THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson Jr., Circuit Court Judge

Case No. 2015-CP-10-3325 & Case No. 2017-CP-10-05055
Appellate Case No. 2018-001413

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SC Court of Appeals

Phillip DeClemente, a/k/a Alec Rochford, Appellant,

v.

Assistive Technology Medical Equipment
Services, LLC; Jeffrey Reed; Murrell G. Smith, Respondents,

And

Phillip DeClemente, a/k/a Phillip Goodpaster, Appellant,

v.

Assistive Technology Medical Equipment
Services, LLC (ATMES); Jeffrey Reed; Murrell G. Smith, Respondents.

RECORD ON APPEAL
Volume 1 of 2, Pages 1-496

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FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2015-CP-10-3325

Phillip DeClemente a/k/a Alec Rochford
PLAINTIFF(S)

Assistive Technology Medical Equipment, et al.
DEFENDANT(S)

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

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

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

☐ **STAYED DUE TO BANKRUPTCY**

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

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

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

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		

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

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge | 2117 Judge Code | 7/2/18 Date

FILED 2018 JUL -2 PM 2:28 CLERK OF COURT

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	
Phillip DeClemente, a/k/a Alec Rochford,	)	Docket No. 2015-CP-10-3325
	)	
Plaintiff,	)	
	)	
v.	)	**ORDER**
	)	
Assistive Technology Medical Equipment Services, LLC; Jeffery Reed; Murrell G. Smith,	)	
	)	
Defendants.	)	
	)	

FILED
2018 JUN -2 PM 2:28
JULIE J. ARMSTRONG
CLERK OF COURT

This case is before the court on a motion for summary judgment. For the reasons that follow, the motion is granted.

ABBREVIATED BACKGROUND

This is a case between former partners. The plaintiff (Phillip DeClemente) owned a medical equipment business. Two of the defendants (Jeffery Reed and Murrell Smith) owned a similar business. These people ultimately combined their businesses into an entity named Assistive Technology Medical Equipment Services. Assistive Technology is the third defendant.

A dispute arose among Assistive Technology's owners and it progressed to the point where litigation commenced. In October of 2011, Assistive Technology sued DeClemente and several other parties. The case number for that litigation is 2011-CP-10-08011.

DeClemente was held in default in that litigation and a default judgment was entered against him. His appeal of those orders is pending at the Court of Appeals.

DeClemente filed *this* lawsuit on June 11, 2015. His complaint stated several causes of action and named two other parties as defendants in addition to Reed, Smith, and ATMES. Those defendants were granted summary judgment by Judge Harrington in an order filed May 11, 2016.

Defendants Reed, Smith, and Assistive Technology responded to DeClemente's complaint with a motion alleging various grounds for dismissal including the statute of limitations.

In January of 2016 Judge Dennis issued a Form 4 order dismissing all counts of DeClemente's claims based on the statute of limitations. DeClemente filed a motion to amend the order of dismissal and requested leave to amend the complaint. After a hearing in February of 2016 Judge Dennis amended his decision, reinstated DeClemente's first cause of action, and allowed DeClemente the opportunity to amend his complaint. DeClemente filed his amended complaint in March of 2016. The amended complaint states a single cause of action against Reed, Smith, and ATMES. Judge Dennis issued a formal order confirming his prior rulings on May 16, 2018.

SUMMARY OF THE AMENDED COMPLAINT

DeClemente's amended complaint alleges the defendants have breached an agreement with him regarding the sale of his interest in ATMES. The amended complaint describes the underlying agreement as a bill of sale and promissory note calling for monthly installment payments. The first payment was due in July of 2009. The last payment was due in March of 2013. DeClemente claims the defendants made its last full payment in September of 2011.

The parties agree the second page of the order Judge Dennis entered on May 16, 2018, contains a typographical error regarding DeClemente's alleged date of last full payment. The order correctly recites this date was September of 2011 at the top of page two, but it incorrectly states in the next paragraph that DeClemente alleges payments have not been made since 2009. Defendants' counsel informed the Court this was his error and that there is no dispute DeClemente's complaint alleges the date of last payment was September of 2011.

DeClemente's amended complaint also asserts three breaches of the agreement. The first of these additional grounds for breach of contract involves a payment related to a non-compete clause. The parties' agreement provided that DeClemente would be paid $30,000 at the end of the buyout period if he had kept his end of the bargain, which included a confidentiality agreement and a covenant not to compete. DeClemente claimed he was owed this money. Next, DeClemente alleged the defendants wrongfully seized proceeds from the sale of an option to buy real estate to which he was entitled under the agreement. Finally, DeClemente alleged the defendants misappropriated a vehicle to which he was entitled under the parties' agreement.

On June 6, 2016, the Defendant's attorney filed another motion to change venue and motion to dismiss based on Plaintiff's failure to file within applicable statute of limitations. On July 22, 2016, this Court denied the Plaintiff's motion and a form 4 was filed.

SUMMARY JUDGMENT ARGUMENTS & RULING

The defendants moved for summary judgment in September of 2017. The Court conducted a hearing on December 11, 2017. Attorney James Smith attended for the defendants. Attorney Cameron Marshall appeared for DeClemente.

The defendants sought summary judgment based on the statute of limitations and on the grounds that all of DeClemente's breach of contract claims should have been brought as compulsory counterclaims in the lawsuit filed against DeClemente in 2011. DeClemente argued this issue had already been resolved by Judge Dennis' refusal to dismiss the breach of contract claim under Rule 12(b)(6), SCRCP. This Court agrees with the defendants and grants summary judgment based on the statute of limitations.

Section 15-3-530(1) establishes a three-year statute of limitations for breach of contract

claims. The discovery rule determines the date a breach of contract action accrues. *CoastalStates Bank v. Hanover Homes*, 408 S.C. 510, 517, 759 S.E.2d 152, 156 (Ct. App. 2014). Under the discovery rule a breach of contract action accrues "not on the date of the breach, but rather on the date the aggrieved party either discovered the breach, or could or should have discovered the breach through the exercise of reasonable diligence." *Maher v. Tietex Corp.*, 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998).

The evidence presented to the Court indicates there is no genuine dispute that DeClemente knew the defendants intended to breach the parties' agreement and that they were in fact in breach of the parties' agreement more than three years before he filed this lawsuit.

First, there is DeClement's affidavit, which was filed with the Court on September 20, 2016. Paragraph 8 of the affidavit indicates no full payment has been made to DeClemente since September of 2011; more than three years before this suit began. Second, there is DeClemente's deposition, a portion of which was provided to the Court during the summary judgment hearing. DeClemente's deposition testimony indicates he received the last payment on defendants' behalf from the private investigator who served him with the 2011 lawsuit. The order of default in the 2011 suit indicates DeClemente was served December 1, 2011, which is more than three years before this suit began.

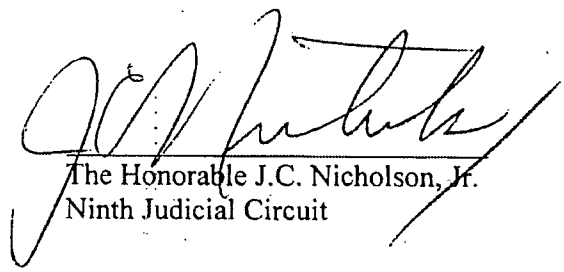
These circumstances are comparable to those that were present in *Maher v. Tietex*. There, as here, the case involved a dispute over periodic payments. The plaintiff in that case sued his employer alleging breach of an employee bonus plan. The plaintiff commenced that lawsuit in September of 1994. The Court of Appeals reversed a jury verdict in the plaintiff's favor, finding the plaintiff knew or should have known he had a cause of action over the bonus plan after he had

unsatisfactory conversations with his boss about the plan in 1989 and 1990. 331 S.C. at 379, 500 S.E.2d at 208. The same is true here. The defendants ceased making full payments to DeClemente in September of 2011. The next month, they sued him. Any reasonable observer would view these actions as a clear indication that the defendants believed DeClemente had breached *his* obligations to them and that the defendants did not intend to follow the agreement.

With respect to DeClemente's argument that this Court is precluded from granting summary judgment by Judge Dennis' prior ruling, the Court respectfully disagrees. Judge Dennis denied a Rule 12(b)(6), SCRCP motion to dismiss this claim. Such a motion is generally confined to the four corners of the complaint. *Spence v. Spence*, 368 S.C. 106, 123, 628 S.E.2d 869, 878 (2006). But the Court may look outside the complaint when considering a motion for summary judgment. Rule 56(c) recognizes this, explaining summary judgment involves considering the pleadings, depositions, answers to interrogatories, and affidavits.

For the foregoing reasons, the defendants' motion for summary judgment is Granted. Any arguments not specifically addressed in this order are denied.

AND IT IS SO ORDERED.



The Honorable J.C. Nicholson, Jr.
Ninth Judicial Circuit

July 2, 2018
Charleston, South Carolina

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2017-CP-10-5055

Phillip DeClemente a/k/a Phillip Goodpaster
PLAINTIFF(S)

Assistive Technology Medical Equipment, et al.
DEFENDANT(S)

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

☒ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

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

☐ **STAYED DUE TO BANKRUPTCY**

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

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

FILED 2018 JUL -2 PM 2:20 CLERK OF COURT

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

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

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

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E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge	2117 Judge Code	7/2/18 Date

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	
Phillip DeClemente, a/k/a Phillip Goodpaster,	)	Docket No. 2017-CP-10-05055
	)	
Plaintiff,	)	
	)	**ORDER**
v.	)	
	)	
Assistive Technology Medical Equipment Services, LLC (ATMES), and Jeffery Reed; Murrell G. Smith,	)	
	)	
Defendants.	)	

FILED
2018 JAN -2 PM 2:30
JULIE J. ... CLERK OF COURT

This case is before the Court on Defendants' Motion to Dismiss filed on November 8, 2017. For the reasons state below, this Court grants Defendants' motion. This lawsuit seeks a declaratory judgment on the validity of a written agreement that was the subject of a counterclaim the Plaintiff attempted to bring in a 2011 case. The counterclaim was barred from consideration because the Plaintiff defaulted. That also bars this litigation.

*

Phillip DeClemente brought this lawsuit in October of 2017. His complaint seeks a declaration on the effect of an agreement the parties entered in 2009. He alleges the agreement is a promise between the parties to never file a lawsuit against each other and that the Defendants breached this agreement by suing him in October of 2011.

DeClemente filed a supporting memorandum the same day he filed this complaint for a declaratory judgment. The memorandum acknowledges DeClemente was held in default in the 2011 case. He claims a declaratory judgment will end the controversy that started when the Defendants sued him in 2011. The memo also asserts DeClemente may pursue this declaratory judgment even though he was held in default in the 2011 case. The Defendants responded by filing

the instant motion seeking a speedy hearing, dismissal, and sanctions.

The Court conducted a hearing on December 11, 2017. Attorney James Smith attended for the Defendants. Attorney Cameron Marshall appeared for DeClemente.

At the hearing, the Defendants withdrew their request for sanctions, indicating they would be satisfied if the case was dismissed. They argued this lawsuit was barred because DeClemente asserted this same cause of action as a counterclaim in the 2011 case, where it was not reached on the grounds of DeClemente's default. They also argued DeClemente asserted this same cause of action in a separate case Plaintiff filed in 2015, where it was dismissed based on the statute of limitations. Defendants further contended these decisions barred DeClemente from filing *this* case, which raises the same issue. In response, DeClemente contended the Declaratory Judgment Act allowed him to file this case to obtain a ruling on the effect of the parties' 2009 agreement. However, he acknowledged the agreement was asserted as a defense to the 2011 case and that his claim was dismissed because he was in default. He also acknowledged the order of default has never been set aside.

**

The Court grants the motion to dismiss because a party may not use a subsequent lawsuit to litigate claims after the party has lost the ability to pursue those claims by virtue of defaulting in a prior case.

DeClemente's complaint is based on his contention that the written agreement the parties executed in 2009 precluded the Defendants from suing him in 2011. This would be a complete defense to the 2011 case and, under the logical relationship test for compulsory counterclaims, it would constitute a compulsory counterclaim to that case. *See N.C. Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989). The rules require a party to state any

compulsory counterclaims in the party's responsive pleading. Rule 13(a), SCRCP. Although DeClemente attempted to assert counterclaims in the 2011 case, he was precluded from doing so as he was in default.

This case is similar to the situation the Court of Appeals addressed in *Stark Truss Co. v. Superior Construction Corp.*, 360 S.C. 503, 512, 602 S.E.2d 99, 104 (Ct. App. 2004). There, as here, a defaulted party attempted to assert counterclaims despite the entry of default and the court's refusal to set default aside. The Court of Appeals noted the counterclaims had been compulsory and that Rule 13(a) requires a party to include such counterclaims in a party's responsive pleading. *Id.* at 512, 602 S.E.2d at 104. The defaulting party's pleading had not been timely; thus, the counterclaims were properly dismissed.

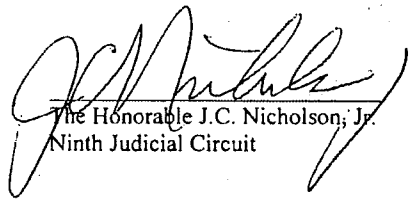
The Court is not able to discern a meaningful way to distinguish *Stark Truss* from the present case. If a party could use a subsequent lawsuit to resurrect counterclaims that were lost by a prior order of default, there would be little purpose or consequence in the prior order of default. Parties could ignore the default and freely bring compulsory counterclaims in a separate lawsuit.

DeClemente's memorandum cited *Loadholt v. South Carolina State Budget & Control Board*, 339 S.C. 165, 528 S.E.2d 670 (Ct. App. 2000) as supporting the right to bring this declaratory judgment even though he was held in default. *Loadholt* was a declaratory judgment to determine the Insurance Reserve Fund's obligation to provide coverage for underlying tort litigation. The fact that a local sheriff (the defendant in the underlying tort suit) defaulted in the tort suit did not affect his ability to sue the IRF to determine the IRF's obligation to satisfy the tort suit's judgment.

DeClemente's declaratory judgment, by contrast, is a collateral attack on his liability in the 2011 case. The sheriff in *Loadholt* did not bring a declaratory judgment against the same parties

who had sued him in tort. Nothing in that opinion suggests he could have done so. Accordingly, Defendants' Motion to Dismiss is Granted.

AND IT IS SO ORDERED.



The Honorable J.C. Nicholson, Jr.
Ninth Judicial Circuit

July 2, 2018
Charleston, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON ASSISTIVE TECHNOLOGY MEDICAL EQUIPMENT SERVIES, INC., Plaintiff, vs. HOOD & SELANDER, CPAS, LLC, DONNA C. CASH, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DOROTHY A. CONNELLY, W.E. APPLEGATE, III, AS PERSONAL REPRESENTATIVE OF JAMES B. CONNELLY, KIMBERLY CUCE, PHILLIP DECLEMENTE, Defendants.	)	IN THE COURT OF COMMON PLEAS IN THE NINTH JUDICIAL CIRCUIT in Civil Action No.: 2011-CP-10-8011

FILED
2014 APR 30 PM 12: 21
JULIE J. ARMSTRONG
CLERK OF COURT
BY

ORDER

THIS MATTER COMES before this Court for a hearing December 16, 2012 on (1) Defendant Donna C. Cash, as Personal Representative of the Estate of Dorothy A Connelly, Motion to Amend Answer to Add Counterclaim; (2) Defendant DeClemente's Motion to Extend Time pursuant to Rule 6 and Rule 60(b)(1) of the South Carolina Rules of Civil Procedure; (3) Defendant DeClemente's Motion for Default Judgment against Plaintiff; and (4) Plaintiff Motion for Damages Hearing for scheduling. At the outset of the hearing counsel for Plaintiff indicated Plaintiff's consent to the relief request in Defendant Cash's Motion to Amend Answer to Add Counterclaim. As such, Defendant Cash's Motion to Amend is GRANTED.

Based upon the pleadings, the Court record, memoranda of law, affidavits filed herein, and other such matters before the Court, Defendant DeClemente's Motion to Extend Time and Relief from Default is DENIED and Defendant DeClemente's Motion for Default Judgment against Plaintiff is DENIED. Plaintiff's Motion for Damages is CONTINUED. I make the following findings of fact, conclusions of law, and render judgment as hereinafter provided.

COURT RECORD

1. On October 31, 2011, Plaintiff commenced this action by filing its Summons and Complaint.

2. On December 1, 2011, the Complaint was properly and duly served upon the Defendant Phillip DeClemente.

3. On March 30, 2012, Plaintiff filed an Affidavit of Default as to Defendant DeClemente more than 120 days after service.

4. Counsel for Plaintiff did not obtain an entry of default from the Clerk of Court or a default judgment from the Circuit Court.

5. On May 14, 2012, Counsel for DeClemente appeared by Letter of Representation filed with the Clerk of Court and asked to be informed of the date of the Plaintiff's motion for Default Judgment, though a motion for Default Judgment had not been scheduled before the Court.

6. On August 10, 2012, Defendant DeClemente filed a Motion to Extend Time pursuant to SCRCP 6 and 60(b)(1) to which at this hearing I granted Defendant DeClemente's request to include a request for relief from entry of default pursuant to SCRCP 55(c).

7. On August 10, 2012, Defendant DeClemente filed an Answer, Counterclaims and Cross Claims.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has personal jurisdiction over the parties and subject matter jurisdiction over this litigation. Venue is proper. The Court permitted Defendant DeClemente to amend his

Motion to Enlarge Time pursuant to SCRCP 6 and 60(b) to include Rule 55(c) for relief from default.

SCRCP Rule 55 permits a party to move to set aside the entry of default. The standard for granting relief from an entry of default under Rule 55(c) is "good cause." See SCRCP 55(c). This standard requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice. Sundown Operating Company Inc. v. Intedge Industries Inc., 383 S.C. 601, 681 S.E.2d 885 (2009). Once a party has put forth a satisfactory explanation for the default, the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted. Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct. App. 1989). The trial court need ***not*** make specific findings of fact for each factor if there is sufficient evidentiary support on the record for the finding of the lack of good cause. [Emphasis Added.] Dixon v. Besco Engineering, Inc., 320 S.C. 174, 179, 463 S.E.2d 636, 639 (Ct. App. 1995). A motion under Rule 55(c) is addressed to the sound discretion of the trial court. Williams v. Stalnaker, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct. App. 1994). See also, Sundown Operating Company Inc. v. Intedge Industries Inc., 383 S.C. 601, 681 S.E.2d 885 (2009).

Defendant DeClemente submitted a memorandum in support of his Motions which the Court has reviewed and considered along with argument of counsel at the hearing. DeClemente's counsel advised the Court that DeClemente was suffering from a psychiatric illness and was hospitalized approximately two weeks from February 2, 2012 through February 16, 2012. DeClemente advised the Court that he knew he had been served and was required to

answer the Complaint. Additionally, at the Court hearing DeClemente's counsel mentioned that DeClemente had other counsel assisting him in this matter prior to present counsel. At the hearing, the Court permitted the parties to submit supplemental affidavits addressing the issues raised at the hearing and relevant to the Rule 55(c) standard and the Court would take the matter under advisement.

After reviewing the supplemental affidavits and considering arguments of counsel and the Court record, I find that Defendant DeClemente was properly served with the Complaint on December 1, 2012. I find pursuant to supplemental affidavits and representations at the hearing, Defendant DeClemente knew he had to answer the Complaint and had the benefit of counsel in around the time he was served with the Complaint. However, I find that DeClemente demonstrated "good cause" pursuant to Rule 55(c) throughout his hospitalization, which was ongoing until sometime in May 2012. However, good cause did not exist from the time DeClemente obtained counsel in May 2012 to the time DeClemente filed the Defendant's Motion to Enlarge Time and Answer and Counterclaims on August 10, 2012. I find that the timing of motion for relief was not prompt.[1] Defendant DeClemente's Motion to Extend Time and/or Relief from Default pursuant to Rule 55(c) is DENIED.

Defendant DeClemente is in default for failure to timely file an Answer to the Complaint. DeClemente filed his Answer, Counterclaims and Cross Claims on August 10, 2012. At that time, Plaintiff had no obligation to respond to Defendant DeClemente's Counterclaims unless and until DeClemente was relieved from default and permitted to enter his Answer,

[1] "Although the presence of other factors, in the totality of the circumstances, may amount to a showing of "good cause," a defendant may not be relieved from the entry of default *solely* because it relied to its detriment on a negligent insurance agent." See, Sundown Operating Company Inc. v. Intedge Industries Inc., 383 S.C. 601, 681 S.E.2d 885 (2009).

Counterclaims and Cross Claims. I find that because Defendant DeClemente is not relieved from default, he cannot enter his Answer, Counterclaims and Cross Claims and cannot pursue default judgment against the Plaintiff for counterclaims that have never been permitted to be asserted. Defendant DeClemente's Motion for Default Judgment against Plaintiff is DENIED and Defendant's Answer and Counterclaims are STRICKEN.

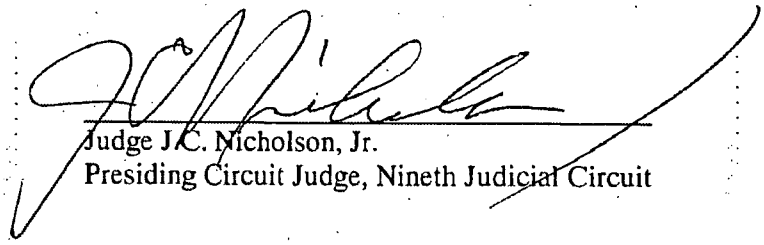
Default judgment is entered as to Defendant DeClemente and a hearing shall be scheduled on Plaintiff's Motion for Damages as to Defendant DeClemente.

NOW, THEREFORE, based upon the foregoing,

IT IS ORDERED, that Defendant Cash's Motion to Amend is GRANTED.

IT IS FURTHER ORDERED, that Defendant DeClemente's Motion to Extend Time and/or Relief from Default is DENIED and Defendant DeClemente's Motion for Default Judgment against Plaintiff is DENIED. Default judgment is entered as to Defendant DeClemente and Plaintiff's Motion for Damages is CONTINUED and a hearing to ascertain damages shall be set for the next term of this Court.

AND IT IS SO ORDERED.



Judge J.C. Nicholson, Jr.
Presiding Circuit Judge, Nineth Judicial Circuit

Columbia, South Carolina
4/24, 2014

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2011- CP-10-8011

Assistive Technology Medical Equipment Services, LLC,

PLAINTIFF(S)

Hood & Selander, CPAS, LLC, Donna C. Cash, as Representative of the Estate of Dorothy Connelly, W.E. Applegate, III, as Personal Representative of the Estate of James B. Connelly, Kimberly Cuce, Phillip DeClemente,

DEFENDANT(S)

FILED 2014 MAY -7 AM 10: 33 JULIE J. ARMSTRONG CLERK OF COURT

Submitted by: _____	Attorney for : ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

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

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

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

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

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

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: **Defendant Phillip DeClemente's Motion to Reconsider of May 2, 2014, is denied without a rehearing.**

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		$

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

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

Circuit Court Judge | 2117 Judge Code | 5/5/14 Date

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2015 CP-10-3325

FILED

2016 JAN 14 AM 11:09

JULIE J. ARMSTRONG
CLERK OF COURT

Phillip Declemente, et al

Assistive Technology Medical Equipment Services LLC, et al

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

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

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

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

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

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Defendant's Motion to Change Venue, filed on 8/24/15, is DENIED.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		$
		$
		$

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

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

Circuit Court Judge

2060
Judge Code

1/7/16
Date

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2015 CP-10-3325

FILED
2016 JAN 14 AM 11: 06
JULIE J. ARMSTRONG
CLERK OF COURT

Phillip Declemente, et al

PLAINTIFF(S)

Assistive Technology Medical Equipment Services LLC, et al

DEFENDANT(S)

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

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

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

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

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

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Defendant's Motion to Dismiss, filed on 7/15/15, is GRANTED ONLY as to Causes of Action 1-5 of Complaint--based on Statute of Limitations.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		$
		$
		$

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R Markley Dennis Jr
Circuit Court Judge

2060
Judge Code

1/7/16
Date

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2015 CP-10-3325

FILED
2016 MAR -3 PM 3:03
JULIE J. ARMSTRONG
CLERK OF COURT

Phillip DeClemente, a/k/a Alec Rochford

Assistive Technology Medical Equipment Services, LLC, et al

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

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

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

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

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

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Plaintiff's Motion to Amend Pleadings, filed on 1/25/16, is GRANTED.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		$
		$
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Circuit Court Judge	Judge Code	Date
	2060	2/19/16

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)))	IN THE COURT OF COMMON PLEAS IN THE NINTH JUDICIAL CIRCUIT

PHILLIP DECLEMENTE, a/k/a ALEC ROCHFORD, Plaintiff, vs. ASSISTIVE TECHNOLOGY MEDICAL EQUIPMENT SERVICES, LLC; JEFFERY REED and MURRELL G. SMITH, Defendants.	))))))))))))	Civil Action No. 2015-CP-10-~~03307~~ 3326 **ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS AND FOR TRANSFER OF VENUE**

FILED
2016 OCT -4 AM 10:09
JULIE J. ARMSTRONG
CLERK OF COURT

This matter was before this Court for a hearing on September 6, 2016 pursuant to Defendant's Motion to Transfer Venue and Motion to Dismiss dated June 1, 2016, and filed June 6, 2016, and Plaintiff's March Motion for Summary Judgment dated March 19, 2016 and filed March 22, 2016. Plaintiff was present and represented by his counsel, Cameron Marshall, Esquire. Defendants' counsel James E Smith, Jr., Esq. was present.

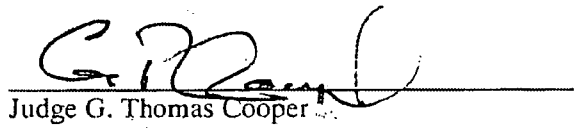
"An agreement that disputes will be heard in a county other than that in which it may otherwise have been brought will be upheld where the circumstances make such agreement reasonable and not contrary to public policy." *Stanley Smith & Sons v. D.M.R. Inc.*, 307 S.C. 413, 417, 415 S.E.2d 428, 430 (Ct. App. 1992) (quoting *St. John's Episcopal Mission Ctr. v. S. Carolina Dep't of Soc. Servs.*, 276 S.C. 507, 280 S.E.2d 207 (1981)).

In this case, the Stock Purchase and Assignment Agreement between the parties specifically states "**This agreement shall be construed and enforced in accordance with the laws of the State of South Carolina. Venue shall lie in Charleston County.**"

In light of the above and other evidence submitted by counsel, this Court finds that there is insufficient grounds upon which to grant the Defendants' various SCRCP Rule 12 motions.

Based on the evidence presented, the arguments of counsel, the pleadings, and memoranda of law, this Court determines that venue is proper in Charleston County. Therefore, Defendants' Motions to Dismiss and Transfer Venue are hereby **DENIED**.

IT IS SO ORDERED.



Judge G. Thomas Cooper
Presiding Circuit Judge, Ninth Judicial Circuit

Charleston, South Carolina
9-27, 2016

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON Assistive Technology Medical Medical Equipment Services, LLC, Plaintiff, v. Hood & Selander, CPAS, LLC, Donna C. Cash, as Representative of the Estate of Dorothy Connelly, W.E. Applegate, III, as Personal Representative Of the Estate of James B. Connelly, Kimberly Cuce, Phillip DeClemente Defendant.	)	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT Case No.: 2011-CP-10-08011 **ORDER DENYING DEFENDANT PHILLIP DECLEMENTE'S MOTION TO RECONSIDER**

FILED
2016 NOV 18 AM 11:52
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Presiding Judge:	Hon. Deadra L. Jefferson
Plaintiff's counsel:	James E. Smith, Esq.
Defendants' counsel:	Cameron L. Marshall, Esq. (Attorney for Phillip DeClemente) R. Davis Howser, Esq. (Attorney for Hood & Selander, CPAS, LLC)
Date of Hearing:	September 19, 2016
Court Reporter:	Denise Lauder

THIS MATTER is before the Court on Defendant Phillip DeClemente's Motion to Reconsider pursuant to Rule 52 and Rule 59, SCRCP. The case initially came before the Court on September 19, 2016, for a non-jury hearing on Defendant Hood & Selander, CPAS, LLC's Motion for Summary Judgment, filed August 1, 2016. At the conclusion of the hearing, the Court found the motion moot since the Court had already ruled on the matter in an Order issued by Judge J.C. Nicholson, Jr. and filed on August 30, 2014. On October 18, 2016, this Court issued an Order ruling Defendant Hood & Selander, CPAS, LLC's Motion for Summary Judgment as moot. Defendant Phillip DeClemente filed a Motion to Reconsider on October 27, 2016. The

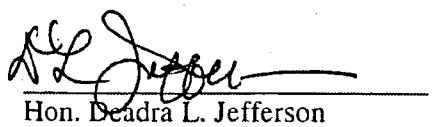
Court received a copy of Defendant Phillip DeClemente's Motion to Alter or Amend on November 1, 2016. At a subsequent hearing on an unrelated motion in this case, the Court was informed by opposing counsel that the filing of a memoranda in response to the Defendant DeClemente's Motion to Reconsider was waived, relying on their previous arguments as their response.

"The purpose of Rule 59(e), SCRCP, to alter or amend the judgment, is to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits.'" Pye v. Estate of Fox, 369 S.C. 555, 565, 633 S.E.2d 505, 510 (2006) (quoting Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992)). The Supreme Court has clarified the two situations in which a Rule 59(e) motion is appropriate. "A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party must file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." Elam v. South Carolina Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). Additionally, "[a] party cannot use a motion to reconsider to present an issue he could have raised prior to judgment but did not." Anderson Mem'l Hosp., Inc. v. Hagen, 313 S.C. 497, 498, 443 S.E.2d 399, 400 (Ct. App. 1994) (citing C.A.H. v. L.H., 315 S.C. 389, 434 S.E.2d 268 (1993)). Correspondingly, Rule 52(b), SCRCP, allows a party "not later than 10 days after receipt of written notice of entry of judgment" to request a court to "amend its findings or make additional findings and may amend the judgment accordingly. . ."

Having considered Defendant's Motion, Defendant Hood & Selander's previous response, any memorandum and the record herein, as well as the various interests balanced by

the Court at the time of the ruling, Defendant Phillip DeClemente's Motion to Reconsider is hereby denied.[1]

IT IS SO ORDERED.



Hon. Deadra L. Jefferson
Presiding Judge
Ninth Judicial Circuit

November 17, 2016
Charleston, South Carolina

[1] This motion is disposed of without the necessity of a hearing and decided on the record and briefs. SCRCP 59(f), Pollard v. City of Florence, 314 S.C. 397, 444 S.E.2d 534 (Ct. App. 1994).

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. ~~2017~~ 2011 CP-10-8011

FILED
2017 DEC 21 AM 9:55
JULIE J. ARMSTRONG
CLERK OF COURT
BY

ASSISTIVE TECHNOLOGY MEDICAL EQUIPMENTS SERVICES, LLC

PLAINTIFF(S)

PHILLIP DECLEMENTE

DEFENDANT(S)

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

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

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

☐ **STAYED DUE TO BANKRUPTCY**

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

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

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

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Assistive Technology Medical Equipment Services, LLC	Phillip DeClemente	$875,144.00
		$
		$

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

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge | 2128 Judge Code | 12/20/17 Date

For Clerk of Court Office Use Only

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

James Smith, Esq.

ATTORNEY(S) FOR THE PLAINTIFF(S)

Cameron Marshall, Esq.

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: Joyce Rueger

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

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)))	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CIVIL ACTION NO.: 2011-CP-10-8011
ASSISTIVE TECHNOLOGY MEDICAL EQUIPMENT SERVICES, LLC, Plaintiff, v. PHILLIP DECLEMENTE, Defendant.	)	**ORDER OF JUDGMENT**

FILED
2017 DEC 21 AM 9:55
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Presiding Judge:	Hon. Deadra L. Jefferson
Counsel for Plaintiff:	James Smith, Esq.
Counsel for Defendant:	Cameron Marshall, Esq.
Date of Hearing:	November 1, 2016 January 5, 2017
Court Reporter:	Joyce Rueger

This matter came before this Court on November 1, 2016 and January 5, 2017 for a hearing on Plaintiff's Motion to Set Damages as to the Defendant Phillip DeClemente, filed September 19, 2016.[1] Plaintiff was represented by James Smith, Esquire at both hearings. Defendant DeClemente was represented by Cameron Marshall, Esquire, at both hearings.[2] The Court gave both parties ample opportunity to make a full presentation of the damages in this case at the scheduled hearings. The Court also disposed of all outstanding motions during these proceedings. Defendant DeClemente nevertheless filed a supplemental, contested Motion to Consider Evidence of Damages, Adopt Proposed Order, and Reconvene Damages Hearing on January 24, 2017.[3] In this

[1] The November 1, 2016 hearing was a full damages hearing on the merits of the case. The January 5, 2017 hearing was held to accommodate Defendant's request to supplement the record with the additional testimony of the Defendant Phillip DeClemente.
[2] Defendant DeClemente was the only remaining Defendant at the time of the hearings.
[3] Plaintiff filed a Memorandum in Opposition to Plaintiff's Motion to Consider Evidence of Damages, Adopt

motion, Defendant asked the Court to re-open the record and consider the expert testimony of a certified public accountant recently procured by him. This Court granted Defendant's motion in part, allowing Defendant DeClemente to obtain the testimony of his expert witness via Order dated and filed July 27, 2017. The deposition of Defendant's expert, Ronald H. Burkett, was subsequently taken on September 14, 2017.[4] The deposition of Ronald H. Burkett was provided to the Court on October 11, 2017. Subsequently the Court held a conference call with counsel on October 17, 2017. As a result, the parties advised the Court that no additional testimony would be necessary and consented to the Court ruling on this matter with benefit of the deposition and no further hearings in this matter. Having provided both parties with significant time in which to present evidence on damages, the Court now makes the following findings of fact and conclusions of law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter commenced with the filing of the Summons and Complaint on October 31, 2011 wherein Plaintiff set forth nine (9) causes of action against the following defendants: Hood & Selander, CPAS, LLC; Donna C. Cash as Personal Representative of the Estate of Dorothy Connelly; W.E. Applegate, III, as Personal Representative of the Estate of James B. Connelly; Kimberly Cuce; and Phillip DeClemente. In the Complaint, Plaintiff alleges that Assistive Technology Medical Services, LLC ("ATMES") entered into a stock purchase and assignment agreement with the Defendant Dorothy A. Connelly (the Seller) and Defendant DeClemente (the Assignor) on November 7, 2008 for the purchase of common stock of Abacare Home Medical, Inc. See Compl. ¶ 10. The purchase price paid by ATMES for the stock at closing was Eight Hundred Nine Thousand, Five Hundred and No/100 dollars ($809,500.00). Id. ¶ 10. Plaintiff

Proposed Order, and Reconvene Damages hearing on February 9, 2017.

[4] This Court issued its Order on July 27, 2017 requiring the parties to schedule the deposition of Defendant's expert on or before August 31, 2017.

contends that the Defendants were aware that Abacare "significantly understated" its sales tax to the South Carolina Department of Revenue, but failed to disclose the sales tax liability owed by Abacare prior to its purchase by ATMES. *Id.* ¶¶ 19-20. As a result, ATMES alleges that it overpaid for the Abacare stock. Id. ¶ 52. Plaintiff further contends that subsequent to the execution of the Stock Purchase and Assignment Agreement, Defendant James B. Connelly agreed to a plan for repayment of the unpaid sales taxes owed by Abacare to the South Carolina Department of Revenue, but failed to do so. Id. ¶¶ 28-29.

This case has been litigated by the above-named parties since the filing of the Complaint in October of 2011. However, as of the date of this Order, Defendant DeClemente is the only active defendant in the case. Defendants W.E. Applegate as Personal Representative of the Estate of James B. Connelly was dismissed from the case on September 28, 2012 by Order of the Honorable Roger M. Young. Defendants Hood & Selander, CPAS, LLC and Donna Cash as Personal Representative of the Estate of Donna Connelly were likewise dismissed from the case by consent Order on November 7, 2016 and November 21, 2016, respectively. Defendant Kimberly Cuce has yet to answer or appear matter despite being properly served with the Summons and Complaint on February 21, 2012. Plaintiff has not sought a formal Entry of Default against Defendant Cuce or otherwise pursued its claims against her as of the date of this Order. Thus, the only remaining claims are those against Defendant DeClemente for fraud, negligence, negligent misrepresentation, promissory estoppel, and civil conspiracy. Accordingly, this Order is on the damages dispute between Plaintiff ATMES and Defendant DeClemente.

The Court finds that Defendant DeClemente was properly served with the Summons and Complaint via certified mail, return receipt requested, and restricted delivery on December 1, 2011. Defendant did not answer or otherwise respond to the Complaint within thirty (30) days of service

as required by South Carolina Rule of Civil Procedure 12(a). Accordingly, Plaintiff filed an Affidavit of Default with the Charleston County Clerk of Court on March 30, 2012. Plaintiff did not, however, simultaneously obtain an Entry of Default from the Clerk of Court or a Default Judgment from the Circuit Court. On May 14, 2012, Counsel for Defendant DeClemente, Cameron Marshall, Esq., filed a Letter of Representation with the Clerk of Court. On August 10, 2012, Defendant DeClemente filed a Motion for Enlargement of Time in which to File Answer pursuant to Rules 6 and 60(b) of the South Carolina Rules of Civil Procedure. This motion was later amended to include a request for relief from entry of default pursuant to South Carolina Rule of Civil Procedure 55(c). Defendant DeClemente simultaneously filed an Answer, Counterclaim, and Crossclaims. Defendant DeClemente thereafter filed an Amended Answer, Counterclaim, and Crossclaims on August 21, 2012.

On or about September 11, 2012, Plaintiff ATMES filed a Motion for a Damages hearing. Defendant DeClemente responded on October 15, 2012 by filing a counter-Motion for Default against Plaintiff ATMES. In this Motion, Defendant DeClemente argues that ATMES is likewise in default for failing to answer Defendant DeClemente's counterclaims. Both Plaintiff and Defendant's Motions for Default came before the Honorable J.C. Nicholson, Jr. on December 16, 2012. Judge Nicholson also heard Defendant DeClemente's Motion for Enlargement of Time at the December 16, 2012 hearing.

