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JUN 26 2014

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE CIRCUIT COURT OF THE 5th **SC Court of Appeals**

Thomas J. Levine,

Plaintiff,

Case No. 2012-CP-40-583

v.

Carolina Craft Acquisitions, LLC,

Defendant.

**ORDER GRANTING JUDGMENT
FOR DEFENDANT**

RICHLAND COUNTY
FILED
2014 APR 23 AM 11:58
CLERK OF COURT

This matter was before the Court for a bench trial, beginning July 17-19, 2013, and continuing thereafter on September 9-10 and October 10-11, 2013. As more fully discussed below, at the conclusion of Plaintiff's case, upon motion of the Defendant, this Court directed verdict for the Defendant on Plaintiff Levine's claim for accounting and receivership. Based on all the testimonial evidence, offered both through live witnesses and deposition testimony read at trial, the numerous exhibits, and the arguments of counsel, this Court hereby grants judgment for the Defendant on Plaintiff's remaining claim (and thus moots the prior Order Granting Temporary Injunction), having made the following findings of fact and conclusions of law:

I. BACKGROUND

The case arises from Defendant Carolina Craft Acquisitions, LLC's ("Acquisitions") purchase of the assets of Carolina Craft Distributing, LLC ("Distributing") – a craft wine and beer distributor doing business in South and North Carolina – in March 2010. Defendant Acquisitions is no longer operating, having sold off its North and South Carolina assets. Tom Levine ("Plaintiff" or "Levine") commenced his action in January 2012 by the filing and service of his verified Summons and Complaint, and an *ex parte* temporary restraining order, signed by

the Honorable James R. Barber, III, requiring, *inter alia*, Acquisitions to place all proceeds from the sale of its assets into an escrow account. As set forth in his Amended Complaint, dated September 24, 2012, Levine in essence seeks a declaratory judgment that he is a "creditor" of Acquisitions, by virtue of having loaned monies to his son, Jeff Levine (the principal of the selling entity, Distributing), at times prior to the asset sale.

Plaintiff contends that he is entitled to be paid his "secured interest" in his "position as a creditor;" and that he is not "bound" by two of the documents that are at the core of this case: the Binding Letter of Intent regarding Acquisitions' asset purchase of Distributing (which was signed by Levine), and the First Amendment to Acquisitions' Operating Agreement. Levine further contends that upon final wind-down of Acquisitions and the distribution of the company's liquidated assets from escrow, he should be paid "in full as a creditor in advance of the payment" of monies owing to the members and other creditors of Acquisitions. Plaintiff also brings a claim for an accounting of Acquisitions' sales proceeds and receivership for purposes of dissolving Acquisitions. Finally, in addition to the temporary restraining order, issued by the Court in January 2012, Levine also sought a temporary injunction, which also issued from the Court (Order Granting Temporary Injunction, dated January 23, 2012), enjoining Acquisitions from distributing the company's escrowed assets during the pendency of this matter.

II. FINDINGS OF FACT

1. Defendant Acquisitions is a South Carolina member-managed limited liability company, organized for the purpose of acquiring the assets of Distributing and thereafter operating as a craft wine and beer distributor in South Carolina. (A sister North Carolina company ["NC Acquisitions"] was also created as a result of the sale of the assets of the Distributing company in North Carolina ["Distributing NC"] which operated in distribution

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territories in North Carolina. It is not a named party to this action.)¹

2. At times pertinent to this matter, Acquisitions had four member/owners: John Leone, Joe Cekola, Carl Masi, and Jeff Levine (the owner of the selling company, Distributing).

3. Acquisitions purchased the assets of Distributing in March 2010.

4. Distributing/Jeff Levine, as the seller, was represented by John Walker, Esquire, in the Distributing-to-Acquisitions asset sale. Plaintiff testified Mr. Walker was not his attorney but admitted he paid Mr. Walker's fees related to the transaction. Regardless, Mr. Walker was circulating drafts of the Binding Letter of Intent to not only Distributing/Jeff Levine, but to Plaintiff as well.

5. Prior to the asset sale, Distributing was "losing money" and "operating at a loss." Beer suppliers threatened to leave Distributing for nonpayment. The loss of such brands would affect the value of the company, since brand rights are the primary assets and value in a company of this type.

6. John Leone and Joe Cekola were part owners of CKL Corp. ("CKL") d/b/a Imperial Beverage and Elite Brands USA ("Elite Brands"), located in Kalamazoo, Michigan, which was a vendor to Distributing, and to which Distributing owed monies.

7. Distributing's owner, Jeff Levine, approached Joe Cekola and John Leone about, variously, Elite Brands and/or Messrs. Cekola and Leone taking a financial interest in Distributing and/or purchasing Distributing. CKL/Elite Brands rejected Jeff Levine's proposal; however, Messrs. Leone and Cekola became individually interested in a possible transaction. Eventually, through Mr. Leone, Mr. Masi also entered the picture as a potential co-purchaser.

¹ However, as set out in the Binding Letter of Intent, it was a co-"Buyer" of the assets of Distributing, was comprised of the same members, and was subject to the exact same purchase terms set forth in the Binding Letter of Intent. Distributing and Distributing NC's initial Operating Agreements were subject to the same Amended Operating Agreement discussed below. Plaintiff currently has similar claims pending against Distributing NC, brought in North Carolina state court.

8. Plaintiff emailed, sent financial information to, and interacted with the potential buyers in an effort to “coax” them to do the deal as he “wanted this deal to go through.”

9. Plaintiff is a well-educated and sophisticated businessman. He has a banking and finance degree, and has a 25 year professional background in banking, accounting, lending and investing, including running his own financial investment company.

