THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2014-001397

Thomas J. Levine,..... Appellant,

v.

Carolina Craft Acquisitions, LLC, d/b/a Carolina Craft Distributors,..... Respondent.

INITIAL BRIEF OF APPELLANT

Wesley D. Few, SC Bar No. 15565
WESLEY D. FEW, LLC
wes@wesleyfew.com
1527 Blanding Street
P.O. Box 11546 (29211)
Columbia, SC 29201
(803) 223-6942

Kathleen Chewning Barnes, SC Bar No. 78854
BARNES LAW FIRM, LLC
kbarnes@barneslawfirmsc.com
P.O. Box 897
607 2nd Street East
Hampton, SC 29924
(803) 943-4529

Attorneys for Appellant Thomas J. Levine

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STATEMENT OF ISSUES ON APPEAL

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II. WHETHER CAROLINA CRAFT ACQUISITIONS, LLC'S FAILURE TO SATISFY THE CONDITION PRECEDENT OF OBTAINING AN ALCOHOL LICENSE IN THE REQUIRED TIME PERIOD PREVENTED AN ASSET TRANSFER.

III. WHETHER CAROLINA CRAFT ACQUISITIONS, LLC MAY NEGATIVELY ALTER THOMAS J. LEVINE'S CREDITOR RIGHTS TO A PRIORITY DISTRIBUTION IN ITS LIQUIDIATION THROUGH A PRELIMINARY LETTER OF INTENT, UNEXECUTED DRAFT OPERATING AGREEMENT, OR AMENDMENT TO AN OPERATING AGREEMENT TO WHICH LEVINE WAS NOT A PARTY.

STATEMENT OF THE CASE

This is an appeal from an order granting judgment for Respondent Carolina Craft Acquisitions, LLC, ("Acquisitions") from a bench trial before the Honorable G. Thomas Cooper, Jr. The case arises out of Acquisitions' purported purchase of assets from Carolina Craft Distributing, LLC, ("Distributing") a craft beer and wine distribution company founded by Appellant Thomas ("Tom") J. Levine's son, Jeffrey Levine. Tom Levine's claims involve the determination of his status as a creditor of Acquisitions and the resulting right to proceeds from Acquisitions' dissolution and liquidation asset sales, mainly assets involving the right to distribute beer brands.

On January 23, 2012, Tom Levine filed a Complaint and Motion for Temporary Restraining Order and/or Temporary Injunction seeking to restrain Acquisitions from distributing the proceeds of asset sales without paying his secured loans. The Honorable James R. Barber, III, granted the Motion for Temporary Restraining Order on January 23, 2012, and ordered Acquisitions to place all proceeds from asset sales into an escrow account. On February 1, 2012, Judge Barber extended the Temporary Restraining Order. On March 16, 2012, Acquisitions filed an Answer. On July 25, 2012, Judge Barber issued an Order Granting Temporary Injunction for Tom Levine as to the funds remaining in the escrow account and any funds generated from further asset sales.[1]

On September 24, 2012, Tom Levine filed an Amended Complaint asserting the following causes of action: (1) accounting and receivership under the South Carolina Uniform Limited Liability Company Act of 1996; (2) injunctive relief against Acquisitions with respect to its financial records and money held in trust from asset sales; (3) successor liability; and (4) a

[1] These same funds are also subject to an order of attachment in the employment case of *Jeffrey Levine v. Carolina Craft Acquisitions, LLC, Joseph A. Cekola, Carl Masi and John S. Leone*, 2013-CP-40-00376, pursuant to an order dated September 11, 2013.

declaratory judgment that Tom Levine is a creditor of Acquisitions, that he receive payment as a creditor in accordance with applicable law, and that he is not bound by the provisions of the Binding Letter of Intent or the First Amendment to the Operating Agreement. On November 9, 2012, Acquisitions filed Defendant's Answer to Plaintiff's Amended Complaint.

The bench trial before Judge Cooper occurred in three stages, beginning on July 17, 2013, and continuing on July 18-19, September 9-10, and October 10-11. On April 23, 2014, the Court filed an Order Granting Judgment for Defendant. On May 5, 2014, Plaintiff filed a Motion for Reconsideration, to Alter or Amend Under Rule 59, SCRCP. Judge Cooper filed an Order Denying Plaintiff's Motion for Reconsideration on June 3, 2014. Appellant Tom Levine filed a timely Notice of Appeal with this Court on June 26, 2014.

FACTS

Jeffrey Levine founded Carolina Craft Distributing, LLC, in 2007 to operate as a beer and wine distributor in South Carolina. (7-17-13 Tr. p. 22 lns. 15-19). He founded Distributing in part to take advantage of the opportunities created by a new high gravity beer law and subsequent influx of craft beers into South Carolina. (7-18-13 Tr. p. 77 lns. 3-5). An explanation of the beer distribution business is relevant to understand the issues in this appeal.

In South Carolina, high gravity beer contains over five percent alcohol and became legal in 2007.[2] (7-18-13 Tr. p. 76 lns. 11-18). South Carolina laws provide extensive protections to beer distributors. (7-17-13 Tr. p. 23 lns. 1-3, 16-18). Once a beer producer or supplier, also referred to as a "brand", enters into an agreement with a distributor to distribute its product, only that distributor may sell the product in a particular geographic area. It is extremely difficult for a

[2] *See* S.C. Code Ann. § 61-4-10 (2009) ("The following are declared to be nonalcoholic and nonintoxicating beverages: . . . (2) all beers, ales, porters, and other similar malt or fermented beverages containing more than five percent but less than fourteen percent of alcohol by weight . . . .").

producer to terminate a distribution agreement.[3] Further, South Carolina is a successor state, meaning that if the beer distributor is bought out, the producer's distribution agreement may be transferred to the new, licensed owner.[4] The beer brands held by a distributor are valuable assets to the business. (Order p. 3).

A beer brand is generally worth four times the amount of the distributor's gross profits earned from the brand. (7-18-13 Tr. p. 78 ln. 24 – p. 79 ln.1). At trial, Jeffrey Levine illustrated the value of a beer brand to a distributor with an example of a brand that Distributing acquired and subsequently sold. After Distributing entered into a distribution agreement with Southampton Brewery, Pabst Brewing Company bought Southampton. (7-18-13 Tr. p. 77 lns. 17-25). Pabst approached Distributing about buying the Southampton distribution rights after Distributing sold approximately $3,000.00 of Southampton beer. (7-18-13 Tr. p. 78 lns. 5-10). Distributing sold the brand to Pabst for $80,000.00. (7-18-13 Tr. p. 79 lns. 5-6). On the flip side, acquiring the distribution rights to a brand is costly to a distributor. When a distributor acquires a new brand, it must buy at least between $10,000.00 and $20,000.00 in beer for the warehouse. (9-9-13 Tr. p. 27 lns. 17-22).

A. <u>The Growth of Carolina Craft Distributing</u>

As Distributing successfully acquired more brands for distribution, it was obligated to spend more money on inventory. Tom Levine loaned Distributing money throughout its three

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[3] *See* S.C. Code Ann. § 61-4-1100(1)(b) (2009) ("It is unlawful for a producer . . . to unfairly, without due regard to the equities of the beer wholesaler or without just cause or provocation, cancel or terminate a written or oral agreement or contract, franchise, or contractual franchise relationship of the wholesaler . . . to sell beer manufactured by the registered producer; this provision is a part of a contractual franchise relationship, written or oral, between a beer wholesaler and a registered producer doing business with the beer wholesaler, just as though the provision had been specifically agreed upon between the beer wholesaler and the registered producer.").

[4] *See* S.C. Code Ann. § 61-4-1130(1) (2009) ("If the application of the prospective purchaser for the permit is approved, it is unlawful, notwithstanding the terms, provisions, or conditions of a written or oral contract or the franchise agreement between the beer wholesaler and the registered producer, for a registered producer to fail or refuse to approve the transfer or change of ownership.").

years of operation from 2007 to 2010. (9-9-13 Tr. p. 26 lns. 21-22). Using his experience working in the banking industry, Tom Levine educated himself on Distributing's sales, brand values, accounts payable, and market as part of his decision to loan money to the company. (9-9-13 Tr. p. 17 lns. 17-19; p. 21 lns. 22-24; p. 34 lns. 7-21).

In December 2008, Distributing expanded its operations and distribution territory into North Carolina with the formation of Carolina Craft Distributing NC, LLC. (Def.'s Exh. 35 p. 4). North Carolina is also a state with laws favorable to distributors. (Def.'s Exh. 35 p. 4). In October 2009, Distributing executed promissory notes to Tom Levine that totaled $575,000.00, and secured them with a UCC-1 Financing Statement filed with the South Carolina Secretary of State. (7-18-13 Tr. p. 138 lns. 6-8; 9-9-13 Tr. p. 69 lns. 3-6; Pl.'s Exhs. 5 & 59). The promissory notes represent debts Distributing already owed to Tom Levine. (9-9-13 Tr. p. 69 lns. 18-24; p. 124 lns. 9-16). The UCC-1 Financing Statement covered "franchised beer lines that have been signed through the State of South Carolina to Carolina Craft Distributing, LLC," including "[a]ll beer lines now pledged to Carolina [C]raft or here after pledged," as well as "[a]ll accounts receivable, assets, inventory," equipment, and client accounts, among other things. (Pl.'s Exh. 5).

Tom Levine testified regarding the record of his loans in Distributing's QuickBooks accounting software. The loans are entered as "Long Term Liabilities" and listed as "2990 – Scarborough Loan 55,000.00", "2900 – Loan – Levine 510,901.17", and "2950 – Loan – Levine Additional Loan 260,000.00." (Pl.'s Exh. 13; 9-9-13 Tr. pp. 102-04). The 2990, 2900, and 2950 numbers are assigned in QuickBooks to track an entry. (9-9-13 Tr. p. 32 lns. 1-17). The

"Scarborough Loan" is a loan to Distributing from Jeffrey Levine's grandfather. (7-18-13 Tr. p. 131 lns. 13-14; 9-9-13 Tr. p. 31 lns. 14-16).