On April 24, 2014, Judge Nicholson issued an Order denying Defendant DeClemente's Motion for Enlargement of Time to Answer on the basis that Defendant did not demonstrate "good cause" for his delay in answering the Complaint as he retained counsel in May of 2012 but did not file his Answer until August of 2012. Judge Nicholson further denied Defendant's request for relief from default judgment pursuant to South Carolina Rule of Civil Procedure 55(c), and placed

Defendant DeClemente in default for failure to timely file an Answer to Plaintiff's Complaint. Judge Nicholson also struck Defendant DeClemente's Answer, Counterclaims, and Crossclaims from the record, and denied Defendant DeClemente's Motion for Default Judgment against Plaintiff ATMES on the basis that Plaintiff has no obligation to respond to Defendant DeClemente's Counterclaims unless and until Defendant DeClemente is relieved from default and permitted to enter his Answer, Counterclaims, and Crossclaims.

Defendant DeClemente thereafter filed a Motion for Reconsideration of Judge Nicholson's April 24, 2014 Order. Defendant's Motion for Reconsideration was denied by Order dated May 3, 2014. Defendant DeClemente then filed an appeal with the Court of Appeals to challenge Judge Nicholson's ruling on May 30, 2014. The South Carolina Court of Appeals denied Defendant DeClemente's appeal by written order dated November 13, 2014 on the basis that Judge Nicholson's order is not immediately appealable because the "circuit court has not yet made an award of damages."[5] The Remittitur was also issued on November 13, 2014.

On September 19, 2016, Plaintiff filed a Motion for Hearing on Damages in order to ascertain the judgment amount to be entered against the defaulting defendant, Phillip DeClemente. This matter was subsequently set for a hearing before this Court on November 1, 2016 to determine damages. Plaintiff's counsel, James Smith, Esq. was present at the November 1, 2016 hearing. Defendant DeClemente was not present, but his attorney, Cameron Marshall, was in attendance. At the outset of the hearing, Attorney Marshall raised objections to moving forward with the hearing (1) without his client present and (2) without certain documents that he had requested. He

[5] This Court notes that the Defendant DeClemente has persistently argued at every hearing in this matter that he should be allowed to argue against the substantive merits of the Plaintiff's causes of action thus negating the default posture of this case. The Court has reinforced that this Court and Judge Nicholson possess concurrent jurisdiction, that this Court has no ability to overturn Judge Nicholson's Order of April 30, 2014, and that any issues raised previously have been preserved for the appropriate appellate review. See, e.g., Enoree Baptist Church v. Fletcher, 287 S.C. 602, 604, 340 S.E.2d 546, 547 (1986) ("One Circuit Court Judge does not have the authority to set aside the order of another.").

further asserted that there was some confusion regarding Plaintiff seeking a jury trial on the issue of damages. However, it is clear from the record that the Plaintiff abandoned any request for a jury trial via its request and notice of damages hearing filed with the court on September 19, 2016. Further, Defendant and his counsel were clearly advised by the Clerk's office as well as the administrative staff that the hearing on damages was going forward as scheduled. After hearing extensive argument from both parties, the Court found that proper notice of the hearing was provided to Defendant DeClemente on October 4, 2016 and October 25, 2016. Further, there was no discernable reason for the Defendant DeClemente's absence from the proceedings. Moreover, the Court found that Defendant DeClemente, by and through his counsel, was afforded significant time in which to pursue discovery on damages. Defendant DeClemente also had the opportunity to elicit deposition testimony from Plaintiff's damages witnesses, namely G. Murrell Smith and Art Brabham, and did, in fact, depose both of these individuals prior to the hearing. In light of these facts, the Court proceeded with the damages hearing on November 1, 2016 by hearing testimony from witnesses for the Plaintiff, Art Brabham and G. Murrell Smith. The Court did, however, in an abundance of caution offer the Defendant the opportunity to supplement the record and request to reconvene the hearing at a later date so that Defendant DeClemente could attend and present any additional evidence. The Defendant was given five (5) days from the date of the hearing to advise the Court of his desire to supplement the record with any additional witnesses so that the matter could be reconvened, if necessary.

The first witness called by Plaintiff on November 1, 2016 was Art Brabham, CPA. Mr. Brabham testified as to his education, training, experience and certification as a Certified Valuation Analyst and Enrolled Agent as well as his experience as an expert witness on economic damages in South Carolina. Mr. Brabham then testified as to his knowledge of the Plaintiff's losses in this

action and detailed how he completed his economic analysis of Plaintiff's losses. Plaintiff's counsel thereafter sought to qualify Art Brabham, CPA as an expert on the calculation and valuation of the damages suffered by the Plaintiff. Defense counsel was afforded the opportunity to cross-examine Mr. Brabham on his qualifications and knowledge of Plaintiff's losses. The Court then heard arguments from counsel. After hearing these arguments and considering the qualifications and experience of Art Brabham, the Court qualified Art Brabham as a Certified Valuation Analyst and an Economic expert witness for the purpose of rendering an expert opinion as to the damages suffered by the Plaintiff.

Plaintiff's counsel thereafter elicited testimony from Mr. Brabham. The Court was provided with a detailed written report and a summary of Mr. Brabham's opinions and conclusions.[6] Mr. Brabham testified as to the three separate methods he employed to calculate the economic loss suffered by Plaintiff: (1) capitalization of net cash flow to equity holders; (2) direct valuation of equity by discounted cash flows method; and (3) market value comparison. Mr. Brabham ultimately came to the conclusion that Plaintiff sustained a total loss of $875,144.00. This amount is comprised of the valuation of the loss suffered by omission of the sales tax liability owed on the purchase date ($100,644.00) and the valuation of the loss suffered by the overstatement of the value of the business ($774,500.00). Moreover, Mr. Brabham testified that Plaintiff sustained actual loss as Plaintiff paid the South Carolina Department of Revenue the sales tax liability ($100,644.00) owed by the business after purchase. Mr. Brabham also testified that Plaintiff showed a loss of over $900,000.00 on their tax returns as a result of the overstatement of the value of the business. Lastly, Mr. Brabham testified that the damages suffered by Plaintiff were the result of the Defendant's conduct. Defense counsel was then given the opportunity to cross

[6] The report drafted by Plaintiff's expert, Art Brabham, was admitted into evidence at the November 1, 2016 hearing as Plaintiff's Exhibit No. 1.

examine Mr. Brabham on his opinions and conclusions and did so. Mr. Brabham further testified on cross examination that the Plaintiffs were "losing their shirts" on the Charleston operation because they "overpaid" for the business due to the Defendant's misrepresentation of the business valuation and underrepresentation of the outstanding tax liabilities. Defense counsel also elicited testimony from Mr. Brabham about past services provided to Plaintiff. The Court finds the testimony of Mr. Brabham credible and persuasive on the issue of damages.

Plaintiff's counsel then called Murrell Smith, owner of ATMES, to the stand to testify on behalf of ATMES. Mr. Smith testified as to his position in the ATMES Company. Mr. Smith further testified regarding the purchase of Abacare stocks from Defendant DeClemente. Mr. Smith stated that he and his business partner are still making payments on the $650,000.00 note they signed to purchase Abacare. Mr. Smith further requested that the Court enter an Order of Judgment in the amount of $875,144.00 in favor of the Plaintiff and against Defendant DeClemente. Defense counsel was then given an opportunity to cross-examine Mr. Smith and did, in fact, do so. On cross examination, defense counsel elicited testimony from Mr. Smith that Plaintiff sold Abacare's assets to Long's Medical on December 30, 2009 for "somewhere between $560,000 and $600,000." The Court finds the testimony of Mr. Smith credible and persuasive.

At the conclusion of Mr. Smith's testimony, Plaintiff's counsel advised the Court that they had no further witnesses or documents to submit. Plaintiff requested that the Court enter an Order of Judgment in the amount of $875,144.00 in favor of the Plaintiff and against Defendant DeClemente. The Court adjourned the hearing upon the conclusion of Plaintiff's case to accommodate Defendant's request to supplement the record with additional testimony at a later date, if necessary.

The damages hearing reconvened on January 5, 2017. Plaintiff's counsel, James Smith,

Esq., was present at the hearing. Defendant DeClemente and his counsel, Cameron Marshall, Esq., were also present. At the outset of the hearing, Defense counsel once again objected to moving forward with the damages hearing on the basis that Plaintiff's counsel had not provided Defendant with subpoenaed documents requested from Art Branham. In response, Plaintiff's counsel notified the Court of its pending Motion to Quash the Subpoena and for Protective Order, filed December 28, 2016. This motion asks the Court to quash the subpoena issued by Defendant DeClemente to Art Brabham and protect the materials sought by Defendant. Defendant subsequently filed a Motion to Compel Subpoena Compliance on December 29, 2016. Neither of these motions were scheduled for hearing on January 5, 2017 or thereafter. Nor did the parties request a hearing on these motions prior to the January 5 damages hearing. The Court then inquired as to the nature of the documents and their relevance for the damages hearing. After considering the arguments of counsel, the Court resolved the motions and proceeded with the continuation of the damages hearing as scheduled and noticed.

The first defense witness was Defendant DeClemente who testified and was cross-examined regarding his case on damages. Mr. DeClemente testified that he has twenty-two (22) years of experience owning and managing durable medical equipment operations and that no damages calculation in excess of Abacare's tax debt and interest (totaling $100, 643.00) is defensible by a person possessing ordinary business knowledge and common sense. Defendant DeClemente further testified that he is entitled to a credit or "set-off" against damages as to any settlement amounts paid to Plaintiff by his Co-Defendants under the South Carolina Uniform Contribution Among Tortfeasors Act. However, Defendant DeClemente has failed to provide this Court with any calculations or figures setting forth the amount he believes he is entitled to as a set-off under the Act. In fact, Defendant Declemente has failed to offer this Court even a scintilla of

evidence that a monetary settlement was tendered to the Plaintiff by any of the parties dismissed by Consent Order. The Court is unable to ascertain, based upon the record and evidence presented by Defendant, the reason why Defendants, Hood & Selander, LLC and Donna E. Cash as Personal Representative of the Estate of Dorothy Connelly, were dismissed by consent.[7] In any event, Defendant DeClemente would not be entitled to a set-off pursuant to Section 15-38-50 of the Uniform Contribution Among Tortfeasors Act. See S.C. Code Ann. § 15-38-50 ("When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death, it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor."). Moreover, the purpose of a default damages hearing is to determine the amount of liability of the defaulting defendant. Wells Fargo Bank, N.A. v. Marion Amphitheatre, LLC, 408 S.C. 87, 90, 757 S.E.2d 557, 558 (Ct. App. 2014). The Circuit Court does not have the authority to determine the amount of liability or "percentage of fault" of any non-defaulting defendants who appeared in the lawsuit and resolved the claims against them. See S.C. Code Ann. § 15-38-15. The remainder of Mr. DeClemente's testimony was not relevant to the issue of Plaintiff's damages. The Court finds that nothing testified to by Mr. DeClemente provided a credible dispute or challenge to the testimony and evidence submitted by Plaintiff's expert, Art Brabham.

Defense counsel then called Jeff Reed, co-owner of the ATMES Company, to the stand. Mr. Reed testified that he relied upon the assessment conducted by Art Brabham to identify the total loss suffered by the Plaintiff. He also testified that he personally continues to make payments on the $650,000.00 note used to purchase Abacare. Mr. Reed further testified that the ATMES Company sustained a loss of $875,144.00 as a result of its transaction with Defendant. The

[7] Defendant W.E. Applegate, III as Personal Representative of the Estate of James B. Connelly was dismissed from the case by Judge Nicholson for lack of subject matter jurisdiction via written Order dated September 28, 2012.

Defendant concluded his case on damages at the end of Mr. Reed's testimony. At that time, the Court adjourned the hearing and took Plaintiff's Motion to Set Damages under advisement.

However, on January 24, 2017, Defendant filed a supplemental Motion to Consider Evidence of Damages, Adopt Proposed Order, and Reconvene Damages Hearing. In this motion, Defendant asks the Court to reconvene the damages hearing, determine settlement amounts paid by the co-defendants, adopt his proposed order on damages, and hear expert testimony from its Certified Public Accountant. Plaintiff filed a Memorandum in Opposition to Defendant's Motion on February 9, 2017, arguing that the motion is untimely, prejudicial, and without merit. On July 27, 2017, the Court conducted a hearing with counsel by telephone to address Defendant's Motion to Reconsider Evidence of Damages, Adopted Proposed Order, and Reconvene Damages Hearing.[8] The Court noted the belated nature of Defendant's request during the status conference and in the Form 4 Order issued on July 27, 2017. But, in an abundance of caution, allowed for the additional, expert testimony of Defendant's expert witness. The Court further ordered the parties to schedule the deposition of the expert at a mutually agreeable time on or before August 31, 2017.

On August 23, 2017, the Defendant filed an affidavit from its expert, Ronald H. Burkett, CPA, CVA. The parties took the deposition of Defendant's expert on September 14, 2017. The Court was provided with a copy of the deposition transcript on October 11, 2017. The Court has reviewed both the affidavit and deposition of Ronald H. Burkett, and finds that Mr. Burkett prepared a draft valuation of the common stock of Abacare for use by Defendant DeClemente on or about July 14, 2008. See Aff. Ronald Burkett. At his deposition, Mr. Burkett was asked to testify regarding his opinion as to the damage, if any, suffered by ATMES as a result of the stock purchase and assignment agreement entered into with Defendant DeClemente. Mr. Burkett

[8] Counsel consented to resolving the motion by telephone conference.

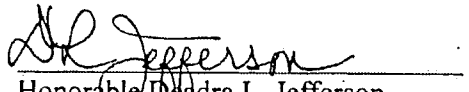
testified that if ATMES had knowledge that there was a potential sales tax issue with Abacare at the time of purchase (as Mr. Burkett opines they had or should have had), then ATMES paid fair market value for Abacare and did not sustain damage. Burkett Dep. 17:21-18:8, September 14, 2017. However, Mr. Burkett admitted that his opinion is based on the potential liability of Defendant DeClemente and is subject to change if ATMEs did not, in fact, have knowledge of the sales tax liability. Burkett Dep. 18:19-25. Moreover, Mr. Burkett testified he does not have an opinion as to whether or not ATMES suffered damages in this case, nor has he made a damages calculation. Burkett Dep. 22:21 – 23:1; 59:1-4. In light of these statements, the Court does not find the testimony of Mr. Burkett to be relevant or persuasive on the issue of damages.

The Court has fully and carefully considered the testimony of all of the witnesses presented, the arguments of counsel, and all documents and exhibits submitted to the Court. Upon careful and deliberate consideration of the evidence, the Court finds Defendant DeClemente to be in default as a result of Judge Nicholson's Order filed April 30, 2014. As a result of his default, Defendant DeClemente is deemed to have admitted the substantive allegations of the Complaint. The only remaining issue before this Court is the amount of damages to be awarded to the Plaintiff. The Court further finds the testimony and conclusions reached by Plaintiff's damages expert, Art Brabham, to be persuasive, credible and reliable. Moreover, the Court finds that Defendant DeClemente has failed to adequately challenge the testimony presented by Plaintiff. Defendant's expert, Ronald H. Burkett, testified that he does not have an opinion as to the damages in this case, nor does he have an opinion as to the damages calculation reached by Plaintiff's expert, Art Brabham. Burkett Dep. 30:17-31:9. In fact, the only evidence offered by Defendant DeClemente to contradict the Plaintiff's damages calculation is his own testimony that the Plaintiff's damages calculation is simply not defensible by a person possessing ordinary business knowledge and

common sense. The Court declines to rely solely upon the testimony of Defendant DeClemente as it is inherently self-serving and, more importantly, unsupported by the numerical evidence before the Court. The Court instead relies upon the damages calculation presented by Plaintiff's expert, Art Brabham. Accordingly, the Court awards Plaintiff Eight Hundred Seventy-Five Thousand One Hundred Forty-Four and 00/100 ($875,144.00) dollars in actual damages.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff is entitled to recover actual damages as Defendant DeClemente is in default. Plaintiff is therefore entitled to an award of Eight Hundred Seventy-Five Thousand One Hundred Forty-Four and 00/100 ($875,144.00) dollars in actual damages against Defendant DeClemente in the name of all his aliases to include Phillip DeClemente, Alec Rocford, and Phillip Goodpastor.

AND IT IS SO ORDERED!



Honorable Deadra L. Jefferson
Presiding Judge, Ninth Judicial Circuit

December 20, 2017
Charleston, SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	Case No.: 2011-CP-10-08011
	)	
Assistive Technology Medical Medical Equipment Services, LLC,	)	
	)	
Plaintiff,	)	
	)	**ORDER DENYING DEFENDANT'S MOTION TO AMEND JUDGMENT**
v.	)	
	)	
Phillip DeClemente,	)	
	)	
Defendant.	)	
	)	

FILED
2018 JAN 26 PM 3:04
CLERK OF COURT

Presiding Judge:	Hon. Deadra L. Jefferson
Counsel for Plaintiff:	James E. Smith, Esq.
Counsel for Defendant:	Cameron L. Marshall, Esq.
Date of Hearing:	November 1, 2016 January 5, 2017
Court Reporter:	Joyce Rueger

THIS MATTER is before the Court on Defendant Phillip DeClemente's Motion to Amend Judgment and be Relieved from Judgment pursuant to Rules 59 and 60 of the South Carolina Rules of Civil Procedure. This case initially came before the Court on November 1, 2016 and January 5, 2017, respectively, for a hearing on Plaintiff's Motion to Set Damages as to Defendant Phillip DeClemente. On December 21, 2017, the Court issued an Order of Judgment in favor of Plaintiff. Defendant was ordered to pay Eight Hundred Seventy-Five Thousand One Hundred Forty-Four and 00/100 ($875,144.00) dollars in actual damages. Defendant filed the instant Motion to Amend Judgment and be Relieved from Judgment on January 8, 2018.[1] Plaintiff filed a Response in

[1] The Order of Judgment was mailed to the parties on December 28, 2017 and received by Defendant on January 2, 2017. Defendant's Motion to Amend Judgment was thus timely filed and served upon Plaintiff. See Rule 59, SCRCP ("A motion to alter or amend the judgment shall be served no later than 10 days after receipt of written notice of the order.").

opposition to Defendant's Motion to Amend on January 22, 2018. Having considered the Defendant's Motion to Amend as well as the various interests balanced by the Court at the time of the ruling, the Defendant's Motion to Amend is hereby denied in accordance with Rules 59 and 60 of the South Carolina Rules of Civil Procedure.

Rule 59(e) of the South Carolina Rules of Civil Procedure states that "(a) motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of entry of the order." Rule 59(e), SCRCP. The purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to allow the parties liberal opportunity to move for the trial judge to reconsider matters properly encompassed in a decision on the merits, regardless of whether the issues and arguments have been previously presented. "A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (emphasis in original). "A party cannot use a motion to reconsider to present an issue he could have raised prior to judgment but did not." Anderson Memorial Hosp., Inc. v. Hagen, 313 S.C. 497, 498, 443 S.E. 2d 399, 400 (Ct. App. 1994) (citing C.A.H. v. L.H., 315 S.C. 389, 434 S.E. 2d 268 (1993)). See Arnold v. State, 309 S.C. 157, 172–73, 420 S.E.2d 834, 842 (1992).

Defendant asks the Court to amend its Order of Judgment under Rule 59, SCRCP on the basis that the judgment entered against him was previously satisfied by a Full and Final Release executed between the parties on July 10, 2009. However, the Defendant has not presented any novel facts, arguments, or theories in support of this request. Nor has Defendant highlighted any portion of the record that this Court may have misunderstood, failed to fully consider, or failed to

rule on. To the contrary, the Court has considered and ruled upon this very argument by Defendant on multiple occasions. Indeed, the Defendant has contested the default posture of this case since his initial filing on August 10, 2012 wherein he attached the Full and Final Release in support of his defense. Judge Nicholson considered the arguments as to default, including the Full and Final Release, and nevertheless entered default judgment against Defendant on April 24, 2014.[2] The Defendant has since continued to argue against default judgment at every hearing before the Court. The instant Motion to Amend Judgment is merely the latest effort by Defendant to have the entry of default against him vacated. In response, this Court once again reiterates that it does not have the jurisdiction to overturn the default decision rendered by Judge Nicholson on April 24, 2014. See, e.g., Enoree Baptist Church v. Fletcher, 287 S.C. 602, 604, 340 S.E.2d 546, 547 (1986) ("One Circuit Court Judge does not have the authority to set aside the order of another."). Defendant is therefore not eligible for relief from judgment under Rule 59, SCRCP.

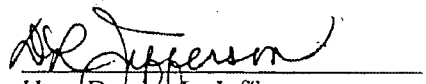
Alternatively, the Defendant asks the Court to relieve him from its Order of Judgment pursuant to Rule 60(b) of the South Carolina Rules of Civil Procedure. Rule 60(b) allows the Court to relieve a party from a final judgment, order, or proceeding on the basis of mistake, inadvertence, surprise, or excusable neglect and/or fraud, misrepresentation or other misconduct of an adverse party. Rule 60(b) also provides for relief when the judgment had been satisfied or is void. Defendant argues that Rule 60(b) is applicable to his case because the Order of Judgment was

[2] Defendant DeClemente filed a Motion for Reconsideration of Judge Nicholson's April 24, 2014 Order. Defendant's Motion for Reconsideration was denied by Order dated May 3, 2014. Defendant DeClemente then filed an appeal with the Court of Appeals to challenge Judge Nicholson's May 30, 2014 ruling. The South Carolina Court of Appeals denied Defendant DeClemente's appeal by written order dated November 13, 2014 on the basis that Judge Nicholson's order is not immediately appealable because the "circuit court has not yet made an award of damages." The Remittitur was issued on November 13, 2014.

rendered as a result of mistake, inadvertence, fraud, and/or excusable neglect. However, Defendant made these very same arguments under Rule 60(b) before Judge Nicholson at a December 16, 2012 hearing and in corresponding motions and briefs. Judge Nicholson issued a ruling April 24, 2014 whereby he expressly rejected these arguments and held Defendant in default for failing to timely answer the Complaint. The present Motion to Amend is another attempt by Defendant to rehash the same arguments previously considered and ruled upon by Judge Nicholson. As aforementioned, this Court lacks the authority to reverse or modify Judge Nicholson's findings. See State ex. Rel. Medlock v. Love Shop, LTD, 286 S.C. 486, 334 S.E.2d 528, 529 (Ct. App. 1985). Defendant thus cannot obtain relief under South Carolina Rule of Civil Procedure 60(b) either.

For the foregoing reasons, the Court hereby denies Defendant's Motion to Amend Judgment and be Relieved from Judgment.

IT IS SO ORDERED.



Hon. Deadra L. Jefferson
Presiding Judge
Ninth Judicial Circuit

January 25, 2018
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	
Phillip DeClemente, a/k/a Alec Rochford,	)	Docket No. 2015-CP-10-3325
	)	
Plaintiff,	)	
	)	
v.	)	**ORDER**
	)	
Assistive Technology Medical Equipment Services, LLC; Jeffery Reed; Murrell G. Smith,	)	
	)	
Defendants.	)	

FILED
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JULIE J. ARMSTRONG
CLERK OF COURT

This order memorializes several prior decisions. The original rulings were made during a hearing conducted February 19, 2016. There were also two Form 4s filed March 3, 2016.

*

Plaintiff filed a complaint stating several causes of action. Defendants responded with a motion alleging various grounds for dismissal including the statute of limitations.

In January of 2016 this Court issued an order dismissing five of Plaintiff's claims—the first cause of action through the fifth. (1/14/16 Form 4). Plaintiff responded by filing a motion to amend the order of dismissal and requesting leave to amend the complaint. (1/25/16 Mot.).

The court conducted a hearing February 19, 2016. Attorney Cameron Marshall attended for Plaintiff. Attorney James Smith attended for Defendants.

As indicated at the hearing, the Court is altering its January 2016 order. The motion to dismiss is denied as to Plaintiff's first cause of action. Otherwise, the prior order stands.

Plaintiff's first cause of action alleges Defendants have breached an agreement with Plaintiff regarding the sale of Plaintiff's interest in a business. The complaint describes the

Rwd/1

underlying agreement as a bill of sale and promissory note calling for monthly installment payments. (Complaint p.2, ¶13 & p.3, ¶19). The first payment was due in July of 2009. (*Id.*p.3, ¶20). The last payment was due in March of 2013. (*Id.*p.3, ¶21).

Plaintiff's first cause of action alleges Defendants have not made payments since September of 2011. (*Id.*p.3, ¶22). Plaintiff also asserts additional breaches of the agreement. These involve a payment related to a non-compete clause, (*Id.*p.4, ¶29), an allegation that Defendants wrongfully seized part of the proceeds from the sale of an option to buy real estate, (*Id.*p.4, ¶¶30-32), and the alleged misappropriation of a vehicle. (*Id.*pp.4-5, ¶¶33-37).

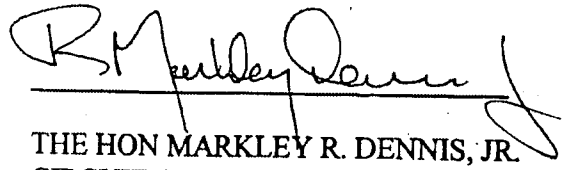
The Court finds this cause of action may not be dismissed at the initial pleading stage. The analysis on a motion to dismiss is confined to the allegations of the complaint; thus, the complaint must itself demonstrate the statute of limitations has run for dismissal to be appropriate. *Brown v. Lexington County*, 283 S.C. 27, 28–29, 320 S.E.2d 498, 499 (Ct. App. 1984) (affirming dismissal where the complaint revealed on its face that the statute of limitations had run). The first cause of action concerns an agreement with a maturity date in March of 2013. Plaintiff initiated this lawsuit in June of 2015; within three years of the maturity date. Although the complaint indicates payments have not been made since 2009—more than three years before this lawsuit began—the complaint does not indicate on its face that the statute of limitations would bar claims related to repeated breaches of this obligation.

The Court reiterates its instruction from the hearing that its decision is based solely on the complaint. The motion to dismiss was not converted to a motion for summary judgment. This order does not preclude a future decision on summary judgment.

The Court orally ruled plaintiff could amend his first cause of action. Plaintiff did so on March 22, 2016. All arguments not specifically addressed in this order are denied.

Rmd 2

IT IS SO ORDERED!



THE HON MARKLEY R. DENNIS, JR.
CIRCUIT COURT JUDGE
NINTH JUDICIAL CIRCUIT

May 16, 2018

Chas., South Carolina

STATE OF SOUTH CAROLINA,)
)
COUNTY OF CHARLESTON)
)
ASSISTIVE TECHNOLOGY MEDICAL)
EQUIPMENT SERVICES, LLC
Plaintiff,)
)
vs.)
)
HOOD & SELANDER, CPAS, LLC, DONNA)
C. CASH, AS PERSONAL)
REPRESENTATIVE OF THE ESTATE OF)
DOROTHY A. CONNELLY, W.E.)
APPLEGATE, III, AS PERSONAL)
REPRESENTATIVE OF THE ESTATE OF)
JAMES B. CONNELLY, KIMBERLY CUCE,)
PHILLIP DECLEMENTE,)
Defendants.)

IN THE COURT OF COMMON PLEAS

SUMMONS

FILE NO. 2011-CP-10-8011

FILED
2011 OCT 31 PM 3:57
JULIE J. ARMSTRONG
CLERK OF COURT
BY

TO THE DEFENDANT ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

Columbia, South Carolina

Dated: October 31, 2011

Plaintiff/Attorney for Plaintiff

Address: 1422 Laurel Street, Columbia, SC 29201

SCCA 401 (5/02)

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT

Assistive Technology Medical Equipment Services, Inc.,
Plaintiff,

vs.

Hood & Selander, CPAS, LLC, Donna C. Cash, as Personal Representative of the Estate of Dorothy A. Connelly, W.E. Applegate, III, as Personal Representative of the Estate of James B. Connelly, Kimberly Cuce, Phillip DeClemente,

Defendants.

Civil Action No.: 2011-CP-10-8011

COMPLAINT
(Jury Trial Requested)

FILED
2011 OCT 31 PM 3:57
JULIE J. ARMSTRONG
CLERK OF COURT
BY

The Plaintiff, Assistive Technology Medical Equipment Services, LLC (hereinafter ATMES), hereby asserts the following Complaint against Defendants, Hood & Selander, CPAS PA, Donna C. Cash, as Personal Representative of the Estate of Dorothy A. Connelly, W.E. Applegate, III, as Personal Representative of the Estate of James B. Connelly, Kimberly Cuce and Phillip DeClemente and avers as follows:

PARTIES

1. The Plaintiff, ATMES, is a corporation incorporated under the laws of South Carolina and has its principal place of business located in Sumter County, State of South Carolina.

2. Upon information and belief, Hood & Selander, CPAS, LLC (hereinafter: Hood and Selander) is a corporation incorporated under the laws of South Carolina and has its principal place of business located in Charleston County, State of South Carolina.

3. Upon information and belief, the Defendant Donna C. Cash, as Personal Representative of the Estate of Dorothy A. Connelly is a citizen and resident of Charleston County, State of South Carolina.

4. Upon information and belief, the Defendant W.E. Applegate, III, as Personal Representative of the Estate of James B. Connelly is a citizen and resident of Charleston County, State of South Carolina.

5. Upon information and belief, the Defendant Kimberly Cuce's was last known to reside in Sumter County, and therefore Ms. Cuce is a citizen and resident of Sumter County, State of South Carolina.

6. Upon information and belief, the Defendant Phillip DeClemente is a citizen and resident of Charleston County, State of South Carolina.

7. This Court has personal jurisdiction over the parties and subject matter jurisdiction over this action.

8. Venue in this action is proper in this Court.

GENERAL ALLEGATIONS

9. Plaintiff realleges paragraphs 1 through 8 as if fully stated herein.

10. A Stock Purchase and Assignment Agreement (the "Agreement") for the remaining shares of common stock of Abacare Home Medical, Inc. (the "Corporation") was executed November 7, 2008 by and between the Estate of Dorothy A. Connelly (the "Seller"), Phillip L. DeClemente ("Assignor"), and Assistive Technology Medical Equipment Services, LLC, (the "Purchaser").

11. At the time the Agreement was executed, the Seller owned one hundred four (104) shares of the Corporation's outstanding common stock (the "Stock").

12. The purchase price for the Stock paid by the Plaintiff ATMES at closing was Eight Hundred Nine Thousand, Five Hundred and No/100 ($809,500.00) Dollars (the "Purchase Price").

13. The purchase price for the Stock paid by the Plaintiff was based on a host of considerations, including Corporation's profitability, assets and liabilities.

14. Paragraph Four (4)(e) of the November 7, 2008 Agreement, Material Omissions or Nondisclosure provides in pertinent part:

> "Seller's representations and warranties, and all statements, certificates, schedules, documents or other information furnished or to be furnished by the Seller to the Purchaser pursuant to this Agreement are true, **correct and complete in all material respects**, and neither contain nor will contain any untrue statement of a material fact or omit nor will omit to state any material facts necessary to make the statements contained therein not misleading." (emphasis added).

15. Unbeknownst to the Plaintiff, Abacare Home Medical, Inc. had been consistently understating to the South Carolina Department of Revenue sales taxes at the time the Agreement was executed on November 7, 2008.

16. A Shareholder Meeting of Abacare Home Medical, Inc. was held on July 24, 2007 for the purposes of discussing: "the bookkeeping, financial health of the company and various other company issues."[1] Dorothy A. Connelly, Phillip DeClemente and David E. Selander were in attendance of the July 24, 2007 Shareholder Meeting.

17. According to the minutes of the July 24, 2007 Shareholder Meeting, the attendees devoted significant time and attention to the issue of Sales Taxes. In fact, "Sales Taxes" was one of the eight topics of discussion appearing in bold type in the minutes of the meeting.

18. The minutes provide in pertinent part:

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[1] July 31, 2007 Memo of written minutes of the Abacare Home Medical Shareholder Meeting prepared by Hood & Selander, CPAS PA **(Attached hereto as Exhibit A)**

> "David noted that the taxable sales reported on the June sales tax forms appeared **significantly understated**. David stressed the importance to report as accurately as possible the taxable sales on the monthly forms...David advised that Abacare should set aside a reserve in case of an audit. If an audit determines the company should use sales rather than collections, then Abacare could owe a substantial amount of tax, penalties and interest. David **noted last meeting, and repeated this meeting**, that a system needs to be set up as soon as possible that will support the gross sales number posted on the sales tax returns. This information will be needed in case of an audit. Finally, David noted that a couple of sales tax returns since the last shareholder meeting were filed and paid late. There is a penalty up to 25% of the tax for late filing and payment."[2] (emphasis added.)

19. Defendants failed to disclose to the Plaintiff at the time of the sale unpaid sales taxes to the South Carolina Department of Revenue in the amount One Hundred Thousand Three Hundred Twenty and 41/100 ($100,320.41) Dollars.

20. The Defendants failed to disclose the above-mentioned tax liability prior to the execution of the Stock Purchase Agreement on November 7, 2008.

21. The above-mentioned tax debt owed to the South Carolina Department of Revenue is and was material to the Stock Purchase and Assignment Agreement.

22. These debts were incurred by the Seller, the Estate of Dorothy Connelly, prior to the execution of the Stock Purchase Agreement.

23. The Seller Represented and Warranted to the Purchaser that the documents and information furnished to the Purchaser was "correct and complete in all material respects". This was not the case.

24. The debt to the South Carolina Department of Revenue was incurred by the Seller, not the Purchaser. Therefore, the Seller must pay the debt owed.

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[2] July 31, 2007 Memo of written minutes of the Abacare Home Medical Shareholder Meeting under the heading Sales Taxes.

25. Furthermore, the tax liability was not contemplated by the business valuation, which occurred prior to the execution of the Stock Purchase and Assignment Agreement.

26. If the tax liability had been included in the valuation of the business, the purchase price would have been drastically lower than Eight Hundred Nine Thousand, Five Hundred and No/100 ($809,500.00) Dollars.

27. Upon information and belief, the Defendants negligently and recklessly prevented the Plaintiff from learning about the tax liability, thereby keeping the purchase price artificially high.

28. Subsequent the execution of the Stock Purchase and Assignment Agreement November 7, 2008, W.E. Applegate, III, as Personal Representative of the Estate of James B. Connelly, agreed to a plan for repayment of the unpaid sales taxes owed to the South Carolina Department of Revenue in the amount One Hundred Thousand Three Hundred Twenty and 41/100 ($100,320.41) Dollars.

29. W.E. Applegate, III failed to pay the moneys owed.

FOR A FIRST CAUSE OF ACTION
(Breach of Contract as to Donna C. Cash,
Personal Representative of the Estate of Dorothy A. Connelly)

30. Paragraphs 1 through 29 are incorporated by reference as if set forth verbatim.

31. The Defendant Donna C. Cash, as Personal Representative of the Estate of Dorothy A. Connelly, executed the November 7, 2008 Stock Purchase and Assignment Agreement wherein as "Seller" she warranted and represented to the Plaintiff "Purchaser": "all statements, certificates, schedules, documents or other information furnished or to be furnished

by the Seller to the Purchaser pursuant to this Agreement are true, correct and complete in all material respects..."

32. The Defendant failed to disclose the above-mentioned indebtedness for unpaid sales taxes to the South Carolina Department of Revenue in the amount One Hundred Thousand Three Hundred Twenty and 41/100 ($100,320.41) Dollars.

33. Pursuant to the terms of the November 7, 2008 Stock Purchase And Assignment Agreement, Defendant's failure to disclose this information amounts to a Material Omission or Nondisclosure.

34. Plaintiff is informed the Defendant's material omission or nondisclosure constitutes a breach of the Agreement, and thereby is in Default pursuant to the contract, including paragraph 9 of the Agreement.

35. In the event of Default, Paragraph 9 and Paragraph 11 of the Agreement provide the following:

> "**9. Default**. If either of the parties hereto fails to meet his or her obligations hereunder, he or she, as the case may be, shall be deemed in default and the non defaulting party shall have the right to seek damages and/or specific performance or such other legal remedies as may be allowed by law."
>
> "**11. Attorneys' Fees**. If either party brings or commences any legal action or proceeding to enforce any of the terms of this Agreement (or for damages by reason of an alleged breach of this Agreement), the prevailing party, if any, in such action shall be entitled to recover from the non-prevailing party all reasonable attorneys' fees that may have been incurred, including any and all costs and expenses incurred in enforcing, perfecting and executing such judgment, and including all costs of appeal."

36. As a direct and proximate result of the Defendant's wrongful breach of contract, Plaintiff has incurred and will incur damages to be determined by the trier of fact.

37. Plaintiff was deprived of the benefit of the bargain and has suffered damages directly flowing from the breach of the kind to arise and flow from such a breach.

38. The Plaintiff is, therefore, entitled to judgment against the Defendant and reasonable attorney's fees and costs pursuant to the Agreement.

FOR A SECOND CAUSE OF ACTION
(Breach of Contract as to W.E. Applegate, III,
Personal Representative of the Estate of James B. Connelly)

39. Paragraphs 1 through 38 are incorporated by reference as if set forth verbatim.

40. Subsequent the execution of the Stock Purchase and Assignment Agreement November 7, 2008, W.E. Applegate, III, as Personal Representative of the Estate of James B. Connelly, agreed to a plan for repayment of the unpaid sales taxes owed to the South Carolina Department of Revenue in the amount One Hundred Thousand Three Hundred Twenty and 41/100 ($100,320.41) Dollars.

41. W.E. Applegate, III failed to pay the moneys owed.

42. As a direct and proximate result of the Defendant's wrongful breach of contract, Plaintiff has incurred and will incur damages to be determined by the trier of fact.

43. Plaintiff was deprived of the benefit of the bargain and has suffered damages directly flowing from the breach of the kind to arise and flow from such a breach.

44. The Plaintiff is, therefore, entitled to judgment against the Defendant and reasonable attorney's fees and costs pursuant to the Agreement.

FOR A THIRD CAUSE OF ACTION
(Fraud and Deceit as to All Defendants)

45. Paragraphs 1 through 44 are incorporated by reference as if set forth herein verbatim.

46. The Defendants represented in writing, and by their words and acts, that they had furnished accurate and complete information to the Plaintiff, information which

Defendants claimed was not misleading regarding the company's profitability, assets and liabilities.

47. The representations made by the Defendants to the Plaintiff regarding Abacare Home Medical, Inc.'s profitability, assets and liabilities were false.