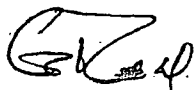
10. By March 2010, Jeff Levine was not seeking a large price tag for the sale of Distributing’s distressed assets, but a price that comprised a “minimal investment”: “just enough to pay off the aging [payables] and build our inventory up.”

11. Mr. Masi is a CPA and experienced in counseling clients with regard to company asset purchases. Based on his review of Distributing’s financials provided by Jeff Levine and Plaintiff leading up to the asset purchase, the buyers concluded prior to the purchase that Distributing had a negative book value.

12. The buyers were willing to go forward with the purchase because it was an asset purchase, and would not involve taking on all “the debts and obligations of the old entity.” As part of the asset purchase, a purchase price was constructed that would allow the new company to settle those debts necessary to build a new company, such as aging payables owed to vendors, but be clear of Distributing’s other significant debts. The consensus among the buyers, Jeff Levine, and the Plaintiff was that the new company, Acquisitions, would “accomplish an awful lot.”

A. Binding Letter of Intent

13. The members of the new company moved quickly to consummate the sale. Even beginning prior to the execution of the Binding Letter of Intent, the members of the new company acted to notify suppliers of Distributing to secure transfer of their brands to the new



company, Acquisitions.

14. The sellers, buyers, and Plaintiff executed a Binding Letter of Intent ("Letter of Intent") on or about March 26, 2010. The Letter of Intent "summarize[d] the terms that Carolina Craft Acquisitions, LLC and NC Carolina Craft Acquisitions, LLC [defined in the Letter of Intent as the 'BUYERS'] will acquire the brand rights, inventory and goodwill of Carolina Craft Distributing, LLC and Carolina Craft Distributing NC, LLC [defined in the Letter of Intent as the 'SELLERS']."

15. The Letter of Intent covered the "formation of BUYERS," i.e., the members comprising Acquisitions, and set forth the capital contribution of each.

16. The Letter of Intent set forth the sale price to be paid by Acquisitions for transfer to it of Distributing's distressed assets, to wit:

In consideration of the transfer of the Brands and Assets, the BUYERS will pay the SELLERS or their suppliers as follows:

a. SELLERS represent that its total indebtedness to their suppliers is less than \$590,000. Upon the execution of this Letter of Intent, BUYERS will pay directly to the suppliers who have agreed to transfer their brands (and credited against SELLERS accounts) an amount not to exceed \$350,000 as of the time of transfer with the remaining indebtedness owed to the suppliers assumed by the BUYERS as trade debt. BUYERS will have a period of 30 days in which to obtain the necessary licenses and agreement for the transfer of Brands with the suppliers.

b. **66% of the profits of the BUYERS until the sum of \$236,000 with 5% interest accruing on this outstanding balance has been paid ("Third-Party Debt"); and**

c. **33% of the profits of the BUYERS until the sum of \$562,000 has been paid without interest ("Levine and Scarborough Loans").**

[Emphasis Added.]

17. As for sub-paragraphs (b) and (c), above, the Letter of Intent stated:

It is the intent of the parties that the payment of the applicable percentage of future profits constitutes a contingent purchase price and



does not create a liability for [Acquisitions] except as profits are generated.

18. In other words, the asset sales price consisted of the following:
 - a. an upfront fixed payment of up to \$350,000 against the majority of Distributing's supplier debt (the most "dire situation" faced by the seller, Distributing); and
 - b. future payments by Acquisitions to Distributing, *contingent* on Acquisitions generating sufficient profits. Assuming Acquisitions generated sufficient profits, Acquisitions would pay: 66% of profits until \$236,000 plus 5% interest was paid to Distributing for Distributing/Jeff Levine's "Third Party Debt"; and 33% of profits until \$562,000 was paid to Distributing for the debts owed by Distributing/Jeff Levine to Plaintiff.
19. No consideration on the asset sale was due to Plaintiff from Acquisitions.
20. Plaintiff signed the Letter of Intent as Distributing's "Secured Creditor." As set forth in the "Warranties and Indemnification" provision of the Letter of Intent, by signing Plaintiff had agreed to release his secured lien in Distributing so that Distributing could sell its assets to Acquisitions "free and clear of all liens and claims":

Warranties and Indemnification. Jeff LeVine represents that he is authorized to sign this Agreement on behalf of SELLERS and to transfer all Assets to BUYERS free and clear of all liens or claims. SELLERS represent that their only secured creditor is Thomas LeVine who has agreed to release his security interest in all assets being transferred to the BUYERS. Jeff LeVine shall indemnify, defend and hold BUYERS and its Members harmless from and against any claims of third parties against the Brands or Assets transferred to BUYERS as part of this agreement. Jeff LeVine pledges his Membership Interests in BUYERS to secure his obligations to BUYERS under this Agreement.

[Emphasis added]

21. The contingent payment based upon future profitability of the new company, Acquisitions, was structured to assist Jeff Levine in paying back the debt he owed to his father,

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but it was always contingent upon the new company becoming profitable.

22. It was understood by the buyers, sellers, and Plaintiff prior to the deal, that such future profits, if any, would be paid to Distributing, for Distributing to, in turn, "distribute among the creditors as [Distributing/Jeff Levine saw] fit." Presumably, Distributing/Jeff Levine would pay back Plaintiff on the monies owing from Jeff Levine/Distributing to Plaintiff.