By late 2009, Distributing grew to a point at which its obligations to suppliers amounted to more money than Tom Levine "was willing to put into the company." (9-9-13 Tr. p. 27 lns. 10-25). At that point, Distributing began to look for an investor or partner to grow the company.

B. Formation of Carolina Craft Acquisitions

Acquisitions is a member-managed South Carolina limited liability company formed in March 2010 by four members—Jeffrey Levine, John Leone, Joseph Cekola, and Carl Masi—to acquire Distributing. (Am. Cmplt. p. 1; Am. Ans. p. 1 ¶ 3; Order p. 3). John Leone owned a company in Michigan named "R. Leone Imports" that merged in 2009 with a beverage distribution company owned by Joseph (Joe) Cekola named "CKL Corporation."[5] (Order p. 3; 10-10-13 Tr. p. 181 lns. 11-17, p. 289 lns. 13-17). After the merger, Leone served as the vice president of CKL Corporation and received a five-year contract with a $175,000.00 per year guaranteed salary plus benefits. (10-10-13 Tr. p. 289 lns. 5-8). In late 2009, Distributing held distribution rights worth over $2 million but operated at a loss and owed money to CKL as a supplier for products it purchased. (Order p. 3; 7-18-13 Tr. p. 141 lns. 7-13; 9-9-13 Tr. p. 47 lns. 21-22; 9-10-13 Tr. p. 238 lns. 10-19; 10-10-13 Tr. p. 182 lns. 5-8). Jeffrey Levine approached Cekola about whether CKL Corporation would purchase an interest in Distributing. (7-18-13 Tr. pp. 141 ln. 23 - 142 ln. 1).

In February 2010, Jeffrey Levine prepared and presented a business plan to Cekola and Leone, which they rejected on behalf of CKL Corporation. (7-18-13 Tr. p. 142 lns. 8-18, p. 145

[5] The merged business is referred to interchangeably throughout the Record as "CKL", "Imperial Beverage", and "Elite Brands." (10-10-13 Tr. p. 182 lns. 15-19).

lns. 8-11; Def.'s Exh. 35).[6] However, Cekola and Leone expressed personal interest in investing in Distributing. (Order p. 3). In early 2010, Cekola, Leone, and Carl Masi, a CPA who became a potential investor in Distributing through Leone, came from Michigan to Columbia, South Carolina, to meet with Jeffrey Levine about Distributing. (Order p. 3; 9-9-13 Tr. p. 38 lns. 1-5). Distributing provided all of its financial information, including QuickBooks accounting files showing Tom Levine's loans, to Cekola, Leone, and Masi before they decided to form Acquisitions. (9-9-13 Tr. p. 33 lns. 7-11, p. 39 lns. 10-20).

In late February 2010, after the initial meeting in Columbia, Tom and Jeffrey Levine traveled to Detroit, Michigan, for another meeting with Cekola, Leone, and Masi. (9-9-13 Tr. p. 44 lns. 1-17). This meeting also included Dick Nagle, Cekola's bookkeeper and assistant, and Bob Borsos, Cekola and CKL Corporation's attorney. (9-9-13 Tr. p. 47 lns. 4-8). At that meeting, the attendees outlined the formation and operation of Acquisitions, including ownership interests and various management and leadership roles. (9-10-13 Tr. p. 247 lns. 10-11). They specifically discussed Tom Levine's status as a secured creditor of Distributing. (9-10-13 Tr. p. 247 lns. 8-10). Jeffrey Levine, Cekola, Leone, and Masi reached an agreement to form Acquisitions and use it to purchase Distributing's assets. (7-18-13 Tr. p. 163 lns. 19-24). Tom Levine understood the agreement to be that Leone and Masi would come to South Carolina, where Leone would run the business as President and make sales, and Masi would handle accounting as Chief Financial Officer, and Jeffrey Levine would continue to sell and acquire new brands. (9-9-13 Tr. p. 49 ln. 17 – 51 ln. 5) Cekola would receive information in Michigan to manage the company and contribute his knowledge of the beer and wine distribution industry. (9-9-13 Tr. pp. 49 ln. 20 - 50 ln. 3).

[6] Around the same time, Jeffrey Levine presented an investment proposal to Liber Capital. (7-18-13 Tr. pp. 145 ln. 24 – 146 ln. 4).

Part of the due diligence and transition from Distributing to Acquisitions required that the producers of the brands held by Distributing agree to transfer their distribution agreements to Acquisitions.[7] (9-9-13 Tr. pp. 53 ln. 15 – 54 ln. 4). Cekola began calling Distributing's suppliers and producers during Tom and Jeffrey Levine's trip to Michigan, prior to the execution of any document regarding a transfer of the brands, the formation of Acquisitions, and Acquisitions obtaining an alcohol license in South Carolina. (9-9-13 Tr. p. 56 lns. 20-25). Masi testified "in this case we simply didn't have the time to do the due diligence" but ultimately decided "we would make it work." (9-10-13 Tr. p. 262 lns. 2-3, p. 263 lns. 17-24).

C. Letter of Intent

The Binding Letter of Intent is the first of only two agreements actually executed in this case and the only document Tom Levine signed. The Letter of Intent was executed on March 26, 2010, by Distributing, the four members of Acquisitions, and Tom Levine in a limited capacity as a "Secured Creditor" of Distributing. (Pl.'s Exh. 6 pp. 7-8). Distributing represented that its "only secured creditor is Tom LeVine who has agreed to release his security interest in all assets *being transferred to BUYERS.*" (Pl.'s Exh. 6 p. 7) (emphasis added). The eight-page Letter "summarizes the terms that" Acquisitions "will acquire the brand rights, inventory and goodwill of" Distributing, states member's responsibilities, and requires the execution of additional agreements in the future. (Pl.'s Exh. 6 p. 1). The Letter defines the members' capital contributions and ownership interests in the company as follows:

a. John Leone- $118,181.82- 26%
b. Carl Masi- $118,181.82- 26%
c. Jeff LeVine- $100,000- 22%
d. the Joseph Cekola Trust- $118,181.82- 26%

(Pl.'s Exh. 6 p. 1).

[7] *See* S.C. Code Ann. § 61-4-1130(1) (2009) (stating a purchaser of a beer wholesaler business must obtain a "permit authorizing the sale of beer" and, if approved, the producer shall "approve the transfer or change of ownership").

The Letter details the preliminary understanding between Acquisitions, its members, and Distributing, and the plans to enter into future, final agreements to effectuate an asset transfer and the company's business operations. It contains two provisions which Acquisitions argues are controlling as to whether Tom Levine is a creditor of Acquisitions and is entitled to receive a distribution from the liquidation sale of the company's assets—(1) a statement of the purchase price for a transfer of assets from Distributing to Acquisitions to be formalized in a subsequent "definitive purchase agreement", and (2) a "Liquidation" provision for the potential dissolution of Acquisitions to be formalized in a subsequent operating agreement. These are discussed below to provide context for the remaining discussion of the Letter of Intent.

i. *Purchase Price and Liquidation Provision*

Section 2 of the Letter of Intent, entitled "Acquisition" outlines the terms of a "definitive purchase agreement" that Distributing and Acquisitions chose not to execute after executing of the Letter of Intent. (Pl.'s Exh. 6 p. 1-2). A transfer of any assets from Distributing to Acquisitions was contingent upon Acquisitions obtaining alcohol licenses within thirty days of execution. (Pl.'s Exh. 6 pp. 1-2). The consideration to be paid by Acquisitions to "SELLERS" for "the transfer of the Brands and Assets" as to Tom Levine's loans is as follows:

> c. 33% of the profits of the BUYERS until the sum of $562,000 has been paid without interest ("Levine and Scarborough Loans").
>
> . . . It is the intent of the parties that the payment of applicable percentage of future profits constitutes a contingent purchase price and does not create a liability for the BUYERS except as profits are generated.

(Pl.'s Exh. 6 p. 2). Two pages later in the Letter is Section 6 entitled "BUYERS' Operating Agreement" which outlines provisions for Acquisitions' operating agreements that Acquisitions' members chose not to execute. (Pl.'s Exh. 6 p. 4). One such provision is a "Liquidation" provision. It states:

> 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.

(Pl.'s Exh. 6 pp. 6-7). The lower court held the asset purchase price payable to Distributing and the priority distribution applicable to Tom Levine's loans, despite his status as a non-party to these future agreements. During a year of conducting business, Acquisitions executed neither a definitive purchase agreement nor an operating agreement with these provisions.

ii. *Events Leading Up to Execution of the Letter of Intent*

On March 12, 2010, at 3:02 p.m., Bob Borsos, Cekola's attorney, circulated an email to the four members of Acquisitions with a draft letter of intent. (Pl.'s Exh. 52). Borsos' email states, "Tom is the only secured creditor so I have added this to the agreement." (Pl.'s Exh. 52). Borsos did not send the draft letter to Tom Levine, who later received it from his son, Jeffrey. (Pl.'s Exh. 52). Borsos' email instructs the recipients to sign the letter and email him their signatures. (Pl.'s Exh. 52 p. 1) The draft letter did not include a liquidation provision. (Pl.'s Exh. 52 p. 7). Almost two hours later, at 4:57 p.m., Borsos sent another email to the members with another draft letter of intent that included revisions to Masi's compensation and added that Leone's salary for his work at Acquisitions would be paid by CKL Corporation and accrue as a

liability of Acquisitions owed to CKL. (Pl.'s Exh. 53 p. 1). CKL's obligation to pay Leone a $175,000.00 salary already existed pursuant to his five-year contract with CKL. (10-10-13 Tr. p. 289 lns. 5-8). The second draft letter of intent also did not include a liquidation provision. (Pl.'s Exh. 53 p. 7).

Three days later, on Monday, March 15, 2010, Tom Levine deposited $99,000.00 into Acquisitions' bank account for Jeffrey Levine's capital contribution to Acquisitions. (Pl.'s Exh. 85; 9-9-13 Tr. p. 67 lns. 7-20). At the time Tom Levine made the deposit, he had not yet signed the Letter of Intent and the then-current draft did not include a liquidation provision. (9-9-13 Tr. p. 68 lns. 5-7; Pl.'s Exh. 53).