48. The representations made by the Defendants were material; the representations influenced the Plaintiff in making the decision to enter into the agreement with the Defendants.

49. The Defendants either knew that the representations were false, or the Defendants made the representations with a reckless disregard of its truth or falsity, as evidenced by the minutes of the July 24, 2007 Shareholder Meeting:

> "David noted that the taxable sales reported on the June sales tax forms appeared **significantly understated**. David stressed the importance to report as accurately as possible the taxable sales on the monthly forms...David advised that Abacare should set aside a reserve in case of an audit. If an audit determines the company should use sales rather than collections, then Abacare could a substantial amount of tax, penalties and interest. David **noted last meeting, and repeated this meeting**, that a system needs to be set up as soon as possible that will support the gross sales number posted on the sales tax returns. This information will be needed in case of an audit. Finally, David noted that a couple of sales tax returns since the last shareholder meeting were filed and paid late. There is a penalty up to 25% of the tax for late filing and payment."[3] (emphasis added.)

50. The Defendants intended for the Plaintiff to act on the Defendants' representation.

51. The Plaintiff did not know that Defendants had failed to disclose a sales tax liability in the amount of One Hundred Thousand Three Hundred Twenty and 41/100 ($100,320.41) Dollars, information the Plaintiff could not have known through its own due diligence. Plaintiffs relied upon the terms of the Agreement whereby the Defendants warranted

[3] July 31, 2007 Memo of written minutes of the Abacare Home Medical Shareholder Meeting under the heading Sales Taxes.

that all of the information furnished to the Plaintiff for the purpose of evaluating the profitability of the Abacare Home Medical Inc., was complete, accurate and not misleading.

52. The plaintiff suffered monetary losses as a direct and proximate result of the Plaintiff's reliance on the Defendants' misrepresentation to be determined by the trier of fact.

FOR A FOURTH CAUSE OF ACTION
(Negligence as to All Defendants)

53. Paragraphs 1 through 52 are incorporated by reference as if set forth herein verbatim.

54. Defendants owed a duty of care to the Plaintiff to provide the Plaintiff with accurate, and complete information in connection with the Agreement.

55. While the Plaintiff and Defendants were in the midst of evaluating the Corporation and negotiating its purchase price, the Defendants breached their duty owed to the Plaintiff by departing from professional standards of care, were thereby negligent, careless, grossly negligent, reckless and acted in violation of the duties owed to the Plaintiff in that they committed any or all of the following, which were departure from the prevailing professional standards of care.

a) In failing to provide the Plaintiff with accurate and complete accounting information in connection with the Agreement;

b) In failing to disclose the Defendants' tax liability to the Plaintiff for unpaid sales taxes owed to the South Carolina Department of Revenue in the amount One Hundred Thousand Three Hundred Twenty and 41/100 ($100,320.41) Dollars;

c) In failing to accurately evaluate the profitability, assets and liabilities of Abacare Home Medical, Inc., contemplated by the Agreement;

d) In failing to accurately state the profitability, assets and liabilities of Abacare Home Medical, Inc.;

e) In failing to take reasonable measures to address the tax liability, known to the Defendants long before the execution of the Agreement, including the Defendants' failure to arrange a repayment plan with the South Carolina Department of Revenue;

f) In such other particulars as may be ascertained through discovery procedures undertaken pursuant to the South Carolina Rules of Civil Procedure.

56. As a direct and proximate result of the negligence, carelessness, gross negligence, recklessness and departure from the professional standards of care by Defendants, Plaintiff has suffered and will continue to suffer monetary losses to be determined by the trier of fact.

FOR A FIFTH CAUSE OF ACTION
(Professional Negligence as to Hood & Selander, CPAS, LLC)

57. Paragraphs 1 through 56 are incorporated by reference as if set forth herein verbatim.

58. Defendant owed a duty of care to the Plaintiff to provide the Plaintiff with accurate and complete information in connection with the Agreement.

While the Plaintiff and Defendant were in the midst of evaluating the Corporation and negotiating its purchase price, the Defendant breached its duty owed to the Plaintiff by departing from professional standards of care, was thereby negligent, careless, grossly negligent, reckless and acted in violation of the duties owed to the Plaintiff in that it committed any of the following, which were departure from the prevailing professional standards of care. Under the accounting industry's standards, a Certified Public Accountant party to a transaction such as the one at issue in this case has a duty to:

a) prepare and sign off on tax returns that are accurate, complete and reflect the true financial status of the company. A CPA should not and normally would not sign a return that he or she knew to be incorrect;

b) to disclose to the Purchaser known tax liabilities of the company; to accurately report the gross and net income of the company;

c) disclose accurate and complete information necessary for a true and accurate business valuation based on accounting industry's standard practice and procedures;

d) prepare accurate and complete financial statements based on the accounting industry's standard practices and procedures;

59. David E. Selander of Hood & Selander, CPAS, LLC breached each of the above-described duties owed to the Plaintiff.

60. David E. Selander violated the accounting industry's standard practice and procedures by failing to prepare accurate and complete tax returns on behalf of Abacare Home Medical, Inc., tax returns that in part formed the basis of the Plaintiff's decision to purchase the business from the Defendants.

61. Mr. Selander knew or should have known that the documents he prepared related to Abacare Home Medical, Inc., and the information he provided, or failed to provide to Burkett Burkett & Burkett CPAs, LLC, would be relied upon by the Plaintiff regarding the purchase of the business.

62. Mr. Selander's failure to provide the proper information to Burkett Burkett & Burkett, and Mr. Selander's failure to report the overstatement of gross income and net income and properly disclose a significant tax liability on Abacare Home Medical, Inc.'s tax returns, amounts to professional negligence.

63. Mr. Selander's breach of the standard of care resulted in significant damage to the Plaintiff. The negligent misrepresentations of Mr. Selander, including his failure to disclose the overstatement of gross income and net income and the understatement of sales tax liability, created the appearance that the business was profitable when it was not.

64. As a direct and proximate result of the negligence, carelessness, gross negligence, recklessness and departure from the professional standards of care by the Defendant, Plaintiff has suffered and will continue to suffer monetary losses to be determined by the trier of fact.

FOR A SIXTH CAUSE OF ACTION
(Negligent Misrepresentation as to All Defendants)

65. Paragraphs 1 through 64 are incorporated by reference as if set forth herein verbatim.

66. Defendants falsely represented to the Plaintiff that they had in fact provided accurate and complete information that was not misleading regarding the company's profitability, assets and liabilities.

67. Defendants had a monetary interest in making these false statements to the Plaintiff for a host of reasons. By failing to disclose the above-mentioned indebtedness for unpaid sales taxes to the South Carolina Department of Revenue in the amount of One Hundred Thousand Three Hundred Twenty and 41/100 ($100,320.41) Dollars, the Defendants were able to grossly overstate the corporation's profitability thereby artificially inflating the purchase price.

68. Defendants owed a duty to the Plaintiff to provide the Plaintiff with accurate, and complete information in connection with the Agreement.

69. Defendants possessed expertise and special knowledge that would ordinarily make it reasonable for another person to rely on the Defendants' judgment with regard to the corporation's profitability, assets, and liabilities.

70. The Plaintiff justifiably relied upon the Defendants' misrepresentations.

71. The Plaintiff suffered monetary losses as a direct and proximate result of the Plaintiff's reliance on the Defendants' misrepresentation to be determined by the trier of fact.

FOR A SEVENTH CAUSE OF ACTION
(Promissory Estoppel as To All Defendants)

72. Paragraphs 1 through 71 are incorporated by reference as if set forth herein verbatim.

73. The Defendants promised, represented and assured the Plaintiff that all statements, documents and other information furnished for the purpose of completing the Stock Purchase and Assignment Agreement were true, correct, complete and not misleading.

74. The Defendants represented and assured the Plaintiff that they had not misled the Plaintiff by omitting material facts in the documents furnished for the purpose of completing the Stock Purchase and Assignment Agreement.

75. Defendants intended that the Plaintiff would act in response to the Defendants promises, and, in fact Plaintiff did act in response to the Defendants' promises by accepting the terms of the Stock Purchase Assignment Agreement, including the purchase price, based on the representations and warranties given by the Defendants.

76. The Plaintiff suffered monetary losses as a direct and proximate result of the Plaintiff's reliance on the Defendants' acts and representations in an amount to be determined by the trier of fact.

FOR A EIGHTH CAUSE OF ACTION
(Violation of S.C. Unfair Trade Practices Act as to Hood and Selander CPAS, LLC)

77. Paragraphs 1 through 76 are incorporated by reference as if set forth herein verbatim.

78. The acts and omissions of Hood and Selander represent unfair business practices, offend public policy, are immoral, unethical and oppressive.

79. Hood and Selander's acts impaired trade and commerce and directly and indirectly affect the people of this state.

80. Hood and Selander's acts are capable of repetition in the accounting industry and in other areas where Hood and Selander participates in business valuation, mergers and acquisitions.

81. Upon information and belief, repetition of the above-mentioned unfair acts has already occurred and the potential for repetition exists as Hood and Selander has refused to act on information of its failure to disclose the tax liability mentioned above.

82. As a direct and proximate result of Hood and Selander's actions, Plaintiff has suffered proximate and consequential damages in an amount to be determined by the trier of fact. Furthermore, Hood and Selander's unfair trade acts require treble damages and attorney's fees.

FOR AN NINTH CAUSE OF ACTION
(Civil Conspiracy - § 16-17-410 as to All Defendants)

83. Paragraphs 1 through 82 are incorporated by reference as if set forth herein verbatim.

84. Defendants maliciously conspired to harm the Plaintiff without legal justification or excuse and performed acts with the intent of injuring the Plaintiff for their benefit.

85. The natural and necessary consequence of the acts of all Defendants resulted in the harm and oppression of the Plaintiff as described above.

86. All Defendants had knowledge of the objective and purpose of the conspiracy to harm the Plaintiff and of the illegal and unfair nature of their own action and the actions of their co-conspirator. Moreover, each Defendant agreed to the commission of these wrongs with the intention to share in the fruits of the fraud.

87. David E. Selander of Hood & Selander provided incomplete information as a result of non-disclosure to Burkett Burkett & Burkett, Certified Public Accounts, P.A. (please see Exhibit A attached)

88. The Defendants knew that Abacare Home Medical, Inc. had overstated their sales as a result of understating their sales tax and that Abacare Home Medical, Inc. was indebted to the South Carolina Department of Revenue.

89. David E. Selander of Hood & Selander derived Abacare's net income from the company's sales figures, dismissing the sales tax liability.

90. All Defendants had knowledge of the objective and purpose of the conspiracy.

91. The Defendants among themselves conspired to injure the Plaintiff causing special damages. In this case, the Plaintiff relied upon the Defendants' portrayal of the company's financial well-being and purchased the corporation based on the scheme devised by the Defendants. In so doing, the Plaintiff unwittingly incurred the debt owed to the South Carolina Department of Revenue and suffered other significant financial hardship and damage.

92. As a direct and proximate result of this conspiracy, Plaintiff has incurred special damages as described herein, including financial losses, mental suffering, worry, and is entitled to recover from the Defendants, for the joint and several liability of this conspiracy, the precise amount of which is presently unknown and will be proved at trial.

JOINT AND SEVERAL LIABILITY

93. The Defendants are jointly and severally liable to the Plaintiff for all injuries and damages alleged herein and the Defendants are jointly and severally obligated to pay any judgment rendered for the Plaintiff in this action.

WHEREFORE, having fully set forth in its Complaint, Plaintiff respectfully prays for the following relief:

A. Judgment against the Defendants for damages in the full amount allowed by law;

B. Plaintiff recovers the costs of this suit, including but not limited to, any expert witness fees, together with reasonable attorneys' fees;

C. For such other and further relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED,

JAMES E. SMITH, JR., P.A.

By: _____

James E. Smith, Jr
Dylan W. Goff
E. Scott Winburn.
1422 Laurel Street
Columbia, South Carolina 29201
(803) 933-9800

Attorneys for Plaintiff

Columbia, South Carolina
October 31, 2011

EXHIBIT A

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)))	IN THE COURT OF COMMON PLEAS IN THE NINTH JUDICIAL CIRCUIT
Assistive Technology Medical Equipment Services, LLC, Plaintiff, vs. Hood & Selander, CPAS, LLC, Donna C. Cash, as Personal Representative of the Estate of Dorothy A. Connelly, W.E. Applegate, III, as Personal Representative of the Estate of James B. Connelly, Defendants.	)))))))))))))	Civil Action No.: 2011-CP-40- **AFFIDAVIT OF** ART BRADHAM

I, Art Bradham, being duly sworn under oath, declare that I am an adult person over the age of 18 years and that if called as a witness, I would competently testify to the following:

1. Unless otherwise noted, the statements in this affidavit are based upon my personal knowledge and experience.

2. I am competent to testify to the contents and details related in this affidavit.

3. I am a CPA with a Master of Taxation from Florida Atlantic University. I am also a Certified Valuation Analyst (CVA) and Enrolled Agent. My professional associations include the AICPA, SCACPA's, National Association of Tax Practitioners, National and SC Association of Enrolled Agents and I am admitted to practice before the US Tax Court.

4. I own my own CPA firm, *Art Bradham CPA PC*, located at 2 Law Range, Sumter, SC 29150.

5. From my education, experience and training, I am familiar with the accounting industry's standard practices and procedures relating to the valuation of businesses for the purposes of sale, and the duties owed by accountants to their clients and to third-parties in their conduct of business.

6. A Stock Purchase and Assignment Agreement for the remaining shares of common stock of Abacare Home Medical, Inc. was executed November 7, 2008 by and between the Estate of Dorothy A. Connelly (the "Seller"), Phillip L. DeClemente ("Assignor"), and Assistive Technology Medical Equipment Services, LLC, (the "Purchaser").

7. The purchase price for the Stock paid by the Plaintiff was based on a host of considerations including Abacare Home Medical's profitability, assets and liabilities.

8. Prior to the purchase of the business by the Plaintiff, the above-captioned Defendants, including David E. Selander of Hood & Selander, CPA, LLC, provided incomplete information as a result of non-disclosure to Burkett Burkett & Burkett, Certified Public Accountants, P.A. For example, the above-named Defendants knew that Abacare Home Medical, Inc. had overstated their sales as a result of understating their sales tax and was indebted to the South Carolina Department of Revenue. Subsequent examination by the SCDOR determined that the sales tax owed was some amount in excess of $100,000. I did not handle the sales tax examination so I am not sure of the exact amounts. The reason this is important is that Burkett et. al used net income, which was overstated, as the primary means of valuing Abacare Home Medical Inc.

9. Furthermore, David E. Selander of Hood & Selander, CPA, LLC, derived Abacare's net income from the company's sales figures, dismissing the sales tax liability and other considerations which would have dramatically lowered the net income figure relied upon by the Plaintiff.

10. Under the accounting industry's standards, a Certified Public Accountant party to a transaction such as the one at issue in this case has a duty to:

a. prepare and sign off on tax returns that are accurate, complete and reflect the true financial status of the company. A CPA should not and normally would not sign a return that he or she knew to be incorrect.

b. to disclose to the Purchaser known tax liabilities of the company; to accurately report the gross and net income of the company

c. disclose accurate and complete information necessary for a true and accurate business valuation based on accounting industry's standard practice and procedures;

d. prepare accurate and complete financial statements based on the accounting industry's standard practice and procedures;

11. From my review of the facts in this case, I believe David E. Selander breached each of the above-described duties owed to the Plaintiff.

12. From my review of the fact in this case, I believe that David E. Selander violated the accounting industry's standard practice and procedures by failing to prepare accurate and complete tax returns on behalf of Abacare, tax returns which in part formed the basis of the Plaintiffs decision to purchase the business from the Defendants.

13. Mr. Selander knew or should have known that the documents he prepared related to Abacare, and the information he provided, or failed to provide to Burkett Burkett & Burkett CPAs, LLC, would be relied upon by the Plaintiff regarding the purchase of the business.

14. Mr. Selander's failure to provide the proper information to the Burkett Burkett & Burkett, and Mr. Selander's failure to report the overstatement of gross income and net income and properly disclose a significant tax liability on Abacare's tax returns, amounts to professional negligence, or negligent misrepresentation.

15. Mr. Selander's breach of the standard of care resulted in significant damage to the Plaintiff. The negligent misrepresentations of Mr. Selander, including his failure to disclose the overstatement of gross income and net income and his known the understatement of sales tax liability, created the appearance that the business was profitable when it was not. The Plaintiff relied upon Mr. Selander's portrayal of the company's financial well-being and purchased the corporation according to the negligent misrepresentations of Mr. Selander.

FURTHER AFFIANT SAYETH NOT.

Executed on August 4____, 2011

Art Bradham

Art Bradham

SWORN to and subscribed before me

this 26th day of September, 2011

My commission expires: 4/23/2012

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)))	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CIVIL ACTION NO.: 2011-CP-10-8011
ASSISTIVE TECHNOLOGY MEDICAL EQUIPMENT SERVICES, LLC, Plaintiff, v. HOOD & SELANDER, CPAS, LLC, DONNA C. CASH, AS REPRESENTATIVE OF THE ESTATE OF DOROTHY CONNELLY, W.E. APPLEGATE, III, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JAMES B. CONNELLY, KIMBERLY CUCE, PHILLIP DECLEMENTE, Defendants.	)	**AMENDED ANSWER, COUNTERCLAIM AND CROSS-CLAIMS OF DEFENDANT PHILLIP DECLEMENTE**

FILED
2012 AUG 22 PM 1:48
JULIE J. ARMSTRONG
CLERK OF COURT

Defendant, Phillip DeClemente, by and through his undersigned counsel, files this Amended Answer, Counterclaim and Cross-Claims to Defendants Hood & Selander, CPAS, LLC, Donna C. Cash, as Personal Representative of the Estate of Dorothy Connelly and W.E. Applegate, III, as Personal Representative of the Estate of James B. Connelly as follows:

1. Defendant denies each and every allegation of the Complaint not hereinafter specifically admitted.

2. Defendant admits paragraph 1.

3. Defendant, upon information and belief, admits the allegations contained in paragraphs 2, 3, 4, 5, 6, 7 and 8 of the Complaint.

4. Answering paragraph 9, Defendant realleges his answers to paragraphs 1 through 8.

5. Defendant, upon information and belief, admits the allegations contained in paragraphs 10, 11, 12, 13 and 14 of the Complaint.

6. Defendant denies paragraph 15.

7. Defendant, upon information and belief, admits paragraphs 16, 17 and 18.

8. Defendant denies paragraphs 19, 20 and 21.

9. Defendant lacks sufficient information to admit or deny the allegations contained in paragraph 22.

10. Defendant, upon information and belief, admits the first sentence of paragraph 23 and denies the second sentence.

11. Defendant lacks sufficient information to admit or deny the first sentence of paragraph 24. The second sentence of paragraph 24 is denied.

12. Defendant denies the allegations contained in paragraphs 25, 26 and 27.

13. Defendant lacks sufficient information to admit or deny the allegations contained in paragraphs 28 and 29.

14. As to the first and second causes of action, stated in paragraphs 30-44, they do not pertain to Mr. DeClemente, and as such no response is required.

AS TO THE THIRD CAUSE OF ACTION

15. Answering paragraph 45 of the Complaint, Defendant realleges his answers to paragraphs 1 through 44.

16. Defendant admits the allegations contained in paragraph 46 of the Complaint as they pertain to himself, but lacks sufficient information to answer on behalf of the co-defendants.

17. Defendant denies paragraphs 47, 48, 49, 50, 51 and 52.

AS TO THE FOURTH CAUSE OF ACTION

18. Answering paragraph 53 of the Complaint, Defendant realleges his answers to paragraphs 1 through 52 of the Complaint as if fully set forth verbatim.

19. Defendant admits paragraph 54.

20. Defendant denies paragraphs 55 and 56.

AS TO THE FIFTH CAUSE OF ACTION

21. The allegations contained in the Fifth Cause of Action as found in paragraphs 57 through 64 of the Complaint do not pertain to this Defendant and therefore no response is required. To the extent paragraphs 57 through 64 of the Complaint may be construed to apply to this Defendant, those allegations are denied.

AS TO THE SIXTH CAUSE OF ACTION

22. Answering paragraph 65 of the Complaint, Defendant realleges his answers to paragraphs 1 through 64 of the Complaint as if fully set forth verbatim.

23. Defendant denies paragraphs 66 and 67.

24. Paragraph 68 contains a legal conclusion which Defendant is not required to admit or deny.

25. Defendant denies paragraphs 69, 70 and 71.

AS TO THE SEVENTH CAUSE OF ACTION

26. Answering paragraph 72 of the Complaint, Defendant realleges his answers to paragraphs 1 through 71 of the Complaint as if fully set forth verbatim.

27. Answering paragraphs 73 and 74 of the Complaint, Defendant seeks reference to the Purchase Agreement and denies any allegations which are inconsistent with the document.

28. Defendant denies paragraphs 75 and 76.

AS TO THE EIGHTH CAUSE OF ACTION

29. The allegations contained in the Eighth Cause of Action as found in paragraphs 77 through 82 of the Complaint do not pertain to this Defendant and therefore no response is required. To the extent any allegations contained in paragraphs 77 through 82 of the Complaint may be construed to apply to this Defendant, those allegations are denied.

AS TO THE NINTH CAUSE OF ACTION

30. Answering paragraph 83 of the Complaint, Defendant realleges his answers to paragraphs 1 through 82 of the Complaint as if fully set forth verbatim.

31. Defendant denies paragraphs 84, 85 and 86.

32. Defendant lacks sufficient information to admit or deny paragraph 87.

33. Defendant denies paragraph 88.

34. Defendant lacks sufficient information to admit or deny paragraph 89.

35. Defendant denies paragraphs 90, 91 and 92.

AS TO THE ALLEGATION OF JOINT AND SEVERAL LIABILITY

36. As to paragraph 93, Defendant denies any liability to Plaintiff.

37. Defendant denies the remaining allegations of the Complaint.

FURTHER ANSWERING THE COMPLAINT AND AS A FIRST AFFIRMATIVE DEFENSE

38. Plaintiff is not entitled to judgment as a matter of law because on July 10, 2009 Plaintiff executed a Full and Final Release (attached as Exhibit 1) which provides, in relevant part:

> [t]he undersigned do intend to and do hereby individually and for their heirs, executors, administrators, successors and assigns, release, acquit and forever discharge Phillip L. DeClemente as well as his agents, servants, successors, heirs, executors, administrators, personal representatives and all other persons, firms, corporations and associations or partnerships of and from any and all claims, actions, causes of action, demands, rights, damages, cost, loss of services, expenses and compensation whatsoever which the undersigned now has or which may have hereinafter accrue on account of or in any way growing out of any and all ownership interest or employment in any of the entities set forth above whether known or unknown, foreseen or unforeseen and any consequences thereof, resulting or to result from ownership of any of the Companies referenced-above, employment in or with any of the entities referenced-above, business relationship with any of the businesses or individuals referenced-above as well as any negotiation contracts or documents executed as a result of the sale of the business as referenced herein.

FURTHER ANSWERING THE COMPLAINT AND AS A SECOND AFFIRMATIVE DEFENSE

39. Prior to entering the Purchase Agreement Plaintiff knew or should have known of any tax liability complained of and therefore is barred from recovery.

FURTHER ANSWERING THE COMPLAINT AND AS A THIRD AFFIRMATIVE DEFENSE

40. Plaintiff had a due diligence duty prior to entering the Purchase Agreement and if the tax liability of which Plaintiff complains did exist at the time of the Purchase Agreement then Plaintiff should reasonably have discovered it at that time.

FURTHER ANSWERING THE COMPLAINT AND AS A FOURTH AFFIRMATIVE DEFENSE

41. The following relevant portions of the Purchase Agreement bar any recovery by Plaintiff:

> "Representations and Warranties of Purchaser. Purchaser represents and warrants to the Seller the following facts with the knowledge that Seller is selling the Stock in full reliance thereon: ...
>
> (d) Knowledge of Risk. Purchaser is aware of the substantial risks that he is accepting by his investment in the Stock. The Purchaser is aware that the Corporation is a small privately held company with an illiquid market for its shares and with no guaranteed return on its shares outstanding either through dividends, distributions, etc.
>
> (e) Financial Conditions. Purchaser is fully familiar with the financial conditions of the Corporation and has been provided with and has reviewed the financial statements, including but not limited to, balance sheets and income statements of the Corporation since inception of the Corporation including interim statements as well as the tax returns for the Corporation since its inception."

FURTHER ANSWERING THE COMPLAINT AND AS A FIFTH AFFIRMATIVE DEFENSE

42. As party to a purchase contract with Mr. DeClemente, any tort claims brought against DeClemente should be dismissed pursuant to the Economic Loss Doctrine.

FURTHER ANSWERING THE COMPLAINT AND AS A SIXTH AFFIRMATIVE DEFENSE

43. The Complaint fails to state a cause of action upon which relief can be granted and therefore should be dismissed pursuant to S.C.R.C.P. 12(b)(6).

FURTHER ANSWERING THE COMPLAINT AND AS A SEVENTH AFFIRMATIVE DEFENSE

44. Plaintiff is barred from recovery by the law of comparative negligence. If Plaintiff suffered any damages, which DeClemente denies, Plaintiff is more than fifty percent at fault in causing its own damages.

FURTHER ANSWERING THE COMPLAINT AND AS AN EIGHTH AFFIRMATIVE DEFENSE

45. If Plaintiff suffered any damages, which DeClemente denies, the damages were proximately caused by the actions of some other party or by circumstances beyond Mr. DeClemente's control.

FURTHER ANSWERING THE COMPLAINT AND AS A NINTH AFFIRMATIVE DEFENSE TO THE NINTH CAUSE OF ACTION – CIVIL CONSPIRACY

46. Plaintiff is barred from recovering for a wrongful act while simultaneously recovering for conspiracy to commit the wrongful act.

FURTHER ANSWERING THE COMPLAINT AND BY WAY OF COUNTERCLAIM AGAINST ASSISTIVE TECHNOLOGY MEDICAL EQUIPMENT SERVICES, LLC

47. Mr. DeClemente is a resident of Charleston County, South Carolina.

48. Assistive Technology Medical Equipment Services, LLC is a South Carolina Corporation conducting substantial business in Charleston County, South Carolina.

49. This court has personal and subject matter jurisdiction over the parties, and venue is appropriate.

FOR A FIRST COUNTERCLAIM
(Breach of Contract)

50. On June 30, 2009 Assistive Technology Medical Equipment Services, LLC (hereinafter A.T.M.E.S.) and Phillip DeClemente executed a Bill of Sale and Promissory Note in favor of Mr. D. DeClemente in the amount of Two Hundred Sixty-Five Thousand dollars ($265,000.00), plus interest at a yearly rate of twelve percent (12%). (See Exhibits 2 and 3)

51. At the time the Promissory Note was executed the total amount owed Mr. DeClemente pursuant to the payment amortization schedule was $330,382.59.

52. Valuable consideration was provided by each party.

53. The referenced documents constitute a contract between the parties.

54. The monthly payment agreed upon in the contract is in the amount of Seven Thousand Three Hundred Forty-One dollars and Eighty Four cents ($7,341.84).

55. The first payment was due Mr. DeClemente on July 30, 2009.

56. The maturity date of the Promissory Note is March 1, 2013.

57. As of the date of this filing, A.T.M.E.S. has not made a payment since October 2011.

58. A.T.M.E.S. is in default on the Promissory Note.

59. Counterclaimant has been damaged as a proximate result of A.T.M.E.S.'s contractual breach.

60. Mr. DeClemente has given written notice of Plaintiff's default in compliance with paragraph six of the Promissory Note.

61. At the time of this filing, A.T.M.E.S. is currently ten payments in arrears, for a total of Seventy-Three Thousand Four Hundred Eighteen dollars and Forty cents ($73,418.40).

62. Late fees on the delinquent payments, as of the time of this filing, total Three Thousand Six Hundred Seventy dollars and Ninety-Two cents ($3,670.92).

63. At the time of this filing, there are seven future monthly payments due under the terms of the Promissory Note.

64. Those payments are for the months September, 2012 through March, 2013.

65. Paragraph 6(B) of the Promissory Note provides for the acceleration of the entire amount due on the note in the event of A.T.M.E.S.'s default.

66. The accelerated amount due, at the time of this filing, is $51,392.88.

67. Paragraph 4 of the Bill of Sale contract between A.T.M.E.S. and Mr. DeClemente requires A.T.M.E.S. to provide Mr. DeClemente with use of a truck.

68. The referenced truck is a 2008 Chevrolet Silverado 2500HD.

69. Mr. DeClemente's money was used to make all payments on the truck.

70. In October 2011 A.T.M.E.S. disposed of the referenced truck in violation of its contract with Mr. DeClemente.

71. At the time of the truck's disposition, there was at least Ten Thousand dollars ($10,000.00) equity in the vehicle.

72. Mr. DeClemente is entitled to recover no less than Ten Thousand dollars ($10,00.00) for his lost equity in the truck.

72. As of the date of this filing, and subject to recalculation with the passage of time, Mr. DeClemente asks the court to award him Seventy-Three Thousand Four Hundred Eighteen dollars and Forty cents ($73,418.40) in arrearage, Three Thousand Six Hundred Seventy dollars and Ninety-Two cents ($3,670.92) in late fees, Fifty-One Thousand Three Hundred Ninety-Two dollars and Eighty-Eight cents ($51,392.88) for the balance of the amount due under the Promissory Note, Ten Thousand dollars ($10,000.00) for lost equity in the referenced truck, and all attorney's fees and costs associated with collection as provided in paragraph 6(D) of the Promissory Note.

FOR A SECOND COUNTERCLAIM
(Breach of Contract)

73. On July 10, 2009 A.T.M.E.S. executed a document entitled "Full and Final Release." (See Exhibit 1).

74. Mr. DeClemente provided valuable consideration in exchange for the Full and Final Release.

75. The Full and Final Release is a contract between the parties.

76. In the Full and Final Release, A.TM.E.S. agreed to permanently release Mr. DeClemente from any and all causes of action, both past and future.

77. The Full and Final Release, in part, states the following:

> [t]he undersigned do intend to and do hereby individually and for their heirs, executors, administrators, successors and assigns, release, acquit and forever discharge Phillip L. DeClemente as well as his agents, servants, successors, heirs, executors, administrators, personal representatives and all other persons, firms, corporations and associations or partnerships of and from any and all claims, actions, causes of action, demands, rights, damages, cost, loss of services, expenses and compensation whatsoever which the undersigned now has or which may have hereinafter accrue on account of or in any way growing out of any and all ownership

interest or employment in any of the entities set forth above whether known or unknown, foreseen or unforeseen and any consequences thereof, resulting or to result from ownership of any of the Companies referenced-above, employment in or with any of the entities referenced-above, business relationship with any of the businesses or individuals referenced-above as well as any negotiation contracts or documents executed as a result of the sale of the business as referenced herein.

78. Plaintiff has breached its contractual duty by filing suit against Mr. DeClemente in Civil Action No. 2011-CP-10-8011.

79. Counterclaimant DeClemente has been proximately damaged by A.T.M.E.S.'s breach of contract.

80. Mr. DeClemente seeks recovery of all damages, including costs and attorney's fees, proximately incurred as a result of Plaintiff's breach of contract.

FURTHER ANSWERING THE COMPLAINT
AND BY WAY OF CROSS-CLAIM
AGAINST DEFENDANT HOOD & SELANDER, CPAS, LLC

81. Mr. DeClemente is a resident of Charleston County, South Carolina.

82. Upon information and belief, Defendant Hood & Selander, CPAS, LLC (hereinafter "Hood & Selander") is a South Carolina Corporation having its principal place of business located in Charleston County, South Carolina.

83. This court has personal and subject matter jurisdiction over the parties, and venue is appropriate.

FOR A FIRST CROSS-CLAIM
(Indemnity)

84. Mr. DeClemente realleges the preceding paragraphs as if fully set forth verbatim.

85. Defendant Hood & Selander was hired by Abacare Home Medical, Inc. (later known as "Assistive Technology Medical Equipment Services, LLC" or "A.T.M.E.S.") to prepare accurate and complete tax returns and advise A.T.M.E.S.'s owners on issues of business valuation.

86. A.T.M.E.S. has brought an action against Phillip DeClemente alleging causes of action for breach of contract, fraud, negligence, negligent misrepresentation, promissory estoppel, and conspiracy, and Mr. DeClemente has denied all claims.

87. If A.T.M.E.S. has been damaged in any way, which Mr. DeClemente denies, then A.T.M.E.S.'s damages are the result of Hood & Selander's negligent acts and omissions, and not any fault of Mr. DeClemente.

88. Therefore, in the event Mr. DeClemente is found liable to A.T.M.E.S., Mr. DeClemente is entitled to indemnity from Hood & Selander.

FURTHER ANSWERING THE COMPLAINT AND BY WAY OF CROSS-CLAIM AGAINST DEFENDANT DONNA C. CASH, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DOROTHY A. CONNELLY

89. Mr. DeClemente is a resident of Charleston County, South Carolina.

90. Upon information and belief, Defendant Donna C. Cash, as Personal Representative of the Estate of Dorothy A. Connelly is a citizen and resident of Charleston County, State of South Carolina.

91. This court has personal and subject matter jurisdiction over the parties, and venue is appropriate.

FOR A SECOND CROSS-CLAIM
(Indemnity)

92. Mr. DeClemente realleges the preceding paragraphs as if fully set forth verbatim.

93. Between September 2005 and September 2008, Mr. DeClemente was an employee and agent of Mrs. Dorothy A. Connelly, and performed all of his job-related duties in accordance with her directives.

94. A.T.M.E.S. has brought an action against Phillip DeClemente alleging causes of action for breach of contract, fraud, negligence, negligent misrepresentation, promissory estoppel, and conspiracy, and Mr. DeClemente has denied all claims.

95. If A.T.M.E.S. has been damaged in any way, which Mr. DeClemente denies, then A.T.M.E.S.'s damages are the result of Mrs. Connelly's acts and/or omissions, and not any fault of Mr. DeClemente.

96. Therefore, in the event Mr. DeClemente is found liable to A.T.M.E.S., Mr. DeClemente is entitled to indemnity from The Estate of Dorothy A. Connelly.

FURTHER ANSWERING THE COMPLAINT
AND BY WAY OF CROSS-CLAIM
AGAINST DEFENDANT W.E. APPLEGATE, III,
AS PERSONAL REPRESENTATIVE OF
THE ESTATE OF JAMES B. CONNELLY

97. Mr. DeClemente is a resident of Charleston County, South Carolina.

98. Defendant W.E. Applegate, III, as Personal Representative of the Estate of James B. Connelly, is a citizen and resident of Charleston County, State of South Carolina.

99. This court has personal and subject matter jurisdiction over the parties, and venue is appropriate.

FOR A THIRD CROSS-CLAIM
(Indemnity)

100. Mr. DeClemente realleges the preceding paragraphs as if fully set forth verbatim.

101. Between September 2005 and March 2007, Mr. DeClemente was an employee and agent of Mr. James B. Connelly, and performed all of his job-related duties in accordance with Mr. Connelly's directives.

102. A.T.M.E.S. has brought an action against Phillip DeClemente alleging causes of action for breach of contract, fraud, negligence, negligent misrepresentation, promissory estoppel, and conspiracy, and Mr. DeClemente has denied all claims.

103. If A.T.M.E.S. has been damaged in any way, which Mr. DeClemente denies, then A.T.M.E.S.'s damages are the result of Mr. Connelly's acts and/or omissions, and not any fault of Mr. DeClemente.

104. Therefore, in the event Mr. DeClemente is found liable to A.T.M.E.S., Mr. DeClemente is entitled to indemnity from The Estate of James B. Connelly.

WHEREFORE, having fully answered the Plaintiff's complaint, Mr. DeClemente requests that the Court dismiss Plaintiff's claims against him, with prejudice; award him attorney's fees and the costs of the defense of this action; and, for such other relief as the Court deems just and proper. Further, Mr. DeClemente requests that the Court grant him judgment on his counterclaims against A.T.M.E.S, and on his cross-claims against Hood & Selander, The Estate of Dorothy A. Connelly and The Estate of James B. Connelly in the event Plaintiff's claims against him are not dismissed.

[SIGNATURE PAGE TO FOLLOW]

Cameron L. Marshall
7 Gamecock Avenue, Suite 707
Charleston, South Carolina 29407
(843) 795-2298
(843) 795-5081 fax
Attorney for Defendant Phillip L. DeClemente

August 21, 2012.

Charleston, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
Civil Action No.: 2011-CP- 10-8011

Assistive Technology Medical Equipment Services, LLC,
Plaintiff,

vs.

Hood & Selander, CPAS, LLC, Donna C. Cash, as Personal Representative of the Estate of Dorothy A. Connelly, W.E. Applegate, III, as Personal Representative of the Estate of James B. Connelly, Phillip DeClemente, Kimberly Cuce

Defendants.

AFFIDAVIT OF
PHILLIP DECLEMENTE

FILED
2013 DEC 30 PM 1:22
JULIE J. ARMSTRONG
CLERK OF COURT

I, Phillip DeClemente, being duly sworn under oath, declare that I am an adult person over the age of 18 years and that if called as a witness, I would competently testify to the following:

1. In response to Judge Nicholson's request at the hearing on December 16, 2013, I am writing this affidavit to supplement the affidavit I previously filed with my Memorandum and further address my psychiatric illnesses at the time my answer to Plaintiff's lawsuit was due on February 6, 2012.

2. In July 2010 Murrell Smith sent me an email and stated that if I turned over documents he wanted, he would honor the agreement between us not to sue.

3. In October 2011, I began having serious problems with my former business partners Jeff Reed and Murrell Smith because they stopped making the monthly payment they owed me for the sale of my business.

4. I was also involved in a private investigation business at that time and the partnership between David Leaird and me was deteriorating quickly.

5. As a result, my sources of income evaporated, my savings were depleted, and I began to lose everything I had worked for my whole life.

6. Due to the circumstances of the harassment from my ex-partner David C. Leaird, I had lost touch with reality, lost confidence in everyone including my attorneys and was no longer able to communicate and function normally.

7. That between the period of October 10, 2011 and November 18, 2011 Scott Winburn and his clients, Reed and Smith, requested numerous times that if I didn't sign an affidavit

against the other defendants that would assist the Plaintiff in their lawsuit. I was informed by Matthew Keller that the Plaintiffs had threatened to add me to the suit if I don't sign the affidavit.