23. If Acquisitions were to dissolve before the contingency purchase price was paid to Distributing through profit, the Letter of Intent allowed for the remaining unpaid contingency purchase price to be paid to Distributing as a priority distribution, if there were any monies left over to distribute after Acquisitions' creditors and obligations to members were first paid:

Liquidation. Upon liquidation of the Company, the assets shall be distributed in the following priorities:

First, to creditors to the extent permitted by law, in satisfaction of Company debts, liabilities and obligations. This class shall include loans and advances paid by the Members but exclude the priority distributions owed to Carolina Craft Distributing, LLC;

Second, to any Guaranteed Payments owed to the Members;

Third, to the extent of the Members capital accounts;

Fourth, to the extent of any remaining priority distribution owed to Carolina Craft Distributing, LLC; and

Fifth, to Members for the remaining balance in accordance with their Sharing Ratios.

[Emphasis added].

24. By its own terms, the Letter of Intent constituted a "complete understanding" and "a binding agreement relative to the matters set forth [therein]."

25. Plaintiff helped structure the contingency arrangement that ultimately led to the Letter of Intent, as Plaintiff recognized that "new money goes before old money;" and that he "would be paid subsequent to new money." Mr. Masi testified that, prior to the asset purchase,

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Plaintiff's focus in negotiations was on the "percentages" of the contingency payout from future profits by Acquisitions to Distributing – and "while [Plaintiff] tried for a higher percentage" in negotiations with the buyers, ultimately "he's the one who came up with the percentages."

26. Leading up to the asset purchase, Mr. Masi and Plaintiff discussed the debt of Distributing to Plaintiff and how to treat same in the asset sale: "*Tom Levine had notes associated with [Distributing's debt owed to him]. He never signed any notes with [Acquisitions]. We [Acquisitions] never crafted a promissory note or performed any guarantee on those notes. So we agreed that . . . it would be an obligation of Distributing.*" Plaintiff presented no evidence of a "promissory note" or "guarantee" running from Acquisitions to Plaintiff on the Distributing indebtedness to refute the signed Letter of Intent and the other pertinent instruments.

27. Jeff Levine acknowledged, among other things, the efforts made by the new company, Acquisitions, to get off the ground, including: obtaining necessary transfers of brand rights from suppliers of Distributing to Acquisitions; establishing a new Acquisitions account; setting up new EIN numbers; and establishing a new company logo, which Jeff Levine used on his email. Mr. Masi, who was tasked with helping to ramp up the transition to the new company, testified he obtained the necessary licensing for the new company; a new company domain name, email addresses, and password were set up; new employees were hired and any employees of Distributing were required to apply separately to the new entity, Acquisitions; the logo was changed; a uniform requirement was implemented; and Acquisitions looked to implement a new company policy manual. Jeff Levine and Plaintiff made representations to the U.S. Alcohol and Tobacco Tax and Trade Bureau regarding the creation of the new company, Acquisitions. The buyers "started a new company" in Acquisitions.

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28. The new company, Acquisitions, was never profitable.

B. Draft Asset Purchase Agreement

29. In addition to the signed Letter of Intent, an Asset Purchase Agreement ("APA") and an Operating Agreement for the new entity were subsequently separately drafted, although one and/or both was never signed or a signed copy no longer exists.²

30. The APA echoed the Letter of Intent on the purchase terms, requiring (1) the upfront fixed price of \$350,000 be paid by Acquisitions on monies past due and owing by Distributing to its suppliers, with (2) \$236,000 (Distributing/Jeff Levine's "Third Party Debt"), and \$562,000 (Distributing/Jeff Levine's "Family Loans") paid to CCD, through 66% and 33% of CCA's profits respectively -- *but only and expressly contingent on CCA's profitability*:

Purchase Price. In full consideration of the receipt of the Assets, the Buyer shall pay Seller (the "Purchase Price") in the following manner:

- (a) Seller is in payment default with all its suppliers. For purposes of transferring the Assets, Buyer has agreed to pay these suppliers directly up to \$350,000 and assume remaining trade debt of up to another \$240,000. In the event the obligations of these suppliers is greater than the total of \$590,000 represented by the Seller, any additional sums necessary to effectuate the transfer of the Assets from the suppliers may be offset against the membership interest of Jeff LeVine and or the Family Loans which would otherwise have been paid from profits as set forth below.
- (b) 66% of the profits of the Buyer until the sum of \$236,000.00 with 5% interest accruing on this outstanding balance has been paid. This is an amount represented by the Seller to reflect its obligations owed to non-family members ("Third -Party Debt"); and
- (c) Following the payment of \$236,000 with interest, 33% of the profits of the Buyer until the sum of \$562,000.00 has been paid without interest. This is the amount represented by the Seller to reflect its obligations owed to family members (" Family Loans").

² While as further discussed below, an LLC need not have a signed writing to constitute its operating agreement among the members, it appears the members and Plaintiff were circulating the initial operating agreement for member signature in late January/early February 2011, during the time they were negotiating and drafting (and ultimately signing) the Amended Operating Agreement.

It is the intent of the parties that the payment of the applicable percentage of future profits constitute a contingent purchase price and does not create a liability for the Buyer, except as profits are generated.

31. Jeff Levine acknowledged the APA materially "tracks" the terms of the asset purchase set out in the signed Letter of Intent.

32. The APA states there was no "one closing date," as the parties to the sale had to move "fast" to complete the deal "because of the seller's inability to continue its operations" and the "rapidly deteriorating state of seller's business."

33. Acquisitions paid the "fixed" portion of the consideration for the assets -- \$350,000 in vendor payables "as agreed to" under the Letter of Intent (as acknowledged by Plaintiff that Acquisitions "picked up" and "paid" the accounts payables under the Letter of Intent).

