EXHIBIT A

ELECTRONICALLY FILED - 2019 Jan 25 9:12 AM - RICHLAND - COMMON PLEAS - CASE#2018CP4002730

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL DISTRICT

Zachary M. Merritt, as personal representative of the Estate of James A. Merritt, Jr.,

Plaintiff,

vs.

Merritt, Webb, Wilson & Caruso, PLLC,

Defendant.

Case No: 2018-CP-40-02730

ORDER DENYING DEFENDANT'S MOTION TO DISMISS, OR, ALTERNATIVELY, TO STAY AND TO COMPEL ARBITRATION

This matter came before the Court on the Defendant Merritt, Webb, Wilson & Caruso, PLLC's (the "Law Firm") Motion to Dismiss, Or, Alternatively, to Stay and to Compel Arbitration ("Law Firm's Motion"). A hearing was held on January 10, 2019. Having carefully considered the parties' briefing as well as the arguments presented at the hearing, it is the judgment of the Court that the Law Firm's Motion will be denied.

FACTUAL AND PROCEDURAL BACKGROUND

This action arises out of the Law Firm's alleged failure to pay the Estate of James A. Merritt, Jr. ("Jim Merritt") for the fair market value of his ownership interest in the Law Firm as required by statutory law. The Law Firm is a professional limited liability company organized under North Carolina law. Law Firm's Mot. ¶ 1. The Law Firm is authorized to do business in South Carolina and maintains an office in Richland County, South Carolina. Am. Compl. ¶ 5. Jim Merritt was the managing member of the Law Firm and held a 25% ownership interest in the Firm at the time of his death on July 12, 2017. *Id.* ¶ 10. Plaintiff Zachary M. Merritt ("Plaintiff") is the personal representative of Jim Merritt's estate, *id.* ¶ 2, which is being administered in the Probate Court for Richland County, South Carolina, *id.* ¶ 4.

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On June 11, 2002, the original members of the Law Firm entered an operating agreement ("Original Operating Agreement"). Law Firm's Mot. ¶ 1; Law Firm's Mot., Ex. A. Jim Merritt practiced law in Columbia, South Carolina at that time and was not a member of the Law Firm then. *See* Law Firm's Mot., Ex. A. Paragraph 1.7 of the Original Operating Agreement contained an arbitration provision. *Id.* ¶ 1.7. When Jim Merritt joined the Law Firm on August 31, 2006, the Law Firm adopted an amended operating agreement ("Amended Operating Agreement"), Law Firm's Mot. ¶ 4, which did not contain an arbitration provision, *see* Law Firm's Mot., Ex. B.

Plaintiff filed his initial complaint in this matter on May 18, 2018, and an amended complaint ("Complaint") on October 8, 2018. In the Complaint, Plaintiff makes three statutory claims for the Court to order the Law Firm to pay Jim Merritt's estate the fair market value of Jim Merritt's ownership interest in the Law Firm, to pay the wages owed to Jim Merritt by the Law Firm, and to turn over Jim Merritt's personal property and effects to his estate. The Complaint asserts claims for declaratory judgment, breach of statutory requirement to purchase shares, payment of wages, and claim and delivery or replevin.

The Law Firm filed its Motion on October 18, 2018. Plaintiff filed a response in opposition to the Motion on January 8, 2019. On January 10, 2019, the Court held a hearing on the Law Firm's Motion at which counsel for both parties and Plaintiff were present.

In its Motion, the Law Firm argues that Plaintiff's claims are subject to the arbitration provision set forth in ¶ 1.7 of the Original Operating Agreement and should, therefore, be dismissed. The Law Firm asserts that the arbitration provision is governed by North Carolina law pursuant to a choice of law provision in ¶ 10.8 of the Original Operating Agreement. The Law Firm contends that the adoption of the Amended Operating Agreement did not affect or modify the arbitration provision in the Original Operating Agreement.

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Plaintiff responds that his claims are not subject to an arbitration provision because the Amended Operating Agreement contains no arbitration provision and does not require arbitration of disputes such as this one relating to the valuation of a member's interest in the Firm. Plaintiff further asserts that, even if the arbitration provision in the Original Operating Agreement were still in effect, it would be inapplicable to Plaintiff's claims because the claims are based on statutory law, not the Original Operating Agreement. Lastly, Plaintiff argues that the Law Firm has failed to provide a proper basis for dismissal of Plaintiff's claims because, under both South Carolina and North Carolina law, a court should stay rather than dismiss claims that are subject to arbitration.