8. That on November 11, 2011 I received an email from Matthew Keller stating:

"Murrell's attorney called and politely threatened they may add Phillip to the suit if I didn't return the affidavit."

This email was sent to Matthew Keller **after** the Plaintiff's filed suit on October 31, 2011.

9. Matthew Keller of the Mason Law Firm had been trying to assist me with some of the legal issues I was facing in 2011. On November 27, 2011 I sent Mr. Keller the following text message:

"I have lost my 18 year investment into EMS (Emergency Medical Services), lost all friends, have no family or communication with them, lost the place I loved to live. I can't even afford to get my belongings (from NC). I have no money, no gas in my vehicle, electricity has been turned off, landlord wants her money, repo man wants my car, bank want my house, ex-partners stopped my flow of money, phone will prob be shut off soon and WORSE of all, my attorney stole my last asset away from me and failed to get the truth out or have me exonerated. I don't sleep and I have to think about how bad life is all day and all night"

"So I don't talk to nobody because I have no idea how to respond or figure anything out anymore"

10. That because of the effects of David Leaird's harassment, I became completely unable to handle my affairs and a Power of Attorney was given to my father on March 23, 2011.

11. On January 6, 2012 I was served by Wayne Freeman with the Plaintiff's lawsuit along with a $2,000 check. A previous attempt by the Plaintiff's to serve me by mail in December 2011 had been unsuccessful because the Plaintiff's lawyers sent the documents to the wrong address.

12. On February 1, 2012 I received a message from attorney Keller stating that the Mason law firm had a conflict of interest and would not be able to represent me any longer.

13. On February 2, 2012 I blocked the Ravenel Bridge and attempted to drive off the bridge and harm myself.

14. I was taken into police custody on the bridge and involuntarily admitted to MUSC's psychiatric unit, where I remained until February 16, 2012.

15. The doctors wrote in their report:

"Two year history of increasing paranoia and believed other people were out to get him/stalk him.....Paranoia.....Delusions.....Insight significantly impaired.....Judgment significantly impaired."

16. I was again involuntarily hospitalized at the psychiatric unit from February 22, 2012 until March 6, 2012 when the doctors wrote that I was suffering "bipolar disorder with psychotic features.....insight and judgment were both significantly impaired."

17. That between September 26, 2011 and April 18, 2012 I was in constant communication with Scott Winburn of the James Smith law firm. During this period, my understanding was the Plaintiff's attorneys would work out an agreement that would not include me on the lawsuit.

18. That between January 6, 2012 and May 8, 2012 I was in constant communication with Scott Winburn, Murrell Smith, Jeff Reed. At no point did anybody explain to me or make sure I understood that there was a requirement to answer the complaint and that if I didn't, I might be held in default.

19. I hired attorney Cameron Marshall on May 9, 2012 and it was on that date that I was first informed that I could be held in default.

20. On May 14, 2012 Mr. Marshall informed the court and the other attorneys that he was representing me and would be defending the Plaintiff's motion for default.

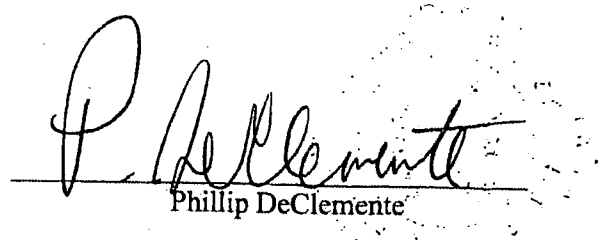
21. In August 2012 I filed my answer and counterclaims and I sued Plaintiff for their breach of contract, and they admit to the breach. They have never responded to the suit and I have moved for default judgment against them.

22. There was a slight delay in filing my responsive pleadings due to MUSC's failure to respond to my medical records request and the contractual requirement that Mr. Marshall give written notice to the Plaintiff of their contractual breach prior to me filing suit against them.

23. Because Murrell Smith and Jeff Reed executed a "Full and Final Release" document in my favor on July 10, 2009 I never believed it was legal for them to sue me.

FURTHER AFFIANT SAYETH NOT.

Executed on December 24, 2013



Phillip DeClemente

2011-8011

Cam Markham

SWORN to and subscribed before me

this 24 day of December, 2013

My commission expires: 3-12-19

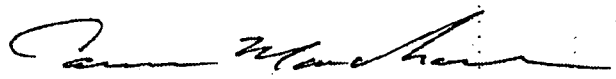
FILED
2013 DEC 30 PM 1:22
JULIE J. ARMSTRONG
CLERK OF COURT

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CIVIL ACTION NO.: 2015-CP-10-3325
PHILLIP DECLEMENTE, a/k/a ALEC ROCHFORD,	)	
Plaintiff,	)	
v.	)	**SUMMONS**
ASSISTIVE TECHNOLOGY MEDICAL EQUIPMENT SERVICES, LLC; JEFFERY REED; MURRELL G. SMITH; ART BRADHAM, CPA, PC; and ART BRADHAM,	)	
Defendants.	)	

FILED
2015 JUN 11 PM 2:24
JULIE J. ARMSTRONG
CLERK OF COURT

TO THE DEFENDANTS NAMED ABOVE:

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is herewith served upon you, and to serve your Answer to said Complaint upon the subscriber at his office at 7 Gamecock Avenue, Suite 707, Charleston, South Carolina, 29407, within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, the Plaintiff will apply to the Court for the relief demanded in the Complaint.



Cameron L. Marshall
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cameron@attorneymarshall.com
Attorney for Plaintiff

June 11, 2015
Charleston, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)))	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CIVIL ACTION NO.: 2015-CP-10- 3325
PHILLIP DECLEMENTE, a/k/a ALEC ROCHFORD, Plaintiff, v. ASSISTIVE TECHNOLOGY MEDICAL EQUIPMENT SERVICES, LLC; JEFFERY REED; MURRELL G. SMITH; ART BRADHAM, CPA, PC; and ART BRADHAM, Defendants.	)))))))))))))))	**COMPLAINT** (Jury Trial Requested)

FILED
2015 JUN 11 PM 2:24
JULIE J. ARMSTRONG
CLERK OF COURT

Plaintiff Phillip DeClemente, a/k/a Alec Rochford, complaining of the Defendants herein, alleges the following:

1. Plaintiff Phillip DeClemente was at all times relevant a resident of Charleston County, South Carolina.
2. Defendant Assistive Technology Medical Equipment Services, LLC (hereinafter A.T.M.E.S.) was at all times relevant a South Carolina corporation conducting substantial business in Charleston County, South Carolina.
3. Defendant Jeffery Reed was at all times relevant a resident of Sumter County, South Carolina and an owner, officer and agent of A.T.M.E.S.
4. Defendant Murrell G. Smith was at all times relevant a resident of Sumter County, South Carolina and an owner, officer and agent of A.T.M.E.S.
5. Defendant Art Bradham, CPA, PC, was at all times relevant a South Carolina corporation conducting substantial business in Charleston County, South Carolina.

6. Defendant Art Bradham was at all times relevant a resident of Sumter County, South Carolina and an owner, officer and agent of Art Bradham, CPA, PC.

7. This Court has jurisdiction over the parties and subject matter, and venue is appropriate.

FOR A FIRST CAUSE OF ACTION – Breach of Contract
(As to A.T.M.E.S., Jeffery Reed, and Murrell G. Smith)

8. Plaintiff re-alleges the preceding paragraphs as if fully set forth verbatim.

9. Plaintiff was an owner of a durable medical equipment (hereinafter "DME") company named Abacare Home Medical, Inc. (hereinafter "Abacare") based in Charleston, South Carolina.

10. Defendants Smith and Reed owned a DME company named Reliable Medical Equipment of South Carolina, Inc (hereinafter "Reliable").

11. Defendants Smith and Reed purchased Abacare from Plaintiff in November 2008 through the umbrella corporation, A.T.M.E.S., into which Reliable and Abacare merged.

12. After the sale of Abacare to A.T.M.E.S., Plaintiff became a 25% owner of A.T.M.E.S.

13. On June 30, 2009, Defendants A.T.M.E.S., Jeffery Reed, and Murrell G. Smith and Plaintiff Phillip DeClemente executed a Bill of Sale and Promissory Note in favor of Mr. DeClemente in the amount of Two Hundred Sixty-Five Thousand Dollars ($265,000.00), plus interest at a yearly rate of twelve percent (12%). (See Exhibits #1 and #2).

14. The Bill of Sale and Promissory Note were executed in exchange for Plaintiff's transfer of his ownership in A.T.M.E.S. to Defendants Reed, Smith and A.T.M.E.S.

15. At the time the Promissory Note was executed, it was agreed by all parties that the total amount owed to Plaintiff for his share of the company pursuant to the payment

amortization schedule was Three Hundred Thirty Thousand Three Hundred Eighty-Two Dollars and Fifty Nine Cents ($330,382.59).

16. At the time the Bill of Sale was executed, it was agreed upon by the parties that:

> "if at the end of the buyout period as set forth hereinabove, Smith and Reed remain as members and have an ownership interest in the Company then DeClemente shall be paid an additional Thirty Thousand Dollars over a six month period as a compliance bonus, interest paid at zero percent at the rate of Five Thousand and 00/100 Dollars per month and subject to DeClemente not having violated any of the terms of this Buy/Sell Agreement, the Confidentiality Agreement referenced herein and the Covenant Not to Compete referenced hereinabove and has not acted in any manner detrimental to the success of any of the companies referenced herein."
> (See Exhibit #2)

17. Valuable consideration was provided by each party.

18. The referenced documents constitute a contract between the parties.

19. The monthly payment due Plaintiff and agreed upon in the contract is in the amount of Seven Thousand Three Hundred Forty-One dollars and Eighty Four cents ($7,341.84) for forty-five (45) months.

20. The first payment was due Mr. DeClemente on July 30, 2009.

21. The maturity date of the Promissory Note is March 1, 2013.

22. As of the date of this filing, A.T.M.E.S. has not made a payment to Mr. DeClemente since September 2011.

23. Defendants A.T.M.E.S., Smith and Reed are in default on both the Promissory Note and their payment obligation under the non-compete agreement in the Bill of Sale.

24. Mr. DeClemente has given Defendants written notice of their default, in compliance with paragraph 6 of the Promissory Note.

25. Paragraph 6(B) of the Promissory Note provides for the acceleration of the entire amount due in the event of Defendants' default.

26. At the time of this filing, A.T.M.E.S. is currently eighteen payments in arrears, for a total of One Hundred Eighty-Eight Thousand Eight Hundred Eighty-One Dollars and Eighteen Cents ($188,881.18).

27. At the time of this filing, late fees on the delinquent payments total Six Thousand Six Hundred Seven Dollars and Sixty-Four Cents ($6,607.64).

28. At the time of this filing, the interest on the balance owed is Forty-Six Thousand Four Hundred Ninety-Nine Dollars and Eighty-Seven Cents ($46,499.87).

29. A.T.M.E.S. also owes the Plaintiff an additional payment of Thirty Thousand Dollars ($30,000.00) for Plaintiff's compliance with the non-compete agreement in the Bill of Sale.

30. Under paragraph 11 of the Bill of Sale, Plaintiff was entitled to purchase the business real property located at 2353 Highway 17 North, Mt. Pleasant, South Carolina.

31. Plaintiff reached an agreement with the property owners to sell his purchase-option rights for Twenty Five Thousand Dollars ($25,000.00).

32. Defendants prevented Plaintiff from receiving the full benefit of his purchase-option rights to sale of the business property by seizing half of the sale proceeds, totaling Twelve Thousand Five Hundred Dollars ($12,500.00).

33. Paragraph 4 of the Bill of Sale between A.T.M.E.S. and Mr. DeClemente requires A.T.M.E.S. to provide Mr. DeClemente with use of a truck.

34. The referenced truck is a 2008 Chevrolet Silverado 2500HD.

35. Plaintiff's money was used to make all payments on the truck.

36. In March 2011 A.T.M.E.S. disposed of the referenced truck in violation of its contract with Mr. DeClemente.

37. At the time of the truck's disposition, there was at least Fifteen Thousand Dollars ($15,000.00) equity in the vehicle, to which Mr. DeClemente is entitled.

38. Defendants' conduct constitutes breaches of contract.

39. Plaintiff has been damaged as a proximate result of Defendants' contractual breaches and seeks recovery of all damages allowed by law.

40. As of the date of this filing, and subject to recalculation with the passage of time, Mr. DeClemente is entitled to recover One Hundred Eighty-Eight Thousand Eight Hundred Eighty-One Dollars and Eighteen Cents ($188,881.18) in arrearage, Six Thousand Six Hundred Seven Dollars and Sixty-Four Cents ($6,607.64) in late fees, Forty-Six Thousand Four Hundred Ninety-Nine Dollars and Eighty-Seven Cents ($46,499.87) in interest, Thirty Thousand Dollars for the balance due under the Non-Compete Clause of the Bill of Sale, Fifteen Thousand Dollars ($15,000.00) for lost equity in the referenced truck, Twelve Thousand Five Hundred Dollars ($12,500.00) to which he is entitled for sale of his business real property rights, and all attorney's fees and costs associated with collection as provided in paragraph 6(D) of the Promissory Note.

FOR A SECOND CAUSE OF ACTION – Breach of Contract
(As to A.T.M.E.S., Jeffery Reed and Murrell G. Smith)

41. Plaintiff re-alleges the preceding paragraphs as if fully set forth verbatim.

42. On July 10, 2009 Defendants executed a document entitled "Full and Final Release." (See Exhibit #3).

43. Plaintiff provided valuable consideration in exchange for the Full and Final Release.

44. The Full and Final Release is a contract between the parties.

45. In the Full and Final Release, Defendants agree to permanently release Mr. DeClemente from any and all causes of action, both past and future.

46. The Full and Final Release, in part, states the following:

> i. [t]he undersigned do intend to and do hereby individually and for their heirs, executors, administrators, successors and assigns, release, acquit and forever discharge Phillip L. DeClemente as well as his agents, servants, successors, heirs, executors, administrators, personal representatives and all other persons, firms, corporations and associations or partnerships of and from any and all claims, actions, causes of action, demands, rights, damages, cost, loss of services, expenses and compensation whatsoever which the undersigned now has or which may have hereinafter accrue on account of or in any way growing out of any and all ownership interest or employment in any of the entities set forth above whether known or unknown, foreseen or unforeseen and any consequences thereof, resulting or to result from ownership of any of the Companies referenced-above, employment in or with any of the entities referenced-above, business relationship with any of the businesses or individuals referenced-above as well as any negotiation contracts or documents executed as a result of the sale of the business as referenced herein.

47. Defendants have breached their contractual duty by filing suit against Mr. DeClemente in Civil Action No. 2011-CP-10-8011.

48. Plaintiff has been proximately damaged by Defendants' breach of contract.

49. Plaintiff seeks recovery of all damages allowed by law, including costs and attorney's fees, incurred as a result of Defendants' breach of contract.

FOR A THIRD CAUSE OF ACTION – Civil Conspiracy
(As to all Defendants)

50. Plaintiff re-alleges the preceding paragraphs as if fully set forth verbatim.

51. Prior to Defendants' purchase of Abacare, Defendant Bradham prepared valuations of both Reliable and Abacare in an effort to facilitate the sale of Abacare and its merger into A.T.M.E.S.

52. Defendant Bradham derived the net income of Reliable from the company's sales figures, dismissing the sales tax liability and other considerations which would have dramatically lowered Reliable's net income figure relied upon by Plaintiff when he sold Abacare and joined as a partner in A.T.M.E.S.

53. Defendant Bradham failed to disclose to the Plaintiff Reliable's known tax liabilities and to accurately report its gross and net income prior to Plaintiff's sale of Abacare to A.T.M.E.S.

54. Defendant Bradham breached his duties owed to Plaintiff by preparing inaccurate reports that deprived Plaintiff of complete and accurate financial statements based on the accounting industry's standard practices and procedures.

55. Defendant Bradham's breaches of the standard of care have damaged Plaintiff.

56. As a result of serving as Reliable's certified public accountant, Defendant Bradham had knowledge of DME companies under-reporting sales tax liabilities to the South Carolina Department of Revenue (hereinafter "SCDOR").

57. Defendants were aware of sales tax withholding issues and the potential for an audit by SCDOR because the Defendants were party to a lawsuit filed by the McNair Law Firm in 2008, and said firm filed a refund claim against SCDOR on behalf of Reliable (then owned by Reed and Smith) prior to A.T.M.E.S.'s purchase of Abacare.

58. Each of the Defendants was aware of potential under-stating of sales tax liabilites to SCDOR prior to A.T.M.E.S.'s purchase of Abacare from Plaintiff.

59. Prior to A.T.M.E.S.'s purchase of Abacare, Defendants under-reported Reliable's sales tax liabilities and, and as a result, owed SCDOR approximately $280,000 in fees and assessments.

60. Defendants Reed and Smith were aware Defendant Bradham altered financial data to achieve financial gain for himself and the other Defendants.

61. Defendants were aware, prior to A.T.M.E.S. purchasing Abacare, that Abacare did not report sales tax for non-taxable sales which included: Nursing Home Rentals, Oxygen Sales (Concentrators and Portable Units), Diabetic Supplies, Ventilator Rentals and Items or Services provided to the government under the VA agreement.

62. Defendants knew, prior to A.T.M.E.S. purchasing Abacare, that approximately 40-50% of Abacare's income fell under the non-taxable DME items, according to SCDOR guidelines.

63. Defendants were aware, prior to A.T.M.E.S. purchasing Abacare, that Plaintiff did not engage in the class action lawsuit against SCDOR, in which DME companies filed requests for refunds of sales tax paid.

64. After the sale of Abacare to A.T.M.E.S., SCDOR performed a self-assessed audit on Abacare.

65. During the SCDOR self-assessed audit, Defendants incorrectly reported that Abacare had $1,212,157.08 in revenues in the year 2008, when the actual income for 2008 totaled $1,075,311.29.

66. During the audit, Defendants did not correctly report Abacare's sales tax liability and, as a result, sustained assessments and fees due to under-reporting of sales tax liability and failure to timely file tax returns.

67. Defendant Bradham inflated the taxes owed by Abacare, claiming that 87% percent of income during the audit period was taxable.

68. Defendant Bradham's inflation of Abacare's taxable income caused an erroneous amount of tax liability, which was the basis for the frivolous civil action A.T.M.E.S. filed against Plaintiff.

69. During his deposition in Case No. 2011-CP-10-8011, on October 13, 2013, Defendant Bradham misrepresented important facts in order to support his role as an "expert witness" hired by Defendants A.T.M.E.S., Reed, and Smith in their civil action against Plaintiff.

70. SCDOR reported on January 27, 2011, in their Audit Information Report for Abacare that Defendant Art Bradham, CPA of Sumter, SC "prepared the returns for the current owners and reviewed the Excel spreadsheet used to determine which sales tax were [sic] taxable and found it to be accurate."

71. This statement by SCDOR is contrary to Mr. Bradham's deposition testimony, during which he stated under oath that he had no involvement in the referenced audit.

72. Defendant Bradham further testified during his deposition that Abacare had no value, and that the company became insolvent and went out of business.

73. In fact, A.T.M.E.S sold Abacare's assets to Longs Home Medical, Inc. on December 20, 2011.

74. Defendants Reed and Smith employed Defendant Bradham as an "expert witness" for the purpose of incorrectly testifying that Abacare under-reported potential sales tax liability prior to its sale to A.T.M.E.S. and that Abacare and Plaintiff withheld this information from Defendants.

75. Defendants were aware that Defendant Bradham's deposition testimony contained false statements designed to prevent Plaintiff from recovering amounts owed him by A.T.M.E.S., Smith and Reed.

76. Defendants Reed, Smith and Bradham combined and acted together for the purpose of injuring Plaintiff and together proximately caused Plaintiff special damages.

77. Plaintiff seeks recovery of all damages proximately caused by Defendants, including punitive damages.

FOR A FOURTH CAUSE OF ACTION – Breach of Contract Accompanied by Fraudulent Act
(As to A.T.M.E.S., Murrell G. Smith and Jeffery Reed)

78. Plaintiff re-alleges the preceding paragraphs as if fully set forth verbatim.

79. Defendants have breached the contracts they made with Plaintiff.

80. Defendants have committed fraudulent acts in the course of their breaches by employing Art Bradham to promote false, untrue and misleading accounting practices.

81. Defendants' fraudulent actions constitute dishonesty, unfair dealing and unlawful appropriation of Plaintiff's property by design.

82. Defendants' actions have proximately caused Plaintiff's damages and Plaintiff seeks recovery of all legal damages, including punitive damages.

FOR A FIFTH CAUSE OF ACTION – Breach of Fiduciary Duty
(As to all Defendants)

83. Plaintiff re-alleges the preceding paragraphs as if fully set forth verbatim.

84. Defendants Smith and Reed owed a fiduciary duty to Plaintiff because they were business partners with Plaintiff and officers and agents of companies they and Mr. DeClemente jointly owned.

85. Defendant Bradham owed a fiduciary duty to Plaintiff because he was an employee of companies partially owned by Plaintiff.

86. Defendants' actions constitute breach of fiduciary duty to Plaintiff.

87. Defendants' conduct is in negligent, willful, wanton or reckless disregard of Plaintiff's rights and is a proximate cause of his damages.

88. Plaintiff seeks recovery of all legally recoverable damages, including punitive damages.

FOR A SIXTH CAUSE OF ACTION – Professional Negligence
(As to Art Bradham, CPA, PC and Art Bradham)

89. Plaintiff re-alleges the preceding paragraphs as if fully set forth verbatim.

90. Defendant Bradham is a certified public accountant and has been employed by companies partially owned by Plaintiff.

91. Defendant Bradham owed a duty of care to Mr. DeClemente to provide Plaintiff with accurate and complete information regarding his valuation of Reliable and Abacare prior to Plaintiff's sale of Abacare to A.T.M.E.S.

92. Defendant Bradham's failure to disclose to Plaintiff Reliable's known tax liabilities during his valuation analysis constitutes a breach of duty by departing from professional standards of care.

93. Defendant Bradham owed a duty of care to Plaintiff to accurately report Abacare's tax liability to SCDOR.

94. Defendant Bradham's inflation of Abacare's tax liability during the audit and efforts to conceal his involvement in the audit constitute breaches of duty by departing from professional standards of care.

95. Defendant Bradham's actions were negligent, grossly negligent, reckless, willful and wanton and in violation of his duties owed to Plaintiff.

96. As a direct and proximate result of Defendant Bradham's departures from the professional standards of care, Plaintiff has suffered damages and seeks the award of all legally recognized damages, including punitive.

FOR A SEVENTH CAUSE OF ACTION – Slander and Defamation of Character (As to A.T.M.E.S. and Murrell G. Smith)

97. Plaintiff re-alleges the preceding paragraphs as if fully set forth verbatim.

98. Defendant Smith made malicious, slanderous, defamatory statements about Plaintiff by reporting to the news media that Plaintiff owed him and A.T.M.E.S. money and that Plaintiff committed fraud and misrepresented facts.

99. Defendant Smith's defamatory statements about Plaintiff were made to the Post and Courier News agency.

100. The Post and Courier published Mr. Smith's statements on February 4, 2012.

101. The aforementioned statements were false and have harmed Plaintiff and his reputation.

102. As a direct and proximate result of the aforementioned statements, Plaintiff has suffered embarrassment, humiliation and mental suffering, and seeks compensatory, special, consequential and punitive damages.

FOR A EIGHTH CAUSE OF ACTION – Abuse of Process (As to all Defendants)

103. Plaintiff re-alleges the preceding paragraphs as if fully set forth verbatim.

104. Defendants have pursued their lawsuit against Plaintiff with an ulterior purpose, using the civil process to attempt to avoid their contractual monetary indebtedness to Plaintiff.

105. Defendants have willfully solicited and propounded false "expert testimony" in the field of accounting for purposes other than a search for the truth through litigation.

106. Plaintiff has been proximately damaged by Defendant's conduct and seeks the award of all legally recognized damages, including punitive.

FOR A NINTH CAUSE OF ACTION – Negligence
(As to all Defendants)

107. Plaintiff re-alleges the preceding paragraphs as if fully set forth verbatim.

108. Defendants A.T.M.E.S., Reed and Smith were negligent, reckless, and grossly negligent by filing their civil action against Plaintiff, and Defendant Bradham acted so by serving as an "expert witness" and failing to conduct his accounting work competently.

109. The Defendants were negligent and reckless in one or more of the following particulars:

a. In failing to verify facts;

b. In making false allegations against Plaintiff;

c. In failing to seek the truth prior to making accusations; and

d. In failing to act as reasonable individuals and entities would have under the same of similar conditions.

All of which are direct and proximate causes of damages suffered by Plaintiff. Plaintiff seeks recovery of all damages allowed by law, including punitive damages.

WHEREFORE, Plaintiff seeks judgment and the award of actual and punitive damages sufficient to compensate him for his losses and in amounts which a jury deems just and proper, for the costs of this action, and such other relief as the Court may find just and proper.

[SIGNATURE BLOCK ON NEXT PAGE]

Respectfully submitted,

Cameron L. Marshall
7 Gamecock Ave, Suite 707
Charleston, SC 29407
(843) 795-2298
(843) 795-5081 (Fax)
cameron@attorneymarshall.com
Attorney for Plaintiff

Charleston, South Carolina

June 11, 2015

EXHIBIT #1

PROMISSORY NOTE

$265,000.00

Assistive Technology Medical Equipment Services, LLC

June 30, 2009 SUMTER SOUTH CAROLINA

[Date] [City] [State]

126 NORTH MAIN STREET, SUMTER, SC 29150

[Business Address]

1. PROMISE TO PAY

Assistive Technology Medical Equipment Services, LLC, hereinafter **"ATMES, LLC"**, promises to pay U.S. TWO HUNDRED SIXTY-FIVE THOUSAND and 00/100 ($265,000.00), (this amount is called "Principal"), plus interest, to the order of **Phillip L. DeClemente,** hereinafter "Note Holder".

ATMES, LLC will make all payments under this Promissory Note in the form of cash, check or money order.

2. INTEREST

Interest will be charged on unpaid principal until the full amount of Principal has been paid. ATMES, LLC will pay interest at a yearly rate of Twelve (12.0%) Percent.

The interest rate required by this Section 2 is the rate ATMES, LLC will pay both before and after any default described in Section 6(B) of this Promissory Note.

3. PAYMENTS

(A) Time and Place of Payments

ATMES, LLC will pay principal and interest by making a payment every month.

ATMES, LLC will make monthly payments beginning Thirty (30) days from the execution of this agreement and will make these payments every month thereafter until all of the principal and interest and any other charges described below are paid in full that ATMES, LLC may owe under this Promissory Note. Each monthly payment will be applied as of its scheduled due date and will be applied to interest before Principal. If, on March 1st 2013, ATMES, LLC still owes amounts under this Promissory Note, ATMES, LLC will pay those amounts in full on that date, which is called the "Maturity Date."

ATMES, LLC will make monthly payments at 1342 River Otter Court, Mt. Pleasant, SC 29466, or at a different place if duly notified by the Note Holder.

(B) Amount of Monthly Payments

ATMES, LLC's monthly payment will be in the amount of U.S. SEVEN THOUSAND, THREE HUNDRED, FORTY ONE and 84/100 ($7,341.84).

4. PREPAYMENT

Should ATMES elect to prepay or accelerate the payments, the Seller shall be entitled to interest based on the amortization schedule regardless of early payment. In other words, there shall be no benefit for early payment.

5. CHARGES

If a law, which applies to this Promissory Note and which sets maximum Promissory Note charges, is finally interpreted so that the interest or other charges collected or to be collected in connection with this Promissory Note exceed the permitted limits, then: (a) any such charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from ATMES, LLC that exceeded permitted limits will be refunded to ATMES, LLC. Note Holder may choose to make this refund by reducing the Principal ATMES, LLC owes under this Promissory Note or by making a direct payment to ATMES, LLC. If a refund reduces Principal amount of this Promissory Note, there will be no changes in the due date or in the amount of ATMES, LLC's monthly payment unless Note Holder agrees in writing to those changes.

6. ATMES, LLC'S FAILURE TO PAY AS REQUIRED

(A) Late Charges for Overdue Payments

If Note Holder has not received the full amount of any monthly payment by the end of Fifteen calendar days after the date it is due, ATMES, LLC will pay a late charge to Note Holder. The amount of the charge will be Five (5%) Percent of ATMES, LLC's overdue payment of principal and interest. ATMES, LLC will pay this late charge promptly but only once on each late payment.

(B) Notice of Default

If ATMES, LLC is in default, Note Holder may send ATMES, LLC a written notice telling ATMES, LLC that if ATMES, LLC does not pay the overdue amount by a certain date, Note Holder may require ATMES, LLC to pay immediately the full amount of Principal which has not been paid and all the interest that ATMES, LLC owes on that amount. That date must be at least Thirty (30) days after the date on which the notice is mailed to ATMES, LLC or delivered by other means.

(C) No Waiver By Note Holder

Even if, at a time when ATMES, LLC is in default, Note Holder does not require ATMES, LLC to pay immediately in full as described above, Note Holder will still have the right to do so if ATMES, LLC is in default at a later time.

(D) Payment of Note Holder's Costs and Expenses

If ATMES, LLC does not pay immediately in full as described above, the Note Holder will have the right to be paid back by ATMES, LLC for all of its costs and expenses in enforcing this Promissory Note to the extent not prohibited by applicable law.

7. GIVING OF NOTICES

Unless applicable law requires a different method, any notice that must be given to ATMES, LLC under this Promissory Note will be given by delivering it or by mailing it by first class mail to ATMES, LLC at the Business Address above or at a different address given by ATMES, LLC to the Note Holder. ATMES, LLC must provide Note Holder notice of ATMES, LLC's different address. Any notice that must be given to the Note Holder under this Promissory Note will be given by mailing it by first class mail to

the Note Holder at the address stated in Section 3(A) above or at a different address if Note Holder has given ATMES, LLC notice of a different address.

8. WAIVERS

ATMES, LLC and any other person who has obligations under this Promissory Note waive the rights of Presentment and Notice of Dishonor. 'Presentment" means the right to require the Note Holder to demand payment of amounts due. "Notice of Dishonor" means the right to require the Note Holder to give notice to other persons that amounts due have not been paid.

WITNESS THE HAND(S) AND SEAL(S) OF THE UNDERSIGNED.

ASSISTIVE TECHNOLOGY MEDICAL EQUIPMENT SERVICES, LLC

Date: June 30th 2009

G. Murrell Smith, Jr., Member

Jeffrey J. Reed, Member

PERSONAL GUARANTY

I, Jeffrey J. Reed, hereby personally guarantee payment of the first Twelve (12) payments on the Promissory Note of Assistive Technology Medical Equipment Services, LLC, to Note Holder in the monthly payment amount of SEVEN THOUSAND, THREE HUNDRED FORTY-ONE and 84/100 ($7,341.84) for the business known as Assistive Technology Medical Equipment Services, LLC, located at 126 North Main Street, Sumter, SC 29150

Jeffrey J. Reed, Individually

PERSONAL GUARANTY

I, G. Murrell Smith, Jr., hereby personally guarantee payment of the first Twelve (12) payments on the Promissory Note of Assistive Technology Medical Equipment Services, LLC, to Note Holder in the monthly payment amount of SEVEN THOUSAND, THREE HUNDRED FORTY-ONE and 84/100 ($7,341.84) for the business known as Assistive Technology Medical Equipment Services, LLC, located at 126 North Main Street, Sumter, SC 29150

G. Murrell Smith, Jr., Individually

EXHIBIT #2

STATE OF SOUTH CAROLINA	)	BILL OF SALE AND TRANSFER BY PHILLIP L. DeCLEMENTE OF OWNERSHIP INTEREST IN ASSISTED TECHNOLOGY MEDICAL EQUIPMENT SERVICES, LLC (ATMES)
COUNTY OF SUMTER	)	

WHEREAS, Assisted Technology Medical Equipment Services, LLC ("ATMES") a South Carolina Limited Liability Company (hereinafter referred to as "the Company" was formed and incorporated on November 5, 2008 and operates under an Operating Agreement dated November 5, 2008.

WHEREAS, Phillip L. DeClemente (hereinafter referred to as "DeClemente") is one of four (4) members of the Company and the other members include G. Murrell Smith, Jr. (Smith), Jeffrey J. Reed (Reed) and Kimberly L. Cuce (Cuce). Each member owns a twenty-five percent (25%) interest in ATMES.

WHEREAS, DeClemente desires to sell, transfer, and assign to the Company all of his right, title, interest, and ownership in the Company pursuant to the terms and conditions set forth herein.

WHEREAS, all members of the LLC, pursuant to the aforesaid Operating Agreement, have acknowledged proper notice and have consented to the sale, transfer, and assignment and acknowledge compliance with the terms of the Company=s Operating Agreement.

NOW, THEREFORE, for and in consideration of the sum of Two Hundred Sixty-Five Thousand and 00/100 Dollars ($265,000.00), representing the purchase price, the receipt of which is hereby acknowledged, the parties agree as follows:

1. That DeClemente does sell, transfer, deliver, and assign to the Company his right, title, interest, and ownership in the Company.

2. That the purchase price of said interest shall be a Two Hundred and Sixty-Five Thousand and 00/100 Dollars ($265,000.00), payable as follows:

   a. Execution by the Company and personal guarantee by Smith and Reed (subject to the limitations set forth therein) of a promissory note in the amount of Two Hundred and Sixty-Five Thousand and 00/100 Dollars ($265,000.00) amortized for a period of forty-five (45) months, at twelve percent (12%) interest, with a monthly payment of Seven Thousand Three Hundred Forty-One and 84/100 Dollars ($7,341.84). There shall be no benefit to the Company for early payment. If payments are accelerated or paid

in advance, the Seller shall be entitled to all interest as per the amortization schedule. Therefore, total payments will be Three Hundred Thirty Thousand Three Hundred and Eighty Two and 59/100 ($330,382.59) even upon early payment by ATMES.

b. That Reed and Smith shall personally guarantee to DeClemente the first twelve (12) payments, and no more, of the promissory note referenced hereinabove. No member shall be personally responsible for said promissory note other than as set forth hereinabove.

c. DeClemente shall be entitled to payment, as set forth above, if ATMES is sold to a third-party after five (5) days has elapsed from the date of sale.

3. That DeClemente shall have no further right, title or interest in ATMES, Reliable Medical Equipment of South Carolina, LLC (Reliable) or Abacare Home Medical Inc. (Abacare), Reliable Prosthetics and Orthotics, LLC, Medical Management Company and Adaptive Total Care and shall not hold or occupy any title or position in regard to any ATMES, Reliable or Abacare, Reliable Prosthetics and Orthotics, LLC, Medical Management Company and Adaptive Total Care referenced herein and shall immediately acknowledge and resign any title, office, ownership right or otherwise as it relates to any Corporation, Limited Liability Company or Entity referenced herein.

TROCK RETURNED PRIOR TO MARCH 2011

4. That DeClemente shall be entitled to the sole and exclusive use, right and ownership in that certain 2008 Chevrolet Silverado vehicle and cell phone which has been used, in the past, as a company phone and shall take every step and action necessary to transfer ownership of the vehicle and cell phone out of the name of Abacare and into the name of DeClemente. Further, until said vehicle and cell phone is transferred out of the name of Abacare, appropriate amounts will be withheld from the monthly payments from the Company to DeClemente as set forth above for payments, taxes and insurance on said vehicle as well as any cell phone currently in possession of DeClemente. Declemente shall also transfer all debt and cost (including but not limited to insurance, taxes and maintenance) associated with 2008 Chevrolet Silverado and cell phone. He shall be responsible for all cost associated with the two and hold the company harmless and indemnify them from any liability whatsoever with said Truck and cell phone. If any liability is created by the cell phone or Truck, then Buyers have the right at their discretion, in addition to any other remedy, to withhold said liability from Seller's monthly payment.

5. That DeClemente shall be entitled to have his health insurance premium in the amount of Three Hundred Forty Five and 25/100 dollars

($345.25) paid by the Company for sixty (60) days and said premium shall be deducted from DeClemente's monthly payment of Seven Thousand Three Hundred and 00/100 Dollars ($7,300.00).

6. That nothing contained herein shall remove, release or discharge DeClemente from any loans, obligations, leases, notes or personal guarantees signed by him to the National Bank of South Carolina or any other creditor, lender or otherwise including, but not limited to the loan to the National Bank of South Carolina in the amount of Eight Hundred and Nine Thousand and 00/100 Dollars ($809,000.00) shown by that certain commercial note dated November 4, 2008 which is secured by life insurance of DeClemente in the amount of Three Hundred Thousand and 00/100 Dollars ($300,000.00) together with all accounts receivable, inventory and equipment now owned or hereinafter owned by AMTES. It is understood and agreed by and between the parties that the Company, with its remaining members, will take all steps necessary to remove DeClemente from any personal guarantees or obligations of the Company after a period of twelve (12) months from the execution of this document and further DeClemente acknowledges and understands that he will, not upon execution of this document, enter into or obligate the Company to any liability, debt or responsibility. Further, DeClemente shall be responsible for any debt incurred by him not previously referenced herein including but not limited to any credit card charges, and the Company shall be entitled to withhold and deduct payment for same from any payment due to Seller.

7. That DeClemente will enter into a Covenant Not to Compete, which shall be incorporated into this document by reference wherein he shall not, during the period of payment, as set forth hereinabove, engage in, be associated in, be employed by, give advice, or allow any direct family member engage in the sale, lease or purchase of durable medical equipment. The parties agree that any violation of this provision by the seller shall be a material breach of the covenant not to compete and confidentiality agreement and the buyer shall be entitled to withhold and terminate any future payments to the buyer in addition to the other remedies provided in the said Covenant not to Compete. Nothing contained herein shall prevent the buyer from seeking any further remedies damages in law or equity. The consideration for this contract is based upon the Sellers covenant not to compete among other considerations.

8. That DeClemente shall, simultaneously upon the execution of this Agreement, enter into and sign a Confidential Agreement wherein he shall agree in consideration of the terms and agreement as set forth herein, to hold in strict confidence and not divulge any of the

provisions of this Agreement or to divulge any and all aspects of the business involved herein, including, AMTES, Reliable or Abacare.