The following day, on March 16, 2010, Borsos emailed the members and Tom Levine another revised letter of intent. He wrote:

> I understand that the changes may not be perfect but should incorporate the common understanding for all. We will need all of you to sign the final version attached and forward to me by e-mail your signatures. . . . I will then start work on the *final* agreement and should have a draft of the operating agreement and the *final* sales agreement by next week.

(Pl.'s Exh. 4 p. 1; Pl.'s Exh. 60 p. 1) (emphasis added). This draft letter of intent contained a liquidation provision. (Pl.'s Exh. 60 pp. 8-9). Tom Levine emailed Masi almost an hour later stating he would sign a UCC statement to release only "all security that is moved to the new company." (Pl.'s Exh. 4 p. 1). Masi responded: "Tom don't worry about the ucc filing, just sign this doc where indicated so we can make good on the closing, we can sort the details later." (Pl.'s Exh. 4 p. 1). Tom Levine signed the Letter of Intent in a limited capacity as a secured creditor and explained to Masi: "[S]o as not to slow down the closing process please accept this that I have signed a copy of the secured creditor line of this agreement and will send in a faxed copy when I get to my office. This commitment should suffice to do your closing." (Def.'s Exh.

15). These email exchanges of Borsos, Masi, and Tom Levine illustrate the Letter of Intent's role as a preliminary framework for the intended, complete transaction and agreements. While Acquisitions and Distributing circulated drafts of the Letter of Intent, they also exchanged a draft asset purchase agreement and operating agreements for the North and South Carolina entities. (7-18-13 Tr. p. 186 lns. 7-13). Bob Borsos circulated these drafts on March 30, 2010, after the execution of the Letter of Intent. (Def.'s Exh. 62). Acquisitions and Distributing chose not to sign the asset purchase agreement; the members of Acquisitions chose not to sign the operating agreements.

iii. *Conditions in the Letter of Intent*

The Letter of Intent specifically required the future execution of three additional categories of agreements—operating agreements for the North and South Carolina entities, an asset purchase agreement, and employment agreements for the members. (Pl.'s Exh. 6 pp. 1, 3). It states, "The Members *will* execute an Operating Agreement for each of the BUYERS by the close of business on Friday, March 19, 2010 or as soon as practicable thereafter." (Pl.'s Exh. 6 p. 1) (emphasis added). The Letter of Intent outlines some provisions for the operating agreements. It states: "The BUYERS' Operating Agreements shall contain the following provisions," of which the liquidation provision is the one at issue in this appeal. (Pl.'s Exh. 6 pp. 5-6). No member signed an operating agreement. (7-18-13 Tr. p. 85 lns. 17-24, p. 99 lns. 13-18, p. 268 lns. 4-8; 9-9-13 Tr. p. 82 lns. 19-21; 10-10-13 Tr. p. 90 lns. 9-15, p. 121 lns. 12-20).

As to the asset purchase agreement, the Letter of Intent states: "BUYERS and SELLERS *shall execute* a definitive purchase agreement in which BUYERS *will* acquire the distribution rights to no less than 80% in volume of all the Brands held by the SELLERS," among other assets. (Pl.'s Exh. 6 p. 1) (emphasis added). A separate provision entitled "Definitive Purchase

Agreement" states: "BUYERS and SELLERS *shall execute* a definitive purchase agreement as soon as practicable after the execution of this Letter of Intent." (Pl.'s Exh. 6, p. 7) (emphasis added). No member signed a "definitive purchase agreement." (7-18-13 Tr. p. 99 lns. 16-18; Order p. 9).

As to employment agreements, the Letter of Intent states: "At the closing, the Members *shall execute* employment agreements with BUYERS and will receive the following annual compensation from the BUYERS." (Pl.'s Exh. 6 pp. 3-4) (emphasis added). Jeffrey Levine eventually signed an employment agreement. (7-17-13 Tr. p. 99 lns. 18-19). However, it was not executed "at the closing" because no closing occurred, and Acquisitions never signed it. No other member of Acquisitions executed an employment agreement. (10-10-13 Tr. p. 147 lns. 6-11).

The Letter of Intent also contains a contingency condition. In the section entitled "Acquisition" which sets forth the requirement of the definitive purchase agreement and its proposed terms, it states: "SELLERS' assignment [of assets] shall be absolute, *contingent* only upon the BUYERS obtaining the necessary licenses in the next 30 days." (Pl.'s Exh. 6 pp. 1-2). Masi testified Acquisitions did not obtain alcohol licenses within thirty days. (10-10-13 Tr. pp. 124 ln. 20 – 125 ln. 5).

D. <u>Draft Asset Purchase Agreement and Operating Agreements</u>

The lower court relied on the terms of an unexecuted draft asset purchase agreement and unexecuted draft operating agreement in granting judgment to Acquisitions. (Order pp. 9-11, 17, 19). The unexecuted draft asset purchase agreement is fourteen pages, references two exhibits, and includes seven sections and forty-two sub-sections. (Pl.'s Exh. 62). Tom Levine is neither a party nor a signatory to the agreement. (Pl.'s Exh. 62 p. 13). The draft in evidence and

considered by the lower court recites "the Buyer desires to purchase, *certain assets* of the Seller related to the Businesses upon the terms and subject to the conditions set forth in this Agreement." (Pl.'s Exh. 62 p. 6) (emphasis added). "The Assets" to be purchased by Acquisitions are listed in seven categories and include more than the assets listed in the Letter of Intent. (*Compare* Pl.'s Exh. 62 pp. 6-7, *with* Pl.'s Exh. 6 p. 1). The unexecuted draft asset purchase agreement also lists "Excluded Assets," which are not mentioned in the Letter of Intent. (*Compare* Pl.'s Exh. 62 p. 7, *with* Pl.'s Exh. 6). As to Tom Levine's loan, the unexecuted draft agreement states Distributing is the owner of the defined "Assets" free and clear of liens

> *except for* the liens of Thomas LeVine who has agreed to release the Assets being sold to the Buyer *as of the* ***signing*** *of this Agreement.* Upon the consummation of the Closing and the delivery to the Buyer of the instruments of transfer of ownership contemplated by this Agreement, the Buyer will be the absolute owner of the Assets free, clear, and discharged of and from any and all Encumbrances.

(Pl.'s Exh. 62 p. 10) (emphasis added). The unexecuted draft agreement lists seven "conditions precedent" to Acquisitions' purchase obligation, including obtaining UCC lien releases and required alcohol licenses in North and South Carolina. (Pl.'s Exh. 62 pp. 14-15).

The unexecuted draft operating agreement for Acquisitions is twenty pages and includes fourteen sections, over sixty sub-sections, and twenty-one defined terms. (Def.'s Exh. 37). Tom Levine is neither a party nor a signatory to the agreement. (Def.'s Exh. 37 p. 20). The unexecuted draft operating agreement contains additional terms and qualifications to the purchase price owed for Tom Levine's debt than those stated in the Letter of Intent. It states the purchase price is only for Distributing's "brands and inventory" rather than the general "assets," and states the payments shall be made "not less often than annually." (Def.'x Exh. 37 p. 7). While the Letter of Intent limits assignment of a membership interest in the company to "a revocable trust or limited liability company for the benefit of family members" absent

unanimous approval of the remaining members, the unexecuted draft operating agreement allows assignment or sale to non-family members without approval. (Pl.'s Exh. 6 p. 5; Def.'s Exh. 37 p. 10).

E. Operations of Acquisitions

In March 2010, Leone and Masi began work for Acquisitions. As CFO of Acquisitions, Masi continued to use Distributing's QuickBooks accounting records with little to no alteration. (7-17-13 Tr. p. 134 lns. 6-15; Pl.'s Exh. 96 p. 1). Levine testified there was no "new set of books created," "they're the same records" as those of Distributing. (7-18-13 Tr. p. 134 lns. 3-15). Acquisitions' classification of Tom Levine's loans as a debt of Distributing or Acquisitions is an issue in this case. Masi, as CFO of Acquisitions, consistently continued to book the loans under its "Long Term Liabilities," used the same identifying numbers for the loans as Distributing, and showed them as Acquisitions' debt owed to Tom Levine rather than to Distributing. (Pl.'s Exh. 13). Masi attempted to explain this by testifying the QuickBooks program did not provide a way to enter contingent liabilities. (10-10-13 Tr. p. 23 lns. 18-22). There is no explanation for why the debt was booked as a debt *of Acquisitions owed to Tom Levine* rather than a debt of Acquisitions owed to Distributing. Additionally, on Acquisitions' draft tax return prepared for 2010, Tom Levine's loans are listed as "other liabilities" of Acquisitions. (Pl.'s Exh. 20 p. 21).

After Leone assumed the role of President of Acquisitions, he acquired only one new beer brand and reduced the sales force in the North and South Carolina locations by at least half, contrary to a provision in the Letter of Intent stating Acquisitions "will need to hire additional employees to furnish necessary accounting, logistics, and sales services." (7-18-13 Tr. p. 83 lns. 6-25; Pl.'s Exh. 6 p. 3). Acquisitions continued to do business with Distributing's prior contracts and under its name without identifying Acquisitions. For example, Daniel Benton, a former

sales management employee of Distributing and Acquisitions testified Acquisitions did not set up new accounts or contracts with vendors but continued under Distributing's prior accounts and contracts. (7-17-13 Tr. p. 36 lns. 3-7, p. 38 lns. 9-10, p. 48 lns. 22-24). Leone moved the warehouse from Fort Mill to Columbia supposedly to attract the "Dogfish Head" beer brand. (7-17-13 Tr. pp. 43 ln. 24 – 44 ln. 19). However, Dogfish Head never entered into a distribution agreement with Acquisitions. (7-17-13 Tr. p. 44 lns. 24-25).

Ultimately, Acquisitions never made a profit. By January 2011, approximately nine months after the execution of the Letter of Intent, the members and Tom Levine met to discuss the state of the company and its need for immediate cash flow. They also discussed purchasing a company named Grapevine, which did not occur. (7-18-13 Tr. p. 261 lns. 3-14). As a result of that meeting, the members of Acquisitions executed the First Amendment to the Operating Agreement.

