5. Meetings. Members may call such meetings as are deemed necessary by the Members for the reasonable management of the Company.

SECTION 6
Financial Reports and other Accountings

6.1. Within ninety (90) days after the close of each fiscal year, the Managing Member shall, at the Company's expense, give a written report to each Member indicating that Member's share of the Company income or loss and any changes in that Member's Capital Account. This requirement may be satisfied by giving each Member a copy of any tax form that includes such information.

6.2. Accounts. Complete books of account of the Company's business shall be kept at the Company's principal office and shall be open to inspection and copying on reasonable notice by any Member during normal business hours. The costs of such inspection and copying shall be borne by the Member.

6.3. Records. At all times during the existence of the Company the Members shall keep:

(a) A current list of the full name and last known address of each Member, together with the total Capital Contribution, the amount and terms of any agreed upon future Capital Contribution and Membership Interest of each Member;

(b) A copy of the Articles of Organization and Certificate of Existence;

(c) An executed copy of this Agreement;

(d) Copies of the Compnay's Federal, State and local tax records for the five most recent taxable years; and

SECTION 7
Banking

All Company funds shall be deposited in the Company's name in such accounts as the Members may designate. The Members may authorize other persons to draw checks on Company bank accounts, but such authority must be in writing. Each bank in which a Company account is maintained is relieved of any responsibility to inquire into the Member's authority to deal with such funds.

SECTION 8
Transfers of Membership Units

8.1. Limitations on Transfer. A Member shall not Transfer any Membership Unit except in accordance with the terms of this Section 8 or with the prior written consent of all of the other Members. An attempted Transfer of any Membership Unit that is not in accordance with the terms of this Section shall not be valid and shall not be reflected on the Company's books.

8.2. Right of First Refusal. A Member who wishes to Transfer any Membership Unit, or who has reason to believe that an involuntary Transfer or a Transfer by operation of law is reasonably foreseeable (an "Offering Member"), shall first give each other Member written notice of the intent to Transfer such Membership Unit (the "Offered Units") or of the knowledge that an Involuntary Transfer or Transfer by operation of law is reasonably foreseeable. This notice must contain a description of the number of Membership Units to be Transferred, the consideration (if any) to be paid, the terms of Transfer and of the payment of consideration (including but not limited to the relative percentages of cash and debt, and the terms of any debt instruments), and the name, address (both home and office), and business or occupation of the person to whom the Offered Units would be transferred, and any other facts which are or would reasonably be deemed material to the proposed Transfer.

8.2.1. Upon the receipt of such notice, each other Member shall have a right to buy that share of the Offered Units having the same proportion to all of the Offering Member's Membership Units as the buying Member's Membership Units bears to the Membership Units held by all Members (except the Offering Member).

8.2.2. Each Member may exercise this purchase option by giving the Offering Member written notice within thirty (30) days after receipt of the latter's notice.

8.2.3. If the Members do not agree to buy all of the Offered Units, the Offering Member may complete the intended Transfer. If this Transfer is not completed within thirty (30) days after expiration of the option period, any attempted Transfer shall be deemed made under a new offer and this Section shall again apply.

8.3. Agreement Price. The purchase price that the Members must pay for the Offered Units under Section 8.2 shall be either (a) that of any proposed Transfer if the proposed Transfer for which notice was given is a bona-fide, third-party transaction with consideration to be paid in cash, notes payable in cash, or any combination thereof, or (b) an amount equal to the proportion that the Offered Units bears to all issued and outstanding Membership Units, multiplied by the fair market value of the Company's assets reduced by any liabilities of the Company if the proposed Transfer for which notice was given is not a bona-fide, third-party transaction with consideration to be paid as described above. The fair market value of the Company's assets shall be determined by an independent appraisal performed by a professional appraiser selected by the Manager. The Company and the Offering Member shall share the cost of the appraisal.