9. That it is further agreed by and between the parties that if at the end of the buyout period as set forth hereinabove, Smith and Reed remain as members and have an ownership interest in the Company then DeClemente shall be paid an additional Thirty Thousand and 00/100 Dollars over a six (6) month period as a compliance bonus, interest paid at the rate of zero percent at the rate of Five Thousand and 00/100 Dollars per month provided and subject to DeClemente not having violated any of the terms of this Buy/Sell Agreement, the Confidentiality Agreement referenced herein and the Covenant Not to Compete referenced hereinabove and has not acted in any manner detrimental to the success of any of the companies referenced herein.

10. The parties acknowledge and understand that simultaneously with the execution of this Buy/Sell Agreement that the remaining members of AMTES, that being G. Murrell Smith, Jr., Jeffrey J. Reed and Kimberly L. Cuce, will enter into an agreement wherein the twenty-five percent (25%) interest of DeClemente transferred and assigned herein shall equally be divided among Smith and Reed only, subject to the terms and conditions of the Agreement including payment method and payment provisions for said additional ownership interest.

11. That DeClemente shall, simultaneously with the execution of this document, execute an assignment of any of his right, title and interest in that certain Commercial Lease Agreement between The Estate of Connely and Abacare date December 27, 2007 so as to assign Smith and Reed all rights, entitlements and privileges up to and through September 15, 2009 as it relates to the option to purchase the Mt. Pleasant property as more specifically described in Exhibit A of that certain Commercial Lease Agreement dated January 1, 2008. Should said Reed and Smith purchase the property in Exhibit A as set forth herein and realize a fifteen percent (15%) discount, Smith and Reed shall pay to DeClemente the sum of Twenty-Five Thousand and 00/100 Dollars ($25,000.00). Should DeClemente, directly or indirectly, exercise the option to purchase the property in Exhibit A, the current lease dated January 1, 2008 shall become null and void with no further obligation by the tenant. Further, DeClemente shall have the right, after the expiration of the above Smith & Reed option, to purchase the subject property or subsequently sell the subject property to a third-party, however, in said event then the current lease of Abacare shall immediately terminate and Abacare and/or ATMES shall have no further obligations under said lease.

WITNESS our signatures this 30 day of June, 2009.

PHILLIP L. DeCLEMENTE

G. MURRELL SMITH, JR.

JEFFREY J. REED

KIMBERLY L. CUCE

CONFIDENTIALITY AGREEMENT AND NON-COMPETITION AGREEMENT

THIS NON-COMPETITION AGREEMENT (the "Agreement"), made as of this 30th day of, June, 2009, by and between **Assisted Technology Medical Equipment Services, LLC (ATMES)**, a South Carolina general business corporation, herein referred to as the Company and/or Purchaser, and **Phillip L. DeClemente**, herein referred to as the "Seller."

WITNESSETH:

For and in consideration of the sum of Five Dollars and 00/100 ($5.00) paid or to be paid Seller, as well as for the sale by seller and purchase, by purchaser, of the membership interest of seller in ATMES, Seller agrees to the restrictive covenants and obligations set forth herein as follows:

1SECTION
RESTRICTIVE COVENANT AND CONFIDENTIALITY

.1 Upon the termination of Seller's employment with the Company, upon the sale of sellers interest in ATMES:

(A) Seller shall not obtain, make or retain copies of any files, charts, books, data, computer data, records, contracts, agreements or documents of any type concerning or relating to, directly or indirectly, the business of the Company or its affiliates or any information relating to any customers, suppliers, or any other person or entity that has any business relationship with Company or its affiliates, and Seller (or his heirs or personal representatives) shall immediately return to the Company all files, charts, books, data, computer data, records and documents (and all copies thereof in Seller's (or his heir's or personal representative's) possession or control concerning or relating to, directly or indirectly, the business of the Company or its affiliates; and

(B) During the period payment for Seller's interest(45 months) or until Jeffrey J Reed and G. Murrell Smith Jr. no longer own an interest in ATMES (whichever event occurs first), Seller shall not, directly or indirectly, within Charleston County, South Carolina, Berkeley County, South Carolina, Dorchester County, South Carolina, Sumter County, South Carolina and Clarendon County, South Carolina, own, manage, operate, join or have a financial interest in, control or participate in the ownership, management, operation or control of, or be employed or engaged as an Seller, agent, contractor, consultant or in any other individual or representative capacity whatsoever, or use or permit his name to be used in connection with, or be otherwise connected, related or associated in any manner whatsoever with (i) any business or enterprise

engaged in the design, development, manufacture, distribution, lease or sale of any products, or the provision of any services, which the Company or its affiliates were designing, developing, manufacturing, distributing, leasing, selling or providing at any time up to and including the date of termination of this Agreement or (ii) any business which is similar to or competitive with the business carried on or planned by the Company or its affiliates at any time during the period of Seller's employment by the Company or ownership of the Company, whether during or prior to the Employment Period or Ownership Period, provided that the foregoing restriction shall not be construed to prohibit ownership by Seller of not more than three percent (3%) of any class of securities of any corporation which is engaged in any of the foregoing businesses, having a class of securities registered pursuant to the Securities Exchange Act of 1934, which securities are publicly owned and regularly traded on any national exchange or in the over-the-counter market, provided further, that such ownership represents a passive investment and that neither Seller nor any group of persons including Seller in any way, either directly or indirectly, manages or exercises control of any such corporation, guarantees any of its financial obligations, otherwise takes part in its business other than exercising his rights as a shareholder, or seeks to do any of the foregoing.

.2 It is in the legitimate business interest of the Company to restrict the Seller's disclosure or use of Trade Secrets and Confidential Information relating to the Company and its affiliates for any purpose other than in connection with the Seller's performance of his duties to the Company and its affiliates, and to limit any potential appropriation of such Trade Secrets and Confidential Information by Seller. The Seller therefore agrees that he will not at any time, whether during or subsequent to the term of this Agreement or his employment or ownership with the Company, use or disclose, or authorize any other person or entity to use or disclose, any Trade Secrets and Confidential Information, other than as necessary to further the business objectives of the Company and its affiliates in accordance with the terms of his employment hereunder. The phrase "Trade Secrets and Confidential Information" includes, by way of example and without limitation, (A) matters of a technical nature, such as scientific, trade and engineering secrets, "know-how", formulas, secret processes, drawings, works of authorship, machines, inventions, computer programs (including documentation of such programs), services, materials, patent applications, new product plans, other plans, technical information, technical improvements, manufacturing techniques, specifications, manufacturing and test data, progress reports and research projects and (B) matters of a business nature, such as business plans, prospects, financial information, proprietary information about costs, profits, markets, sales, lists of customers and suppliers of the Company and its affiliates, procurement and promotional information, credit and financial data concerning customers or suppliers of the Company and its affiliates, information relating to the names, or particular desires or needs of customers or any other person or company with whom the Company or its affiliates has any business relationship, and other information of a similar nature to the extent not available to the public, and plans for future development. The parties hereto stipulate

that as between them, such Trade Secrets and Confidential Information relating to the Company and its affiliates are important, material and confidential and gravely affect the effective and successful conduct of the Company's business and its goodwill and that any breach of the terms of this paragraph is a material breach hereof.

.3 In the event of a breach by Seller of the provisions of Section 1.1 or Section 1.2 hereof, the Company could not reasonably or adequately be compensated in damages in an action at law and that the Company shall be entitled to temporary and permanent injunctive relief, without the necessity of posting any bond, against Seller to enforce the provisions of this Agreement. However, nothing contained in this paragraph shall prohibit the Company from pursuing any other legal action that may be brought by the Company to enforce any of the terms or provisions of this Agreement, including pursuing the recovery of damages from Seller. In the event of litigation over the terms of this Agreement, costs and attorney's fees may be awarded to the prevailing party.

.4 It is expressly understood and agreed that the Company and Seller consider the restrictions contained in Sections 1.1 and 1.2 hereof to be reasonable for the purpose of preserving the goodwill, proprietary rights and going concern value of the Company, and that Seller shall not at any time under any circumstances challenge the reasonableness of such restrictions. Notwithstanding the foregoing, in the event that a final judicial determination is made by a court of competent jurisdiction that the time or territory or any other restriction contained in such Sections 1.1 and 1.2 is an unenforceable restriction on Seller's activities, the provisions of such Sections 1.1 and 1.2 shall not be rendered void but shall be deemed amended to apply as to such maximum time and territory and to such other extent as such court may judicially determine or indicate to be reasonable. Alternatively, if the court referred to above finds that any restriction contained in Sections 1.1 and 1.2 or any remedy provided herein is unenforceable or otherwise void, and such restriction or remedy cannot be amended so as to make it enforceable, such finding shall not affect the enforceability of any of the other restrictions or other provisions contained herein or the availability of any other remedy. The provisions of Sections 1.1 and 1.2 shall in no respect limit or otherwise affect Seller's obligations under other agreements with the Company (or its affiliates), if any.

2SECTION
MISCELLANEOUS

2.1 Seller shall relinquish, transfer and turn over to Buyer all above described confidential information within twenty-four (24) hours of the execution of this document and other closing documents.

2.2 Waiver. The waiver by either party of a breach or violation of any provision of this Agreement shall not operate as or be construed to be a waiver of any subsequent breach hereof.

2.3 Notices. Any and all notices required or permitted to be given under this Agreement will be sufficient if furnished in writing, sent by registered or certified mail to his last known residence in case of Seller or to its principal office in Columbia, South Carolina, in the case of the Company.

2.4 Governing Law. This Agreement shall be interpreted, construed and governed according to the laws of the State of South Carolina.

2.5 Assignment. Seller may not assign his rights or obligations hereunder except as and to the extent expressly permitted hereby. The rights and obligations of the Company hereunder shall inure to the benefit of and shall be binding upon the successors and assigns of the Company. Without limiting the generality of the foregoing, the Company may assign its rights and obligations hereunder to any successor or assign of the Company or any company or entity that is affiliated with the Company or the owners of the Company, including but not limited to any parent or subsidiary company.

2.6 Paragraph or Section Headings. The paragraph or section headings contained in this Agreement are for convenience only and shall in no manner be construed as a part of this Agreement.

2.7 Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original and together shall constitute one and the same Agreement, with one counterpart being delivered to each party hereto.

2.8 Legal Construction. In case any one or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision hereof and this Agreement shall be construed as if such invalid, illegal or unenforceable provisions had never been contained herein.

2.9 Prior Agreements. This Agreement constitutes the sole and only agreement of the parties hereto and supersedes any prior understandings or written or oral agreements between the parties concerning the subject matter hereof.

2.10 Amendment. This Agreement may be modified or amended only by written instrument signed and executed by Seller and the Company.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date and year first above written.

WITNESSES: SELLER:

PHILLIP L. DeCLEMENTE

Purchaser's signature on Page 5.

PURCHASER:

ASSISTED TECHNOLOGY MEDICAL EQUIPMENT SERVICES, LLC (ATMES)

EXHIBIT #3

STATE OF SOUTH CAROLINA	)	**FULL AND FINAL RELEASE**
	)	
COUNTY OF SUMTER	)	

WHEREAS, Phillip L. DeClemente, (hereinafter referred to as "DeClemente") is one of four (4) members of a Company known as Assistive Technology Medical Equipment Services, LLC (ATMES) a South Carolina Limited Liability Company (hereinafter referred to as "ATMES").

WHEREAS, the other members include G. Murrell Smith, Jr. (Smith), Jeffrey J. Reed (Reed) and Kimberly L. Cuce (Cuce). Each member owns a twenty-five percent (25%) interest in ATMES.

WHEREAS, a dispute and disagreement arose between DeClemente and the remaining members of ATMES and, as a result DeClemente has agreed to sell, transfer and assign his interest in ATMES and his interest in all other associated Companies, and certain documents have been prepared and are being executed simultaneously with this Release, including, but not limited to a Bill of Sale and a Confidentiality Agreement and Non-Competition Agreement. In addition, a promissory note was executed by ATMES and the promissory note was executed with certain restrictive personal guarantees, by Smith and Reed simultaneously with the Bill of Sale and Confidentiality Agreement and Non-Competition Agreement.

WHEREAS, during the period in which all members operated under ATMES and during the period of negotiation and preparation of the closing documents and other documents referenced hereinabove, certain disputes were referenced, certain allegations were made and certain claims were referenced and the undersigned, in consideration of the mutual promises, covenants and payments to be made pursuant to the Bill of Sale, Confidentiality Agreement and Non-Competition Agreement, the undersigned do intend to and do hereby individually and for thier heirs, executors, administrators, successors and assigns, release, acquit and forever discharge Phillip L. DeClemente as well as his agents, servants, successors, heirs, executors, administrators, personal representatives and all other persons, firms, corporations and associations or partnerships of and from any and all claims, actions, causes of action, demands, rights, damages, cost, loss of services, expenses and compensation whatsoever which the undersigned now has or which may have hereinafter accrue on account of or in any way growing out of any and all ownership interest or employment in any of the entities set forth above whether known or unknown, foreseen or unforeseen and any consequences thereof, resulting or to result from ownership of any of the Companies referenced-above, employment in or with any of the entities referenced-above, business relationship with any of the businesses or individuals referenced-above as well as any negotiation contracts or documents executed as a result of the sale of the business as referenced herein.

It is understood and agreed that this is a settlement or a compromised of a doubtful and disputed claim and that the execution of this Release is not to be construed as an admission of liability on the part of the party or parties hereby released and that said Releasees deny liability therefore and the execution of this Release is merely to avoid litigation and buy the peace of all involved.

The undersigned hereby declare and represent that all documents executed including the Bill of Sale, Confidentiality Agreement and Non-Competition Agreement and this Release were entered into freely and voluntarily without any threat, coercion or otherwise on the part of the Releasees and the undersigned further declares and represents that no promise, inducement or agreement not herein expressed has been made to the undersigned and that this Release contains the entire Agreement between the parties and that the terms of this Release are contractual and not a mere recital.

The undersigned has read this forgoing Release and fully understands same.

Signed, sealed and delivered this 10 day of July, 2009.

WITNESSES:

Judy A Blocker

Bob Thomas

CAUTION! READ BEFORE SIGNING.

_____(LS)
G. MURRELL SMITH, JR.
Individually and as remaining member of ATMES

WITNESSES:

Judy A Blocker

Bob Thomas

CAUTION! READ BEFORE SIGNING.

_____(LS)
JEFFREY R. REED
Individually and as remaining member of ATMES

WITNESSES:

Judy A Blocker

Bob Thomas

CAUTION! READ BEFORE SIGNING.

_____(LS)
KIMBERLY L. CUCE
Individually and as remaining member of ATMES

STATE OF SOUTH CAROLINA)
) ACKNOWLEDGMENT
COUNTY OF SUMTER)

On the 10th day of July, 2009, personally appeared before me, G. Murrell Smith, Jr., to me being the person named herein and who executed the foregoing release and that he acknowledged to me that he voluntarily executed same.

_____ (LS)
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 2/10/2019

STATE OF SOUTH CAROLINA)
) ACKNOWLEDGMENT
COUNTY OF SUMTER)

On the 10th day of July, 2009, personally appeared before me, Jeffrey J. Reed, to me being the person named herein and who executed the foregoing release and that he acknowledged to me that he voluntarily executed same.

_____ (LS)
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 2/10/2019

STATE OF SOUTH CAROLINA)
) ACKNOWLEDGMENT
COUNTY OF SUMTER)

On the 10th day of July, 2009, personally appeared before me, Kimberly L. Cuce, to me being the person named herein and who executed the foregoing release and that he acknowledged to me that he voluntarily executed same.

_____ (LS)
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 2/10/19

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)))	IN THE COURT OF COMMON PLEAS IN THE NINTH JUDICIAL CIRCUIT
PHILLIP DECLEMENTE A/K/A ALEC ROCHFORD, PLAINTIFF, vs. ASSISTIVE TECHNOLOGY MEDICAL EQUIPMENT SERVICES, LLC; JEFFERY REED; MURRELL G. SMITH; ART BRADHAM, CPA, PC; AND ART BRADHAM, DEFENDANTS.	)	Civil Action No. 2015-CP-10-3325 **DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS**

FILED
2015 JUL 15 PM 1:38
JULIE J. ARMSTRONG
CLERK OF COURT
BY

TO: CAMERON L. MARSHALL, ATTORNEY FOR THE PLAINTIFF

YOU WILL PLEASE TAKE NOTICE that Defendants, Assistive Technology Medical Equipment Services, LLC, Jeffery Reed, Murrell G. Smith, Art Bradham, CPA, PC, and Art Bradham, by and through their undersigned counsel, pursuant to Rules 12(b)(1), (2), (3), (4), (5) (6) and (7), Rule 12(f) and Rule 12(h) of the South Carolina Rules of Civil Procedure, will move before the Presiding Judge on the tenth (10th) day after service hereof at 10:00 a.m. or as soon thereafter as counsel may be heard, for immediate dismissal of the Complaint filed in this case.

Plaintiff has failed to provide sufficient service and process to grant personal and subject matter jurisdiction of all Defendants. Plaintiff failed to file within applicable statute of limitations. Plaintiff has failed to file this action in the proper venue. Plaintiff has failed to plead facts sufficient to grant the relief requested. Further and pursuant to S.C. Code Ann. Sec. 15-36-10, Plaintiff is further on notice of facts and law that would

lead any reasonable attorney to understand that the claims alleged herein are clearly not warranted and there is no good faith basis to argue for an extension of the law that might grant any viability to Plaintiff's claims as alleged herein.

This motion is based upon South Carolina statutory and case law, the pleadings filed in this action and such other further affidavits, depositions, pleadings and memoranda as the Defendants may file prior to the hearing of this matter.

JAMES E. SMITH JR., P.A.

BY: _____

James E. Smith Jr.
Dylan W. Goff
1422 Laurel Street
Columbia, South Carolina 29201
(803) 933-9800

ATTORNEY FOR DEFENDANTS

Columbia, South Carolina
July 15, 2015

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)))	IN THE COURT OF COMMON PLEAS IN THE NINTH JUDICIAL CIRCUIT
PHILLIP DECLEMENTE A/K/A ALEC ROCHFORD, PLAINTIFF, vs. ASSISTIVE TECHNOLOGY MEDICAL EQUIPMENT SERVICES, LLC; JEFFERY REED; MURRELL G. SMITH; ART BRADHAM, CPA, PC; AND ART BRADHAM, DEFENDANTS.	))))))))))))))	Civil Action No. 2015-CP-10-3325 **MOTION TO CHANGE VENUE**

FILED
2015 AUG 24 PM 2:18
JULIE J. ARMSTRONG
CLERK OF COURT
BY

TO: CAMERON L. MARSHALL, ESQ., ATTORNEY FOR PLAINTIFF

YOU WILL PLEASE TAKE NOTICE that the Defendants, by and through their undersigned attorney will move before the Presiding Judge of the Court of Common Pleas for the Ninth Judicial Circuit for a Motion Changing Venue to Sumter County. The basis of this Motion is that the Plaintiff has sued the Defendants which are limited liability companies and/or professional corporations that are headquartered in Sumter County as their principal place of business. The Plaintiff's own pleadings reflect that Defendants Reed, Smith and Bradham are all residents of Sumter County. Therefore, Defendants would move for venue to be transferred to Sumter County pursuant to S.C. Code Ann. §15-7-30 (C)(1) and §15-7-30 (e)(1).

RESPECTFULLY SUBMITTED,

JAMES E. SMITH JR., P.A.

BY: _____

James E. Smith Jr.
Dylan W. Goff
1422 Laurel Street
Columbia, South Carolina 29201
(803) 933-9800

ATTORNEY FOR DEFENDANTS

Columbia, South Carolina
August 19, 2015

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)))	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CIVIL ACTION NO.: 2015-CP-10-3325
PHILLIP DECLEMENTE, a/k/a ALEC ROCHFORD, Plaintiff, v. ASSISTIVE TECHNOLOGY MEDICAL EQUIPMENT SERVICES, LLC; JEFFERY REED; MURRELL G. SMITH; ART BRADHAM, CPA, PC; and ART BRADHAM, Defendants.	)))))))))))))))	**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO CHANGE VENUE, MOTION TO DISMISS, AND AND OBJECTION TO CASE ASSIGNMENT TO THE BUSINESS COURT PILOT PROGRAM**

FILED
2016 JAN -7 AM 10: 43
JULIE J. ARMSTRONG
CLERK OF COURT

FACTUAL AND PROCEDURAL BACKGROUND

This lawsuit results from a business dispute among former partners Phillip DeClemente, Murrell G. Smith and Jeffery Reed. Plaintiff is the former manager and partial owner of Abacare Home Medical ("Abacare"), a durable medical equipment ("DME") company located in Charleston, SC. Defendants Jeffery Reed and Murrell G. Smith are the current owners of Abacare and Reliable Medical Equipment Co., Inc. ("Reliable"), and their parent company, Assistive Technology Medical Equipment Services ("ATMES"), a DME company located in Sumter, SC. Abacare and Reliable joined forces and merged into ATMES in November 2008 when ATMES purchased Abacare from its owners, the Estate of Dorothy Connelly and Phillip DeClemente. As part of the sale, Mr. DeClemente assigned all of his interest in Abacare, in the form of stock purchase options, to ATMES. Plaintiff, Mr. Reed, Mr. Smith, and a fourth partner, Kimberly Cuce, then each became twenty-five percent owners of ATMES, the parent company of Abacare and Reliable (Bradham deposition p. 13). Defendant Art Bradham, a certified public

accountant, represents ATMES, Reliable and Abacare and provided business valuation analysis to Plaintiff, Smith, Reed and Cuce prior to ATMES's purchase of Abacare.

Plaintiff and Defendants Smith and Reed had disagreements over management of ATMES and its subsidiaries, Abacare and Reliable. On June 30, 2009 Plaintiff sold his 25% ownership in ATMES to Defendants Smith and Reed for $265,000.00. The sale contract and promissory note require Defendants to pay Plaintiff $7,341.84 per month beginning July 2009, with the final payment due in March of 2013 (Exhibit #1). The contract contains mutual covenants not to sue and requires that should Defendants miss any payments, Plaintiff must inform them of the missed payments by certified mail (Exhibit #2). Defendants first missed a payment to Plaintiff in September 2011, but subsequently made additional payment and assured Plaintiff of their intent to honor the parties' sales contract obligations.

On October 31, 2011, Defendants Reed and Smith violated their written covenant not to sue Mr. DeClemente when they filed case number 2011-CP-10-8011 in Charleston County Court of Common Pleas. The case caption is Assistive Technology Medical Equipment Services v. Hood & Selander, CPAs, LLC, Donna C. Cash, as Representative of the Estate of Dorothy Connelly, W.E. Applegate, III, as Personal Representative of the Estate of James B. Connelly, Kimberly Cuce, and Phillip DeClemente. In their lawsuit, Smith and Reed claim Mr. DeClemente and the other Defendants acted fraudulently and misled them about the value of Abacare by failing to disclose to them the company's true sales tax liability owed to the South Carolina Department of Revenue ("SCDOR").

As evidence alleged to support their false allegations, ATMES, through its owners Smith and Reed, rely upon the "expert" testimony of Defendant Bradham. Mr. Bradham has stated under oath at his deposition and by affidavit that he believes Mr. DeClemente and the other

Defendants fraudulently inflated Abacare's value by failing to disclose to Smith and Reed Abacare's potential sales tax liability (Bradham depo p. 27, 54 and depo exhibit #11). The extent of Mr. Bradham's due diligence while investigating Abacare's value consisted only of reviewing a confidential draft of an Abacare valuation report created by a different CPA firm for the exclusive use of Mrs. Connelly and Mr. DeClemente (Exhibit #3). Mr. Bradham says he does not know how he came into possession of the confidential document (Bradham depo p. 86-87, 100, 136, 139, 152-153, 168, 169, 197, depo. Exhibit #11).

Contrary to their claims, Mr. Bradham, Mr. Smith and Mr. Reed were each well aware of the accounting and tax reporting practices used by Abacare and had used similar accounting and tax reporting practices during their nine year ownership of Reliable (Smith deposition p. 41, 86-87). As a result of these practices, which were legal at the time utilized, both Reliable and Abacare have been forced to pay delinquent sales taxes to SCDOR (Bradham depo p. 50, 76-77, 129, Exhibit #4). These delinquent sales taxes were assessed against Reliable for the same reasons that delinquent sales taxes were assessed against Abacare for the time period prior to Mr. DeClemente and Ms. Connelly's sale of Abacare (Bradham depo p. 106, 143, 172-174, 180-183, 194-195).

Between 2006 and 2009 there was an issue in South Carolina whether or not many DME products were exempt from sales taxes. The Administrative Law Court issued a ruling in August of 2007 in favor of exemption (Smith depo p. 24, 42, 84-85). SCDOR appealed the ruling and the South Carolina Supreme Court reversed the decision in June of 2009. *Home Medical Systems, Inc. v. South Carolina Department of Revenue*, 677 S.E. 2d 582 (2009) (Exhibit #5). As a result, SCDOR audited many South Carolina DME companies, including Abacare, Reliable & ATMES. SCDOR began collecting sales tax from DME companies for sales conducted in

previous years, regardless of whether the seller had ever been paid for the merchandise (Bradham depo p. 165).

Mr. Bradham falsely testified during his October 18, 2013 deposition, during which he purported to be an expert witness in the case, that he had no role in the audit of Abacare. In fact, Mr. Bradham was involved in the audit, which resulted in a finding that Abacare, as well as Reliable, and the parent company ATMES, had underpaid sales taxes (Bradham depo p. 40-43, 46-49, 72) (Exhibits #6 & #7). Mr. Bradham's "expert" testimony against Mr. DeClemente constitutes a conflict of interest and professional negligence, as Mr. Bradham is Mr. DeClemente's former CPA. American Institute of Certified Public Accountants ("AICPA") Code of Professional Conduct § 2.000.020. Pursuant to S.C. Code § 15-36-100(c)(2), no expert affidavit is needed to establish that Mr. Bradham has testified as an expert witness against his former client, Mr. DeClemente, and that he has furthermore done so falsely and damaged Plaintiff. Mr. Bradham's actions are in violation of professional standards 1.100, 1.200, 1.320, and 1.700 of the AICPA Code of Professional Conduct.

Mr. DeClemente failed to answer the complaint Smith and Reed filed against him within thirty days. Mr. DeClemente answered the complaint and filed counter-claims against ATMES on August 10, 2012. The counter-claims seek judgment against ATMES, Smith and Reed for the funds which are still owed Mr. DeClemente pursuant to the $265,000.00 sales contract in which Mr. DeClemente sold his 25% ownership in ATMES to Smith and Reed. Prior to filing the counterclaims, Mr. DeClemente mailed Defendant Smith a certified letter informing him of the missed payments, as required by the contract conveying Mr. Declemente's ownership in ATMES to Defendants Reed and Smith (Exhibit #8). By letter dated June 12, 2012 and received June 15, 2012, Mr. Smith responded by saying he had no intention of immediately paying the money

owed to Mr. DeClemente, and that ATMES would address the arrearage issue at the conclusion of a damages hearing, as Mr. DeClemente had failed to timely answer the frivolous suit filed against him (Exhibit #9). On April 24, 2014, Judge J.C. Nicholson found Mr. DeClemente's answer to the lawsuit untimely, held him in default and struck his counter-claims. That ruling has been appealed, but the Court of Appeals has found the appeal premature until it is determined whether any damages are ever ordered against Mr. DeClemente.

Mr. DeClemente filed this action on June 11, 2015, re-alleging the causes of action asserted in his initial counter-claims and adding some which have arisen since the initial counter-claims were filed. Mr. DeClemente was notified of Defendants' intent to dishonor their payment obligation to him by letter from Defendant Smith dated June 12, 2012 and received June 15, 2012. Plaintiff therefore filed this action within the applicable three year statute of limitations, which expired on June 15, 2015. If Defendants claim there is any evidence unknown to Plaintiff which might support an argument for an earlier statute of limitations, then that issue is to be decided by the jury. *Manios v. Nelson, Mullins, Riley and Scarborough, LLP*, 389 S.C. 126, 697 S.E. 2d 664 (2010).

ARGUMENT OPPOSING CHANGE OF VENUE

S.C. Code § 15-7-30(C) states:

> "A civil action tried pursuant to this section against a resident individual defendant must be brought and tried in the county in which the:
> (1) defendant resides at the time the cause of action arose; **or**
> (2) most substantial part of the alleged act or omission giving rise to the cause of action occurred." (emphasis added)

While it is true the Defendants reside in Sumter Counter, this fact is not dispositive of the issue and is but one factor to be considered in a balancing test. The acts and omissions which are the subject of Plaintiff's complaint occurred in Charleston County and involve the sale of

Abacare, a Charleston County company. Many of the witnesses in this case reside in Charleston County. The initial related lawsuit filed by Mr. Smith and Mr. Reed against Mr. DeClemente and others is pending in Charleston County and is scheduled for trial in May of 2016, thus allowing for consolidation of the two cases and speedy resolution of all claims, crossclaims and counter-claims. The Stock Purchase and Assignment Agreement between Plaintiff and Defendants mandates, in Paragraph 14, that "Venue shall lie in Charleston County" (Bradham depo. exhibit #6). Furthermore, Plaintiff has made a motion to have this case heard by the Business Court, and this motion has not yet been ruled upon by the Chief Justice.

Mr. DeClemente requests that the Court deny Defendants' Motion to Change Venue, Motion to Dismiss, and Objection to Business Court Assignment.

Respectfully submitted,

Cameron L. Marshall
7 Gamecock Ave., Suite 707
Charleston, SC 29407
(843) 795-2298
(843) 795-5081 (Fax)
cameron@attorneymarshall.com
Attorney for Plaintiff

Charleston, South Carolina

January 6, 2016.

Bill of Sale & Transfer

Dated June 30, 2009, appears in this Record on Appeal at pages 112-116

Promissory Note

Dated June 30, 2009, appears in this Record on Appeal at pages 107-109

Personal Guaranty

Of Jeffrey J. Reed, appears in this Record on Appeal at page 110

Personal Guaranty

Of G. Murrell Smith, Jr., appears in this Record on Appeal at page 111

Full and Final Release of DeClemente

Dated July 10, 2009, appears in this Record on Appeal at pages 122-124

OPINION LETTER

July 14, 2008

Mrs. Dorothy Connelly
2353 North Highway 17
Mount Pleasant, SC 29466

Dear Mrs. Connelly:

The enclosed valuation report has been developed for the exclusive and confidential use of Mrs. Connelly and Mr. Phillip Declemente. The report has been prepared by Burkett Burkett & Burkett CPAs, P.A. dated July 14, 2008 and was made by and/or under the direct supervision of the undersigned. The purpose of the valuation is to render an opinion as to the fair market value of the common stock interest, as of April 30, 2008.

In preparing my business valuation report, I have relied upon historical financial information provided to me by management and derived from tax returns and internal financial statements. This financial information has not been audited, reviewed, or compiled by me and accordingly I do not express an opinion or any form of assurance on this financial information.

My report is based on historical and prospective financial information provided to me by management and other third parties. Users of this valuation report should be aware that business valuations are based on future earnings potential that may or may not materialize. Therefore, the actual results achieved during the projection period will vary from the projections used in this valuation, and the variations may be material. The accompanying report discusses all assumptions and limiting conditions that apply to this opinion of value and are integral to the understanding of the opinion.

Based upon my study and analytical review procedures, I have concluded that a reasonable estimate of the fair market value of a 100% common stock interest of ABACARE Home Medical, Inc. as of April 30, 2008 is $975,000.

This engagement was not contingent upon developing or reporting predetermined results. My compensation for completing this assignment is not contingent upon the development or reporting of a predetermined value or direction in value that favors the cause of the client, the amount of the value opinion, the attainment of a stipulated result, nor the occurrence of a subsequent event directly related to the intended use of this appraisal. My analyses, opinions, and conclusions were developed, and this report has been prepared, in conformity with the *National Association of Certified Valuation Analysts, Professional Standards* and the guidelines established by the American Institute of Certified Public Accountants.

Sincerely yours,

Ronald H. Burkett CPA, CVA

Ronald H. Burkett, CPA, CVA
Burkett Burkett & Burkett CPAs, P.A.

Art Bradham CPA PC
2 Law Range
Sumter SC 29150

Phone: (803) 774-1040 Fax: (803) 753-9508
E-mail: art@artbradham.com Website: www.artbradham.com

Mr Rodger Watson
SCDOR

Deliver as email item
Re File # 043-16868-7

Wednesday, December 09, 2009

Dear Mr. Watson,

I am writing in regards to my client Reliable Medical Equipment of South Carolina LLC. I have power of attorney with respect to this matter, previously submitted to your auditor Steve Pierce.

Reliable Medical is a durable medical equipment (DME) supplier, and was affected by the confusion in application of sales tax to their products. As you may be aware, auditors Pierce and Wilson recently completed an examination of the sales tax returns for this client, and a considerable amount of sales tax is payable. Auditor Pierce has applied $19695.67 in penalties for negligence to the amounts due as provided by statute, and we are requesting a waiver of that penalty. The taxpayers accept the $12564.39 in penalties unrelated to negligence. The rest of this letter will be devoted to providing the facts and circumstances of this situation.

The taxation of DME products has been subject to strong controversy over the past few years, with taxpayers taking positions that nothing is taxable to fully taxable, and no guidance has been available until the SC Supreme Court reversed an earlier decision of an administrative law court judge in 26638 – Home Medical Systems v SCDOR filed April 20, 2009. (please excuse my probable incorrect citation; my expertise is income tax cases, none of which are heard before the SC Supreme Court.) This court case established the taxability of a number of DME products that had long been considered non-taxable.

As a result of the "victory" in the Supreme Court case, SCDOR began a process to offer DME taxpayers an opportunity to voluntarily report and correct any errors as a result of the changed taxation due to the case. There was an email that was mailed offering a "clemency period" or some such, with the real or implied threat that anyone who did not come forward voluntarily would be subject to examination.

My clients did not receive the email. I will not use this letter to argue that an email is not a proper method of notification. However, at some point Reliable was notified that they would be examined. Shortly after this was the first time that Reliable ownership or management became aware that any sort of clemency or self reporting was available or required.

Here is what we did:

1. Reliable immediately contacted me, and we began to immediately conduct an internal audit.
2. We contacted the auditors, Pierce and Wilson, and have cooperated fully in every respect.
3. We conducted an exhaustive internal audit, with thousands of documents and many hundreds of electronic pages generated to develop an accurate revised calculation of sales taxes due.
4. We provided the auditors with self assessment information that permitted them essentially to review our workpapers and with a modest amount of effort make an assessment of taxes, interest and penalties owed.

Of course I expect you to inquire of auditors Pierce and Wilson to confirm the truth of these statements.

Request for Waiver of penalty:

We respectfully request that the negligence penalty of $19,695.67 be waived.

1. The business prepared its returns and reported taxable income in conformity with industry understanding of the applicable law.
2. A negligence penalty would not have been applied if the taxpayer had received the notification that permitted self-reporting. The manner of notification is not standard practice.
3. The taxpayers have complied fully and completely with examination.
4. We are not requesting waiver of other penalties.
5. The taxpayer's self-audit and cooperation during this process may well have saved SCDOR a considerable sum in audit personnel time and difficulty.

We appreciate your consideration.

Art Bradham CPA CVA EA Mtax

677 S.E.2d 582
382 S.C. 556
HOME MEDICAL SYSTEMS, INC.,
Respondent,
v.
SOUTH CAROLINA DEPARTMENT OF REVENUE, Appellant.
No. 26638.
Supreme Court of South Carolina.
Heard February 19, 2009.
Decided April 20, 2009.
Rehearing Denied June 24, 2009.

[677 S.E.2d 583]

Milton G. Kimpson, Managing Counsel for Litigation; Ray N. Stevens, Director; Harry T. Cooper, Jr, Chief of Staff; and Nicholas P. Sipe, General Counsel for Litigation, all of Columbia, for Appellant.

Erik P. Doerring, Celeste T. Jones, and Robert L. Widener, all of McNair Law Firm, of Columbia, for Respondent.

Justice WALLER:

Appellant South Carolina Department of Revenue (DOR) directly appeals from the grant of summary judgment by the Administrative Law Court (ALC) in favor of respondent Home Medical Systems, Inc. (Taxpayer). We reverse.

FACTS/PROCEDURAL HISTORY

Taxpayer is a retailer of durable medical equipment, medical supplies, and other medical products. At issue in the instant case is whether the following categories of products are exempt from sales tax:

1. *Continuous Positive Airway Pressure (CPAP) and Bi-level Positive Airway Pressure (BiPAP) devices.* These medical devices are approved by the federal Food and Drug Administration (FDA). The CPAP provides positive air pressure to patients who suffer from a variety of diseases including sleep apnea and acute respiratory failure. The BiPAP provides differing pressure during inhalation to patients who suffer from sleep apnea and acute respiratory failure. Both devices are used to provide a patient with proper

[677 S.E.2d 584]

breathing and require a physician's prescription.

2. *Ventilator devices.* The ventilator is used by a patient to assist in breathing and is normally connected to the patient through a tracheotomy tube. In its simplest form, a ventilator consists of a compressible reservoir, an oxygen air mixture, and a compressor.

3. *Nasal Intermittent Positive Pressure Ventilation (NIPPV) devices.* This is used by a patient to assist in breathing and is normally connected to the patient through the nasal cavity.

4. *Nebulizer devices.* A nebulizer is a specialized air compressor. The compressor forces pressurized air into a breathing cup into which medication is drawn. The nebulizer's pressure mixes with the medication to ease the introduction of the medication into the patient's lungs. The nebulizer does not force the medication into the lungs, but rather vaporizes the medication so the medication is effectively inhaled. This device is used to treat bronchiospasms and other respiratory diseases.

5. *Enteral Nutritional formulas.* These are prescribed for patients who, due to an illness or disease, are unable to consume food products orally. The formula prescribed is selected by the physician based on the caloric and metabolic needs of the individual patient. The formulas may include specific nutrients to treat specific metabolic disorders such as sodium imbalances and protein needs. Enteral formulas are typically administered

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by: (1) a gravity feed bag and tubing connected to a feeding tube inserted in the patient, or (2) an electronic pump which also requires bags and tubing and connects to a feeding tube or catheter inserted in the patient.

Taxpayer sold the above items to customers who had a Certificate of Medical Necessity (CMN). A CMN is a standard form used by Medicare and Medicaid; it is signed by a physician and details the customer's diagnosis and medical necessity for the item.

After an audit by the DOR, Taxpayer was assessed sales taxes on retail sales of the above-listed medical devices and products.[1] The DOR's Final Agency Determination ruled there was no tax exemption because: (1) the items listed in categories 1-4 above are not "prosthetic devices" since they do not replace a body part; and (2) the enteral nutritional formulas (category 5) were not actually sold pursuant to a prescription, and do not require a prescription to be sold.