F. First Amendment to the Operating Agreement

On January 25, 2011, Cekola circulated a draft amendment to the unexecuted operating agreement. (Def.'s Exh. 16). On February 8, 2011, the members executed the "First Amendment to the Operating Agreements for Carolina Craft Acquisitions, LLC and NC Carolina Craft Acquisitions, LLC." (Def.'s Exh. 38). The purpose of the First Amendment was to provide cash flow into the company. (7-18-13 Tr. pp. 85 ln. 25 – 86 ln. 2; Def.'s Exh. 38). The document purports to amend the unexecuted draft operating agreements and Masi's unexecuted employment agreement. (Def.'s Exh. 38 p. 1). It requires that Leone, Cekola, and Masi each loan Acquisitions $300,000.00 "on the condition that if the Companies fail to perform according to below criteria, that the Companies will be immediately liquidated and the brands sold." (Def.'s Exh. 38 p. 1; Order p. 12). In section 2 entitled "Employment Agreements," the First

Amendment elevates repayment to CKL Corporation for Leone's salary. It states: "As profitability of the Companies increase, the Companies shall reimburse CKL for all past advancements prior to making any distribution to members." (Def.'s Exh. 38 p. 2). The Amendment also contains a limited liquidation provision for the sale of only "the brands and inventory" of Acquisitions.[8] (Def.'s Exh. 38 p. 3). The distribution order is as follows:

> a. First to the allowed creditors of the Companies;
> b. Next to the Members to the extent of unpaid compensation;
> c. Next for the Capital Contributions of the Members;
> d. Next for the priority distribution set forth in Section 5.1(b) in the Operating Agreements; and
> e. And finally any remaining funds will be allocated among the Members in accordance with their Sharing Ratio's [sic].

(Def's Exh. 38 pp. 3-4). The first distribution category listed in the Letter of Intent and draft unexecuted operating agreement included the following language which is omitted from the Amendment: "This class shall include loans and advances paid by the Members but exclude the priority distributions owed to Carolina Craft Distributing, LLC." (Pl.'s Exh. 6 p. 6; Def's Exh. 37 p. 17).

Leone wrote in a February 3, 2011 email to Tom Levine and the other members regarding the First Amendment: "I don't have an employment agreement with carolina craft. My agreement is with Ckl corp. . . . I really don't give a shit about this agreement anymore. If the company is not funded by tomorrow morning it will BLOW UP!" (Def.'s Exh. 22 p. 1). Jeffrey Levine testified he signed the First Amendment under duress and the false representation that his attorney approved the agreement. (7-18-13 Tr. pp. 238 ln. 19 – 239 ln. 10). He testified: "And Joe stood up there and John stood up there and dropped about 20 F. bombs saying that this has got to be signed or we're not putting any money in and we're going home. Everybody was

[8] The liquidation provisions in the Letter of Intent and unexecuted draft operating agreement refer to the sale of "the assets." (Pl.'s Exh. 6 p. 6; Def.'s Exh. 37 p. 16).

pissed off and screaming at me to sign this thing. It was under duress and deceit that I signed this . . . ." (7-18-13 Tr. p. 239 lns. 12-17). The First Amendment specified some of the cash provided to Acquisitions would go towards payment of Jeffrey Levine's unpaid wages, second only after payment of taxes and liens. (Def.'s Exh. 38 p. 2). However, Acquisitions did not pay his salary. (9-10-13 Tr. p. 127 lns. 12-16). Despite the First Amendment and promised loans to Acquisitions, the company dissolved shortly thereafter.

G. Dissolution and Liquidation of Acquisitions

On March 10, 2011, Jeffrey Levine exercised his right to call for a dissolution of Acquisitions based in part on Masi's failure to contribute the $300,000.00 loan required by the First Amendment. (7-18-13 Tr. p. 234 lns. 12-16, pp. 248 ln. 14 – 49 ln. 1; Def.'s Exh. 25). Tom Levine began this action in January 2012 upon discovering Acquisitions' intent to sell assets and not contribute any of the proceeds to pay his secured loans.

Before and after Tom Levine filed this action, Acquisitions calculated the amounts it planned to distribute from the asset sale proceeds. Plaintiff's Exhibit 22 consists of six pages of Acquisitions' June 2012 projected "Liquidation" distributions and loans purportedly owed to CKL Corporation, Cekola, Leone, and Masi. (Pl.'s Exh. 22). By this time, the company sold all of the distribution rights to the beer brands for $2.31 million. (Pl.'s Exh. 22 p.1; 7-18-13 Tr. p. 121 lns. 1-6, 20-21). The projected liquidation numbers show a loss or "shortfall" of $125,745.67 to the company after paying "escrow transaction," "allowed creditors," Masi's "unpaid compensation," "operating loans (including interest)," and "capital accounts," leaving no money to pay Tom Levine. (Pl.'s Exh. 22). The "operating loans" listed are from (1) CKL Corporation, totaling $702,715.46, (2) Cekola personally, totaling $346,869.65, and (3) Leone personally, totaling $351,122.50. (Pl.'s Exh. 22). Acquisitions incurred the CKL loan solely to

pay Leone's salary, which CKL was already obligated to pay to him as its Vice President. (7-18-13 Tr. p. 114 lns. 3-16, pp. 179 ln. 15 – 180 ln. 3; Pl.'s Exh. 6 p. 3). As to the Cekola and Leone personal loans, they borrowed money from CKL Corporation to make contributions to Acquisitions and then earned $40,044.65 and $41,122.50 respectively in interest over an eighteen-month period. (Pl.'s Exh. 22; 7-18-13 Tr. pp. 113 ln. 17 – 114 ln. 2; 10-10-13 Tr. p. 115 lns. 10-17). The asset sale proceeds are currently in escrow pending the outcome of this and other litigation involving the Carolina Craft Acquisitions North and South Carolina entities, including Jeffrey Levine's wage payment claim.

H. Bench Trial

At trial, five witnesses testified live—Daniel Benton, Jeffrey Levine, Tom Levine, Carl Masi, and John Leone—and two witnesses testified via deposition designations—Joe Cekola and Dick Nagle. At the close of Tom Levine's case, Acquisitions made a motion for a directed verdict. (9-10-13 Tr. p. 203 lns. 11-15). The Court granted the motion as to the first cause of action for an accounting and receivership. (9-10-13 Tr. p. 208 lns. 7-8; Order p. 1). The Court found the second cause of action for an injunction moot due to the prior order granting the temporary injunction. (9-10-13 Tr. p. 208 lns. 9-15). As to the third cause of action—a declaratory judgment that Tom Levine is a creditor of Acquisitions, is entitled to payment as a creditor, and is not bound by the Letter of Intent or First Amendment to the Operating Agreement—the Court denied Acquisitions' motion and proceeded with the trial.[9] (9-10-13 Tr. p. 231 lns. 23-25).

On April 23, 2014, the Court issued an Order Granting Judgment for Defendant. Specifically, the Court found the Letter of Intent governed an asset purchase that took place; the

[9] Tom Levine dropped his claim for successor liability after trial because there is no evidence of a date the assets transferred and proof of an actual asset transfer is necessary for a successor liability cause of action. (Exh. A to Pl.'s Mot. to Recon. p. 25).

assets passed to Acquisitions in March 2010 free of Tom Levine's secured encumbrance; and Acquisitions' obligation to pay the asset purchase price allocated to Tom Levine's loan was contingent upon future profits, with any remaining balance paid as a fourth distribution at dissolution according to the Letter of Intent and unexecuted operating agreement. (Order pp. 14-15).

STANDARD OF REVIEW

"Declaratory judgment actions are neither legal nor equitable and, therefore, the standard of review depends on the nature of the underlying issues." *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009). An action seeking a declaration that the plaintiff is a creditor of the defendant is an action at law. *See, e.g., McInnis v. Estate of McInnis*, 348 S.C. 585, 589, 560 S.E.2d 632, 634 (Ct. App. 2002) ("A claim for money due from an estate sounds in law."); *Crafton v. Brown*, 346 S.C. 347, 351, 550 S.E.2d 904, 905 (Ct. App. 2001) ("An action to collect on a guaranty is an action at law.").

"In an action at law tried without a jury, this court reviews the trial court's decision to correct only errors of law." *Laser Supply & Servs. v. Orchard Park Assocs.*, 382 S.C. 326, 333, 676 S.E.2d 139, 143 (Ct. App. 2009). "In an action at law tried without a jury, the findings of fact made by the trial court will not be disturbed on appeal unless found to be without evidence which reasonably supports the judge's findings." *Travelers Indem. Co. v. Auto World of Orangeburg, Inc.*, 334 S.C. 137, 141, 511 S.E.2d 692, 694 (Ct. App. 1999).

ARGUMENTS

This appeal presents four main questions:

1. Whether the Letter of Intent may operate to transfer assets when the letter outlines an asset purchase agreement for future execution, both the letter and draft agreement required execution of the agreement prior to an asset transfer, Acquisitions and

Distributing failed to execute the agreement, and a transfer of assets at the time of execution of the Letter of Intent would have been illegal?

2. Whether Tom Levine released his security interest in Distributing's assets that never legally transferred from Distributing to Acquisitions?

3. Whether the Letter of Intent that contains an express condition precedent for Acquisitions to obtain alcohol licenses within thirty days can effectuate a transfer of assets from Distributing to Acquisitions when Acquisitions failed to satisfy the condition precedent?

4. Whether Acquisitions may negatively alter Tom Levine's creditor rights to a priority distribution in its liquidation through a preliminary Letter of Intent, an unexecuted operating agreement or amendment to an operating agreement to which he was not a party?