C. Acquisitions' Operating Agreement

34. An initial Operating Agreement was drafted, although it is unclear whether it was ever signed by the members (as discussed below, it was later amended, which amendment was signed by each of the members). It also tracks the language of the Letter of Intent with regard to the "contingent purchase price." It calls for a "Priority Distribution" to be paid to *Distributing* in the event "net profits" were realized by the new company pursuant to the same material terms set out in the Letter of Intent (and APA):

Priority Distribution. As part of the purchase price of the Company's brands and inventory, Carolina Craft Distributing, LLC shall be entitled to a priority distribution, not less often than annually, of:

1. 66% of the net profits of the Company until Carolina Craft Distributing, LLC has received from the Company and NC Carolina Craft Acquisitions, LLC an aggregate payment of \$236,000 with interest of 5% per annum on the outstanding balance until paid;

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2. Once the \$236,000 obligation with accrued interest has been paid, the priority distribution will be reduced to 33% of the net profits of the Company until Carolina Craft Distributing, LLC has received an additional \$562,000 without interest from the Company and NC Carolina Craft Acquisitions, LLC.
3. The priority distributions correspond with the terms of the contingent purchase price under the Asset Purchase Agreement with Carolina Craft Distributing, LLC and Carolina Craft Distributing NC, LLC and will be modified to reflect any setoffs or changes to these amounts in accordance with the terms of the Asset Purchase Agreement.

35. As had the Letter of Intent, the Operating Agreement placed these contingent amounts fourth in order of priority upon final distribution of Acquisitions' assets, upon dissolution of the company:

Winding Up. Upon dissolution, the Company shall cease carrying on its business and affairs and shall commence the winding up of the Company's business and affairs and complete the winding up as soon as practicable. Upon the winding up of the company, the assets of the Company shall be distributed in the following priorities:

1. First, to creditors to the extent permitted by law, in satisfaction of Company debts, liabilities and obligations. This class shall include loans and advances paid by the Members but exclude the priority distributions owed to Carolina Craft Distributing, LLC;
2. Second, to any Guaranteed Payments owed to the Members excluding other compensation and fringe benefits;
3. Third, to the extent of the Members capital accounts;
4. Fourth, to the extent of any remaining priority distribution owed to Carolina Craft Distributing, LLC; and
5. Fifth, to Members for the remaining balance in accordance with their Sharing Ratios.

[Emphasis added.]

36. The new company, Acquisitions, was never profitable.
37. Plaintiff attended member meetings as a "consultant" to his son, and in that role he discussed with the members how to "fix" the struggling company. With Acquisitions losing

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money and in need of operating funds, in February 2011, the four members of Acquisitions entered into a signed First Amendment to Acquisitions' Operating Agreement (the "Amended Operating Agreement"), to memorialize that three of the four members (John Leone, Joe Cekola, and Carl Masi) were to loan \$300,000 each to the new company to meet immediate operating costs. The fourth member, Jeff Levine, refused to loan any money to Acquisitions. The Amended Operating Agreement, in language that was reviewed and approved by Plaintiff, nevertheless continued to protect Jeff Levine's capital position in Acquisitions in the event there was a subsequent agreement to convert the other members' loans to capital. It also allowed for any member to call for the company's dissolution should the loans not be made or if any of the provisions in the Amended Operating Agreement were not met.

38. Plaintiff was involved in the drafting of the Amended Operating Agreement. He suggested and circulated language for the draft Amended Operating Agreement, and had retained his own counsel for review of same.

39. While the Plaintiff and Jeff Levine at trial attempted to repudiate the agreement as signed due to "fraud" or "duress," Plaintiff admits that each of the members signed the Amended Operating Agreement.

40. Further, Plaintiff admitted at trial that he emailed Carl Masi and the members to correct an "oversight" in the circulated draft Amended Operating Agreement. The effect of this correction by Plaintiff was that Distributing's debt of \$236,000 would also be reflected in Section 4 of the Liquidation provision, where Distributing's debt to Plaintiff was already reflected. Section 4 provides for Distributing to be paid fourth in line, behind creditors and obligations to members. The provision, as corrected by Plaintiff (and showing Distributing

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fourth in line in order of priority upon liquidation of Acquisitions), was in the draft that was signed by the members:

- a. First to the allowed creditors [of SC and NC Acquisitions];
- b. Next to the Members to the extent of unpaid compensation;
- c. Next to the Capital Contributions of the Members;
- d. **Next for the priority distributions set forth [in] Section 5.1(b) in the Operating Agreements;**
- e. And finally any remaining funds will be allocated among the Members in accordance with their sharing ratios.

[Emphasis added]

41. The Amended Operating Agreement's liquidation provision is consistent with the provisions set out in the signed Letter of Intent and the initial Operating Agreement. Jeff Levine acknowledged at trial that "[t]here's never been any other liquidation provision."

42. Carl Masi did not make his \$300,000 loan to Acquisitions as was provided by the Amended Operating Agreement.

43. It was Jeff Levine -- not the other members -- who, thereafter, called for the dissolution of Acquisitions pursuant to the Amended Operating Agreement.