8.4. Agreement Terms. The terms upon which the Members must acquire the Offered Units under Section 8.2 shall be either (a) the purchase terms of any proposed Transfer if the proposed Transfer for which notice was given is a bona-fide, third-party transaction described in Section 8.3(a) above, or (b), if the proposed Transfer is not as described in Section 8.3(a) above, payment of one third (1/3) of the purchase price in cash or by good personal check at the closing for the sale of such Offered Units with the balance of the purchase price paid in two (2) equal, annual installments commencing one (1) year from the date of the closing. Interest shall accrue on the outstanding principal balance from the date of closing at a simple, fixed rate equal to the "Prime Rate" as published in the Wall Street Journal on the date of closing and shall be paid with each installment. The buyer shall give the Offering Member a promissory note secured by the Offered Units as evidence of this debt and shall execute and consent to filing of appropriate a security agreement and UCC filing with respect to the Offered Units. The buyer may prepay all or any part of the principal balance of the note at any time without penalty or premium.

8.5. The Closing. The purchase of Offered Units under this Section shall take place at a closing to be held not later than the thirtieth (30^{th}) day after the earlier of the date on which the Members' purchase options have all expired, or the earliest date on which the Members in the aggregate exercise their purchase options, if any, to buy all of the Offered Units. The closing shall be held during normal business hours at the Company's principal business office, or at any other place to which the parties agree. If the Offering Member is not present at the closing, then the buyer shall deposit the purchase price by check, note, or both, as this Section requires, with any state or federally chartered bank with which the Company has an account, as escrow agent, to be paid to the Offering Member as soon as is reasonably practicable, less an appropriate fee to the Company (not to exceed one thousand dollars ($1,000.00)) to cover additional administrative costs, and the Company shall adjust its books to reflect the transfer of these Membership Units.

SECTION 9
Amendments

This Agreement shall be amended by the Manager without Member consent or approval to reflect any valid Transfers of Membership Units or any periodic revisions or corrections to Exhibit A. Otherwise, this Agreement shall be amended only with the approval of a Super-Majority Vote of the Members.

SECTION 10
Admission, Retirement, and Resignation of Members

10.1. Admission. A person that is not admitted as an additional Member in accordance with Section 3.10 of this Agreement may be admitted as an additional Member by the Majority Vote of the Members (excluding any Member transferring a Membership Unit to the prospective new Member).

10.1.1. A Member need give no reason for voting not to admit an applicant as a new Member, and a Member may unreasonably withhold its agreement to such admission.

10.1.2. In no event may any person be admitted as a new Member unless that person consents in writing to be bound by this Agreement and pays the Company a fee not to exceed one thousand dollars ($1,000.00) to cover costs of preparing, executing, and recording all pertinent documents. Absent a Majority Vote of the Members, the individual to whom the Membership Unit was Transferred shall be an assignee and shall be entitled to share in the profits and losses and distributions to which the assigning Member would have been entitled, but not to participate in the management and affairs of the Company.

10.2. Retirement and Resignation. A Member may resign, retire, or otherwise dissociate from the Company only with the unanimous consent of the Members.

SECTION 11
Dissolution

11.1. Causes. Neither the death, incapacity, disassociation, bankruptcy or withdrawal of a Member shall automatically cause a dissolution of the Company. The Company shall be dissolved upon any of the following "Dissolution Events":

11.1.1. The affirmative vote of all of the Members;

11.1.2. Any event occurs that makes it unlawful for all or substantially all of the business of the Company to be continued, but any cure of illegality within ninety (90) days after notice to the Company of the event is effective retroactively to the date of the event for purposes of this Section;

11.1.3. On application by a Member or a dissociated Member, upon entry of a judicial decree as provided by Section 33-44-801(5) of the Act; or

11.1.4. The filing by the Secretary of State of a certificate administratively dissolving the Company pursuant to Section 33-44-810 of the Act.

11.1.5. The affirmative vote of those Members holding a majority of the outstanding Membership Interests to dissolve the Company.