The lower court erred in holding that the Letter of Intent governed or effectuated any asset purchase and transferred Distributing's assets to Acquisitions free of Tom Levine's secured lien. The Letter of Intent is a preliminary document that required the execution of additional documents to effectuate a legal asset transfer free of Tom Levine's secured interest. Tom Levine retained his first priority secured interest in Distributing's assets covered by his UCC-1 Financing Statement due to Acquisition's failure to execute an asset purchase agreement as required by the Letter of Intent and failure to meet a condition precedent in the Letter of Intent. The lower court also erred in holding the Letter of Intent and unexecuted draft operating agreement govern Tom Levine's distribution upon Acquisition's liquidation, assuming the assets transferred free of his security interest. Tom Levine is not a party to any operating agreement and thus it cannot negatively alter his rights. For any one of these reasons, this Court should reverse the judgment of the lower court and find Tom Levine is a creditor of Acquisitions.

I. THE LETTER OF INTENT THAT OUTLINES AN ASSET PURCHASE AGREEMENT FOR FUTURE EXECUTION CANNOT OPERATE AS THAT AGREEMENT WHEN ACQUISITIONS AND DISTRIBUTING FAILED TO EXECUTE IT AND A TRANSFER OF ASSETS TO ACQUISITIONS AT THE TIME OF EXECUTION OF THE LETTER OF INTENT WOULD HAVE BEEN ILLEGAL.

The lower court incorrectly held the Letter of Intent alone governed and effectuated a transfer of Distributing's assets to Acquisitions. (Order pp. 15-18). The Letter of Intent is a preliminary agreement not intended to be the final contract as to the transfer of any assets or operating agreements of Acquisitions. (Pl.'s Mot. for Recon. pp. 4, 6). The Letter of Intent did not effectuate a legal transfer of Distributing's assets to Acquisitions and, therefore, Tom Levine retained his first priority security interest and is a secured creditor of Acquisitions.

A. <u>The Letter of Intent was not Intended to Transfer Distributing's Assets</u>

The Letter of Intent does nothing more than state the parties' agreement to ownership interests and capital contributions in Acquisitions to enable the business to begin initial operations and outline anticipated terms for future agreements. The lower court essentially found the Letter of Intent operates as a comprehensive asset purchase agreement and operating agreements. This is legally incorrect and not supported by the plain language of the Letter. The Letter of Intent itself is a binding contract. It bound Acquisitions' members to ownership interests and capital contributions. (Pl.'s Exh. 6 p. 1). It also required Acquisitions and Distributing to take certain actions—it did not, however, effectuate those actions merely by requiring the companies to perform them in the future. Ultimately, Acquisitions, its members, and Distributing chose not to enter into the required agreements.[10] (7-18-13 Tr. p. 99 lns. 13-18, p. 85 lns. 17-24, p. 268 lns. 7-8; 9-9-13 Tr. p. 82 lns. 19-21; 10-10-13 Tr. p. 90 lns. 9-15, p. 121 lns. 12-20).

"[T]he foremost rule of contract interpretation is that courts must give effect to the intentions of the parties by looking to the language of the contract." *M&M Group, Inc. v.*

[10] The lower court's Order suggests doubt as to whether the asset purchase agreement and operating agreements were executed. It states "or a signed copy no longer exists" and "it is unclear whether it was signed by the members." (Order pp. 9-10). Acquisitions presented no evidence that the members executed these documents. Masi represented to the members in an email that he had the signed documents but testified at trial this was incorrect and the documents were not executed. (10-10-13 Tr. p. 90 lns. 1-15; 7-18-13 Tr. p. 85 lns. 17-19, p. 99 lns. 1-19). Further, Acquisitions has not and cannot produce a signed copy of these agreements.

Holmes, 379 S.C. 468, 475, 666 S.E.2d 262, 266 (Ct. App. 2008) (internal quotation marks omitted). "[W]hether the contracting parties intended to be bound by an informal agreement prior to the execution of a contemplated formal agreement is to be determined by the surrounding facts and circumstances of each particular case." *Bugg v. Bugg*, 272 S.C. 122, 125, 249 S.E.2d 505, 507 (1978).

> Whether the parties to an oral or informal agreement became bound prior to the execution of a contemplated formal writing is a question depending largely upon their intention. This principle is sometimes expressed as whether they intend the formal writing to be a condition precedent to the taking effect of the agreement. Where it is determined that the parties intended not to be bound until the written contract is executed, no valid and enforceable obligation will be held to arise.

Id. at 125, 249 S.E.2d at 507.

In *Bugg*, the parties and their counsel orally agreed to settlement of a divorce action. *Id.* at 123-24, 249 S.E.2d at 506. The wife refused to sign the written agreement, and the court granted husband's motion to make the proposed agreement a court order. *Id.* at 124, 249 S.E.2d at 507. The Supreme Court reversed based on its finding "that both parties intended that the negotiations for settlement would be consummated by the execution of a written agreement." *Id.* at 125-26, 249 S.E.2d at 507. The Court held "it was the intention of the parties that the signing of the written agreement was a condition precedent to its effectiveness." *Id.* at 126, 249 S.E.2d at 508.

This case is analogous to *Bugg*. There can be no doubt Acquisitions, its members, and Distributing intended for the asset purchase agreement and operating agreements to be executed as a condition precedent to their effectiveness and enforceability. Acquisitions agreed it "will execute an Operating Agreement . . . by the close of business on Friday, March 19, 2010 or as soon as practicable thereafter," and "shall execute a definitive purchase agreement." (Pl.'s Exh.

6 pp. 1, 3). This language indicates Acquisitions and Distributing did not consider the informal, anticipated terms to those agreements outlined in the Letter of Intent as binding until reduced to a separate writing and executed. *See* Black's Law Dictionary 924 (8th ed. 2004) (defining a "letter of intent" as: "A written statement detailing the preliminary understanding of parties who plan to enter into a contract or some other agreement; a noncommittal writing preliminary to a contract").

The lower court found "[t]he members of the new company moved quickly to consummate the sale." (Order p. 4). Given that context, it made sense for Acquisitions and Distributing to execute an agreement to enable them to move forward with forming Acquisitions while allowing them to later execute formal, complete documents regarding the specific assets for purchase and the exact terms of distribution and liquidation.

If the lower court's finding—the Letter of Intent governed the asset purchase in its entirety—is affirmed, then two sentences in the Letter are meaningless. The Letter stated in *two separate sections* the parties would enter into a definitive asset purchase agreement to effectuate a transfer of Distributing's assets to Acquisitions. Section 2 states: "BUYERS and SELLERS shall execute a definitive purchase agreement in which BUYERS will acquire" certain assets of Distributing. (Pl.'s Exh. 6 p. 1). Section 10 entitled "Definitive Purchase Agreement" states "BUYERS and SELLERS shall execute a definitive purchase agreement as soon as practicable after the execution of this Letter of Intent." (Pl.'s Exh. 6 p. 7).

> The District Court of South Carolina has adopted and applied four factors to determine whether the parties intended to be bound only upon execution of a writing . . .
>
> (1) has one party explicitly indicated that it would be bound only by a writing; (2) has one party partially performed and the performance been accepted by the other party disclaiming the contract; (3) do the parties have much or little left to

> negotiate; and (4) does the agreement concern complex business matters that are usually reduced to writing.

Blanton Enters., Inc. v. Burger King Corp., 680 F. Supp. 753, 772 (D.S.C. 1988) (citing *R.G. Group, Inc. v. Horn & Hardart Co.*, 751 F.2d 69 (2nd Cir. 1984)). In *Blanton*, the plaintiff attempted to prove the existence of a franchise agreement with the defendant by arguing an oral franchise agreement bound the parties. 680 F. Supp. at 772. The District Court, applying the four factors listed above, disagreed. As to factor one, the court found Burger King's franchise application clearly required certain written approvals and the execution of preliminary and final agreements. *Id.* As to the second factor, the court found the plaintiff's actions were "properly characterized as preparatory" to obtaining franchise approval. *Id.* at 773. As to the third factor, the court found the parties did not agree to or even discuss all of the terms to the alleged franchise agreement. *Id.* Finally, as to the fourth factor, the court found "that reasonable, prudent businessmen could only conclude that such an agreement would have to be in writing and executed before it became binding." *Id.*

In this case, the *Blanton* factors weigh in favor of finding the parties intended to be bound to an asset transfer *only upon* execution of a written asset purchase agreement. As to the first factor, the Letter of Intent expressly states in two provisions that Distributing and Acquisitions "shall execute a definitive purchase agreement." (Pl.'s Exh. 6 pp. 1, 7). As to the second factor, Tom Levine is a signatory—not a party—to the Letter of Intent. He did not accept any partial performance by Acquisitions, as evidenced by his retention of the filed UCC-1 Financing Statement. (9-9-13 Tr. p. 83 lns. 23-24). Acquisitions and Distributing performed under the Letter of Intent to the extent Acquisitions operated as a beer distributor with members who made capital contributions. As to the third factor, Acquisitions and Distributing had much left to negotiate regarding the asset purchase agreement. This is evidenced by the fact that the outlined

terms in the Letter of Intent are a little over one page, and the draft asset purchase agreement is fourteen pages. (Pl.'s Exhs. 6 & 62). Finally, as to the fourth factor, the distribution rights to Distributing's brands alone were worth approximately $2.8 million at the execution of the Letter of Intent, and ultimately sold for approximately $2.3 million. (9-9-13 Tr. p. 35 lns. 2-3, p. 47 lns. 21-22; 7-17-13 Tr. p. 121 lns. 3-6). A reasonable businessperson could only conclude that an agreement to transfer assets worth over $2 million would have to be in writing and executed before it became binding. This is supported by the law of South Carolina requiring licensure approval prior to a new wholesaler obtaining the alcoholic assets at issue. S.C. Code Ann. § 61-6-100(2) (2009).

The Supreme Court recently issued an opinion supporting Tom Levine's argument that the Letter of Intent cannot operate as an asset purchase agreement. In *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, Op. No. 27434 (S.C. Ct. App. filed Aug. 20, 2014) (Shearouse Adv. Sh. No. 33 at 19), the Court held a memorandum of understanding relating to the development of a hotel was not an enforceable contract because "[i]t is only an agreement to agree in the future outlining the framework under which the parties would proceed to negotiate" and "the clear language of the MOU indicates the parties consciously agreed to finalize binding agreements at some point in the future." *Id.* at 26. While the Letter of Intent in this case is a binding document as to some of its provisions, the agreements whose provisions it outlines are not binding. As in *Stevens*, the provisions regarding the asset purchase agreement do not constitute a binding asset purchase agreement. They are merely a framework for negotiation and intended to be finalized in an agreement at some point in the future.