D. Acquisitions' Treatment of Distributing's "Indebtedness" to Levine

44. The "loans" that comprised the contingent purchase price set out in the Letter of Intent and other instruments were booked by Acquisitions in a manner consistent with those instruments. Plaintiff contended that certain of Acquisitions' financial documents are evidence that Acquisitions viewed Plaintiff as a creditor of Acquisitions, because they reference the "Levine" and "Scarborough" loans in the company balance sheets, generated from the company QuickBooks, as "long term liabilities." However, the only witness present at trial who was competent to testify on Acquisitions' financials was Mr. Masi, Acquisitions' CPA, who was

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professionally experienced in corporate asset purchases and mergers/acquisitions; personally familiar with Acquisitions' QuickBooks and use of same, and who, in his professional experience, understood and had dealt with the listing of contingent liabilities in such transactions as the asset sale here. He was also personally familiar with and tended to Acquisitions' draft tax returns, and other company financials. Mr. Masi testified that Acquisitions' QuickBooks does not provide for a separate place in the report to show a contingent liability, and "usually they are listed under long-term liability" as a potential liability of the company, because they need to be listed for management purposes. Mr. Masi further noted that these "loans" on Acquisitions' balance sheets through to August 7, 2012 did not accrue interest, because contingent liability amounts "would not accrue interest." Acquisitions' subsequent CFO, Dick Nagle, also testified through designated deposition testimony that the "Levine loans" listed as long-term liabilities on the Acquisitions balance sheets were contingent liabilities.³

III. CONCLUSIONS OF LAW

This Court concludes that the Binding Letter of Intent governed the asset purchase; that an asset purchase took place; that the assets passed to Acquisitions free and clear of any encumbrance imposed by Plaintiffs' lien or other "interest" in Distributing, which Plaintiff knowingly, voluntarily, and effectively waived; that the "indebtedness" of Jeff Levine/Distributing to Plaintiff was specifically treated in the Letter of Intent (signed by the Plaintiff) and other pertinent instruments as a "contingency purchase price" to be paid from future profits of the new company, if any, to *Distributing*; that, in the event there were insufficient profits (which there were in actuality none), any remaining contingent purchase price

³ The Plaintiff at trial also relied on unfiled draft tax returns that listed the "Levine loans" as "other liabilities." However, as Mr. Masi explained, the balance sheets were merely printed out for the drafts, and the accounting had yet to be done on the draft returns. On a final return, the loans would be treated, consistent with how Acquisitions had always treated them, as a "contingent purchase price or a contingent liability" that "would be reflected as a deduction of income."

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would be paid as a "priority distribution" to *Distributing* upon dissolution/liquidation of Acquisitions, but *Distributing* would be fourth in line for any such payment, behind other creditors and the members of Acquisitions; and that Plaintiff cannot otherwise circumvent the Letter of Intent and other pertinent instruments so as to now be declared a "creditor" of Acquisitions, either as a matter of law or equity, to wit:

A. Plaintiff cannot prevail as a matter of law.

45. Despite Plaintiff's contention to the contrary, the assets of *Distributing* were validly transferred to Acquisitions. An official closing is not required to effectuate the transfer of personal property, and a binding Letter of Intent is sufficient to evidence the terms of the parties' agreement respecting the transfer. A binding letter of intent is an enforceable contract, even where the letter of intent contemplates the execution of a subsequent formal agreement. See, e.g., *Burbach Broadcasting of Del. v. Elkins Radio Corp.*, 278 F.3d 401 (4th Cir. 2002), citing *Teachers Insurance & Annuity Association of America v. Tribune Co.*, 670 F. Supp. 491 (S.D.N.Y. 1987).

46. Plaintiff released his security interest in all of *Distributing's* assets transferred to Acquisitions, pursuant to the terms of the Letter of Intent signed by the Plaintiff. See S.C. Code § 36-9-315(a) (a security interest continues in secured collateral notwithstanding a sale of such collateral, "unless the secured party authorized the disposition free of the security interest."); see also 36-9-315(a) cmt. 2 (noting that if a secured party authorizes the disposition of collateral "free of" his security interest, then the secured party's security interest ceases to exist in the collateral upon the sale of the collateral).

47. A person who signs a contract or other written document cannot avoid the effect of the document by claiming he did not read it. *Regions Bank v. Schmauch*, 582 S.E.2d 432

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(S.C. Ct. App. 2003). Plaintiff signed the Binding Letter of Intent and he is bound by its terms acknowledging his waiver of his security interest in Distributing's assets.

48. The filing of a termination statement was not necessary to terminate the effectiveness of Plaintiff's financing statement, which had already been rendered ineffective as to the assets by his release of his lien. The function of the Termination Statement is related to the continuing effectiveness of a financing statement covering a security interest. See § 36-9-513(d) cmt 5. A termination statement is not necessary where the related financing statement has already been rendered ineffective. See § 36-9-507 cmt 3 ("a financing statement remains effective following the disposition of collateral *only when* the security interest or agricultural lien continues in the collateral" [emphasis added].) Thus, where a security interest is extinguished as a result of the disposition of the collateral, any financing statement covering such collateral becomes ineffective and the termination statement is unnecessary. See also *Smith v. Akers*, No. LR-2775-3, 1990 WL 751321, at *1 (Va. Cir. Ct. October 12, 1990) ("[I]f there is no collateral, there can be no security interest, perfected or otherwise. The failure to file a termination statement under the Uniform Commercial Code makes no difference. The financing statement, whether or not formally terminated, simply has no meaning once the underlying debt is gone.") Plaintiff's security interest in the collateral was extinguished upon the sale of the assets to Acquisitions, per his agreement, and thus, his financing statement was rendered ineffective under § 36-9-507.⁴

⁴ Even when a termination statement is not necessary to terminate the financing statement, a former debtor still has the right to require the former secured party to make such filing for the purposes of providing public notice that there is no longer a perfected security interest in the collateral covered by the financing statement. § 36-9-513(c). In other words, because Plaintiff no longer possessed an obligation secured by the collateral covered by the financing statement, *Distributing* has the right, but not the obligation, to require Plaintiff to file a Termination Statement. § 36-9-513(c)(1).