Taxpayer asserted the sales were exempt from sales tax and filed for a contested case hearing. After discovery, the parties filed cross-motions for summary judgment.[2] Following a hearing on the motions, the ALC granted summary judgment in favor of Taxpayer.

The DOR filed a motion for reconsideration with the ALC, which was denied, and thereafter filed a Notice of Appeal. Taxpayer filed a motion to dismiss the appeal based on failure to timely serve the Notice of Appeal. This Court certified the case for review pursuant to Rule 204(b), SCACR, and deferred ruling on the motion to dismiss until after full briefing on the issue and oral argument.

ISSUES

1. Did the DOR timely serve the Notice of Appeal?

2. Did the ALC err by finding that the sales tax exemption applies to all items and granting summary judgment in favor of Taxpayer?

DISCUSSION

1. Timeliness of Notice of Appeal

Taxpayer argues we should dismiss the instant appeal because the DOR failed to timely serve the Notice of Appeal. This

[677 S.E.2d 585]

raises a novel issue regarding the intersection of the South Carolina Rules of Civil Procedure and the ALC Rules.

The ALC's summary judgment order was dated August 28, 2007, and the DOR received the order on August 30, 2007. On September 10, 2007, the DOR filed a "Motion for Reconsideration and to Alter or Amend Judgment Pursuant to ALC Rule 29(D), ALC Rule 68, and Rule 59(e), SCRCP" (Post-Order Motion). The ALC denied the Post-Order Motion on October 1, 2007. The DOR then served the Notice of Appeal on October 9, 2007.

Taxpayer contends that under the ALC rules, the DOR's Post-Order Motion was improper because ALC Rule 68 does not permit a Rule 59(e), SCRCP. motion. Therefore, according to Taxpayer, the Post-Order Motion did not toll the time period for serving the Notice of Appeal.[3] Stated differently, Taxpayer argues Rule 59(e), SCRCP, does not apply to ALC actions.

The ALC rules contemplate a "motion for reconsideration" under ALC Rule 29(D):

Motion for Reconsideration. Any party may move for reconsideration of a final decision of an administrative law judge in a contested case, **subject to the grounds for relief set forth in Rule 60(B) (1 through 5), SCRCP,** as follows:

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(1) Within ten (10) days after notice of the order concluding the matter before the administrative law judge, a party may move for reconsideration of the decision, provided that a petition for judicial review has not been filed.

(2) The administrative law judge shall act on the motion for rehearing within thirty (30) days after it is filed, and if no action is taken by the administrative law judge within that period, the inaction shall be deemed a denial of the relief sought in the motion.

(3) The filing of a motion for reconsideration shall not, of itself, stay the order of the administrative law judge or excuse or delay compliance with the order of the administrative law judge.

(4) **The time for appeal for all parties shall be stayed by a timely motion for reconsideration, and shall run from receipt of an order granting or denying such motion,** or if no order is filed regarding the motion, thirty (30) days after notice that the motion was filed.

The filing of a motion for reconsideration is not a prerequisite to filing a notice of appeal from a final decision of an administrative law judge.

(Emphasis added).

Taxpayer maintains that because ALC Rule 29(D) only allows a motion for reconsideration when there are grounds for relief under Rule 60(b), SCRCP,[4] a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP, is not permitted in an ALC case. The DOR, on the other hand, argues the ALC rules specifically allow the Rules of Civil Procedure to apply. ALC Rule 68 provides as follows:

The South Carolina Rules of Civil Procedure and the South Carolina Appellate Court Rules may, where practicable, be applied in proceedings before the Court **to resolve questions not addressed by these rules.**

(Emphasis added). The DOR points out there is no ALC rule akin to Rule 59(e),

[677 S.E.2d 586]

SCRCP,[5] and thus, ALC Rule 68 authorizes a Rule 59(e) motion. Moreover, the DOR contends that because issue preservation rules apply to an appeal from an ALC action, there is a need for a Rule 59(e) type motion. We agree with the DOR's position.

Although a Rule 59(e) motion may effectively seek a reconsideration of issues and arguments, this type of motion is often **required** for issue preservation purposes. *See Elam v. South Carolina Dep't of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004). We explained in *Elam* that "there is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument." *Id.* at 22, 602 S.E.2d at 779. Indeed, "it is inherently unfair to disallow such an opportunity." *Id.*

The *Elam* Court further stated that a "party **must** file [a Rule 59(e), SCRCP] motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." *Id.* at 24, 602 S.E.2d at 780. In *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000), we discussed the policy underlying this rule:

If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party **must** file a motion to alter or amend the judgment in order to preserve the issue for appellate review. Imposing this preservation requirement on the appellant is meant to enable the lower court to rule

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properly after it has considered **all** relevant facts, law, and arguments.

(Emphasis added, citations omitted).

Put simply, Rule 59(e) motions serve a vital purpose for proper issue preservation. As in other appellate matters, we require issue preservation in administrative appeals. *See, e.g., Brown v. South Carolina Dep't of Health and Envtl. Control,* 348 S.C. 507, 519, 560 S.E.2d 410, 417 (2002) (issues not raised to and ruled upon by the ALC are unpreserved for appellate review); *Carson v. South Carolina Dep't of Natural Res.,* 371 S.C. 114, 120, 638 S.E.2d 45, 48 (2002) (court sitting in appellate capacity may not consider issues not raised or ruled on by administrative agency); *Kiawah Resort Assoc. v. South Carolina Tax Comm'n,* 318 S.C. 502, 458 S.E.2d 542 (1995) (same). We therefore hold Rule 59(e), SCRCP, motions are permitted in ALC proceedings. Accordingly, the DOR's Post-Order Motion tolled the time period for filing an appeal, and the Notice of Appeal was timely served. We deny Taxpayer's motion to dismiss.

2. Application of the Sales Tax Exemption

The DOR argues the ALC erred in finding Taxpayer is entitled to the sales exemption for the above-categorized products.

State law sets the retail sales tax on tangible personal property at five percent. *See* S.C.Code Ann. § 12-36-910(A) (2000). By statute, however, there is a sales tax exemption for "medicine and prosthetic devices sold by prescription." S.C.Code Ann. § 12-36-2120(28)(a) (2000 & Supp.2008).

"To assist in the administration of this exemption," the DOR promulgated a regulation which defines both medicine and prosthetic devices:

"Medicine" — a substance or preparation used in treating disease.

"Prosthetic Device" — an artificial device to replace a missing part of the body.

S.C.Code Reg. § 117-332 (Supp.2008). The regulation further provides as follows, in pertinent part:

The sale of prescription lenses that replace a missing part of the eye are exempted from the tax, as for example eyeglasses prescribed for a person whose natural lenses have been surgically removed.

Eyeglasses, contact lens, hearing aids and orthopedic appliances, such as braces, wheelchairs and orthopedic custom-made shoes, do not come within the exemption at Code Section 12-36-2120(28).

Id.

In a 2003 Revenue Ruling, the DOR issued an advisory opinion on this exemption, and opined as follows, in relevant part:

[677 S.E.2d 587]

Medicine sold by prescription. In order for this exemption to be applicable, the medicine must be of a type that requires a prescription, the sale must require a prescription, and must actually be sold by prescription....

Prosthetic devices sold by prescription. In order for this exemption to be applicable, ... the sale must require a prescription and the device must actually be sold by prescription and the device must replace a missing part of the body. **A device that merely replaces a missing function is not exempt.**

S.C. Rev. Rul. # 03-02 (2003) (emphasis added).

Despite the DOR's long-standing construction of this exemption,[6] the ALC

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found that the department's policies had "contorted the plain language of the statute to severely limit the scope of the exemption." The ALC stated that "the definition of prosthetic device has been updated as the field of medicine has progressed" and therefore found all of the devices at issue in the instant case are prosthetic devices. Furthermore, the ALC held that Regulation 117-332's definition of "prosthetic device" was inconsistent with "current medical definitions and as such should be rejected as contrary to the intent of the General Assembly to provide an exemption for `prosthetic devices sold by prescription.'"

The DOR argues the ALC erred in invalidating the agency's definition of prosthetic device and by improperly broadening the definition. We agree.

The language of a tax exemption statute must be given its plain, ordinary meaning and must be strictly construed against the claimed exemption. *TNS Mills, Inc. v. South Carolina Dep't of Revenue*, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998); *see also Southeastern-Kusan, Inc. v. South Carolina Tax Comm'n*, 276 S.C. 487, 489, 280 S.E.2d 57, 58 (1981) ("As a general rule, tax exemption statutes are strictly construed against the taxpayer."). Moreover, "[r]egulations authorized by the Legislature have the force of law." *Goodman v. City of Columbia*, 318 S.C. 488, 490, 458 S.E.2d 531, 532 (1995). Nonetheless, a regulation may not alter or add to a statute. *Id.*

The sales tax exemption enumerated in section 12-36-2120(28)(a) is for "medicine and prosthetic devices sold by prescription." Taxpayer submitted a multitude of definitions for "prosthetic devices" and "prosthesis" in support of its motion for summary judgment. Based on our review of the record, we agree with the DOR's observation that many of these definitions have as a primary definition one that is consistent with the regulatory definition, e.g. "an artificial replacement of a body part." Accordingly, we find Regulation 117-332 reasonably defines "prosthetic devices."

Moreover, while it is clear that one current, accepted definition in the medical community is a broad one which encompasses not only a device to replace a missing part of the body, but also a device to replace missing functionality, we emphasize that simply because another definition exists does not mean the ALC is empowered to invalidate an otherwise proper regulatory definition. *See Drummond v. State, Dep't of Revenue*, 378 S.C. 362, 370, 662 S.E.2d 587, 591 (2008) (because the ALC is part of the executive branch, it has "no authority to rule on the facial validity" of a regulation); *cf. Goodman, supra* (unless a regulation improperly alters or adds to a statute, a court may not invalidate it).

Finally, we note the ALC's ruling that the regulatory definition was not sufficiently expansive goes against the rule that a statutory tax exemption must be strictly construed against the taxpayer. *TNS Mills, Inc. v. South Carolina Dep't of Revenue, supra.*

In sum, we hold that the ALC erred in applying its own, broad definition of prosthetic device to find that Taxpayer's durable products were prosthetic devices.

Regarding the enteral nutritional formulas, the ALC found they were "medicine sold by prescription."[7] The DOR argues that because the formulas are "over the

[677 S.E.2d 588]

counter" (OTC) products[8] which do not **require** a prescription, the ALC erred. Furthermore, the DOR contends that CMNs are not equivalent to a prescription. We agree.

As discussed above, the DOR has set forth a definition for "medicine by

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prescription" — the medicine must be of a type that requires a prescription, the sale must require a prescription, and it must actually be sold by prescription. Taxpayer argues that a prior legislative version (a 1970 reimbursement statute) more explicitly stated the requirement — "medicines required by law to be sold only by prescription" — and therefore, the current language is not **exclusively** for medicines that require a prescription. In our opinion, however, the current statutory language — "medicine ... sold by prescription" — clearly evidences a legislative intent that the exemption be only for those medicines requiring a prescription. *See TNS Mills, Inc., supra* (tax exemption statute must be given its plain, ordinary meaning and must be strictly construed **against** the claimed exemption).[9]

CONCLUSION

We hold the ALC rules allow a Rule 59(e), SCRCP, motion, and therefore deny Taxpayer's motion to dismiss the appeal. Additionally, we reverse the ALC's decision which found Taxpayer's products tax exempt.

REVERSED.

TOAL, C.J., PLEICONES, BEATTY and KITTREDGE, JJ., concur.

Notes:

1. The audit covered Taxpayer's sales from July 1, 2000 through June 30, 2003. The proposed assessment was for $299,207.81 in sales taxes, and $ 92,285.51 in interest, for a total of $391,493.32.

2. The DOR's motion was for partial summary judgment.

3. The ALC's order was received on August 30, 2007. An appeal from the ALC must be filed within 30 days. *See* Rule 203(b)(6), SCACR. If the time period was not tolled, the deadline for filing in this case would have been Monday October 1, 2007 (because the 30th day fell on **Saturday**, September 29, 2007). *See* Rule 234(a), SCACR.

4. Rule 60(b), SCRCP, states:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud, misrepresentation, or other misconduct of an adverse party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

5. Under Rule 59(e), SCRCP, a motion "to alter or amend the judgment" may be made within ten days of receipt of written notice of the entry of the order.

6. These regulatory definitions have been in continuous use since 1978.

7. We recognize the ALC found that all the items at issue — even the durable devices — were medicine sold by prescription. In making this determination, the ALC relied on the definition of medicine for pharmacists found in S.C.Code Ann. § 40-43-30(16). We agree with the DOR that this definition has no application to the definition of medicine in the sales tax exemption statute found in section 12-36-2120(28)(a). *See* § 40-43-30 (where statute specifies that the definitions

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are for "purposes of **this** chapter") (emphasis added).

8. One example the DOR highlights is PediaSure with Fiber which can be purchased at a grocery store.

9. Moreover, in another section of the sales tax exemption statute, the Legislature seems to have made a distinction between prescription and OTC medicines. The statute provides the following exemption:

> (63) prescription and over-the-counter medicines and medical supplies, including diabetic supplies, diabetic diagnostic equipment, and diabetic testing equipment, sold to a health care clinic that provides medical and dental care without charge to all of its patients.

§ 12-36-2120. Thus, if the Legislature had intended to include OTC medicines in the exemption at issue here, it could have used language evidencing that intent.

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Art Bradham CPA PC

2 Law Range
Sumter SC 29150

Phone: (803) 774-1040 Fax: (803) 753-9508
E-mail: art@artbradham.com Website: www.artbradham.com

SCDOR
PO box 5418
Florence SC 29502

Wednesday, September 23, 2009
Re **Reliable Medical Equipment of SC**
File # 043-16868-7

Dear Mr. Pierce,

We are looking forward to your visit on 10/28/09 at the company's office. **Please note that the current address is 418 Broad St, not 329 Broad St Sumter SC.** I will have a SC 2848 available for you at that time or before.

We do not anticipate any delay in accumulating the documents and records requested.

Reliable Medical has been on several different accounting systems with some degree of computerization over the audit period, but no consistent computer system over that period. I suspect that we might have more difficulty making the audit software fit the circumstances than is warranted.

After you conduct your initial interview and tour of the business, we are asking that you conduct your examination at my office at 2 Law Range. You will be much more comfortable and I have the space that you can spread out and work in. Reliable office is only a few minutes away if we need any documents not included or anticipated.

Unless we hear otherwise, we will see you on the 28th of October.

Thank you,

Art Bradham CPA CVA EA Mtax

Admitted to Practice in US Tax Court

Art Bradham CPA PC
2 Law Range
Sumter SC 29150

Phone: (803) 774-1040 Fax: (803) 753-9508
E-mail: art@artbradham.com Website: www.artbradham.com

ABACARE ONLY TAX DEBT OWED

SCDOR
Sales Tax (PDMS)
Columbia SC 29214-0111

Re 1932364

Sunday, September 27, 2009

I am writing in regards to my client Abacare Home Medical Inc. We are in receipt of your proposed notice of assessment (copies attached) and are requesting an additional 30 days to respond. We have just now received the notice; we are unaware of the proper reporting at this location; we are making every effort to quickly ascertain the correct tax and respond to your notice, however additional time is required to respond appropriately.

Thank you,

Art Bradham CPA CVA EA Mtax

Admitted to Practice in US Tax Court

Exh #8

CAMERON L. MARSHALL, L.L.C.

ATTORNEY AT LAW

June 8, 2012

Via United States Mail – Proof of Delivery Requested
Mr. G. Murrell Smith, Jr.
Mr. Jeffrey J. Reed
Assistive Technology Medical Equipment Services, LLC
126 North Main Street
Sumter, SC 29150

Re: Arrearages on Promissory Note dated June 30, 2009

Dear Gentlemen,

Please be advised that pursuant to Paragraph 7 of the Promissory Note between ATMES, LLC and Phillip L. DeClemente, executed on June 30, 2009, this is to inform you that you are behind in your payments to Mr. DeClemente. This is to request that payment of all arrearages to date, including principal and late fees in the amount of $59,571.45, be made within thirty days, and that monthly payments of $7,341.84 be resumed to Mr. DeClemente.

Please be aware that pursuant to Paragraphs 6(B) and 6(D) of the referenced Promissory Note, if the arrearage amount of $59,571.45 is not paid, and the monthly payments of $7,341.84 are not resumed within thirty days of this letter, ATMES, LLC will be required to pay the full amount outstanding on the Note, including all remaining principal, interest, late fees, and all attorney's fees and costs associated with enforcing this Promissory Note. Along with payment of the full amount of the Promissory Note, a $30,000.00 compliance bonus will also be owed Mr. DeClemente pursuant to Paragraph 9 of the Bill of Sale.

Please remit to my office a check payable to my client for $59,571.45 within thirty days of receipt of this letter to avoid further collection action.

Thank you for your attention to this matter.

Sincerely yours,

Cameron L. Marshall

CLM:jdh

cc: Mr. Phillip DeClemente

7 GAMECOCK AVE. • SUITE 707 • CHARLESTON, SOUTH CAROLINA 29407
PHONE (843) 795-2298 • FAX (843) 795-5081 • MOBILE (843) 324-7200

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0310264000022187046	Priority Mail®	Delivered	June 11, 2012, 9:30 am	SUMTER, SC 29150	Expected Delivery By: June 9, 2012 Delivery Confirmation™
		Notice Left (Business Closed)	June 09, 2012, 9:47 am	SUMTER, SC 29150	
		Out for Delivery	June 09, 2012, 9:29 am	SUMTER, SC 29150	
		Sorting Complete	June 09, 2012, 9:19 am	SUMTER, SC 29150	
		Arrival at Post Office	June 09, 2012, 7:39 am	SUMTER, SC 29150	
		Processed through USPS Sort Facility	June 09, 2012, 2:47 am	COLUMBIA, SC 29201	
		Depart USPS Sort Facility	June 08, 2012	CHARLESTON, SC 29423	
		Processed at USPS Origin Sort Facility	June 08, 2012, 9:39 pm	CHARLESTON, SC 29423	
		Acceptance	June 08, 2012, 3:36 pm	CHARLESTON, SC 29407	

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Exh #9

Lee, Erter, Wilson, James, Holler & Smith, L.L.C.

Jack W. Erter, Jr.
Harry C. Wilson, Jr.
David C. Holler*
G. Murrell Smith, Jr.
John E. James, III
Sumter, South Carolina 29151

Lucy Grey McIver

*Licensed in SC, NC & GA

Attorneys at Law
---
126 North Main Street
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Henry B. Richardson, Sr. (1916-1997)
John D. Lee, Jr. (1921-1999)
George C. James (1927-1999)

Telephone: (803) 778-2471
Facsimile: (803) 778-1643

E-Mail Address: murrellsmith@leeandmoise.com

June 12, 2012

Cameron L. Marshall, Esquire
7 Gamecock Avenue
Suite 707
Charleston, SC 29407

Re: Arrearages on Promissory Note dated June 30, 2009

Dear Mr. Marshall:

I received your correspondence dated June 8, 2012 concerning the note to Mr. DeClemente. As you probably know, we have filed suit against Mr. DeClemente and he is now in default. We are awaiting a damages hearing to be scheduled for the Court to set the damages incurred as a result of Mr. DeClemente's numerous breaches.

Once we have our damages set, then we can determine the amount that is owed pursuant to this Promissory Note. We intend to apply a set-off to any amounts awarded by the Court. At that point, we will pay the remaining balance, if any.

It is our position that Mr. DeClemente has damaged us to a much greater extent than the amount left on the Promissory Note. We anticipate Mr. DeClemente owing us money upon the conclusion of the damages hearing.

Lastly, I would point out that the $30,000.00 compliance bonus has been breached due to the incident on the Ravenel Bridge. I don't think any reasonable Judge and/or jury would find that manner not to be detrimental to the success of any company since it was published in the Post and Courier that he was an owner of ABACARE.

Lastly, I would also point out that Mr. DeClemente turned in his Chevrolet Silverado truck. His truck was also to be deducted the amounts that are owed.

As I believe you know, our company is being represented by James E. Smith, P.A. in Columbia. I would appreciate if you would provide any further communication to Mr. Smith.

If you have any questions, please feel free to contact me.

With kindest regards, I am,

Sincerely,

G. Murrell Smith, Jr.

GMS,jr:mln
cc: James E. Smith, Jr. (via email only)
Jeffrey J. Reed (via email only)

Smith Depo

1 State of South Carolina
In Common Pleas Court
2 County of Charleston
3
Assistive Technology Medical
4 Equipment Services, LLC,
5 Plaintiff,
V. 2011-CP-10-8011
6
Hood & Selander, CPAS, LLC,
7 Donna C. Cash, as Personal
Representative of the Estate of
8 Dorothy Connelly, W. E. Applegate,
III, as Personal Representative of
9 the Estate of James B. Connelly,
Kimberly Cuce, Phillip Declemente,
10
Defendants.
11
12
30(b)(6) Deposition of: Assistive Technology
13 Medical Equipment Services, LLC (Murrell Smith)
14 Location: 1422 Laurel Street
Columbia, South Carolina
15
Date: Wednesday, October 31, 2012
16
Time: 10:35 a.m. - 1:34 p.m.
17
Court Reporter: Kathleen M. Hagood
18
19 The 30(b)(6) deposition is taken pursuant to
20 notice and/or agreement, in the above-entitled
21 cause pending in the above-named court and
22 pursuant to the South Carolina Rules of Civil
23 Procedure.
24
25

1 A P P E A R A N C E S

2 For the Plaintiff:
James E. Smith, Jr., P.A.
3 1422 Laurel Street
Columbia, SC 29201
4 by: James E. Smith, Esq.

5

6
For the Defendant Hood & Selander, CPAS, LLC:
7 Howser, Newman & Besley, L.L.C.
1508 Washington Street
8 PO Box 12009
Columbia, SC 29201
9 by: R. Davis Howser, Esq.

10

11
For the Defendant Donna C. Cash as Personal
12 Representative of the Estate of Dorothy Connelly:
Womble, Carlyle, Sandridge & Rice
13 5 Exchange Street (29401)
PO Box 999
14 Charleston, SC 29402
by: James D. Myrick, Esq.
15

16

17 For the Defendant Phillip DeClemente:
Cameron L. Marshall, LLC
18 7 Gamecock Avenue, Suite 707
Charleston, SC 29401
19 by: Cameron L. Marshall, Esq.

20

21
For the Defendant W. E. Applegate, III, as
22 Personal Representative of the Estate of James B.
Connelly:
23 Wills, Massalon & Allen, LLC
97 Broad Street (29401)
24 PO Box 859
Charleston, SC 29402-0859
25 by: Christy Ford Allen, Esq. (by telephone)

1 I N D E X

2 Examination by Mr. Howser 4
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3 Further Examination by Mr. Howser 128
Examination by Ms. Allen 135
4

5 E X H I B I T S

6 Defendant's:

Pg/Ln	Ex.	Description
10/05	1	Notice of 30(b)(6) deposition

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** uh-huh = affirmative
25 huh-uh = negative

1 S T I P U L A T I O N S

2 It is stipulated among Counsel that this
3 30(b)(6) deposition is being taken pursuant to the
4 South Carolina Rules of Civil Procedure; and that
5 all objections, except as to the form of the
6 question, are reserved until the time of trial.
7 It is also stipulated among Counsel for
8 the respective parties and the deponent that the
9 deponent will waive the right to read and sign
10 this transcript.
11 Thereupon,
12 Murrell Smith,
13 being first duly sworn by the Court Reporter, as
14 hereinafter certified, testified as follows:
15 E X A M I N A T I O N
16 BY MR. HOWSER:
17 Q Mr. Smith, my name is Dave Howser; as
18 you know, and we've met on several occasions.
19 A Right.
20 Q I understood that you're the Rule
21 30(b)(6) designee for Assistive Technology Medical
22 Equipment Services, LLC?
23 A Unfortunately, yes.
24 Q All right. If I refer to the Plaintiff
25 as just Assistive Technology, can we agree that we

1 are referring to the whole name and --
2 A You can. Or you can call it ATMES,
3 would be a whole lot easier. That's what we call
4 it. So whichever you --
5 Q AT---
6 A -- want.
7 Q ATMES?
8 A Yeah. A-T-M-E-S.
9 Q All right.
10 A That's what I call it.
11 Q Mr. Smith, I -- I know you're a
12 practicing attorney and engage in the trial of
13 cases, but nevertheless the rules require that I
14 give you certain instructions. If I should ask
15 you a question during the course of these
16 proceedings that you do not understand, you should
17 tell me that you do not understand and -- and I
18 will rephrase or restate the question. That
19 should be directed to me rather than to Mr. Smith,
20 your attorney.
21 A Right.
22 Q If during the course of the deposition
23 you want to take a break, just tell us that you
24 want to take a break and we'll be glad to
25 accommodate you. As you unders--- and I know you

1 understand if you and Mr. Smith were to discuss
2 your testimony during the break, I'd be entitled
3 to ask you what you discussed. You have also the
4 right to read over and sign the deposit---
5 A I'll waive that right.
6 Q All right. He's waiving the right to
7 read and sign.
8 A Thank you. I forgot about that one.
9 Q Do you feel well enough to give a
10 deposition today?
11 A I do.
12 Q Are you on any medication that would
13 impair your ability to understand my questions and
14 to give full and complete answers?
15 A I do not.
16 Q Okay.
17 A I am not.
18 Q Okay. Mr. Smith, would you give us
19 your home address?
20 A 2755 Windmill Drive, Sumter, South
21 Carolina 29150.
22 Q And your business address?
23 A The law firm, I -- I -- I -- my law
24 firm is 126 North Main Street, Sumter, South
25 Carolina 29150. And I -- I'm on Broad Street with

1 the medical equipment company. I don't know the
2 exact address. I can't ever remember that.
3 Q Okay. The medical equipment company,
4 ATMES, has a different address from the law firm?
5 A Yes, sir.
6 Q Okay. How many people are employed by
7 Assistive Technology?
8 A I don't know the exact number, but it's
9 a lot -- over ten. The -- somewhere between ten
10 and twenty.
11 Q Okay. Do you have offices other than
12 in Sumter?
13 A We had an office in Mount Pleasant and
14 that place is no longer in operation.
15 Q And so does that mean that Sumter is
16 the sole place of business --
17 A That's correct.
18 Q -- for ATMES?
19 A That's correct.
20 Q What does ATMES do?
21 A It's a durable medical equipment and
22 prosthetic/orthotic company.
23 Q In layman's terms, tell me what that
24 means.
25 A Sell medical equipment. Wheelchairs --

1 not sell, but, you know, we're we -- it's just
2 a long -- complicated rules with it, but provide
3 medical equipment to patients and does -- do some
4 prosthetics and orthotics. We do power chairs,
5 which are the motorized wheelchairs.
6 Q Okay. For example, if somebody needed
7 a CPAP machine --
8 A We do that. Res---
9 Q You do?
10 A That's respiratory. Yes.
11 Q Right. You do that? Okay. Excuse me.
12 What is the name of your law firm?
13 A Lee, Erter, Wilson, Holler and Smith.
14 Q And what does your practice consist of?
15 A We're a general practice of law and
16 emphasize -- don't emphasize, but do a fair amount
17 of insurance defense work.
18 Q And are you engaged in litigation?
19 A I am.
20 Q Okay. And are you married?
21 A I am.
22 Q What is your wife's name?
23 A Macaulay Smith.
24 Q And does she work at Tuomey Hospital?
25 A She does.

1 Q And what is her position at Tuomey?
2 A She is in the risk management
3 department.
4 Q Okay. And your father, I think, is
5 also a physician?
6 A He is.
7 Q And I think you have an uncle here
8 who's retired?
9 A Retired physician.
10 Q Physician, yeah.
11 A He's the smart one.
12 Q How long have you been engaged in the
13 practice of law?
14 A Since 1994, I believe. 1993-94.
15 Q And do you hold an elected position in
16 the State of South Carolina?
17 A I am. I'm a member of the South
18 Carolina House of Representatives.
19 Q All right. How long have you been in
20 the South Carolina House of Representatives?
21 A Since 2001. I think I was sworn in in
22 November of 2000.
23 Q You have been designated to appear at
24 this deposition on behalf of ATMES, have you not?
25 A I have.

1 Q I have handed you a copy of the notice
2 of the taking of the Rule 30(b)(6) deposition, and
3 what I'd like to do is get a copy of that notice
4 marked as Exhibit 1. All right.
5 (Defendant's Exhibit Number 1
6 Marked for identification.)
7 BY MR. HOWSER:
8 Q This notice, on Exhibit A, has some 14
9 areas that I had noticed to -- to examine
10 Assistive Technologies (sic) about.
11 A Correct.
12 Q Are you prepared to testify as to all
13 14 of these items?
14 A I'm prepared to testify to the best of
15 my ability. Some of these I cannot answer and,
16 you know, it's just -- some of them aren't
17 applicable. Some of them, a CPA may have better
18 knowledge than I do.
19 Q Okay.
20 A But I'm the most knowledgeable, as it
21 relates to these 14, with --
22 Q Okay.
23 A -- ATMES.
24 Q All right. Now, what is your
25 connection or position with ATMES?

1 A I own 50 percent of it right now.
2 Q Who owns the other 50 percent?
3 A Jeff Reed, R-E-E-D.
4 Q And where does Mr. Reed reside?
5 A In Sumter.
6 Q Are there only two members of ATMES, at
7 the present time?
8 A That's --
9 Q That is, you and Mr. Reed?
10 A That's correct.
11 Q Were there other members of ATMES
12 before the two of you became sole members?
13 A There were.
14 Q Who were the other members?
15 A Phillip DeClemente.
16 Q How much did he own?
17 A 25 percent.
18 Q All right.
19 A And Kim Cuce, C-U-C-E -- C-U-C-E. And
20 she owned 25 percent also.
21 Q And then you owned 50 percent?
22 A No, sir. I owned 25 percent at that
23 time.
24 Q All right. And who owned the remaining
25 25 percent?

1 A Jeff Reed.
2 Q Now, how did Mr. Clemente (sic) dispose
3 of his interest?
4 A He sold his interest to Jeff Reed and
5 myself. Equal shares, twelve -- whatever, twelve
6 and a half equals twenty-five.
7 Q And how did Kim Cuce...
8 A She did the same thing.
9 Q Sold half of her interest to you and
10 half of her interest to Mr. Reed?
11 A Yes, sir.
12 Q All right. How long were Mr. Clemente
13 and Ms. Cu--- Cuce members of ATMES?
14 A I think -- I -- and I don't have the
15 paperwork in front of me, but I think within 2009
16 DeClemente was out. It -- I want to say it was
17 sometime in the summer of 2009. He didn't last
18 long in the business at all. I think he was in
19 essence out beginning February-March of 2009, when
20 we fir--- when we first started. And then Cuce --
21 I want to say either a year, maybe two years ago,
22 that she was -- she was bought out.
23 Q Okay. Did Assistive Technologies, or
24 ATMES as we've referred to it, engage the
25 accounting firm of Hood and Selander to perform

1 any professional accounting services for it?
2 A Well, today I realize that indirectly
3 we did, and directly -- let me explain to you, if
4 I could, the -- the -- how this situation went is
5 we bought -- ATMES was formed as an LLC. And so
6 we bought ATME--- we formed ATMES and then
7 purchased from the Connelly -- whichever -- the
8 Estate of Connelly -- I -- I don't know who it
9 was. Whoever owned it. Either -- Dorothy
10 Connelly's estate I believe is who we purchased it
11 from. It's whatever's in the paperwork. We
12 bought the company from them, and so in there you
13 had -- in the way ATMES was set up is you had some
14 holding companies. We -- the -- the business in
15 Sumter is called Reliable Medical Equipment of
16 South Carolina, LLC. And so --
17 Q Reliable what?
18 A Medical Equipment --
19 Q Thank you.
20 A -- of Sumter, LL--- I mean, of South
21 Carolina, LLC. Sorry. And so that was already in
22 a -- in business, and then you had the Abacare
23 Home Medical, Inc., which was already in business,
24 which the Connellys and Phillip DeClemente owned.
25 So then, you know, the merger happened and so the

1 way we were gonna structure this was we were going
2 to open up under ATMES and -- and keep the Abacare
3 and keep the Reliable Medical, 'cause you have to
4 do that "cause you've got provider numbers. And
5 those are -- Medicare issues you a provider number
6 and Medicaid issues you a provider number. So if
7 -- if you change entities, you've got to -- you
8 lose your Medicare number and you've got to start
9 all over again. So ATMES owned those -- the --
10 owned those entities.
11 And -- and so as it relates to
12 Mr. Selander and the law f--- and the law firm --
13 the CPA firm of Hood and Selander, they did --
14 they were engaged by -- by Abacare Home Medical.
15 And the reason they were engaged by Abacare Home
16 Medical is Mr. Selander, at the end -- he was
17 their accountant in the beginning. And at the --
18 after we purchased this, we had an accountant --
19 Art Bradham was our CPA. And so at that point we
20 had to file tax returns, so what my understanding
21 is -- and you'll talk to Mr. Bradham to get -- be
22 more specific about it -- is that Selander ended
23 up filing the tax returns for Abacare Home
24 Medical, Inc. in 2008. And so that, in turn, was
25 when we -- he filed those in -- in the 2009 before

1 -- somewhere before April 15th, 2009. So he did
2 do that work for Abacare Home Medical, Inc., which
3 was owned by us at the time.
4 Q All right. And let -- let me make sure
5 I understand. Hood and Selander prepared returns
6 -- tax returns for Abacare?
7 A That's correct.
8 Q All right. Hood and Selander never
9 prepared a tax return for Assistive Technology?
10 A That's correct.
11 Q Did Assistive Technology ever have a
12 written engagement letter with Hood and Selander?
13 A They did not.
14 Q When did Assistive Technology, or
15 ATMES, purchase the interest of either the
16 Connellys or from whomever you purchased?
17 A I want to say November '08.
18 Q All right.
19 A I don't have the contract in front of
20 me, but I believe --
21 Q Was it --
22 A -- that's correct.
23 Q -- November 5th or November 7, 2008?
24 A I -- I -- I -- it's -- I can't tell you
25 the exact date. I don't have the contract in

1 front of me. But it --
2 Q All right.
3 A -- was sometime in November of '08.
4 Q All right. Who prepared that contract?
5 A Sam Applegate.
6 Q Do you have any knowledge as to whether
7 or not there was an engagement letter or a written
8 engagement between Hood and Selander and Abacare?
9 A I have no -- I do not have any
10 knowledge of that. I would presume there was one,
11 but I am not sure.
12 Q Are you aware of whether or not Hood
13 and Selander prepared any financial statements for
14 Abacare?
15 A I -- it's my understanding from Art
16 Bradham that they prepare financial statements for
17 Abacare, 'cause the way sale goes -- and, you
18 know, the sale went -- and I know I'm here to
19 testify as the 30(b)(6) representative, but --
20 Q Right.
21 A -- you know, I -- I own the company.
22 I'm not involved in the day-to-day management of
23 this company. But the way this all went is
24 basically David Holler in my office represented me
25 and my partners and Sam Applegate represented the

1 Connellys. And then -- and so then Art Bradham
2 was an accountant and David Selander was an
3 accountant -- this is my understanding of it,
4 'cause -- is that they worked in conjunction with
5 this Burkett and Burkett and provided financial
6 statements of -- Selander of Abacare and Art
7 Bradham of Reliable to deal with this merger.
8 But, you know, it was really for the purchase of
9 Abacare, so my understanding is -- is David
10 Selander provided financial information to Burkett
11 and Burkett and to Art Bradham.
12 Q All right. Now, there's a difference
13 between furnishing financial information and
14 furnishing a financial statement. Do you have
15 knowledge as to whether or not Hood and Selander
16 ever prepared a financial statement for Abacare?
17 A Personal knowledge, no. But I -- my
18 understanding from Art Bradham is that they did,
19 but I'm not a hundred percent sure on that.
20 Q All right. You have never seen a
21 financial statement, would it be fair to say, that
22 Hood and Selander prepared on Abacare?
23 A Not that I recall. I could have during
24 the -- during the sale -- well, you know, November
25 of 2008's a long time ago, so I don't remember

1 exactly what I would have seen in the fall of '08,
2 but I -- I -- so I can't say for certainty whether
3 I did or didn't.
4 Q. All right. You think Art Bradham --
5 Bradham would -- would have knowledge as to
6 whether or not there was a financial statement
7 prepared --
8 A Yes, sir. Yeah, I believe --
9 Q -- or that --
10 A -- he would.
11 Q -- Burkett, Burkett & Burkett --
12 A Yes, sir.
13 Q -- would have that knowledge?
14 A Yes, sir.
15 Q Okay. In connection with the
16 performance of due diligence in connection with
17 this purchase of Abacare, what financial records
18 was ATMES or Reliable given?
19 A Again, it's my -- you know, Art
20 Bradham's the best one to direct that question to,
21 but -- you know, that's why we engaged him to go
22 through those records. But I know he went through
23 the financial records of Abacare to determine
24 whether it was a, you know, deal that should have
25 been pursued or not.