The lower court's order cites to *Burbach Broadcasting of Del. v. Elkins Radio Corp.*, 278 F.3d 401 (4th Cir. 2002) in support of its conclusion that Distributing's assets were transferred to

Acquisitions solely by virtue of the Letter of Intent because "[a] binding letter of intent is an enforceable contract, even where the letter of intent contemplates the execution of a subsequent formal agreement." (Order p. 15). The court misstates Tom Levine's argument. He does not argue that he is a creditor of Acquisitions because the Letter of Intent is not an enforceable contract. Rather, he argues that he is a creditor of Acquisitions because the only document he executed—the Letter of Intent—did not legally transfer assets free of his secured interest. Therefore, his first priority secured interest continues and attaches to the proceeds now held in escrow by Acquisitions.

Further, in *Burbach*, the Fourth Circuit did not find the letter of intent at issue was an enforceable contract. 278 F.3d at 406. It merely recited contract law principles and remanded the case to the district court for further proceedings. *Id.* at 409. The *Burbach* opinion contains language equally favorable to Tom Levine's position that there is no enforceable asset purchase agreement, specifically "that mere participation in negotiations does not create a binding obligation, even if agreement is reached on all terms. More is needed than agreement on each detail—the parties must have intended to enter into a binding agreement." *Id.* at 406.

The Letter of Intent is not sufficient, by itself, to transfer assets free of Tom Levine's security interest. A separate asset purchase agreement was required, drafted, and circulated because Acquisitions and Distributing agreed and intended for it to be the contract to govern and effectuate an asset transfer. Thus, Distributing's assets covered by Tom Levine's filed UCC-1 Financing Statement did not transfer to Acquisitions free of his secured interest, and he maintains a security interest in the proceeds and is a secured creditor of Acquisitions.

B. The Assets Could Not Legally Transfer to Acquisitions When the Parties Executed the Letter of Intent

Another, independent basis Tom Levine argued as to why the Letter of Intent did not transfer Distributing's assets to Acquisitions is that such a transfer was illegal at the execution of the Letter of Intent. The lower court found the assets transferred in March 2010. (Order pp. 3, 14). Tom Levine argued at trial and in his Motion for Reconsideration that there is no transfer date for the assets because, as of March 2010, Acquisitions did not have the required license to buy and sell alcohol as a wholesaler in South Carolina. (9-10-13 Tr. p. 217 lns. 14-20; Pl.'s Mot. to Recon. pp. 3, 7). This is one reason for the requirement that Acquisitions and Distributing execute an asset purchase agreement—to provide for a legal transfer of assets.[11]

The South Carolina Department of Revenue issues licenses under the Alcohol Beverage Control Act, including "wholesalers' licenses which authorize the licensees to purchase, store, keep, possess, import into this State, transport, sell, and deliver alcoholic liquors in bottles or similar closed containers, in accordance with regulations, to a person having a manufacturer's or retail dealer's license." S.C. Code Ann. § 61-6-100(2) (2009). A license is nontransferable even upon a change of ownership. S.C. Code Ann. § 61-6-4280 (2009). Therefore, a new wholesaler or distributor must apply for and obtain a new license before it may legally "store, keep, receive, have in possession, transport, ship, buy, sell, barter, exchange, or deliver" alcohol. S.C. Code Ann. § 61-6-4010(A)(1) (2009). The penalty for a first violation of this statute is "a fine of not less than six hundred dollars or imprisonment for six months." § 61-6-4010(B)(1).

The Act required Acquisitions to obtain a license prior to, among other things, *buying* alcohol. § 61-6-100(2). Under Acquisitions' and the lower court's interpretation of the Letter of Intent, Acquisitions bought Distributing's alcohol "inventory" in March 2010, *prior to obtaining a license*. (Pl.'s Exh. 6 p. 1). Without a license, a transfer could not legally occur and a beer

[11] The unexecuted draft asset purchase agreement specifies that Acquisitions is not obligated to "consummate the transactions contemplated by" the agreement unless seven conditions precedent are satisfied. (Pl.'s Exh. 62 pp. 8-9). Approval of alcohol licenses is one condition precedent. (Pl.'s Exh. 62 p. 10).

producer could not agree to a transfer of the distribution rights. *See* S.C. Code Ann. § 61-4-1130(1) (2009) ("*If* the application of the prospective purchaser for the permit is approved, it is unlawful . . . for a registered producer to fail to refuse to approve *the transfer or change of ownership.*" (emphasis added)). To hold the assets transferred is essentially a finding that Acquisitions operated as a beer distributor in violation of the alcohol licensing laws of South Carolina. The Letter of Intent cannot be legally enforced as held by the lower court.

"The general rule, well established in South Carolina, is that courts will not enforce a contract when . . . an act required for performance violates public policy as expressed in . . . statutory law." *White v. J.M. Brown Amusement Co.*, 360 S.C. 366, 371, 601 S.E.2d 342, 345 (2004). Under South Carolina statutory law, it was illegal for Acquisitions to purchase and possess Distributing's alcohol inventory at the execution of the Letter of Intent. The lower court erred in interpreting the Letter of Intent in such a way as to make it effectuate an illegal transaction. This Court should reverse and interpret the Letter of Intent as written—to require the execution of an asset purchase agreement to legally transfer assets.

C. Tom Levine Retained his Security Interest in the Asset Proceeds

The lower court held Tom Levine "released his security interest in all of Distributing's assets transferred to Acquisitions, pursuant to the Letter of Intent signed by" him. (Order p. 15). This holding is premised on the incorrect legal conclusion that any assets legally transferred. Tom Levine "agreed to release his security interest in all assets *being transferred to the BUYERS.*" (Pl.'s Exh. 6 p. 7) (emphasis added). The release of his security interest is qualified by the actual, legal transfer of specific assets, which did not occur at the time Tom Levine signed the Letter of Intent or thereafter. (9-10-13 Tr. pp. 217, 219). The lower court's ruling effectively changes the terms upon which Tom Levine agreed to release his security interest.

The Letter of Intent required a definitive asset purchase agreement with much greater detail regarding the sale than the terms outlined in the Letter of Intent. For example, the draft asset purchase agreement includes additional assets not listed in the Letter of Intent. (Pl.'s Exh. 62 p. 4). Bob Borsos, the attorney who drafted the Letter of Intent and asset purchase agreement acknowledged that the Letter of Intent does not effectuate an asset transfer. He stated in an email on March 16, 2010, that, after the parties signed the Letter, he would then "have a draft of the . . . final sales agreement by next week." (Pl.'s Exh. 4 p. 1; Pl.'s Exh. 60 p. 1). Tom Levine agreed to release his security interest in exchange for performance of the formalized, business transaction outlined in the Letter of Intent which Acquisitions failed to perform.

At the time the parties entered into the Letter of Intent, Tom Levine possessed a perfected security interest in Distributing's assets covered by his filed UCC-1 Financing Statement. (Pl.'s Exh. 5; Pl.'s Exh. 6 p. 7). "[A] security interest . . . continues in collateral notwithstanding sale, lease, license, exchange, or other disposition thereof unless the secured party authorized the disposition free of the security interest." S.C. Code Ann. § 36-9-315(a)(1) (2003). When "a filed financing statement covers the original collateral, a security interest in proceeds which remains perfected [pursuant to a filed financing statement covering the original collateral] becomes unperfected . . . when the effectiveness of the filed financing statement lapses . . . or is terminated." S.C. Code Ann. § 36-9-315(e)(1) (2003). Tom Levine agreed to release his security interest only in those assets that legally transferred to Acquisitions, which Acquisitions and Distributing agreed would occur through a separate, executed asset purchase agreement. If Acquisitions' investment in Distributing was for the purpose of acquiring its assets, Acquisitions should have executed the necessary documents and obtained the license to enable it to legally

possess the assets. Absent those actions, no assets legally transferred and, therefore, no release of Tom Levine's security interest occurred.

Tom Levine did not file a termination statement, and Acquisitions never asked him to do so. The lower court's Order cites to comment 2 of section 36-9-315(a) for the proposition that Tom Levine's signature on the Letter of Intent released his security interest and made filing a termination statement unnecessary. (Order p. 15). The lower court misinterprets this comment. The comment refers to whether a security interest *in the collateral* continues after disposition and not whether a security interest *in the proceeds* of collateral exists. *See* S.C. Code Ann. § 36-9-315(a) cmt. 2 ("In many cases, a purchaser or other transferee of collateral will take free of a security interest, and the secured party's *only right will be to proceeds*. For example, the general rules does not apply, and a security interest does not continue *in collateral*, if the secured party authorized the disposition . . . ."). Tom Levine does not claim an interest in the actual collateral. Rather, he claims status as a creditor of Acquisitions with a resulting right to the proceeds of the collateral. Additionally, neither the lower court nor Acquisitions are able to point to a specific date when any asset transferred from Distributing to Acquisitions.

The lower court's holding that Tom Levine's security interest extinguished upon the sale of the assets is incorrect and should be reversed in favor of finding that Tom Levine's security interest in the collateral remained effective and attaches to the proceeds of the asset sales as a creditor of Acquisitions.

II. ACQUISITIONS' FAILURE TO SATISFY THE CONDITION PRECEDENT OF OBTAINING ALCOHOL LICENSURE IN THE REQUIRED TIME PERIOD PREVENTED A LEGAL TRANSFER OF ASSETS.

Even assuming the Letter of Intent could, standing alone, legally transfer Distributing's assets to Acquisitions, Acquisitions failed to satisfy a condition precedent to the transfer by not

obtaining alcohol licensure within the required time period. Therefore, no release of Tom Levine's security interest in any of Distributing's assets occurred. Tom Levine and Masi testified that Acquisitions did not obtain licenses in the time required by the Letter of Intent. (9-10-13 Tr. pp. 138 ln. 24 – 139 ln. 16, p. 183 lns. 6-17). The lower court found that "[w]hile the timing contemplated by the Letter of Intent proved to be an impracticality, the licensing was nevertheless obtained by Mr. Masi." (Order p. 18). In his Motion for Reconsideration, Tom Levine argued the assets could not transfer because Acquisitions failed to obtain licensure within thirty days. (Pl.'s Mot. to Recon. pp. 3, 7, n. iii). The lower court's Order ignores the plain language of the condition precedent and improperly rewrites the parties' agreement.