11.2. Upon Dissolution. Upon its dissolution, the Company shall end and commence to wind up its affairs. The Members shall continue to share in profits and losses during liquidation as they did before dissolution. The Company's assets may be sold if a price deemed reasonable by the Members can be obtained. The proceeds from liquidation of Company assets shall be applied as follows:

11.2.1. First, all of the Company's debts and liabilities to persons other than Members shall be paid and discharged in the order of priority as provided by law;

11.2.2. Second, all debts and liabilities to Members (including any unpaid Guaranteed Payments and fees payable to the Manager pursuant to the Management Agreement) shall be paid and discharged in the order of priority as provided by law;

11.2.3. Third, any remaining assets shall be distributed proportionately among the Members based on their respective positive Capital Accounts, after taking into account all allocations and distributions required by this Agreement, as necessary to bring the balance of all Capital Accounts to zero.

11.2.4. Fourth, all remaining assets shall be distributed proportionately among the Members based upon their respective proportion of Membership Units.

11.3. Gain or Loss. Any gain or loss on the disposition of Company properties in the process of liquidation shall be credited or charged to the Members in proportion to their respective Membership Units, except that gain or loss with respect to property contributed to the Company by a Member shall be shared among the Members so as to take account of any variation between the basis of the property so contributed and its fair market value at the time of contribution, in accordance with any applicable U.S. Treasury regulations. Any property distributed in kind in the liquidation shall be valued and treated as though it were sold and the cash proceeds distributed. The difference between the value of property distributed in kind and its book value shall be treated as a gain or loss on the sale of property, and shall be credited or charged to the Members accordingly.

11.4. Company Assets Sole Source. The Members shall look solely to the Company's assets for the payment of any debts or liabilities owed by the Company to the Members and for the return of their capital contributions and liquidation amounts. If the Company property remaining after the payment or discharge of all of its debts and liabilities to persons other than Members is insufficient to return the Members' capital contributions, they shall have no recourse therefor against the Company or any other Members, except to the extent that such other Members may have outstanding debts or obligations owing to the Company.

SECTION 13
Miscellaneous

13.1. Notices. Any notice under this Agreement shall be given and served either by personal delivery to the party to whom it is directed, or by registered or certified mail, postage and charges prepaid, and if it is sent to a Member, it shall be addressed with its address as it appears on the signature page of this Agreement.

13.1.1. Any notice shall be deemed given when it is personally delivered, or, if mailed, on the date three days after it is postmarked by the United States Postal Service, if it was addressed as required in this Section 13.1.

13.1.2. Any Member may change its address for purposes of this Agreement by written notice to the Manager, stating its new address. A change of address shall be effective fifteen (15) days after the notice is received by the Manager.

13.2. Non-Waiver. Any party's failure to seek redress for violation of or to insist upon the strict performance of any provision of this Agreement shall not prevent a subsequent act that would have originally constituted a violation from having the effect of an original violation.

13.3. Severability. Every provision of this Agreement is intended to be severable. If any term or provision hereof is invalid for any reason whatsoever, its invalidity shall not affect the validity of the remainder of the Agreement.

13.4. Good Faith. The performance of any act or the failure to do any act by a Member or the Company, the effect of which causes any loss or damage to the Company, shall not subject such Member or the Company to any liability, if the decision to perform or the failure to perform such act was made pursuant to advice of the Company's legal counsel or in good faith to promote the Company's best interests.

13.5 Loyalty. Each member of the LLC owes a duty of loyalty to the LLC. Such duty shall extend to include each members duty to act in the best interest of the company and in furtherance of company goals and policies. Any member involving him or herself in any form or method of competition with the LLC shall be deemed in violation of the duty of loyalty and subject to such penalties as determined by a Court of Competent Jurisdiction.

13.6. Governing Law. This Agreement is to be construed according to the laws of South Carolina.

13.7. Cumulative Rights. The rights and remedies provided in this Agreement are cumulative and the use of any right or remedy does not limit a party's right to use any or all other remedies. All rights and remedies in this Agreement are in addition to any other legal rights the parties may have.

13.8. Other Activities. No Member shall be obliged to refrain from conducting, or to disclose to the Company or any other Member or Manager opportunities or plans for conducting, or to permit the Company or any other Member or Manager to participate in conducting, any activity whatsoever, even if activity is in competition with the business of the Company or any other Member or Manager.