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49. Plaintiff's contention that an Operating Agreement was not signed by the members is also of no moment. The South Carolina Limited Liability Company Act provides that the members may enter into an operating agreement, which need not be in writing, to govern relations among the members, managers, and company. S.C. Code Ann. § 33-44-103. The existing operating agreement is evidence of the members' agreement on how Acquisitions should be governed. In fact, the members took pains to *amend* the terms of the initial operating agreement, which amendment they *did* sign.

50. The Letter of Intent makes clear that Acquisitions would pay certain sums in payables owing to vendors as part of the asset purchase price and was not assuming the Jeff Levine/ Distributing indebtedness to Plaintiff as a *company debt*. **Acquisitions had no obligation running to Plaintiff** that could serve as a basis for Plaintiff's claim.

51. Had Acquisitions been profitable, it would have been obligated to pay on the contingent asset purchase price to the seller *Distributing*. That is where Acquisitions' obligation would have ended per the Letter of Intent. Acquisitions could never "make" Distributing/Jeff Levine pay Plaintiff. By the same token, if Jeff Levine/Distributing, after being paid by Acquisitions, did not pay Plaintiff, then Plaintiff's recourse would be against Jeff Levine and/or Distributing, not Acquisitions.

52. While not pled in his Amended Complaint, the Plaintiff testified at trial that the Letter of Intent is "ambiguous," in that it does not define "priority distribution." The Court disagrees. The Letter of Intent, which Plaintiff signed, was unambiguous and therefore must be enforced as written. *See Jordan v. Security Group, Inc.*, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993) (if the contract's language is plain, unambiguous, and capable of only one interpretation, the language alone determines the instrument's force and effect); *Park Regency, LLC, et al., v. R*

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& D Development of the Carolinas, LLC, 402 S.C. 401, 412, 741 S.E.2d 528, 534 (Ct. App. 2012) (basic contract law provides that an unambiguous contract must be enforced as written, with the intention of the parties and the meaning gathered from the four-corners of the contract(s); *Nicholson v. Nicholson*, 378 S.C. 523, 532, 663 S.E.2d 74, 79 (Ct. App. 2008) (the Court does not have the authority to modify terms that are clear and ambiguous on their face).

53. This is especially so where Plaintiff never offered an explanation of what “priority distribution” could mean *other than* the meaning attributed to it by the members.⁵ A contract is ambiguous only when it may fairly and reasonably be understood in more ways than one. See *Gordon Farms, Inc. v. Carolina Cinema Corp.*, 294 S.C. 158, 160, 363 S.E.2d 235, 236 (Ct. App. 1987). A contract is, likewise, not ambiguous merely because a term is undefined. See generally, *Ex parte United Services Auto. Ass'n*, 365 S.C. 50, 614 S.E.2d 652 (Ct. App. 2005). Where Plaintiff offered no support for any such alleged ambiguity, Plaintiff cannot credibly claim the Letter of Intent should be set aside based upon same. See generally, *Hansen ex rel. Hansen v. United Services Auto. Ass'n*, 350 S.C. 62, 565 S.E.2d 114, 117 (Ct. App. 2002) (All of the policy provisions should be considered, and one may not, by pointing out a single sentence or clause, create an ambiguity that otherwise would not exist).

54. Also while not pled in his Amended Complaint, Plaintiff contended at trial that Acquisitions “breached” certain terms of the Letter of Intent by, e.g., not obtaining licensing for the company and not “hiring more employees.” While the timing contemplated by the Letter of Intent proved to be an impracticality, the licensing was nevertheless obtained by Mr. Masi. While it is not clear from the testimony and documents whether and to what extent Acquisitions hired “more” employees, the evidence showed that, given the distressed condition of

⁵ A version of the initial operating agreement, with “Priority Distribution” defined, was being circulated among the members and Plaintiff on March 12, 2010, in advance of the March 26, 2010 signing of the Letter of Intent by the buyers and the Plaintiff. (Pl Ex. 51; 10/10-11 Tr: 159-162.)

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Acquisitions at the time of the asset purchase, it was understood by Acquisitions and its members that the "anticipatory need" to hire more employees was not practical in the short term. Regardless, it is clear from the record that the assets passed to the new company pursuant to the Letter of Intent and the members were operating thereafter as the *new* company, to which Distributing's assets passed clear of Plaintiff's lien. Plaintiff's argument and reliance upon certain contract case law to the contrary is misplaced.⁶

55. Plaintiff also contended at trial that because Acquisitions' members had at times referred to him as a "creditor," he should thus be elevated to a first tier "creditor" of Acquisitions. That Plaintiff was the ultimate payee on the contingent asset purchase price paid to Distributing was not lost on the members. However, the record reflects that Acquisitions members, in their dealings with Plaintiff, never modified the material terms set forth in the Letter of Intent, initial Operating Agreement, and Amended Operating Agreement with regard to how and in what order Distributing (*not* Plaintiff) would be paid by Acquisitions. This argument, therefore, is also unpersuasive.

56. Plaintiff made much at trial of various monies treated by Acquisitions as loans from CKL and other creditors and various Excel "distribution" spreadsheets circulated by the members during the pendency of this matter. None of this evidence has probative value to Plaintiff's claimed status as a "creditor" of Acquisitions. This was not a liquidation proceeding.