"A condition precedent to a contract is any fact, other than the lapse of time, which, unless excused, must exist or occur before a duty of immediate performance arises." *M&M Group*, 379 S.C. at 477, 666 S.E.2d at 266 (internal quotation marks omitted). "The question of whether a provision in a contract constitutes a condition precedent is a question of construction dependent on the intent of the parties to be gathered from the language they employ." *Id.* at 476, 666 S.E.2d at 266 (internal quotation marks omitted). In *M&M*, this Court found a condition precedent based on contract language stating the buyer's obligation to purchase the assets of a carwash and the seller's obligation to sell "is contingent upon Buyer's ability to secure commercial financing." *Id.* at 472, 477, 666 S.E.2d at 264, 266. This Court held "No other meaning could be deduced from such clear and commonly used language." *Id.* at 477, 666 S.E.2d at 266.

In this case, the Letter of Intent plainly states, "SELLERS' assignment shall be absolute, *contingent only* upon the BUYERS obtaining the necessary licenses *in the next 30 days*." (Pl.'s Exh. 6 pp. 1-2) (emphasis added). On March 30, 2010, Bob Borsos wrote an email

acknowledging that obtaining new licensure was a condition precedent to an asset transfer. He wrote "I understand that Ken Allen has all of the documents and is processing the liquor license so hopefully these *contingencies* will be satisfied shortly." (Def.'s Exh. 62; Pl.'s Exh. 62) (emphasis added). Tom Levine agreed only "to release his security interest in all *assets being transferred* to the BUYERS." (Pl.'s Exh. 6 p. 7) (emphasis added). No assets legally transferred to Acquisitions as stated and, thus, Tom Levine retained his security interest.

The signatories to the Letter of Intent bargained for Acquisitions' promise to obtain licensure within thirty days. If Acquisitions never obtained the required licenses, it could have repudiated any contract obligating it to accept an illegal transfer of assets.[12] Notably, the licensure condition precedent is one of the only provisions in the Letter of Intent with an express, specific time requirement. The Letter requires execution of an Operating Agreement "on Friday, March 19, 2010 *or* as soon as practicable," and execution of a definitive purchase agreement "as soon as practicable." (Pl.'s Exh. 6 pp. 1, 7) (emphasis added). No such allowance for impracticality or extended time is provided for Acquisitions' obligation to obtain alcohol licenses.

The lower court's summary dismissal of an express condition precedent in effect rewrites the parties' contract and eliminates its plain meaning. Courts "are without authority to alter an unambiguous contract by construction or to make new contracts for the parties." *S.C. DOT v. M*

[12] To the extent the Court considers the terms of the unexecuted agreements in interpreting the Letter of Intent, which Tom Levine asserts is unnecessary in this appeal, the unexecuted draft asset purchase agreement states Acquisitions' obligation to

> consummate the transactions contemplated by this Agreement is subject to the satisfaction of each of the following conditions, the failure of any one of which shall excuse the Buyer from consummating such transactions . . . (j) The approval of the North and South Carolina Liquor Control Commission to the *transfer* of all wholesale beer and wine licenses necessary for the Buyer's operation of the Business.

(Def.'s Exh. 37 p. 10) (emphasis added). This contemplates a transfer of the licenses rather than Acquisitions applying for its own. Transfer of a license is prohibited in South Carolina. S.C. Code Ann. § 61-6-4280.

& T Enters. of Mt. Pleasant, LLC, 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct. App. 2008). "A court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." *Id.* at 655, 667 S.E.2d at 13; *see also Gordon Farms, Inc. v. Carolina Cinema Corp.*, 294 S.C. 158, 160, 363 S.E.2d 235, 236 (Ct. App. 1987) ("[T]he court's province is confined to the enforcement of the contract as written; the court cannot exercise its discretion as to the contents of the contract or substitute its own construction for an agreement clearly entered into between the parties.").

The Letter of Intent contemplated performance by three persons or entities—Acquisitions, Distributing, and Tom Levine. Tom Levine promised to release his security interest in Distributing's assets *contingent upon* Acquisitions and Distributing satisfying their promised performance. When Acquisitions failed to perform as required, Tom Levine's duty of performance to release his security interest did not arise and is not now enforceable by Acquisitions.

It is undisputed that Acquisitions did not satisfy the condition precedent of obtaining the necessary alcohol license within thirty days. (10-10-13 Tr. pp. 124 ln. 20 – 125 ln. 5). By the terms of the Letter of Intent, this failure prevented a legal asset transfer. Therefore, Tom Levine retained his security interest in the assets covered by his UCC-1 Financing Statement, and is a creditor of Acquisitions.

III. ACQUISITIONS CANNOT ALTER TOM LEVINE'S CREDITOR RIGHTS TO A PRIORITY DISTRIBUTION AT ITS LIQUIDATION THROUGH A PRELIMINARY LETTER OF INTENT, UNEXECUTED DRAFT OPERATING AGREEMENT, OR AMENDMENT TO AN OPERATING AGREEMENT TO WHICH HE WAS NOT A PARTY.

In addition to the preliminary nature of some provisions of the Letter of Intent and Acquisitions' failure to obtain alcohol licenses when required, a third independent basis upon which this Court should reverse the lower court's Order is that Tom Levine is not bound to the liquidation provision in the Letter of Intent, unexecuted draft operating agreement, or First Amendment. If the Court agrees with Tom Levine that the assets did not transfer free of his security interest, and he therefore has a secured interest attached to the proceeds, it does not need to reach this issue.

As an initial matter, the parties to this appeal agree that Acquisitions never made a profit. The purchase price provision in the Letter of Intent states payment shall come from "profits." (Pl.'s Exh. 6 p. 2). Therefore, whether or not the purchase price provision in the Letter of Intent is contingent or applies to Tom Levine is irrelevant because its validity or invalidity would not result in payment to him as a creditor of Acquisitions or otherwise. The provision at issue, now that Acquisitions is no longer operating and sold the assets, is the liquidation provision. The lower court found this provision places Tom Levine's loans fourth in line for payment in a liquidation based on the incorrect premises that (1) the provision is valid and enforceable against Tom Levine and (2) Tom Levine is not a creditor of Acquisitions. The remainder of this issue will discuss only the liquidation provision.

A. Tom Levine is Not Bound by the Preliminary Liquidation Provisions in the Letter of Intent or the Unexecuted Draft Operating Agreement and First Amendment

The lower court found Tom Levine bound by the liquidation provisions in the Letter of Intent, unexecuted draft operating agreement, and First Amendment. (Order p. 15). The liquidation provision in the Letter of Intent does not bind Tom Levine because he is not a party to an operating agreement in any form. Further, the liquidation provision in the Letter is a preliminary provision intended to be enforceable only if included in a subsequent, formal, and

executed operating agreement, which never occurred. The liquidation provision in the draft operating agreement and First Amendment likewise do not bind Tom Levine because the operating agreement is unexecuted and Tom is not a member or manager of Acquisitions whose rights any operating agreement may legally affect.

As to the Letter of Intent, the analysis in Argument section I.A. above regarding the preliminary nature of the Letter of Intent and its express requirement of later executed agreements applies to and is incorporated into this argument section. Applying the *Blanton* factors[13] to the draft operating agreement provision in the Letter of Intent weighs in favor of finding the members of Acquisitions intended to be bound to the operating agreement outline, specifically the liquidation provision, only upon execution of a separate, written operating agreement. As to the first factor, the Letter of Intent explicitly states the "Members *will execute* an Operating Agreement for each of the BUYERS by the close of business on Friday, March 19, 2010 or as soon as practicable thereafter." (Pl.'s Exh. 6 p. 1) (emphasis added). As to the second factor, an operating agreement in any form could not create performance obligations between Tom Levine as a third party non-signatory and Acquisitions. *See* S.C. Code Ann. 33-44-103(a) (2006) (stating an operating agreement "governs relations among the members, managers, and company"). Acquisitions did operate under some of the outlined provisions. As to the third factor, much remained for the members to negotiate in the operating agreement. This is evidenced by the fact that the outlined terms in the Letter of Intent are approximately two-and-a-half pages, and the draft operating agreement is twenty pages, including fourteen sections, over sixty sub-sections, and twenty-one defined terms. (Def.'s Exh. 37). Finally, as to the fourth

[13] For ease of reference, the factors are: "(1) has one party explicitly indicated that it would be bound only by a writing; (2) has one party partially performed and the performance been accepted by the other party disclaiming the contract; (3) do the parties have much or little left to negotiate; and (4) does the agreement concern complex business matters that are usually reduced to writing." *Blanton*, 680 F. Supp. at 772.

factor, a reasonable business person could conclude that the operating agreement for a business valued at over $2 million with capital contributions of almost half-a-million dollars would have to be in writing and executed before it became binding. A separate operating agreement was required, drafted, and circulated because Acquisitions' members intended for it to be executed to govern its operations. *See Bugg*, 272 S.C. at 126, 249 S.E.2d at 508 ("[I]t was the intention of the parties that the signing of the written agreement was a condition precedent to its effectiveness").

As to the unexecuted draft operating agreement, the lower court based its holding that the agreement controlled Tom Levine's status as a creditor on the combination of these incorrect findings: (1) the South Carolina Limited Liability Act allows for an oral operating agreement, (2) the existing unexecuted draft operating agreement "is evidence of the members' agreement on how Acquisitions should be governed," and (3) the members executed a First Amendment to the Operating Agreement. (Order p. 17). While reversal of any one of these findings is dispositive, all three are incorrect.