13.9. Confidentiality. No Member may, without every Member's express written consent, divulge to others any information not already known to the public pertinent to the services, clients, customers or operations of the Company, whether before or after the Company's dissolution.

13.10. Counterparts. This Agreement may be executed in any number of counterparts with the same effect as if all parties hereto had all signed the same document. All counterparts shall be construed together and shall constitute one (1) agreement.

13.11. Waiver of Partition. Each Member waives any right to maintain any action for partition with respect to the Company's property or assets during its term.

13.12. Binding Terms. The terms of this Agreement are binding upon and inure to the benefit of the parties and, to the extent permitted by this Agreement, their heirs, executors, administrators, legal representatives, successors and assigns.

13.13. Personal Property. The interests of each Member in the Company are personal property.

13.14. Gender and Number. Unless the context requires otherwise, the use of a masculine pronoun includes the feminine and the neuter, and vice versa, and the use of the singular includes the plural, and vice versa.

13.15. Reserved.

13.16. Indemnity. The Company shall have the power to indemnify any Person who was or is a party, or who is threatened to be made a party, to any proceeding by reason of the fact that such Person was or is a Member, Manager, officer, employee, or other agent of the Company, or was or is serving at the request of the Company as a director, manager, officer, employee, or other agent of another limited liability company, corporation, partnership, joint venture, trust, or other enterprise, against expenses, judgments, fines, settlements, and other amounts actually and reasonably incurred by such Person in connection with such proceeding, if such Person acted in good faith and in a manner that such Person reasonably believed to be in the best interests of the Company, and in the case of a criminal proceeding, such Person had no reasonable cause to believe that the Person's conduct was unlawful. The termination of any proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the Person did not act in good faith and in a manner that such Person reasonably believed to be in the best interests of the Company, or that the Person had reasonable cause to believe that the Person's conduct was unlawful.

To the extent that an agent of the Company has been successful on the merits in defense of any proceeding, or in defense of any claim, issue, or matter in any such proceeding, the agent shall be indemnified against expenses actually and reasonably incurred in connection with the proceeding. In all other cases, indemnification shall be provided by the Company only if authorized in the specific case unanimously by all of the Members.

"Proceeding," as used in this section, means any threatened, pending, or completed action or proceeding, whether civil, criminal, administrative, or investigative.

13.17 Expenses. Expenses of each Person indemnified under this agreement actually and reasonably incurred in connection with the defense or settlement of a proceeding may be paid by the Company in advance of the final disposition of such proceeding, as authorized by the Members who are not seeking indemnification upon receipt of an undertaking by such Person to repay such amount unless it shall ultimately be determined that such Person is entitled to be indemnified by the Company.

"Expenses," as used in this section, includes, without limitation, attorney fees and expenses of establishing a right to indemnification, if any, under this section.

13.18. Entire Agreement. This Agreement embodies the entire understanding and agreement among the parties pertaining to the subject matter hereof, and all prior agreements and understandings of the parties, whether written or oral, are terminated and superseded by this Agreement and shall be deemed merged herein.

SECTION 14

Definitions

14.1. Act. "Act" shall mean the South Carolina Uniform Limited Liability Company Act of 1996, Sections 33-44-101 et. seq. of the Code of Laws of South Carolina (1976), as amended, and any corresponding provisions of future laws.

14.2. Agreement. The "Agreement" is the Collegiate Athletic Resources, LLC Operating Agreement as amended from time to time. The Agreement shall include all exhibits, as they may be amended from time to time.

14.3. Articles. The "Articles" means the Articles of Organization filed on behalf of Collegiate Athletic Resources, LLC, as may be amended from time to time.

14.4. Capital Accounts. The "Capital Accounts" or "Company Capital" is the total of the Members' capital contributions.

14.5. Days and Months. "Day," "days," "month," and "months" refer to calendar days and months, including any days which fall on legal holidays or weekends.

14.6. Initial Capital Contribution. The "Initial Capital Contributions" are each Member's cash contributions to the Company Capital as reflected on Exhibit A and paid by each Member at the time the Member becomes a Member of the Company or at such times otherwise agreed between the parties and recorded on Exhibit A.