⁶ During argument on Plaintiff's motion for directed verdict, Plaintiff cited to *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 514 S.E.2d 126 (1999) for the proposition that "if you're in default on a contract, you can't enforce the provisions of that contract." *Swinton Creek Nursery* is inapposite. It prohibits a Plaintiff from seeking damages on a contract where he was in default. 514 SE 2d at 135, citing to *Parks v. Lyons*, 219 S.C. 40, 48, 64 S.E.2d 123, 126 (1951). ("one who seeks to recover damages for breach of a contract, to which he was a party, must show that the contract has been performed on his part, or at least that he was, at the appropriate time, able, ready, and willing to perform it.") Plaintiff does not seek contract damages. Regardless, Mr. Masi did obtain the licensing for Acquisitions, and the extent to which the new company did or did not hire is otherwise unclear in the record. Mr. Masi noted that such hiring optimism expressed in the Letter of Intent was in part due to Jeff Levine's own information provided on Distributing's assets as a precursor to the asset purchase, and which information proved "inaccurate," with sales "grossly overstated," and (as John Leone testified) with an existing sales force that immediately proved to be only additional financial loss for the new company, Acquisitions.

B. Plaintiff cannot prevail as a matter of equity.

57. Plaintiff cannot otherwise avail himself of an equitable theory to sidestep the very asset sale and instruments he pushed, championed, and helped negotiate. "It is well settled that 'where one company sells or otherwise transfers all its assets to another company, the latter is not liable for the debts and liabilities of the transferor.'" *National American Ins. Co. v. Ruppert Landscaping Co.*, 25 Fed.Appx. 116, 120 (4th Cir. 1990) (Plaintiffs failed to advance "sufficient evidence to defeat the general rule of non-liability" on a mere continuation theory, and the "heavy weight that must be accorded the plain language" of the asset purchase instrument "cannot be circumscribed"). "This general rule of corporate non-liability serves, in effect, 'as a security blanket' that 'protects corporate successors from unknown or contingent liabilities of their predecessors.'" *Id.* The purchasing corporation "is not liable on the other company's obligations merely by reason of its succession to such company's property." *Id.*

58. South Carolina courts have held that "[i]n the absence of a statute, a successor company is not ordinarily liable for the debts of a predecessor company under a theory of successor liability unless: (a) there was an agreement to assume such debts; (b) the circumstances surrounding the transaction indicate a consolidation of the two corporations; (c) the successor company was a mere continuation of the predecessor company; or (d) the transaction was fraudulently entered into for the purpose of wrongfully denying creditor claims." *See Walton v. Mazda of Rock Hill*, 376 S.C. 301, 657 S.E.2d 67, 69 (S.C. Ct. App. 2010).

59. At the beginning of trial, counsel for Plaintiff identified two bases for the successor liability exception that Plaintiff maintained would be supported by the evidence presented: "fraud on a creditor" (counsel also identified, perhaps relatedly, "duress," although

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not a recognized stand-alone basis of successor liability), and that Acquisitions was “a mere continuation of the old entity [Distributing].”

60. A reasonable inference of “fraud”⁷ on the Plaintiff or, for that matter, “duress” cannot be fairly drawn from the evidence. Plaintiff released his secured lien in Distributing to allow the asset purchase to go forward unencumbered by Distributing’s indebtedness to him. If Plaintiff truly understood the liquidation provision to have *at any time* incorrectly treated the amounts comprising the contingency purchase price to be paid to *Distributing* through profits and/or as “fourth in line” upon liquidation of Acquisitions, the drafting of the Amended Operating Agreement offered another opportunity to raise the issue. He did not. Instead, he revised the draft Amended Operating Agreement to make sure all amounts comprising the Distributing “indebtedness” were included in the draft, as fourth in line, as consistent with the Letter of Intent, APA, and initial Operating Agreement.

61. This Court also cannot conclude “duress.” Jeff Levine contended at trial that he signed the Amended Operating Agreement because the other members were “screaming” at him to do so. But he also acknowledged at trial that the members separately signed it in parts; that he was represented by counsel in entering into the Amended Operating Agreement; that what he signed in fact contained the revisions his own father was circulating in leading up to the finalizing and signing of the Amended Operating Agreement; and that he ultimately elected to exercise his rights under the signed Amended Operating Agreement to call for the dissolution of Acquisitions.

⁷“It is well-settled that a complaint is fatally defective if it fails to allege all nine elements of fraud.” *Inman v. Ken Hyatt Chrysler Plymouth, Inc.*, 294 S.C. 240, 242, 363 S.E.2d 691, 692 (1988). Additionally, the elements of fraud must be plead with “particularity.” See *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 56, 463 S.E.2d 85, 89 (1995) (citing *Bookhart v. Central Electric Power Co-op, Inc.*, 222 S.C. 289, 72 S.E.2d 576 (1952)). Here, there is no allegation of “fraud,” particularized or otherwise, in the Amended Complaint.

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62. The Maryland Court of Special Appeals in *Baltimore Luggage Co. v. Holtzman*, 562 A.2d 1286, 1293 (Md. Ct. Spec. App. 1989) observed that “[t]he policy” behind the “mere continuation exception” is that, “whenever there is a transfer of assets, the rights of a creditor must be protected,” and in furtherance of that policy, “[t]he exception is designed to prevent a situation whereby the specific purpose of acquiring assets is to place those assets out of reach of the predecessor’s creditors.” *Holtzman*, 562 A.2d at 1293 (emphasis added). The policy behind the application of the “mere continuance” exception is not implicated here.

63. The Distributing-to-Acquisitions asset sale did not “place those assets out of reach” of Plaintiff as a creditor of the predecessor company Distributing. To the contrary, the sales instruments and Acquisitions’ initial and amended operating agreements consistently and continually recognized the Distributing “Levine/Family indebtedness” as a “contingent purchase price” to be paid either out of the successor company Acquisitions’ profitability, or absent any profits, to be paid in order of priority from the liquidation of the company. This arrangement was brokered by Plaintiff himself.