The South Carolina Limited Liability Act ("the Act") does allow a limited liability company to operate pursuant to an oral operating agreement. S.C. Code Ann. § 33-44-103(a) (2006) ("[A]ll members of a limited liability company may enter into an operating agreement, which need not be in writing, . . . to govern relations among the members, managers, and company."). However, the permissibility of an oral operating agreement is not the equivalent of the enforceability of a written but unexecuted draft operating agreement. The existence of the draft operating agreement is evidence only of the members' intent but deliberate failure to execute a written operating agreement as required by the Letter of Intent. To the extent Acquisitions conducted its business and operated among the members according to alleged oral

terms, it is Acquisitions' burden to prove those terms of an oral operating agreement it argues restrict Tom Levine's rights as a creditor. *See Landbank Fund VII, LLC v. Dickerson*, 369 S.C. 621, 628, 632 S.E.2d 882, 886 (Ct. App. 2006) ("The burden of establishing the existence of an oral contract and its terms" is on the party pleading to prove it.).

Regardless of whether an operating agreement exists, oral or otherwise, the Act prohibits the members of Acquisitions from restricting Tom Levine's rights as a creditor through an operating agreement. It states "[t]he operating agreement *may not*: . . . restrict rights of a person, *other than* a manager, member, and transferee of a member's distributional interest." S.C. Code Ann. § 33-44-103(b)(7) (2006) (emphasis added). This prohibition may not be altered or eliminated by an operating agreement. *See* § 33-44-103(b) cmt. ("This section makes clear that the only matters an operating agreement may not control are specified in subsection (b)."). Tom Levine is not a manager, member, or transferee of a member's distributional interest. Based on section 33-44-103(b)(7), Acquisitions' operating agreement, no matter what form it took, could not restrict Tom Levine's rights as a creditor. To hold otherwise would inhibit loans secured by collateral by allowing the debtor company to negatively alter a secured party's rights without his knowledge or consent to the debtor's advantage.

Finally, the First Amendment to the Operating Agreement does not bind Tom Levine because he did not sign it and it did not ratify the unexecuted operating agreement. The lower court found the "members took pains to *amend* the terms of the initial operating agreement, which amendment they *did* sign." (Order p. 17). The "whereas" clauses on the first page of the Amendment states that the purpose of entering into the agreement is to create cash flow into the company. (Def.'s Exh. 38 p. 1). Acquisitions could have drafted the First Amendment to state that, although the operating agreement was not executed, the members expressly agreed to its

terms and incorporated it into the First Amendment. However, it did not. The First Amendment states on the last page only that "[a]ll other terms of the Operating Agreements of the Companies remain in full force and effect except as above modified." (Def.'s Exh. 38 p. 4). There is no operating agreement "in full force and effect." Masi acknowledged this in an email he wrote in January 2011 reminding the members of Acquisitions "to sign the original operating agreements so we all have a signed copy of the entire agreements." (Def.'s Exh. 21). Despite this reminder and the execution of the First Amendment, the members still did not execute a written operating agreement. Further, section 33-44-103(b) applies equally to an amendment to an operating agreement and, in the same way, prohibits Acquisitions from restricting Tom Levine's rights.

The liquidation and distribution provisions do not apply to Tom Levine and, as provisions of purported operating agreements, cannot affect his rights. Therefore, he is a secured creditor of Acquisitions.

B. Tom Levine is a Creditor of Acquisitions Based on Acquisitions' Records and Representations

This Court should also find Tom Levine is a creditor of Acquisitions based on its records and representations to him. Should this Court find the liquidation provisions in the Letter of Intent, unexecuted draft operating agreement, or First Amendment bind Tom Levine, it may still find in his favor that Acquisitions' accounting records and representations to Tom Levine establish his status as its creditor. (Pl.'s Mot. to Recon. pp. 8-9).

Before and after execution of the Letter of Intent and First Amendment, Acquisitions' accounting records showed Tom Levine as a creditor of Acquisitions, and Carl Masi, as its member, CFO, and agent, represented to Tom Levine a status as Acquisitions' creditor. (Pl.'s Mot. to Recon. p. 8); *see* S.C. Code Ann. § 33-44-301 (2006) ("Each member is an agent of the limited liability company for the purpose of its business, and an act of a member . . . for

apparently carrying on in the ordinary course the company's business or business of the kind carried on by the company binds the company . . . ."). The lower court found Tom Levine's loans were treated as money to be paid "*to Distributing*" and that Acquisitions did not agree to assume "indebtedness to Plaintiff as a *company debt*. Acquisitions had no obligation running to Plaintiff that could serve as a basis for Plaintiff's claims." (Order pp. 14, 17) (emphasis added). In his Motion for Reconsideration, Tom Levine argued Acquisitions' accounting records continued to show the debt as an obligation to Tom Levine, not as an obligation to Distributing, and Acquisitions consistently made representation to Tom Levine regarding his status as its creditor. (Pl.'s Mot. for Recon. pp. 7-9).

Acquisitions' QuickBooks accounting balance sheets show Tom Levine's loans as "Long Term Liabilities" of Acquisitions and use the same identifying numbers for the loans as Distributing's prior records. (Pl.'s Exh. 13; Pl.'s Exh. 96 p. 2). Masi testified the QuickBooks program did not provide a way to enter contingent liabilities. (10-10-13 Tr. p. 23 lns. 18-22). Even assuming this claim regarding QuickBooks is true, it does not explain why the debt was recorded as a debt *of Acquisitions owed to Tom Levine* rather than a debt of Acquisitions owed to Distributing. (Pl.'s Mot. to Recon. p. 7). Additionally, Acquisitions' 2010 draft tax return lists Tom Levine's loans as "other liabilities" *of Acquisitions*. (Pl.'s Exh. 20 p. 21). Therefore, Acquisitions' own accounting practices are inconsistent with its interpretation of the Letter of Intent and First Amendment.

Tom Levine testified that after he signed the Letter of Intent, Acquisitions, specifically Masi, assured him "many times" of his status as a creditor of the company, verbally and on its balance sheets. (9-9-13 Tr. p. 100 lns. 3-15; p. 102 lns. 3-19; Pl.'s Exh. 13). He also testified:

"Never once did they say that your loan is going to be through CCD, LLC and not CCA. It was never stated that way." (9-9-13 Tr. p. 85 lns. 5-11).

Acquisitions' corporate accounting records show Tom Levine's loans as *its* debt owed *to Tom Levine*. The records are evidence of Acquisitions' acknowledgment of Tom Levine's status as its creditor. This, combined with Masi's representations to Tom Levine regarding his status as a creditor are sufficient to reverse the lower court and find Tom Levine is a creditor of Acquisitions.

CONCLUSION

The lower court's Order permitting Respondent Carolina Craft Acquisitions, LLC, to enforce unsigned agreements, which it could have but chose not to execute, should be reversed. For the reasons set forth herein, Appellant Thomas J. Levine respectfully requests that the Order granting judgment to Respondent be reversed and this Court find Appellant is a secured creditor of Respondent with a first priority secured interest.

Respectfully submitted,

Wesley D. Few, SC Bar No. 15565
Wesley D. Few, LLC
wes@wesleyfew.com
1527 Blanding Street
P.O. Box 11546 (29211)
Columbia, SC 29201
(803) 223-6942

Kathleen Chewning Barnes, SC Bar No. 78854
Barnes Law Firm, LLC
kbarnes@barneslawfirmsc.com
P.O. Box 897
607 2nd Street East
Hampton, SC 29924
(803) 943-4529

Attorneys for Appellant Thomas J. Levine

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

RECEIVED
AUG 27 2014
SC Court of Appeals

Appellate Case No. 2014-001397

Thomas J. Levine,..... Appellant,

v.

Carolina Craft Acquisitions, LLC, d/b/a Carolina Craft Distributors,..... Respondent.

PROOF OF SERVICE

The undersigned hereby certifies that on August 27, 2014, the foregoing **INITIAL BRIEF OF APPELLANT** was served on all counsel of record via hand delivery as follows:

Dennis J. Lynch
Nexsen Pruet
1230 Main Street, Suite 700
Columbia, South Carolina 29201

Amy Geddes
Nexsen Pruet
1230 Main Street, Suite 700
Columbia, South Carolina 29201

Attorneys for Respondent Carolina Craft Acquisitions, LLC,d/b/a Carolina Craft Distributors

[*Signature block appears on the following page.*]

August 27, 2014

Wesley D. Few, SC Bar No. 15565
WESLEY D. FEW, LLC
wes@wesleyfew.com
1527 Blanding Street
P.O. Box 11546 (29211)
Columbia, SC 29201
(803) 223-6942

Kathleen Chewning Barnes, SC Bar No. 78854
BARNES LAW FIRM, LLC
kbarnes@barneslawfirmsc.com
P.O. Box 897
607 2nd Street East
Hampton, SC 29924
(803) 943-4529

Attorneys for Appellant Thomas J. Levine

WESLEY D. FEW, LLC
1527 Blanding Street
Columbia, SC 29201
P.O. Box 11546 (29211)
wes@wesleyfew.com | 803-223-6942

August 27, 2014

Via Hand Delivery

The Honorable Jenny Abbott Kitchings
Clerk of Court
S.C. Court of Appeals
1015 Sumter Street
Columbia, SC 29201

RE: Thomas J. Levine v. Carolina Craft Acquisitions, LLC, d/b/a Carolina Craft Distributors, Appellate Case No. 2014-001397
Our File No. 00103-001

Dear Mrs. Kitchings:

Enclosed for filing please find the original and one copy of Appellant Thomas J. Levine's Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal in the above-referenced case. Also enclosed is proof of service of the Initial Brief of Appellant and Designation of Matter on Respondent Carolina Craft Acquisitions, as well as a Form 21 Confidential Reference List of Redacted Identifiers. Please file the documents and return a file-stamped copy to me in the enclosed self-addressed, stamped envelope. By copy of this letter, we are serving all counsel of record with a copy of the same. If you have any questions, please do not hesitate to contact me.

With warm regards, I remain

Sincerely Yours,

Wesley D. Few

Enclosures

WDF/hrk

cc: Dennis Lynch, Esquire (via hand delivery)
Amy Harmon Geddes, Esquire (via hand delivery)
Kathleen C. Barnes, Esquire (via email only)