1 Q But you don't know what those financial
2 records were?
3 A No, sir. He -- he just reported back
4 to us after he went through them.
5 Q In the complaint in this lawsuit, there
6 are a number of references to minutes of Abacare.
7 A Yes, sir.
8 Q Did ATMES or Reliable have access to
9 the corporate minutes of Abacare, in connection
10 with its due diligence investigation?
11 A No, sir. Not to my knowledge.
12 Q All right. The complaint refers to
13 minutes of a July 24, 2007 shareholder meeting of
14 Abacare.
15 A Correct.
16 Q When did ATMES or Reliable obtain
17 copies of those minutes?
18 A After Sam Applegate sent me the -- an
19 e-mail saying that his clients have decided not to
20 pay the sales taxes that were incurred during
21 their ownership. And so what happened was then I
22 started obviously having conversations with
23 everybody about -- that we've got some concerns
24 that we -- we bought a company that -- with sales
25 tax liability that was not disclosed to us, and

1 Phillip DeClemente said, well, David Selander knew
2 about it because I've got the copies of the
3 minutes. And I asked -- and I said, well, if
4 you've got copies of the minutes, I certainly
5 would be interested in seeing those, and he
6 forwarded me a copy of those minutes by e-mail.
7 Q All right. The complaint in this
8 lawsuit alleges that there were minutes of July
9 24th, 2007 that stated, in part -- and I'm quoting
10 from paragraph 18 of the complaint -- David noted
11 that the taxable sales reported on the June sales
12 tax forms appeared significantly understated.
13 A Right.
14 Q David stressed the importance to report
15 as accurately as possible the taxable sales on the
16 monthly forms. David advised that Abacare should
17 set aside a reserve in case of an audit. If an
18 audit determines the company should use sales
19 rather than collections, then Abacare could owe a
20 substantial amount of tax penalties and interest.
21 David noted last meeting and reported this meeting
22 that a system needs to be set up as soon as
23 possible that will support the gross sales number
24 posted on the sales tax returns. This information
25 will be needed in the case of an audit. Finally

1 David noted that a couple of sales tax returns
2 since the last shareholder meeting were filed and
3 paid late and there was a penalty of up to 25
4 percent of the tax for late filing and payment.
5 Are you familiar with that allegation in the
6 complaint?
7 A I am.
8 Q All right. Did anyone on behalf of
9 ATMES or Reliable investigate the issue of sales
10 tax and the sales tax treatment, as part of the
11 due diligence investigation?
12 A My understanding is Burkett and
13 Burkett, when they provided the evaluation to
14 which we relied upon, had a discussion with
15 Mr. Selander. And it's noted in their evaluation
16 report. And Mr. Selander provided that
17 information and -- and so I would presume if he's
18 aware there's a potential and a possibility of --
19 of a sales tax liability, that he would have
20 reported that to the valuator, based upon this
21 sale.
22 Q All right. What do you understand
23 Mr. Selander reported to Burkett, Burkett &
24 Burkett?
25 A I presume he provided the financial

1 ~~information which is -- which is in the valuation~~
2 report that says, you know, that they had
3 discussions with Mr. Selander about the company.
4 Q All right. Do you know if he had any
5 discussion with Burkett, Burkett & Burkett about
6 the sales tax issue and whether or not there was a
7 possibility that sales tax could have been
8 understated?
9 A No, sir. I don't have any personal
10 knowledge of that.
11 Q All right. Have you ever discussed
12 with Burkett, Burkett & Burkett any information
13 that they received -- or it received from
14 Mr. Selander?
15 A No, I have not had any discussions with
16 Burkett. I think -- I understand my attorney sent
17 a subpoena to them. I don't know what the result
18 of that was.
19 Q All right. Now, who engaged Burkett,
20 Burkett & Burkett?
21 A The Connelly estate.
22 Q And what is your understanding of the
23 engagement of Burkett, Burkett & Burkett?
24 A To provide a fair market value of the
25 company.

1 Q Did Burkett, Burkett & Burkett provide
2 ATMES or Reliable with its opinion of the fair
3 market value of the company?
4 A It did.
5 Q All right. And did ATMES and/or
6 Reliable rely on that valuation in coming up with
7 a purchase price for Abacare?
8 A It did. It was part of the
9 consideration.
10 Q Okay. What -- what else went into the
11 consideration?
12 A Just negotiating with the estate for
13 the -- you know, we only purchased the 80 percent
14 interest, I believe, that they owned.
15 Q Okay. And it -- the -- the estate
16 owned 80 percent?
17 A I -- I think --
18 Q And --
19 A -- that's correct.
20 Q All right. And 20 percent was owned by
21 Mr. DeClemente?
22 A That's correct. Whatever the remainder
23 of it was, was owned by DeClemente.
24 Q Before the sale was consummated, did
25 you have any discussion with Mr. DeClemente about

1 the sales tax issue?
2 A I -- I think I did, 'cause I remember
3 dealing with that issue, 'cause at that time there
4 was a sales tax issue with durable medical
5 equipment sales. There was an Administrative Law
6 Court case in which they had made certain exem---
7 they said they were exempt from sales taxes, and
8 that was on appeal to the Supreme Court and the
9 Supreme Court ended up reversing it. And I
10 remember having discussions with DeClemente and
11 Cuce saying, folks, we have got to pay sales taxes
12 and so I just want this to be perfectly clear --
13 that we all understand that sales taxes have been
14 paid and that we're gonna pay them going forward
15 on what the Department of Revenue says, not on
16 what you think. 'Cause some companies just
17 stopped paying sales taxes completely. And so
18 both DeClemente and Cuce assured me that sales
19 taxes were being paid appropriately and that we
20 were gonna do that moving forward too.
21 Q All right. So they assured you that
22 the sales tax were being paid appropriately?
23 A That's what they told me.
24 Q All right. Did they tell you who the
25 CPA was for Abacare?

1 A I knew -- yeah. I knew it was --
2 Q Or -- or did you --
3 A -- Selander.
4 Q All right.
5 A Yeah.
6 Q Did you specifically address a question
7 to Mr. Selander about whether or not the sales tax
8 was being appropriately paid?
9 A Me, I did not.
10 Q All right.
11 A No.
12 Q Do you know if anyone on behalf of
13 ATMES or Reliable addressed the sales tax issue to
14 Mr. Selander?
15 A I would presume Art Bradham did, but I
16 cannot say. You have to ask him that question.
17 Q All right. You've never discussed with
18 Mister -- is it Brabham?
19 A Bradham. I think -- I think --
20 Q Bradham?
21 A Yeah. B-R-A-D-H-A-M.
22 Q D-H-A--- have you ever discussed this
23 with Mr. Bradham?
24 A I can't recall. I -- I -- you -- I've
25 had so many discussions with him about this,

1 subsequent
2 Q Okay.
3 A -- so I -- I may, may not have. I just
4 can't tell you.
5 Q Does Assistive Technology contend that
6 Hood and Selander had knowledge of any
7 indebtedness for unpaid taxes of Abacare to the
8 South Carolina Department of Revenue?
9 A I think -- yes. I think we do.
10 Q All right. What knowledge do you
11 contend that Se--- Hood and Selander had that
12 there was actually unpaid indebtedness?
13 A Well, I don't think there was actual
14 undebtedness (sic) -- indebtedness at that point,
15 I think that they were underreporting sales taxes
16 at Abacare. And, you know, if you went back and
17 you looked at what they were doing -- and my
18 understanding is that Mr. Selander was the one
19 filling out the sales tax returns and -- and
20 sending them to the Department of Revenue. And if
21 I recall correctly -- and, you know, I have not
22 looked at this since we went through this
23 situation whenever we reported to the DO--- to DOR
24 about this, but I believe that Abacare was
25 substantially underreporting the in--- the income

1 of that company on their sales tax returns. 'Cause
2 I remember having a conversation with
3 Mr. Applegate saying, Sam, it's -- this is not --
4 you know, there was a question about what was
5 deductible and not deductible, per this -- per the
6 statute the Supreme Court resolved. And I said
7 this isn't about taking deductions that were
8 subsequently not allowed, this is in my opinion
9 underreporting income and -- and, you know, I have
10 a real concern about that. And so, you know, it
11 -- to me, Mr. Selander would see the income that
12 was coming in to Abacare and then seeing the
13 income that he was reporting to the DOR in sales
14 tax or in--- you know, revenue for the company to
15 base sales tax on were completely different.
16 And then let me add one more thing too,
17 is -- in -- and I can't remember the months, but
18 there was one month when we received a call from
19 the Department of Revenue after we bought the
20 company in 2009, and a sales tax return was not
21 filed by Abacare, Inc. prior to our ownership.
22 And so my partner, Jeff Reed obviously called Sam
23 Applegate and Sam Applegate referred him over to
24 David Selander. And so he went and -- either he
25 talked to Selander or he visited him and -- and

1 Se--- and David Selander told him -- said, I knew
2 it, I knew it, I told them they were
3 underreporting this. Or something to that effect;
4 you'd have to ask him more about that. But, you
5 know, Se--- Mr. Selander acknowledged then that
6 they were underreporting income to him. That's
7 what he relayed to me, so it's hearsay, but...
8 Q Now, who -- who related this to you?
9 A Jeff Reed, the --
10 Q Okay.
11 A -- co-owner.
12 Q All right. And Jeff Reed tells you
13 that -- that Mr. Selander said, I knew they were
14 underreporting?
15 A I told them, or something to that
16 effect. Yes, sir. 'Cause I asked him -- we
17 talked about that this morning on the way over
18 here, I just wanted to confirm that was the
19 conversation. And I think the -- Mr. Selander
20 prepared that report that was not filed and --
21 well, let me back up. It -- what Mr. Reed told --
22 and -- and of course, you know, I'm under oath, so
23 I want to make sure you -- this is hearsay, so I
24 -- you know, what I'm saying. But I think what
25 Mr. Reed -- if I remember correctly what he was

1 telling me this morning, is when he told him --
2 when he called -- subsequently told Mr. Selander
3 of the number that the taxes that were owed is
4 when Mr. Selander said, I knew it, I knew it, they
5 -- you know, that's much larger than what we've
6 been paying, I told them they were underreporting.
7 Or something to that effect.
8 Q All right. Did anyone with Abacare
9 deny ATMES or Reliable access to the CPA firm of
10 Hood and Selander, in connection with its due
11 diligence investigation for the purchase?
12 A I wouldn't know that answer. I -- I --
13 I -- I -- the negotiation was handled -- the --
14 the financial analysis was handled by Art Bradham,
15 so I wouldn't know that answer.
16 Q Do you have any knowledge as to whether
17 anyone on behalf of ATMES or Reliable specifically
18 asked Hood and Selander if, in their opinion -- or
19 its opinion, sales tax was being underreported
20 prior -- as far as the due diligence --
21 A Okay. That's what --
22 Q -- investigation?
23 A Obviously the conversation with Jeff
24 Reed, subsequent to that, is -- you know, I would
25 -- I would maintain that that's when he -- he

1 asked him and that -- it -- it was reported to
2 him. But before that I -- I would presume Art
3 Bradham did, but I do not have personal knowledge
4 of that.
5 Q Okay. All right. Let me jump way
6 ahead. Has the matter of the sales tax issue been
7 resolved with the South Carolina Department of --
8 A Yes, sir.
9 Q -- Revenue?
10 A Yes, sir.
11 Q How was that resolved?
12 A You mean how -- is the debt or --
13 Q Correct.
14 A Yeah. We paid the debt.
15 Q All right. How much did you have to
16 pay?
17 A Golly. With penalties and interest and
18 all that, I want to say it was like 157,000 or
19 somewhere in that neighborhood.
20 Q All right. Did the state agree to
21 waive the penalties and interest?
22 A No, sir. There were -- and -- and I
23 don't remember -- there -- there was an amnesty
24 program that was -- that -- after that Supreme
25 Court case came out, and it's -- I can't remember

1 which one it was. Either the penalties were
2 waived or the interest was waived, one of them
3 was, and whatever the amnesty program is what we
4 fell under.
5 Q Okay.
6 A So -- but -- but one could -- one could
7 be waived and one could not be waived, and I
8 cannot remember which one could not be waived.
9 Q All right. But it was resolved by the
10 payment of 157,000 dollars?
11 A In that neighborhood. I mean, I
12 can't --
13 Q Okay.
14 A -- tell you exact now.
15 Q All right. Yeah, I understand that.
16 Okay. Now, as I understand your testimony,
17 though, Hood and Selander was not engaged by
18 Assistive Technology to provide an evaluation of
19 Abacare as part of the sales transaction between
20 Assistive Technology and Abacare?
21 A That's correct.
22 Q All right. Do you have any knowledge
23 as to whether or not Hood and Selander provided a
24 financial evaluation of Abacare to anyone as part
25 of the sales transaction between Assistive

1 Technology and Abacare?
2 A Do I have personal knowledge, no.
3 Q And do you have any knowledge
4 otherwise?
5 A I want to say that -- that Applegate --
6 that Sam Applegate had relayed that to my law
7 partner, but I cannot tell you for sure that --
8 that -- I know that the financial information that
9 was relayed to Sam Applegate that was used in the
10 negotiat--- the negotiation of this, Hood and
11 Selander was referenced on numerous occasions as
12 providing that information to them.
13 Q Okay. What, if any, financial
14 statements on Abacare did Assistive Technologies
15 receive from any source in connection with the due
16 diligence investigation?
17 A You'd have to ask Art Bradham that.
18 Q What financial information was
19 Assistive Technologies -- or Technology furnished
20 in connection with its due diligence
21 investigations?
22 A Again you -- I think you're gonna have
23 to ask Art Bradham those questions, 'cause in
24 essence what we did is we hired Art Bradham, he
25 went out and got -- obtained all the information,

1 and then came back and had discussions with us.
2 Q All right.
3 A And to correct one thing, ATMES wasn't
4 formed before -- before all this was -- while we
5 were doing the due diligence, and I -- I mean, I
6 -- and I understand what you're talking about, I
7 just wanted to correct the record that --
8 Q Okay.
9 A -- ATMES wasn't formed until right
10 before the purchase of Abacare -- shares of
11 Abacare.
12 Q All right. Who -- who was -- who was
13 requesting the due diligence?
14 A For?
15 Q For the purchase of Abacare. That is,
16 if -- if Assistive Technologies was not formed,
17 was it Reliable that was --
18 A It was Reliable and/or the
19 shareholders.
20 Q Okay. And you're talking about the
21 shareholders of Reliable?
22 A Right. I mean, ATMES was -- you know,
23 and let me tell you, this process started in
24 August -- and, you know, I'd have to look on the
25 Secretary of State's website, but we were -- we

1 were formed sometime in October or November, and
2 -- and then, you know, the sale happened very
3 quick, so -- you know, I -- I know there were a
4 lot of discussions and negotiations right up
5 before this closing happened and financial
6 information was being given right up towards the
7 then.
8 Q Okay.
9 A 'Cause we were going back and forth on
10 the price.
11 Q All right. Now, who were -- who were
12 the shareholders of Reliable, again? Just you and
13 -- and Reed?
14 A And Cuce had a -- maybe a -- I think
15 she had a five percent interest at that point.
16 Q Okay. And -- and with regard to the
17 acquiring of an interest in Abacare, you -- and
18 you being Reliable and/or ATMES -- did not
19 purchase the company, as I understand it, what you
20 did is purchase the 80 percent interest of the
21 Connelly estate?
22 A No, sir. We purchased the company. We
23 purchased the company -- you had 20 percent with
24 -- with DeClemente and then you had the -- and we
25 purchased the remaining shares of -- of the

1 Connellys, and then DeClemente transferred his
2 shares into ATMES after that purchase.
3 Q I hadn't -- I know the -- the complaint
4 and whatever refers to DeClemente as assignor.
5 And so what I'm understanding you to say is that
6 you purchased the 80 percent interest of the
7 Connellys and the 20 percent interest of
8 DeClemente in Abacare and then after that
9 Mr. DeClemente received a 25 percent interest in
10 the new company?
11 A Well, I think the company was formed
12 prior to the purchase of Abacare; okay?
13 Q Okay.
14 A So -- and that -- and Mr. Declemente's
15 capital contribution into that was the -- his 20
16 percent ownership.
17 Q Okay.
18 A But again I would refer to my corporate
19 lawyer, 'cause that's not my specialty.
20 Q Okay. And that would be Mr. Holler?
21 A Well -- well, he -- it's not his
22 specialty either. He was the negotiator. It was
23 Jack Erter in my office did the closing.
24 Q Okay. So whatever knowledge of the
25 sales tax situation was that Abacare had,

1 certainly Mr. DeClemente had that knowledge?
2 MR. SMITH: Object to the form of the
3 question.
4 THE DEPONENT: I -- I -- I would -- I
5 -- I don't know what Mr. DeClemente -- he's all
6 over the board, 'cause I had -- but certainly he's
7 the first one that I addressed that issue with,
8 you know, and his name is on this meeting. But,
9 you know, you'd have to ask Mr. DeClemente that
10 question, what he had knowledge of.
11 BY MR. HOWSER:
12 Q Do you know if he was the chief
13 operating officer of Abacare?
14 A I -- I don't know what Mr. DeClemente
15 was.
16 Q Okay. Do you --
17 A I --
18 Q Do you have any knowledge as to whether
19 or not he was in a management position with
20 Abacare?
21 A I think he was running the day-to-day
22 show. Now, you know, subsequent conversations
23 were that the Connellys and -- and Selander
24 handled all the financial information -- that's
25 what he told me at some point -- and that he

1 didn't know anything about it. So, you know, for
2 what that's worth.
3 Q That is, Mr. DeClemente told you that
4 he didn't know anything about the day-to-day
5 operations --
6 A No, the financial --
7 Q -- of the comp---
8 A -- information.
9 Q Financial information?
10 A Yes, sir, that he did the day-to-day
11 operations. But that's just what he said. I
12 mean, he's -- has said so many things throughout
13 that process, so, you know...
14 Q All right. With regard to paragraph 18
15 of the complaint, which I read to you --
16 A Uh-huh.
17 Q -- about David Selander questioning
18 whether the sales tax had been properly
19 reported --
20 A Uh-huh.
21 Q -- do you have any knowledge as to
22 whether or not Mr. DeClemente was at that meeting?
23 A I think it says in the minutes he was.
24 Q Do you know of any information, be it
25 financial or otherwise, in connection with the due

1 diligence investigation, that Reliable or ATMES
2 asked for that was not provided by Assistive
3 Technology?
4 A Again --
5 MR. SMITH: Object to the form.
6 THE DEPONENT: Again, I wouldn't know
7 that answer, because that was -- it -- I wasn't
8 involved in the due diligence of that. That's
9 what we hired Mr. Bradham and --
10 MR. HOWSER: Yeah.
11 THE DEPONENT: -- attorneys for.
12 BY MR. HOWSER:
13 Q All right. Do you know of any
14 financial information that was requested of Hood
15 and Selander by Reliable or ATMES that was not
16 provided?
17 A I wouldn't know that answer either. I
18 would defer to Mr. Bradham on that.
19 Q What financial information in
20 connection with due diligence preceding the
21 purchase of Abacare -- or the stocks of -- or the
22 shares and the ownership interest of Abacare, did
23 you, yourself, review?
24 A I -- I -- I think what I did was met
25 with Mr. Bradham and I think I looked at some tax

1 returns, but, you know, it's four years ago. And
2 I -- I want to say I had some financial
3 statements, but I'm not sure. I'm -- you know, I
4 just can't remember four years ago, 'cause this --
5 it was a long process, and I just remember sitting
6 down with Mr. Bradham on a number of occasions
7 with big stacks of paper he had saying, you know,
8 the viability of this purchase and the earnings of
9 the company and the liabilities and all that.
10 Q Okay. Now, we talked about this
11 earlier, but -- but let me follow up in a little
12 more detail. With regard to the allegations in
13 the complaint related to the July 24, 2007
14 shareholder meeting --
15 A Uh-huh.
16 Q -- when did Assistive Technology
17 acquire those minutes?
18 A It would have to be after Applegate --
19 Sam Applegate sent me that e-mail saying that his
20 clients decided not to pay that. So --
21 Q But I'm trying to find out, when was
22 that?
23 A I want to say in '0--- in '11 -- 2011.
24 Q Okay. Are you aware of any request
25 made of Abacare for minutes of shareholder

1 meetings before the sale took place?
2 A No, sir. I'm -- at -- I -- I don't
3 know whether they did or did not. I'm not aware
4 of it.
5 Q If such a request had been made, who
6 would likely have made that request on behalf of
7 Reliable or ATMES?
8 A Could have either been Art Bradham or
9 Kim Cuce.
10 Q Are you aware of anyone on behalf of
11 Assistive Technology asking Hood and Selander,
12 prior to the purchase, if it had any knowledge
13 that Abacare might have a potential liability for
14 unpaid taxes?
15 A I'm not aware one way or the other.
16 And let me qualify that by saying I would presume
17 when Hood and Selander is having conversations
18 with a valuator, that they are -- if -- that, if
19 they are aware, as it stated in that minute, of
20 the possibility of underreporting sales taxes,
21 that they are communicating that to the valuation.
22 So, you know, I relied upon that valuation.
23 Q All right. Now, how did you rely on
24 that valuation?
25 A Ju--- as to the -- as to the financial

1 shape of that company.
2 Q All right. With regard to any
3 underpaid or unpaid sales tax liability, how far
4 back did that underpayment or nonpayment run?
5 A It was from three years notice of
6 audit. It's in the sales tax forms. Mr. Selander
7 should have a copy of that. I'd have to look at
8 it, but they -- they could go back three years and
9 that's what they did. For -- I don't know when it
10 started, but it would have gone -- I would say it
11 was back to 2006, but I'm not sure.
12 Q All right. You think it's 2006, 2007
13 and 2008?
14 A Maybe it's 2007, '08 and '09 -- and
15 some of '09. I -- I can't remember. It's -- it's
16 in there.
17 Q Well, if it -- if it's 2009, that would
18 have been after the sale occurred, though?
19 A Yeah. Yeah. The audit went through
20 after the sale occurred. No. Let me back up. I
21 -- I don't know what it did. It's -- I -- it's
22 been so long since I looked at that. But I think
23 some of the audits -- some of the debt was
24 afterwards too, because some of it was for
25 deductions that the Supreme Court had said was not

1 proper deduction, so, you know, some of this was
2 for that too. They -- I can't remember what
3 things they came back and said they weren't
4 deducted that we had historically taken.
5 Q Okay. In your complaint you allege
6 that the purchase price of the stock paid by the
7 Plaintiff, ATMES, was based on a host of
8 considerations, including the corporation's
9 profitability, its assets and its liabilities.
10 A Correct.
11 Q What other considerations went into the
12 purchase price besides profitability, assets and
13 liabilities?
14 A I would presume goodwill, but, you
15 know, again, I'm -- I defer to the CPAs. That's
16 why I hire them, to look at those valuations.
17 Q Well, it says that the purchase price
18 of the -- for the stock, paid by Plaintiff, was
19 based on a host of considerations. And I'm just
20 trying to find out from you what those host of
21 considerations were.
22 A I -- I -- I don't know. I -- I -- I
23 don't know the answer. And of course I didn't
24 draft that complaint and...
25 Q How do you maintain -- you, being

1 ATMES, contend that the profitability of the
2 company was not correctly stated?
3 A Well, I think the profitability of the
4 company was not correctly stated by underreporting
5 the sales tax. And when you underreport the sales
6 tax liability, that's obviously a liability that
7 should have been taken into consideration that was
8 not, which affected the profitability of the
9 company.
10 Q All right. Any other way that you
11 think that the profitability of the company was
12 not correctly stated, other than that related to
13 sales tax?
14 A Not to -- not -- not to my knowledge.
15 You know, and I would again defer to the -- to our
16 CPA on that.
17 Q All right. Do you contend that any of
18 the assets of the corporation Abacare were
19 understated?
20 A Not to my knowledge.
21 Q Do you contend they were overstated?
22 A Not to my knowledge.
23 Q Okay. With regard to liabilities, do
24 you contend that there was any liability that was
25 understated, other than the sales tax liability?

1 A Other than the sales tax, no. Not to
2 my knowledge.
3 Q Do you have any knowledge as to whether
4 or not Abacare was reporting its sales tax on the
5 basis that was usual and customary in this medical
6 field?
7 A I -- I would say they didn't -- they
8 weren't, because when we realized that there was
9 -- after that Supreme Court case came out, in --
10 before we even -- and I think we self-reported,
11 but, you know, I can't remember how that happened.
12 But before this, we went -- and once the case came
13 out, we went and looked -- there was a computer
14 program that Abacare used at that point that
15 tracked their sales. And in the medical equipment
16 business everything is computerized 'cause you
17 submit electronically your bills. And so -- and
18 we can -- I -- I think it was called QS/1 or
19 something like that, is what they use. That's not
20 the same program we use. So when we went back
21 into QS/1, the sales that were recorded in there
22 were completely different from what was reported
23 to the South Carolina Department of Revenue.
24 'Cause I remember calling up Sam Applegate and
25 saying, that's the problem I have, Sam; this isn't

1 y'all not following the -- following the
2 deductions and taking deductions you shouldn't, it
3 looks like y'all just, for all practical purposes,
4 were misrepresenting the income to the Department
5 of Revenue, and I said, you know, I've got some
6 concerns about that. And that's when he said,
7 hold on, hold on, hold on, and then he said, I'll
8 call my clients and we'll be back in touch. And
9 then that's when they -- and I don't know how all
10 that went, because somehow Selander and/or
11 Applegate engaged some other CPA firm to come up
12 with these numbers. And I think if you look at
13 the amended returns and you look at the returns
14 that were filed, you would find them to be
15 different.
16 Q Okay. All right. So -- following up,
17 though, you paid -- you, being ATMES -- 157,000
18 dollars approximately --
19 A Right.
20 Q -- to the South Carolina Department of
21 Revenue?
22 A Correct.
23 Q Having paid that amount to the South
24 Carolina Department of Revenue, did it reduce the
25 taxable income of ATMES?

1 A No, sir. No -- well, I don't know that
2 answer, 'cause -- I don't know that answer. I
3 have to look at the tax return. 'Cause we paid it
4 -- I don't know if we paid it in December of this
5 year or paid it in January -- I mean, December of
6 last year or January of this year.
7 Q Uh-huh.
8 A I -- I want to say we did it in
9 December, so, you know, obviously we reported a
10 loss on ATMES for last year.
11 Q All right. And that resulted in a tax
12 break, or reduction in taxes, both at the state
13 level and federal level for income tax, did it
14 not?
15 A That's correct.
16 Q All right. So of the 157,000 dollars,
17 what was the net loss to ATMES?
18 A I have to look at my tax returns. It
19 was substantial. I want to say it was like
20 400,000 dollars or something to that effect.
21 Q Well, if you paid 157,000 dollars in
22 sales tax, did not that reduce the net income for
23 state and federal income taxes of ATMES?
24 A Yeah, I'm saying I had a 450,000 dollar
25 loss.

1 Q All right. So you had a 450,000 dollar
2 loss that would have carried back three years;
3 correct?
4 A I don't know the answer to that. I'm
5 not a -- I don't -- you have to ask Art Bradham
6 that question.
7 Q Well, if you --
8 A I just know what my K-1 showed.
9 Q All right. Do you understand what I'm
10 asking, though? If you -- if you paid 157,000
11 dollars to the State of South Carolina for sales
12 tax --
13 A Right.
14 Q -- that reduced the net income that
15 Abacare had in 2006, '07 and '08?
16 A I didn't o--- yeah. It may have, but I
17 don't know -- you know, I didn't own Abacare in
18 2006, '07 or '08.
19 Q Well, somebody got the benefit of the
20 157,000 dollars that was paid; correct?
21 A I would presume the Connellys and --
22 did then.
23 Q But at this point the company was owned
24 by ATMES and/or Reliable, was it not?
25 A Correct. That's correct. So I -- if

1 -- if you -- if -- Art Bradham may have amended
2 those tax returns, but I -- I'm not aware of it,
3 if he did.
4 Q Okay. Was he -- did you have any
5 discussion with him as to whether or not he could
6 carry the loss forward?
7 A No.
8 Q All right. If you could carry the loss
9 forward, then ATMES would receive the benefit of
10 having paid that 157,000 dollars in the sense of
11 it reducing its net income upon which it would
12 have to pay taxes?
13 A That's correct. If -- if that
14 happened, that, you know...
15 Q Now, in going about and determining the
16 profitability of Abacare, what did Assistive
17 Technologies -- Assistive Technology do to
18 investigate the profitability?
19 A Hired Art Bradham.
20 Q And do you know who Art Bradham talked
21 to, to determine the profitability?
22 A Selander, is my understanding.
23 Q Did he talk with anyone else?
24 A Maybe Burkett and Burkett. I -- I -- I
25 don't know. I -- I know those were the -- the

1 CPAs handled all that. Burkett, Selander and Art
2 Bradham were all involved in that.
3 Q All right. Do you know if Mr. Bradham
4 talked to Phillip DeClemente about the
5 profitability of Abacare?
6 A I -- I would presume so, but I don't
7 know. 'Cause it was kinda like there was --
8 DeClemente and the Connellys were at odds with one
9 another, and so they were not speaking. In my
10 understanding, it was like DeClemente was over
11 here with us and then Connellys were over there.
12 And during this -- the sale started off when -- is
13 it Dorothy Connelly, maybe, was still alive; and
14 then she passed away, which triggered a provision
15 in their agreement for the sales price and their
16 -- maybe their operating agreement, or whatever
17 they had. He had some contract with them. I have
18 to go back and look. So I -- and -- and, you
19 know, I don't -- don't -- what I'm aware of
20 DeClemente, who he was communicating with, is he
21 was communicating with Selander. I remember him
22 doing that, and I remember him communicating with
23 Applegate. 'Cause at the same time, DeClemente
24 was dating one of the Connellys -- they were
25 living together -- one of the Connellys'

1 granddaughters.
2 Q Okay. And you say that -- that
3 DeClemente was communicating with Selander. Do
4 you know what he was communicating with
5 Mr. Selander --
6 A No, I --
7 Q -- about?
8 A No, I don't.
9 Q Do you know what he was communicating
10 with Mr. Applegate about?
11 A Both of them were a variety of issues.
12 It -- you know, it was about ongoing issues with
13 the company on -- they -- they -- they were always
14 -- it was always something with that -- with those
15 folks.
16 Q And the complaint, in paragraph 13,
17 which again relates to the purchase price being
18 based on a -- on a host of considerations,
19 including liabilities, did Assistive Technology
20 ask Abacare how it accounted for any sales tax
21 payments or calculations for sales tax payments?
22 A You'd have to ask Art Bradham that, so
23 -- I would presume he did, but I don't know that
24 answer.
25 Q All right. Do you have any knowledge

1 as to whether or not the sales tax was reported on
2 an accrual basis or whether it was a -- reported
3 on a cash basis?
4 A I don't have any personal knowledge how
5 Abacare was reporting their taxes. I -- I -- I
6 think I subsequently learned they were doing it on
7 a cash basis, but I'm not a hundred percent sure
8 about that.
9 Q Okay. And we would ask Mr. Bradham
10 what -- he would be the person who would have
11 knowledge about Assistive Technology asking and
12 determining from Abacare how it accounted for the
13 sales tax payment?
14 A I would presume so. I mean, the --
15 it -- as I told you before, we hired a CPA and let
16 him deal with the financial issues, as it related
17 to the sale.
18 Q And the -- according to the affidavit
19 of Mr. Bradham, he -- his office is at 2 Law
20 Range?
21 A Yes, sir.
22 Q All right. And that would be right
23 around the corner from, what, your law firm?
24 A It is. It's on -- across the street
25 from the courthouse.

1 Q Right. Y'all are across the street
2 from the courthouse on Main Street --
3 A That's right.
4 Q -- and he's across the street from the
5 courthouse on Law Range?
6 A That's right.
7 Q All right. Is he also the accountant
8 for the law firm?
9 A No, sir.
10 Q Who is the accountant for the law firm?
11 A James King.
12 Q Okay. Paragraph 10 of the complaint
13 makes reference to the stock purchase and
14 assignment agreement. Do you have a copy of the
15 stock purchase and assignment agreement?
16 A I do.
17 Q Who -- who executed that agreement on
18 behalf of Assistive Technology?
19 A I think all of us. Is that what you're
20 talking about?
21 Q Yeah. I mean --
22 A I think all the four partners were.
23 Q Okay. That would be you, Mr. Reed,
24 Cuce --
25 A Cuce.

1 Q -- Cuce and Mr. DeClemente?
2 A That's correct.
3 Q Okay.
4 A I think that's right. I don't have it
5 in front of me, but I'm almost certain that's
6 what...
7 Q All right. And Mr. DeClemente is
8 referred to as the assignor. What is your
9 understanding of what he assigned?
10 A His stock. He's the assignor in the
11 agreement? Is that what your question is?
12 Q That's right.
13 A I -- I -- I don't know whether he is or
14 not, but if he assigned anything, he assigned his
15 stock to us.
16 Q And that would be his 20 percent stock
17 interest in Abacare?
18 A That's correct.
19 Q And for which he got 25 percent
20 interest in Assistive Technology?
21 A That's correct.
22 Q Now, you allege in the complaint that
23 at the time the agreement was executed, the
24 seller, who is referred to as the Estate of
25 Dorothy Connelly --

1 A Uh-huh.
2 Q -- owned 104 shares of the
3 corporation's outstanding stock. At -- at that
4 time did anyone else own shares of stock besides
5 the Estate of Dorothy Connelly and the shares
6 owned by DeClemente?
7 A Not to my knowledge, unless there's
8 some technicalities with the Connelly estate. And
9 I don't know what Mr. Applegate did to square that
10 away, 'cause she owned the shares in the
11 beginning -- no, back up. I think the Estate of
12 whatever -- Mr. Connelly owned the shares --
13 'cause that's how it started off, and then it
14 somehow ended up with her. So I don't know what
15 Mr. Applegate did, but the fa--- the basic
16 question is those are the two entities, whichever
17 of the Connellys and DeClemente owned it.
18 Q Okay. That's what I was going to say.
19 Whatever entity --
20 A Right.
21 Q -- was in the Connelly estate and --
22 Connelly entities -- only that section and
23 Mr. DeClemente were the stockholders in --
24 A That's correct.
25 Q -- Assistive --

1 A That's correct.
2 Q -- I mean, in Abacare? All right. In
3 paragraph 23 of the complaint -- and I don't know
4 if you've got a copy. But it's --
5 A No. I don't have one.
6 Q -- it's alleged that seller represented
7 and warranted to the purchaser that the documents
8 and information furnished the purchaser was,
9 quote, correct and complete in all material
10 respects.
11 A That's correct.
12 Q All right. Other than the sales tax
13 issue, does Assistive Technologies -- or
14 Technology -- contend that the documents and
15 information furnished to it -- let me strike that.
16 Other than -- than the sales tax issues, does
17 ATMES contend that any other information given to
18 it was incorrect or incomplete?
19 A Other than sales tax, as it encompasses
20 the -- it affects the evaluation of the company,
21 the answer is no. The sales taxes work towards
22 creating an unfunded liability, which thereby
23 reduces the value of that company, that I'm aware
24 of. And I certainly would let Art Bradham -- he's
25 calculating the damages of what he thinks the

1 value of the company was diminished by -- by -- as
2 a result of the underreporting of the sales taxes.
3 Q All right. Does Assistive Technology
4 contend that Hood and Selander prevented it from
5 learning about the tax liability?
6 A I think Hood and Selander did not
7 report their knowledge to Burkett and Burkett.
8 And I don't think any way you -- any way you look
9 at -- obviously Selander was involved in this
10 company from -- since its formation, and that
11 Selander was involved in discussions with Burkett
12 and Burkett, and I -- I don't know what -- to what
13 extent, but that he did not report that there was
14 a -- there was a sales tax concern, which resulted
15 in a liability. If someone had said, hey, they're
16 not reporting the sales taxes that they -- are in
17 line with what the company is -- is making, then
18 that -- certainly that would have raised flags and
19 this deal would not have gone through or it would
20 have been evaluated a whole lot more. Instead, it
21 was represented that the sales taxes were paid and
22 that was represented, to my understanding, to
23 Mr. Bradham.
24 Q All right. But that answer's a little
25 different than the question I asked. My question

1 is did Hood and Selander prevent ATMES or Reliable
2 from learning about the potential tax liability?
3 A Yeah, I think when you don't disclose
4 that, that is preventing. Yes, sir.
5 Q Okay. So you're using that in the
6 sense of not -- of -- of a nondisclosure?
7 A Yes, sir.
8 Q Do you think anyone else had an
9 obligation to disclose the potential tax
10 liability?
11 A I think DeClemente had an obligation to
12 -- to disclose that, also, if he had knowledge of
13 it, which he -- you know, from the minutes.
14 Q Do you know for what years Hood and
15 Selander prepared income tax returns or other tax
16 returns for Abacare?
17 A No, sir. I -- I -- all that was -- I
18 believe, is in the possession of Mr. Bradham, if
19 he still maintained the...
20 Q Other than the sales tax issue, do you
21 contend that any tax returns prepared by Hood and
22 Selander were inaccurate?
23 A Other than sales tax? Not to my
24 knowledge.
25 Q Other than -- strike that. What

1 representation do you contend that Hood and
2 Selander made about the financial condition of
3 Abacare directly to Reliable or ATMES?
4 A And when you say directly, is that
5 through their -- through their CPA, Art Bradham?
6 Q No.
7 A Okay. Directly to ATMES or Reliable,
8 the -- the only representations that they made --
9 well, I would presume, is when they filled out
10 their tax returns -- the 2008 Abacare tax returns,
11 that they -- they correctly reported the sales
12 taxes, which were not, in fact, the case. They
13 were in -- and they were in possession of the
14 financial information of the company at that time.
15 Q All right. The complaint -- and the
16 reason I -- alleges that Defendants represented in
17 writing and by their words and acts that they had
18 furnished accurate and complete information to
19 Plaintiff. And I want to know what the Defendant,
20 Hood and Selander, represented in writing.
21 A They didn't. That was the agreement
22 with the Connellys.
23 Q Okay. And did Defendant, Hood and
24 Selander, represent anything by their words and
25 acts that they had furnished accurate and complete

1 information to the Plaintiff?
2 A Yes, sir. Through the evaluation of
3 Burkett and Burkett.
4 Q And as I understand it, we would have
5 to ask Burkett, Burkett & Burkett exactly what
6 information they were furnished by Hood and
7 Selander?
8 A That's correct. I just noticed in the
9 valuation report there was mention of consult---
10 consultations with Hood and Selander.
11 Q And it's also alleged in the complaint
12 that the representations made by the Defendants to
13 the Plaintiff regarding Abacare's profitability,
14 assets and liabilities were false. And as I
15 understand, what you're telling me is there was no
16 -- no representation made that was false with
17 regard to the assets?
18 A To my knowledge, correct.
19 Q Okay. And the only thing that you're
20 relying upon as a basis for this allegation as to
21 a representation being false relates to
22 profitability and liabilities with -- that stemmed
23 from the sales tax issue?
24 A Correct. To my knowledge.
25 Q There's also a cause of action in the

1 complaint related to promissory estoppel. Tell me
2 the basis on which you would contend that Hood and
3 Selander would be liable to the Plaintiff for
4 promissory estoppel.
5 A Can I see the complaint?
6 Q Sure.
7 A You know, I'm not sure how this -- does
8 this say to all Defendants?
9 Q It does.
10 A Okay. I'm not sure how to them, other
11 than the fact that they did not disclose the
12 underreporting of sales taxes. I think --
13 Q That is --
14 A -- that applies more to the Connellys.
15 Q All right. With regard to the
16 complaint -- and I can show you this -- the ninth
17 cause of action is one for civil conspiracy.
18 A Yes, sir.
19 Q How do you contend that Hood and
20 Selander conspired with anyone, as alleged in your
21 complaint?
22 A I think it -- it -- what -- you know,
23 and I'm -- what I'm alleging -- and we'll let the
24 evidence come out -- is they conspired with the
25 Connellys in maybe -- I -- I don't -- whether

1 DeClemente or not, I don't know -- to just get
2 away from DeClemente and, for a lack of a better
3 term, dump him on us. And so, you know, I -- I --
4 I think Selander and Connelly, from subsequent
5 con--- a subsequent conversation with Dorothy --
6 it's not Dorothy Connelly -- Donna Cash, that
7 Phillip DeClemente was a problem for them and I
8 think they were gonna do whatever it took to
9 disassociate themselves from him.
10 Q All right. So any conspiracy relates
11 to an -- or the idea that Hood -- Hood and
12 Selander assisted the Connellys -- or the Connelly
13 estate -- in getting rid of DeClemente?
14 A Of getting rid of this company by not
15 disclosing all of the assets -- not disclosing the
16 liabilities of the company.
17 Q All right. And what specific acts do
18 you allege that Hood and Selander did in
19 furtherance of a conspiracy?
20 A Of not disclosing to Burkett and
21 Burkett that they -- there were sales tax concerns
22 that they had raised before about the accurate
23 reporting of sales taxes.
24 Q If Hood and Selander was the CPA firm
25 for Abacare, do you maintain that it was under

1 some duty to ATMES to disclose this information to
2 a third party?
3 A If ATMES has an ownership interest of
4 Aba--- are you talking about before or after our
5 purchase?
6 Q Before your purchase.
7 A Before our purchase? They don't have a
8 dis--- they don't have a duty to disclose to
9 ATMES, but I think they have a duty, when they're
10 giving a fair market valuation, to provide
11 accurate information to that which was presented
12 and relied upon us in the sale of -- in the
13 purchase of this company.
14 Q Okay. Do you know if Burkett, Burkett
15 & Burkett was furnished copies of any minutes of
16 Abacare?
17 A I do not know that.
18 Q Would you acknowledge that, if Burkett,
19 Burkett & Burkett was furnished minutes, that it
20 would have knowledge that Hood and Selander had
21 raised the issue of proper reporting of sales tax?
22 A If they disclosed those minutes that
23 the -- that we have, that I reference. And
24 alternative--- let me supplement that, that they
25 also -- I -- you know, if they're working back and

1 forth with Art Bradham, I think they probably
2 should have told him that too.
3 Q Do you acknowledge that someone acting
4 on behalf of Reliable or ATMES would be under an
5 obligation to investigate whether or not sales
6 taxes had been properly reported to the State of
7 South Carolina?
8 A Yeah. I think -- and I think that did
9 occur by -- with Art Bradham, and it was
10 represented that they were. The Connellys rep---
11 certainly represented that, by stating everything
12 that was in their -- that -- stating in that
13 agreement everything was -- whatever that language
14 you used. I don't want to quote it -- misquote
15 it.
16 Q All right. Would someone on behalf of
17 Reliable or ATMES be under a responsibility to
18 inquire of the CPA firm involved with Abacare as
19 to whether or not the sales tax had been properly
20 reported?
21 A I don't know if I would agree with
22 that. I think that -- I think it was represented
23 that it was reported -- that they reported
24 correctly, and it was represented by Selander and
25 it was represented by -- by the Connellys. Now,

1 do they have to a duty to further go and check
2 into that, I -- I -- I -- I don't think that's --
3 if that's your question, I don't think that's
4 required.
5 Q All right.
6 A That's obviously something for our jury
7 to determine.
8 Q All right. Now, with regard to the
9 sales tax issue, do I understand you to say that
10 you understood that Selander represented that the
11 sales tax was, in fact, reported correctly?
12 A Implicitly, yes. I mean, I think if --
13 if we -- when you're going through the liabilities
14 with Burkett and/or another CPA -- and sales tax
15 liabilities are certainly something that needs to
16 be reported -- that they are current. I -- I
17 mean, I would presume that. Do I have personal
18 knowledge he represented that, no.
19 Q All right. And do you understand that
20 Abacare maintained, prior to the sale, that it in
21 fact had reported the sales tax correctly?
22 A Repeat that question.
23 Q Prior to the sale, is it your
24 understanding that Abacare had maintained that it
25 had reported the sales tax correctly?