64. The Court of Appeals in *Walton*, 376 S.C. at 307, 657 S.E.2d at 70, in declining to apply the mere continuation exception, noted that the South Carolina Supreme Court “declined to extend the mere continuation exception to situations where there is no commonality between officers, directors, and shareholders of the seller and purchaser. *Walton*, 376 S.C. at 307, 657 S.E.2d at 70, citing *Simmons v. Mark Lift Industries, Inc.*, 366 S.C. 308, 312 n. 1, 622 SE2d 213, 215 n. 1 (2005). The overlap of a single officer or director does not meet the traditional requirement of “a common identify of the officers directors, and stockholders” in the purchasing company, which is the “key factor” in whether to apply the mere continuation exception. *Taylor v. Atlas Safety Equip. Co., Inc.*, 808 F.Supp. 1246, 1251-52 (E.D. Va. 1992).

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65. Whereas Jeff Levine ran Distributing (he testified he "was" Distributing), Acquisitions comprised an entirely new management team, consisting of a new president (John Leone), a new CFO (Carl Masi), and new officer (Joe Cekola) – and newly constituted ownership, with those three individuals each owning 26% of the new company, and Jeff Levine owning 22%. There is no sufficient "common identity" here, and in the absence of same, a mere continuation exception will not be applied as a matter of law. *Walton*, 376 SC at 307, 657 SE2d at 70 (citing *Simmons*, 366 S.C. at 312 n. 1, 622 S.E.2d at 215 n. 1).

C. Directed Verdict


66. At the close of Plaintiff's case, this Court granted Defendant's motion for directed verdict as to Plaintiff's first cause of action for an accounting and receivership, having found that there is no dispute by the parties that the Plaintiff is not a member of Defendant Acquisitions and is therefore not entitled to the relief sought. See *Collins v. Bisson Moving & Storage, Inc.*, 332 S.C. 290, 295, 504 S.E.2d 347, 350 (Ct. App. 1998) (In ruling on a motion for directed verdict, the relevant inquiry for the trial court is whether, viewing the evidence in the light most favorable to the non-moving party and giving him the benefit of all reasonable inferences, the case is susceptible of only one reasonable inference). Moreover, where the only parties to this matter are Plaintiff and Acquisitions, the requested relief is further improper. In making this determination, the court must decide credibility issues or resolve conflicts in testimony. See *Collins*, 504 S.E.2d at 350. Judgment as a matter of law is proper if there can be but one reasonable conclusion as to the verdict. See *Id.* Plaintiff's first cause of action is otherwise mooted by the Court's findings and conclusions herein.

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Based on the above findings and conclusions, I HEREBY ORDER judgment be entered in favor of Defendant on all Plaintiff's claims in this matter and set aside this Court's Order Granting Temporary Injunction, dated January 23, 2012, as moot.

AND IT IS SO ORDERED

This, the 22 day of April, 2014.


G. Thomas Cooper, Jr.
Presiding Judge, 5th Judicial Circuit.

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2012CP4000583

Thomas J Levine

Carolina Craft Acquisitions LLC

Carolina Craft Distributors

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : Plaintiff Defendant or Self-Represented Litigant

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

RICHLAND COUNTY
FILED
APR 24 2014
11:03 AM
COURT CLERK

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:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		S
		S
		S

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the ____ day of _____, 20 ____ and a copy mailed first class or placed in the appropriate attorney's box on this 24 April 2014 to attorneys of record or to parties (when appearing pro se) as follows:

Wesley D. Few

Dennis John Lynch

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court _____

Jeanette W. McBride

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: **2012CP4000583**

Thomas J Levine

Carolina Craft Acquisitions LLC

Carolina Craft Distributors

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant or <input type="checkbox"/> Self-Represented Litigant
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DISPOSITION TYPE (CHECK ONE)

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 Affirmed; Reversed; Remanded; Other _____

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Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

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Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 3 June 2014 to attorneys of record or to parties (when appearing pro se) as follows:

Wesley D. Few

Dennis John Lynch

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Janette W. McBride

RECEIVED

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS)
IN THE FIFTH JUDICIAL CIRCUIT)

JUN 26 2014

COUNTY OF RICHLAND)

Case No. 2012-CP-40-00583)

SC Court of Appeals

Thomas J. LeVine,)

Plaintiff,)

vs.)

ORDER DENYING PLAINTIFF'S MOTION)
FOR RECONSIDERATION)

Carolina Craft Acquisitions, LLC,)
d/b/a Carolina Craft Distributors,)

Defendant.)

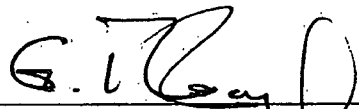
RICHLAND COUNTY
FILED
2014 JUN -3 AM 10:34
JEANETTE W. HERRING
C.C.P. & C.S.

This matter comes before the Court by way of Plaintiff Thomas J. Levine's Motion to Reconsider pursuant to Rule 59(e), SCRPC. Specifically, Plaintiff asks this Court to reconsider its Order Granting Judgment for Defendant filed April 23, 2014.

After careful consideration of the record in this case and the submissions of the parties, this Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or facts not appropriately considered. Accordingly, this Court hereby **DENIES** Plaintiff's Motion under Rule 59(e), SCRPC to Reconsider this Court's Order filed April 23, 2014. Pursuant to Rule 59(f), the Court is of the opinion that oral argument is not necessary.

IT IS SO ORDERED.

Columbia, South Carolina
May 29, 2014


G. Thomas Cooper, Jr., Judge
Fifth Judicial Circuit

SCANNED