LEGAL STANDARD

It is the public policy of both North Carolina and South Carolina[1] to favor arbitration and to resolve doubts regarding the scope of arbitrability in favor of arbitration. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596-97, 553 S.E.2d 110, 118 (2001); *Johnston Cnty. v. R.N. Rouse & Co., Inc.*, 414 S.E.2d 30, 32 (N.C. 1992). In considering whether to compel arbitration of a dispute, a court must first determine whether the parties had a valid agreement to arbitrate. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007); *T.M.C.S., Inc. v. Marco Contractors, Inc.*, 780 S.E.2d 588, 593 (N.C. Ct. App. 2015). Although public policy favors the arbitration of disputes, a party cannot be compelled to arbitrate claims unless there is a valid arbitration agreement. *Zabinski*, 346 S.C. at 596, 553 S.E.2d at 118 ("Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not

[1] As stated above, the Law Firm asserts that the arbitration provision in the Original Operating Agreement is governed by North Carolina law. That position, however, presupposes that there is a valid arbitration provision in the Original Operating Agreement. The Court need not decide whether North Carolina or South Carolina law applies because the relevant standards are the same under the laws of both States.

agreed to submit." (citations omitted)); *Thompson v. Norfolk S. Ry. Co.*, 535 S.E.2d 397, 400 (N.C. 2000) ("[P]arties may not be compelled to arbitrate their claims unless there exists a valid agreement to arbitrate." (citation omitted)).

DISCUSSION AND ANALYSIS

The Court agrees with Plaintiff that his claims are not subject to an arbitration provision because the Amended Operating Agreement contains no arbitration provision and does not require arbitration of disputes such as this one.

As set forth above, the Law Firm adopted the Amended Operating Agreement in August 2006 when Jim Merritt joined the Firm. Jim Merritt was not a member of the Law Firm when it implemented the Original Operating Agreement in June 2002. Section IV.E of the Amended Operating Agreement governs the valuation of a leaving or disassociated member's interest in the Law Firm. Law Firm's Mot., Ex. B ¶ IV.E. This section states, in full:

> Should any Member decide to leave or disassociate themselves from the Firm their interest in the Firm will be determined by valuation of the Firm as an on-going concern. They will receive their share of the value of the Firm less their debts to the Firm. The value of the Firm will be determined by third party appraisal of both the Fair Market Value of all Firm assets less the Fair Market Value of all Firm liabilities. A further explanation of departing Member's rights of valuation will be set forth in a further Amendment. There is no lump sum, artificially or arbitrarily determined "buyout" amount.

Id. This section lacks an arbitration provision.

Section II of the Amended Operating Agreement provides that, to the extent any provision in the Original Operating Agreement conflicts with the Amended Operating Agreement, the terms of the Amended Operating Agreement "prevail and control," and any "conflicting terms are deleted from the Operating Agreement and replaced by the terms of this [Amended] Agreement." *Id.* ¶ II.

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The arbitration provision in the Original Operating Agreement references arbitration for the determination and payment of a partnership buyout and related valuations. It provides in relevant part:

> Neither any Member nor a successor, representative, or assign of any Member, shall have any right, title, or interest in or to any Company property or the right to partition any Property owned by the Company, other than the right to initiate an arbitration proceeding pursuant to the rules of the American Arbitration Association Rules for determination and payment of a partnership assets [sic] and payment of a partnership buyout as further provided in this agreement. It is explicitly agreed by and between the parties that no civil action shall be maintained against an individual or the company as to the determination of any rights, liabilities, obligations, valuations, or payment plans, and that all matters will be resolved by arbitration . . . .
>
> Law Firm's Mot., Ex. A ¶ 1.7.

Section IV.E of the Amended Operating Agreement, however, supersedes ¶ 1.7 of the Original Operating Agreement with respect to valuation of a member's interest and the valuation rights of a departed member. Section IV.E of the Amended Operating Agreement omits any requirement that such valuations and rights be determined in arbitration. Therefore, the Amended Operating Agreement does not require arbitration of disputes relating to the valuation of a former member's interest. Pursuant to Section II of the Amended Operating Agreement, the superseding terms of the Amended Operating Agreement control. Accordingly, the Court holds that Plaintiff's claims are not subject to an arbitration agreement, and the Court cannot compel Plaintiff to arbitrate his claims. *See Zabinski*, 346 S.C. at 596, 553 S.E.2d at 118; *Thompson*, 535 S.E.2d at 400.

The Court further holds that, even if it were to assume that the arbitration provision in the Original Operating Agreement remains in effect, the provision does not compel arbitration of Plaintiff's claims because the claims are based upon statutory law, not the Original Operating Agreement.

Plaintiff's Complaint asserts causes of action for declaratory judgment, breach of the statutory requirement to purchase shares, payment of wages, and claim and delivery or replevin, which are all statutory claims. The Complaint does not assert a cause of action for breach of either the Original Operating Agreement or the Amended Operating Agreement and does not seek enforcement of any provision of either Agreement. In fact, the Complaint does not even mention or reference either Operating Agreement. Thus, Plaintiff's claims are entirely separate and independent from the Operating Agreements. The arbitration provision in the Original Operating Agreement is, therefore, inapplicable to this action and fails to provide any basis for compelling Plaintiff to submit his statutory claims to arbitration. *See Zabinski*, 346 S.C. at 596, 553 S.E.2d at 118; *Thompson*, 535 S.E.2d at 400.

CONCLUSION

For the foregoing reasons, the Law Firm's Motion is DENIED. The Law Firm is directed to file an answer to the Complaint within fifteen days of entry of this Order.

IT IS SO ORDERED.

The Honorable L. Casey Manning
South Carolina Circuit Judge

January 24, 2019
Richland County, South Carolina

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