14.7. Company. The "Company" is Collegiate Athletic Resources, LLC

14.8. Majority Vote. "Majority Vote" means an affirmative vote of the Members holding more than fifty percent (50%) of the issued and outstanding Membership Units entitled to vote, unless otherwise defined herein.

14.9. Reserved.

14.10. Members. The "Members" shall refer to the individuals and entities executing this Agreement and any persons who later become Members of the Company through the execution and acceptance by the Company of a counterpart to this Agreement.

14.11. Membership Units. The "Membership Units" are the relative interests of the Members in the Company.

14.12. Net Cash Flow. "Net Cash Flow" is the Company's total net income, computed for federal income tax purposes, increased by any depreciation or depletion deductions taken into account in computing taxable income and any nontaxable income or receipts (other than capital contributions and the proceeds of any Company borrowing), and reduced by any principal payments on any Company debts, expenditures to acquire or improve Company assets, any proceeds from the sale or exchange of Company assets, and such reasonable reserves and additions thereto as the Manager shall determine to be advisable and in the best interests of the Company.

14.13. Net Cash Flow from Sale. "Net Cash Flow from Sale" is the net cash proceeds (i.e., gross receipts from any transaction, reduced by debts required to be paid by the Company in such transaction and the Company's expenses incurred in such transaction), less any portion thereof used to establish reasonable reserves as determined appropriate by the Manager, if any, realized by the Company from a sale or other disposition (other than a refinancing) of all or a part of the Company's assets.

14.14. Super-Majority Vote. "Super-Majority Vote" means an affirmative vote of the Members holding sixty percent (60%) or more of the Membership Units entitled to vote.

14.15. Tax Distribution. "Tax Distribution" means and refers to the aggregate amount of federal and state income tax liabilities attributable to the aggregate amount of income and gain allocated to the Members, reduced by the aggregate amount of any current or prior deductions and losses allocated to the Members by the Company, whether or not utilized. The Tax Distribution shall be calculated on a cumulative basis by an accountant selected by the Manager and shall be determined based on the maximum federal and state income tax rates that apply to ordinary income and long-term capital gain, as applicable.

14.16. Tax-Sensitive Adjustments. The "Tax-Sensitive Adjustments" are all adjustments to a Member's Capital Account that are not specifically required under the terms of this Agreement, but that are required by U.S. Treasury Regulations § 1.704-1(b)(2)(iv) ("Maintenance of Capital Accounts"), as amended. These adjustments shall be made annually, unless these regulations require a more frequent adjustment.

14.17. Transfer. A "Transfer" of a Member's interest includes any sale, pledge, encumbrance, gift, bequest, or other transfer or disposition of a Membership Unit, or permitting it to be sold, encumbered, attached, or otherwise disposed of, or changing its ownership in any manner, whether voluntarily, involuntarily, or by operation of law. "Transfer" shall not include any assignment of any Membership Unit to another Member or to any trust that is entirely revocable by the assignor, and such trust shall be treated as the agent of the assignor, and any subsequent disposition of such Membership Unit by such trust shall be deemed to have been made by the trust's settlor or grantor.

IN WITNESS WHEREOF, the undersigned have executed this Operating Agreement, under seal, on the date noted below.

Capella Carolinas, LLC

Date: April 1, 2014

Donivon Glassburn

Exhibit A

Membership Agreement

Exhibit B

Articles of Organization

RECEIVED
Oct 30 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE CIRCUIT COURT
FIFTH JUDICIAL CIRCUIT

Alison Renee Lee, Circuit Court Judge

Appellate Court Case No. 2023-000858
Circuit Court Case No. 2022-CP-40-2586

Capella Capital, LLC, Capella Carolinas, LLC, and Michael Lindley, ... Respondents,

v.

Donivon Glassburn, ... Appellant.

CERTIFICATE OF COUNSEL

I certify that the Record on Appeal contains all materials proposed to be included by any of the parties and not any other material.

s/Christy Ford Allen
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October 9, 2023