1 A Maintained to whom?
2 Q To Hood and Selander and others that it
3 had reported sales tax correctly.
4 A That Abacare, the corporation, to your
5 clients, Hood and Selander had reported
6 accurately? No, I do not.
7 MR. SMITH: Object to the form of the
8 question.
9 THE DEPONENT: I do not agree with
10 that.
11 BY MR. HOWSER:
12 Q All right. And upon what do you base
13 your disagreement?
14 A The subsequent conversations with
15 DeClemente, where he said he gave all the
16 information to David Selander and he filled out
17 the tax returns.
18 Q So the --
19 A He and/or Connellys gave, I don't know.
20 He just kept saying I didn't handle the sales tax
21 returns. That's -- was -- the Connellys had
22 Selander for that. That's -- that's the
23 understanding -- that's where I got that
24 understanding from.
25 Q All right. But going back to the

1 shareholders meeting of the 24th of July, 2007 --
2 A Uh-huh.
3 Q -- that we quoted, it's your
4 understanding that the minutes showed that Phillip
5 DeClemente was present?
6 A Yes, sir.
7 Q Okay. Do you know if Abacare ever put
8 -- set up a reserve for sales tax?
9 A Not to my knowledge.
10 Q And is it your understanding that David
11 Selander advised Abacare that it should set aside
12 a reserve for sales tax --
13 A That's what the --
14 Q -- in the case of an audit?
15 A That's what the minutes say.
16 Q Do you have any reason to dispute those
17 minutes?
18 A I presume they're accurate. I have no
19 reason to say they aren't.
20 Q Okay. Now, isn't it true that Hood and
21 Selander was not engaged by Reliable or ATMES to
22 provide an evaluation of Abacare? That --
23 MR. SMITH: Object to the form of the
24 question.
25 THE DEPONENT: They were not engaged to

1 perform a valuation by Reliable or ATMES. That's
2 correct.
3 BY MR. HOWSER:
4 Q Okay. Did Hood and Selander
5 participate directly in the price that was arrived
6 at for the stock purchase?
7 A I think, with the consultation of
8 Burkett and Burkett, that that's the basis to
9 which we negotiated the sale; yes. If that's --
10 that's the only direct involvement that I have --
11 that I'm aware of.
12 Q Okay. And am I correct that Assistive
13 Technologies did not enter into any contract for
14 professional accounting services with Hood and
15 Selander?
16 A Written or...
17 Q Written or oral.
18 A Yes, I think they did enter into a
19 contract with -- well, let me back up. I -- you
20 know, the corporation -- the -- one of the
21 corporations that -- the -- Abacare, which is
22 affiliated with ATMES, entered into a -- a
23 contract with -- with Hood and Selander to prepare
24 the 2008 tax returns. We owned those -- that
25 corporation at that point in time, and they

1 prepared those corporate tax returns.
2 Q All right. And those tax returns would
3 have been prepared after the purchase of the stock
4 took place?
5 A Yes, sir.
6 Q Okay. So there was no contract between
7 Assistive Technology or Reliable and Hood and
8 Selander for professional services prior to the
9 sales agreement being signed in November 2008?
10 A That's correct. They were with the
11 Connellys and Abacare. Well -- yeah, they were
12 with -- they were Abacare's CPAs at that time.
13 Q All right. To your knowledge, again,
14 did Hood and Selander prepare any financial
15 statements -- that is, profit and loss, balance
16 sheets, other financial statements -- on Abacare
17 that were in turn furnished to Reliable or ATMES?
18 A I thought they did, but I can't say
19 with certainty on that. It was so long ago, I --
20 I -- I presume they did and I think they did, but
21 I'm not a hundred percent sure.
22 Q And the person who would know that
23 would be Art Bradham?
24 A Yes, sir.
25 Q And any and all information that Hood

1 and Selander furnished to Reliable or ATMES should
2 be in possession of Art Bradham?
3 A I would hope so, but I -- I -- I -- I
4 haven't asked him that -- whether he maintained
5 that or not.
6 Q All right. Well, do you think you
7 would have any informa--- you, being the company
8 itself, would have any information other than what
9 Art Bradham has?
10 A I don't know the answer to that.
11 'Cause at some point -- and -- and I'm -- have to
12 go back and think about this -- at some point
13 somebody gave us the information to Abacare. And
14 -- and I don't know whether it was -- it -- it was
15 after the Connellys and Applegate and Selander and
16 -- went and hired somebody. Somebody got all the
17 financial information, and I'm not sure whether we
18 still have it or not. I have to look for it.
19 Q Okay.
20 A Let me correct that. I have to get
21 somebody to look for it. I wouldn't know where it
22 would be.
23 Q Do you need to take a break or
24 anything?
25 A No, I'm fine. You don't mind me

1 checking my phone? I'm not gaining any
2 information from there.
3 Q I don't care at all. I'm not being
4 critical of anyone, but we served some written
5 interrogatories and requests --
6 A I learned that this --
7 Q -- to produce.
8 A -- morning.
9 Q And I'm just trying to short -- do you
10 know who -- well, the first interrogatory is, give
11 the names and addresses of persons known to the
12 Plaintiff or his Counsel to be witnesses
13 concerning the facts of this case. Who would --
14 you think would have knowledge of the facts of
15 this case?
16 A Without being held to that, 'cause I --
17 I -- I was aware today that we had some
18 interrogatories that we had to answer, and so it
19 -- I -- I'm gonna get a copy and -- and work on
20 that for them. With that being said, you know,
21 there'll be some additional people, obviously,
22 once I start thinking about this a little bit
23 more. I would presume Sam Applegate, to the
24 extent of his non-attorney role of being the PR.
25 My understanding is I think Mr. Applegate's being

1 dismissed from this lawsuit. I think Donna Cash
2 is certainly one. I think Phillip DeClemente is
3 one. I think Kim Cuce is one. I think Art
4 Bradham is one. I think Jeff Reed would be one.
5 I think David Selander would be one. I think the
6 -- whoever performed the evaluation at Burkett and
7 Burkett would be a witness. And then there would
8 probably be some ancillary witnesses that, you
9 know, I have to think about, but those would be
10 the ones with the knowledge and involvement in the
11 sale of this.
12 Q Okay. And I presume you don't have any
13 statements from any of those people?
14 A No.
15 Q If -- if you or --
16 A I -- I do have some e-mails from
17 DeClemente, back and forth with -- but, you know,
18 that's not a statement.
19 Q We also -- we asked for a list of
20 photographs, plats, sketches or other prepared
21 documents in possession of the Plaintiff that
22 relate to this matter. Do you know what that
23 might be?
24 A They -- I think it would be all those
25 sales tax returns that were -- that you -- I would

1 presume you're in possession of. Obviously the
2 contracts, that minutes that you keep referring to
3 -- that you kept referring to. There's an e-mail
4 from Sam Applegate telling me that -- whatever it
5 said -- that they're not paying. I'm trying to
6 think. The Department of Revenue document showing
7 what the sales tax liability was. That's all I
8 can think of right now.
9 Q Okay. With regard to any expert
10 witnesses that you would propose, would that be
11 Art Bradham?
12 A Uh-huh. Yes, sir. Uh-huh.
13 Q And -- and, what, so -- you don't know
14 whether anybody from Burkett, Burkett & Burkett...
15 A Right. They may testify. And
16 depending upon -- you know, I -- I think the case
17 has been around for awhile, but I don't think
18 we've started discovery yet, so, you know, as
19 discovery develops, certainly we may add an
20 expert.
21 (Off-the-record discussion.)
22 BY MR. HOWSER:
23 Q All right. Has Mr. Bradham given you
24 any kind of a written report?
25 A He typed up -- I think when we had a

1 damages hearing, he sent me an e-mail or a report
2 that said what the value -- what he thought the
3 damages were. He didn't set it out in detail, he
4 just gave me a number.
5 Q And what -- what damages hearing was
6 this?
7 A On the default of Mr. DeClemente.
8 Q Okay. Do you have any information as
9 to whether Hood and Selander was ever engaged to
10 perform an audit for Abacare -- or an audited
11 finan--- or prepare an audited financial
12 statement?
13 A Not -- I -- I don't know what happened
14 when the sales tax liability came back. Somehow I
15 -- I -- something was happening, and I can't
16 recall what -- what Sam Applegate was saying about
17 Hood and Selander's role in the preparation of the
18 amended sales tax returns, whether -- I know David
19 Selander was involved in it some way, and I would
20 -- I mean, it wasn't -- I -- I don't know what
21 type of audit he did. So I don't know the answer
22 to that. If there was, I don't know of one prior
23 to the sale.
24 Q What -- what damages are ATMES and
25 Reliable claiming in this case?

1 A The hundred-and-something thousand
2 dollars sales tax return -- I mean, sales tax
3 liability. Whatever's listed in the complaint is
4 what was attributed to -- to their ownership. And
5 then the -- taking the liability of the company --
6 the sales tax liability, which obviously
7 diminishes the -- the value of the company, I want
8 to say, you know, what -- I think Art Bradham came
9 up with -- well, that's on my phone; I'll tell
10 you. He says that 774,500 dollars is the
11 overstatement of the value of the business, and
12 with the omission of the sales tax liability is a
13 hundred -- 875,000 dollars. You know, and
14 obviously that's got to have some adjustments to
15 it, but that's the -- you know, if you're talking
16 about carrying forward -- you know, I -- those are
17 questions you can address with him, but that's all
18 -- that's what I've been provided.
19 Q Well, as I understand it, what was paid
20 for the company was 809,000 dollars?
21 A That's correct.
22 Q And if he contends that you got 875,000
23 dollars in damage, it seems to me that he's saying
24 they should have paid you to take the company.
25 A No. If you look at it, is that -- he's

1 saying they overstated the com--- the value of the
2 company by 775,000 dollars, and so -- and honestly
3 they probably should have paid us to take over the
4 company, 'cause it was the way it -- the way it
5 went. But, you know, regardless -- you know,
6 you've got a hundred thousand dollar tax liability
7 that we had to pay out of our pocket, that was
8 incurred under the ownership of -- of the
9 Connellys and DeClemente, that we paid that was
10 not ours, that -- that -- and then, when you take
11 that and you add the over--- the overstatement of
12 the value of the company, then the -- you know, I
13 think you do arrive at that.
14 Q All right. I mean, you earlier told me
15 that you didn't question the value placed on any
16 of the assets of the company; correct?
17 A Correct.
18 Q All right. And that the only liability
19 that you contend was incorrectly stated was a
20 potential liability for the sales tax?
21 A That's correct.
22 Q And that that liability, at least in
23 the complaint, is alleged to be $100,320.41?
24 A If that's what it says, yeah.
25 Q Looking at -- looking at paragraph --

1 A I -- and I trust you're telling me the
2 right thing.
3 Q Look -- look at --
4 A Yeah.
5 Q -- paragraph 19.
6 A Yeah. I trust you're telling me that.
7 Q All right. Well, if that's the case,
8 what is your understanding of how he arrives at
9 the company being overvalued by 755,000 dollars?
10 MR. SMITH: Object to the form.
11 THE DEPONENT: You'd need to direct
12 that to him; I don't understand the accounting
13 principles. But it's an over--- it -- the way he
14 looks it is they -- dadgum -- I can't remember
15 what he told me. There was -- the way that
16 Burkett and Burkett valued the company -- oh, no,
17 they valued the company, I think he said, in -- on
18 the profits, and that's how he -- he arrived at
19 that figure. But you can certainly ask him that.
20 I'm just providing you the information he gave me.
21 BY MR. HOWSER:
22 Q All right. So what you're saying is
23 your understanding is that because there was
24 unpaid sales tax to the South Carolina Department
25 of Revenue in the amount of $100,320.41, that the

1 company was overvalued by 755,000 dollars?
2 A That's what he says. That's my
3 understanding, yes.
4 MR. HOWSER: Okay. All right. I'm
5 gonna pass you to somebody else.
6 MR. SMITH: Okay.
7 MR. MARSHALL: Y'all want to do a
8 little break?
9 MR. SMITH: Yeah, let's take a little
10 break.
11 (Whereupon, a break was taken
12 from the proceedings.)
13 E X A M I N A T I O N
14 BY MR. MYRICK:
15 Q Mr. Smith, we've met. My name is Jim
16 Myrick. I'm here today representing the Estate of
17 Dorothy Connelly. Donna Cash is the
18 representative of that estate.
19 A Right.
20 Q And I've been here today for the first
21 part of your 30(b)(6) deposition. The notice was
22 provided by Davis Howser for -- the attorney for
23 Hood and Selander, and those questions pertained
24 particularly to Plaintiff's claims versus Hood and
25 Selander. As we discussed earlier, there were 14

1 of those claims. Most of them, I -- I -- I will
2 have some questions about, but most of them
3 pertain to Hood and Selander, and as we discussed,
4 I will have a separate 30(b)(6) deposition for you
5 or we'll depose you as a witness separately. But
6 today I'm going to look at those topics in the
7 30(b)(6) notice from Hood and Selander that I
8 think may have application to my client at this
9 stage, and I'll start with topic number 6. And
10 that is whether Plaintiff, Assistive Technology
11 Medical Equipment Services, and you call it ATMES,
12 received any financial statements on Abacare Home
13 Medical, Inc. and, if so, who prepared those
14 financial reports, the dates of such report and
15 from whom Plaintiffs received a copy of such
16 report. Now, I might be able to save some time
17 here by -- let me just say my understanding of
18 your testimony here today was that you just don't
19 know the answer to that question. Is that
20 accurate?
21 A That -- that's -- that's accurate. I
22 -- I -- I think all that was -- Art Bradham would
23 be best to answer that question.
24 Q Can you answer it in any -- with any
25 information? Do you know of any document that you

1 reviewed before purchasing Abacare?
2 A I cannot answer. I can't say what -- I
3 just don't recall four-and-a-half years ago --
4 Q Right.
5 A -- what I -- what I reviewed and what I
6 didn't. I know I reviewed information. I just
7 don't know what I reviewed.
8 Q And as we sit here today, you can't
9 identify a single document that you reviewed
10 before the purchase of Abacare?
11 A No. No.
12 Q Okay. Do you know who provided
13 information to you?
14 A It would have been Art Bradham.
15 Q Did you receive information from any
16 other sources?
17 A I -- I -- I can--- I can't recall. I
18 don't know.
19 Q And if I asked you when you received
20 it, you wouldn't know that?
21 A That's right.
22 Q Okay. How did the Abacare opportunity
23 first come to your attention?
24 A Through Kim Cuce.
25 Q Okay. What did she tell you and when?

1 A I want to say spring/summer of '08,
2 that you have to get into -- the competitive
3 bidding with -- of -- Medicare was coming into
4 effect and that the trend in the industry was that
5 we needed to be a -- have a -- more than one
6 place. You needed to have a -- more of a
7 statewide presence, 'cause that was gonna be the
8 way that the medical equipment company industry
9 went, and that there was an opportunity to merge
10 with another company in Charleston who was of
11 similar size that, it was represented to me --
12 that -- that would be able to grow from there.
13 Q Okay. So -- and can I infer from that
14 that you had had a durable medical equipment
15 business before?
16 A Right. We had Reliable Medical
17 Equipment of South Carolina.
18 Q Tell me about Reliable Medical Care
19 (sic) of South Carolina.
20 A It was a durable medical equipment
21 company that we started, I want to say, 1998.
22 Jeff Reed and I.
23 Q 1998?
24 A Yeah.
25 Q So you had been in the business nine

1 years at the time you purchased Abacare?
2 A Plus/minus, yeah.
3 Q Plus or minus. And earlier did you say
4 that there were a bunch of separate rules that
5 applied to this type of business because it's
6 Medicare-involved and --
7 A That's correct.
8 Q It -- are Federal funds the source of
9 much income of this?
10 A It's -- makes up a majority of it, with
11 Medicare.
12 Q Okay. The sales tax issue that we're
13 talking about here, can you define that for me?
14 What is exactly the issue on the sales tax?
15 A I -- I don't understand the question.
16 Q Well, my understanding -- I'll tell you
17 my rudimentary understanding of the sales tax
18 piece -- is that there was a question about
19 whether sales tax were due on collections or they
20 were due on the -- at the time of sale, on the
21 amount of what was billed. Is that accurate?
22 A That's not my understanding --
23 Q Okay.
24 A -- of it.
25 Q What is your understanding?

1 A My understanding was whether there was
2 -- whether medical equipment was exempted from
3 sales tax.
4 Q Okay.
5 A Certain medical equipment sales was
6 exempted from sales tax.
7 Q Okay. And did --
8 A If that's what you're talking about.
9 The issue that...
10 Q The hundred and -- hundred and --
11 hundred thousand dollar issue is what we're
12 talking about.
13 A Okay. Oh, I thought you were -- all
14 right. That's -- I don't think I'm following you.
15 Q Okay. What is the amount -- what is
16 the nature of the sales tax issue, money that was
17 due to the South Carolina Department of Revenue
18 but was not paid?
19 A You talking about between the comp---
20 that I'm claiming as part of this lawsuit?
21 Q Yes.
22 A That the Connellys did not report the
23 income to -- or Connellys -- or Abacare did not
24 report the income correctly to the South Carolina
25 Department of Revenue, which in -- which resulted

1 in a sales tax liability.
2 Q Okay. And was that simply a failure to
3 report income that would have -- could have
4 resulted from any business, or was it -- did it
5 have to do with medical care equipment --
6 A It had to do with the medical
7 equipment.
8 Q How?
9 A That they under--- say -- and I'm using
10 examples. Say they collected 100,000 dollars one
11 year --
12 Q Uh-huh.
13 A -- that they -- or one month -- that
14 they claimed they collected 30,000 dollars and
15 paid the sales tax on the 30,000 dollars.
16 Q Okay. And what was the issue that went
17 up through the Administrative Law Court to the
18 Supreme Court?
19 A That -- that was the exemption. There
20 was a question as -- and I have to go back and
21 review the case, 'cause, again, I'm -- you know,
22 you understand, you can get --
23 Q I do.
24 A -- cases mixed up all the time. And --
25 but if my -- from my recollection of it, is there

1 was -- it had to do with some Medicare rules in
2 conjunction with State rules and whether med---
3 certain medical equipment was exempt from sales
4 tax. Moreover, there was a question of, if you
5 pay something through Medicare and/or Medicaid and
6 that's where you receive your reimbursement,
7 whether that was subject to sales tax. And the
8 Administrative Law Court -- and I have to look at
9 the order -- basically ruled in favor of what the
10 industry did. They have a -- the industry's
11 called South Carolina MESA -- SC MESA -- Medical
12 Equipment Supplier Association. They filed a suit
13 against the South Carolina Department of Revenue,
14 that went through the court, and I can't remember
15 which Administrative Law judge ruled in -- in SC
16 MESA's favor. And then the -- the -- the Supreme
17 Court overturned that, maybe about eighteen months
18 -- two years later.
19 Q Okay. So what I'm trying to
20 understand, I guess at this point is, is that the
21 100,000 dollar sales tax issue or is that a
22 separate issue?
23 A That's a separate issue.
24 Q So they're two separate issues
25 underway?

1 A Yeah.
2 Q Okay.
3 A And I don't know -- I -- I don't know
4 if that could have been an issue in their
5 calculat--- in Abacare's calculation of the sales
6 tax, 'cause you -- you know, when -- let me
7 explain to you. When I -- when I had this
8 conversation with Applegate, what I was telling
9 him is that there is a question as to the
10 deductibility -- whether you deducted -- every
11 company was doing it differently. I mean, a bunch
12 of companies were just saying once that
13 Administrative Law Court ruling came out, we're
14 not paying sales tax on Medicare and Medicaid
15 receipts. And then some companies were saying
16 oxygen's -- you know, I'm just using examples --
17 oxygen's -- is -- is -- is not subject to sales
18 tax, or some of this isn't. And finally the
19 Supreme Court came out and clarified it all, what
20 was subject to sales tax, what wasn't subject to
21 sales tax.
22 So I don't know what they -- what David
23 Selander and -- and Abacare were claiming. It
24 just looked for me, at some point when I looked at
25 the returns from the computers what they collected

1 that month and then what they reported to the
2 South Carolina Department of Revenue, were two
3 different numbers.
4 Q And as we sit here today, it's your
5 impression that those are a distinct issue;
6 deductibility in Medicare versus just you've got
7 to pay taxes on your sales. You're not sure of
8 any overlap there?
9 A There may be overlap.
10 Q Okay.
11 A I -- I'm not a hundred percent sure. I
12 -- I don't know -- I -- I don't know how -- you
13 know, I never got the explanation as to how they
14 -- why and how they were calculating the sales tax
15 returns, because upon me discovering -- once I --
16 once the Supreme Court ruling came out, obviously
17 we had to go back and look at our sales tax
18 returns. And so when we went back and looked at
19 it, that's when I called Sam Applegate and said,
20 Sam, you know, we've got some problems here. And
21 Sam -- and we went and had this discussion and
22 that's what I think I told -- said earlier. I
23 said, Sam, this isn't -- you know, there's
24 questions in every durable medical equipment
25 company. Even the one I own, we had an

1 underreporting of sales tax liability, because we
2 were taking deductions. But I said, this isn't
3 the underreporting because you were claiming
4 things that we all thought was deductible, it
5 looks like to me that y'all have underreported
6 what your income was to the South Carolina
7 Department of Revenue and honestly, Sam, I'm
8 worried about some fraud issues.
9 Q Uh-huh.
10 A And so, you know -- and that's when he
11 said, whoa, whoa, whoa, whoa, let's -- let's just
12 stop right there, let me talk to my clients. And
13 of course I'm paraphrasing it. And then Sam
14 called me back later and said, just give me the --
15 get me the documents, we will file them into tax
16 returns, we want to file them. And so that --
17 they all went to him.
18 Q Okay. Thanks for that clarification.
19 Just before I forget it, we talked a little bit
20 about that July 24, 2007 set of minutes.
21 A Uh-huh.
22 Q Do you know what I'm talking about?
23 A Yeah.
24 Q And there was a -- apparently -- I'll
25 see if I can find that real fast. And there's a

1 statement in those minutes about sales taxes, and
2 I'll just show them to you, but they were quoted
3 earlier. And it says, Phillip stated that the
4 sales tax forms are completed based on collections
5 rather than billings. David -- that would be
6 David Selander -- stressed that the sales tax is
7 computed on sales for the months, regardless of
8 actual collections. Have you read that before?
9 A Yeah, I saw that.
10 Q Okay. And that Phillip is who?
11 A Phillip DeClemente --
12 Q Okay.
13 A -- I would presume.
14 Q Right. 'Cause he was one of the
15 attendees at the meeting?
16 A I would presume that's --
17 Q Yeah. The minutes --
18 A -- correct. That's what it says in the
19 minutes.
20 Q All right. And when did you first
21 discuss that issue with Phillip DeClemente that it
22 -- that, in his view, that taxes were payable on
23 what you collected, not on the sales?
24 A Well, I'm not sure we ever had a
25 discussion. I -- I -- I don't think that's an

1 issue anymore. I think that's what David Selander
2 was saying an issue. I -- I think that -- I think
3 it is based upon collections.
4 Q Uh-huh. I understand. But what I'm
5 trying to figure out is did DeClemente ever take
6 that position with you in a conversation that you
7 had with him?
8 A I don't recall that. I mean, I just --
9 I don't know whether he did or didn't. I just
10 don't recall that. This all came to light when I
11 got those from DeClemente, had to be in 2011 --
12 Q Uh-huh.
13 A -- after we -- after Applegate and the
14 Connellys decided not to pay the sales tax
15 liability.
16 Q Is this, the 100,000 dollar issue, the
17 difference between paying taxes on sales and
18 paying taxes on collections?
19 A No, sir.
20 Q No? Different to you?
21 A To my knowledge, it is. And again I'd
22 go back and refer to the sales tax returns and
23 what they are.
24 Q Uh-huh.
25 A But my basic understanding is it's not.

1 Q We just talked about, under topic 6,
2 what financial reports or documents were supplied
3 to you, and I believe you said -- I believe you
4 said you don't remember, that Bradham would be the
5 one who knew that, and you don't know the date of
6 any financial information you obtained in order to
7 make a decision to the pur--- on behalf of ATMES
8 to purchase Abacare. Correct? Did you say those
9 things to me?
10 A Say that again?
11 Q Well, we just talked about what
12 financial documents were reviewed in order to make
13 a decision about whether to purchase Abacare --
14 A Right.
15 Q -- and I asked you what -- when
16 financial documents were produced to you, what
17 financial documents were produced to you. And you
18 told me you don't -- you can't recall any specific
19 financial document, that those materials went to
20 Bradham, the CPA that you hired to do the finan---
21 due diligence --
22 A That's correct.
23 Q -- and you don't know when those
24 documents were provided to him. Correct?
25 MR. SMITH: Object to the form.

1 THE DEPONENT: Well, I -- I -- I mean,
2 I think they were provided. I just don't recall
3 what was provided and when it was provided. I --
4 you know, I -- just to clarify that. I -- I think
5 the question implies that I don't know. The
6 answer is I -- that I do recall all that being
7 provided, I just don't know what and when.
8 BY MR. MYRICK:
9 Q All right. Good. Now, aside from
10 written financial documents, what oral -- were
11 there any oral reports or representations made
12 with regard to Abacare's finances on which ATMES
13 relied?
14 A From whom?
15 Q From anybody.
16 A I -- I would presume there were some,
17 but I -- I -- again, you know, I don't recall
18 four-and-a-half years ago.
19 Q Uh-huh.
20 A I would presume there were some -- from
21 Selander to me, personally, other than my
22 conversations with -- and I don't think I ever had
23 a conversation with Sam Applegate 'til after the
24 sale was over with. I think that I let those
25 attorneys handle that. So, you know, Applegate

1 may have made some representations to my attorneys
2 and then Selander may have made representations to
3 my -- Art Bradham. You can ask him that question.
4 And that -- those would be the two that I would
5 think would have made some representations, if
6 there were oral representations made.
7 Q And if Sam Applegate made such
8 representations, who were your attorneys, you
9 said, that would have been representing you --
10 A It would be --
11 Q -- people to whom he might have made --
12 A David Holler and Jack Erter.
13 Q Anybody else?
14 A Not that I'm aware of.
15 Q Okay. Did you ever have any
16 conversation with Donna Cash before the time of
17 November 7th --
18 A No, sir.
19 Q -- 2008, before the time of the --
20 A No, sir.
21 Q -- purchase of the business? Do you
22 remember when your first conversation with her
23 was?
24 A It was sometime after DeClemente left
25 us.

1 Q Okay.
2 A And I think it -- and I may be wrong.
3 It may have been more than one, but I -- it was
4 either one or two conversations. I have had very
5 little interaction with her.
6 Q Okay. Well, just so we address it
7 right now up front, do you remember in short the
8 substance of either of those short conversations?
9 A I don't -- something about rent -- some
10 -- there --
11 Q All right.
12 A -- was some question -- and I just
13 remember her calling, and -- and we talking and we
14 were talking about Phillip DeClemente.
15 Q Uh-huh.
16 A And I said he's out and -- you know,
17 and -- and -- and, you know, we -- something about
18 this business is just not doing well. And she
19 was, like, oh, I wish you had just called me, I
20 could have -- I could have helped. And I don't --
21 and it -- it just was a strained conversation.
22 And something acknowledging that DeClemente was
23 everybody's problem. And I think Applegate has
24 always -- has told me that on a couple occasions
25 too.

1 Q Uh-huh. Did ATMES -- I understand that
2 the location you have is now just in Sumter and
3 you don't have a Mount Pleasant --
4 A That's correct.
5 Q -- location anymore? Did ATMES have a
6 lease for the Mount Pleasant location?
7 A Yes.
8 Q Did ATMES, for some reason, breach that
9 lease?
10 A I would say we -- we no longer -- we
11 vacated the premises. I mean, we -- again, as --
12 you know, as -- I think you've talked with my
13 attorneys -- is we allege that they owe us damages
14 and we are mitigating our damages.
15 Q Okay. So that's -- that would be the
16 reason for leaving this place?
17 A Yes, sir.
18 Q Because of mitigation of damages?
19 A Yes, sir.
20 Q Okay.
21 A So I --
22 Q Other --
23 A -- guess I'd better add that to some of
24 Mr. Howser's questions. I might have to look into
25 some damages on -- on loss of profits and stuff

1 like that and obligations that we had to honor as
2 a result of this business venture.
3 Q Other than what we have discussed
4 already, some financial documents, which have not
5 been specified but would be in the possession of
6 Bradham, like --
7 A We hope.
8 Q We hope -- and anything that you might
9 have or -- or you might have in your shop -- are
10 there any -- was there any other financial
11 information that ATMES received or reviewed prior
12 to making a decision to purchase Abacare?
13 A Besides the valuation of Burkett and
14 Burkett --
15 Q Okay.
16 A -- and the -- I -- I think that that's
17 the extent of it.
18 Q Okay. How did you first meet Phillip
19 DeClemente?
20 A Through Kim Cuce.
21 Q Okay. And when would that have been?
22 A I think the first time I recall is when
23 we had a ribbon-cutting at our facility where
24 we're located now, and so it had to be in 2008.
25 And he --

1 Q In Sumter?
2 A In Sumter. And he was there. And --
3 and, you know, I just remember her saying this --
4 he owns a medical equipment company in -- in Mount
5 Pleasant, and that's -- that was the extent of it.
6 Q Did Phillip DeClemente provide any
7 information to ATMES with regard to the purchase
8 of Abacare?
9 A To me, no. I -- I don't know what --
10 you'd have to ask Art Bradham whether he --
11 whether he provided anything, but -- you know, I
12 think mostly what was provided came from the
13 Connellys and Sam Applegate and Selander.
14 Q Now, James Connelly was dead.
15 A All right. Whatever. I -- I -- and
16 I --
17 Q Right.
18 A When I'm referring to Connellys, let's
19 go ahead and say I'm referring to the Estate of
20 James Connelly and this -- then the Estate of
21 Dorothy Connelly; okay? That make sense? 'Cause,
22 like I told Mr. Howser, there was some interchange
23 of -- of passing away and so the seller changed
24 somewhere in the process with Applegate.
25 Q And no matter what came from that, the

1 conduit for all of that information, based on your
2 earlier testimony, was Sam Applegate?
3 A Sam Applegate and -- and David
4 Selander.
5 Q And David Selander? Okay.
6 A And --
7 Q Now --
8 A -- whatever was provided by those
9 respective estates. I -- I don't know the inner
10 workings of what happened within there -- if that
11 makes sense -- with them.
12 Q Right.
13 A The faces of their negotiations, from
14 my understanding -- and again it's -- you know, I
15 did not have personal negotiations, I hired
16 attorneys and I hired CPAs -- was that they are
17 the ones who communicated with those folks.
18 Q But -- and my question about Sam
19 Applegate being a conduit is correct, that Sam --
20 A Oh, yeah.
21 Q -- Sam Applegate --
22 A I --
23 Q -- and David Selander -- but --
24 A Corre--- I would presume so, yeah.
25 Q Okay. Now, naturally when you became

1 interested in purchasing Abacare, based on Kim
2 Cuce's statement, you asked DeClemente about the
3 business surely, didn't you?
4 A You know, I -- I -- I just don't recall
5 what conversations I had with DeClemente. And --
6 and you've got to understand my role in this is
7 I'm -- I'm very limited in the operation of this.
8 And so what I -- how I recall this coming through
9 is Kim Cuce came and met with me and pitched the
10 idea. It was her, by herself; okay? And said,
11 you know, we've got an opportunity and we grow --
12 blah, blah, blah -- and all that. And so -- you
13 know, and I said I would be interested in pursuing
14 that. And then, my discussions, really, from that
15 point forward, were with the CPA on the via---
16 viability of the purchasing of this business;
17 okay?
18 Q CPA Bradham?
19 A Bradham. And -- and -- you know,
20 DeClemente was in Mount Pleasant and our paths
21 really didn't cross that often, prior to this --
22 to this. I remember him coming into my office and
23 -- you know, and -- and having to negotiate
24 something with -- with Applegate before, and David
25 Holler, my partner, had to do something. And I

1 can't remember what it was. Maybe it was -- it
2 was after the death and the triggering of that. I
3 -- it -- I -- I can't recall all that. But, you
4 know, really there were not a whole lot of
5 discussions with DeClemente other than what I --
6 you know, what I presume he was providing, if
7 anything, to Art Bradham.
8 Q Well, he eventually became an equal
9 owner with you in the business?
10 A That's correct.
11 Q In November of 2008?
12 A That's correct.
13 Q Did he make any representations to you
14 prior to November 2008?
15 A Concerning what?
16 Q The business of Abacare. I know you've
17 said your role is limited --
18 A Yeah, I --
19 Q -- but if I'm going into a business
20 with somebody and they're going to own a 25
21 percent interest and I'm going to own an equal
22 percentage, I'm thinking I have some
23 conversations. Did that not happen?
24 A Well, I'm sure we had conversations. I
25 -- I just don't -- when you ke--- you keep saying

1 representations, not conversations, and so I'm
2 trying to re--- I -- I -- I don't recall what
3 representations. I mean, we had conversations
4 about what the -- what he said the business was
5 bringing in, maybe, but, you know, it was very
6 limited.
7 Q All right. Well, let -- let's open it
8 from beyond representations to just conversations.
9 What was the substance of the conversations that
10 you recall?
11 A Going into business together, I guess,
12 and what -- what was -- trying to understand that
13 Abacare -- the financial aspect of it was left
14 to -- from -- well, it was left more to Art
15 Bradham and dealing with David Selander and -- and
16 all that crowd. We -- the discussions I mainly
17 had with him was over operations. You had the
18 Mount Pleasant -- and then we had to figure out
19 how we were gonna operate everything. How are you
20 going to deal with -- with Medicare and billing
21 numbers and all that. And then there was also
22 something about a -- a Little River office that he
23 had in -- up in -- near Myrtle Beach with Abacare
24 or -- and/or a Walterboro office. I -- I mean,
25 there was -- you know, it was all -- it was stuff

1 like that.
2 MR. SMITH: John, this is what I'd like
3 to talk about doing. We're about four minutes
4 away from the 1:00 hour.
5 MR. HOWSER: Yeah.
6 MR. SMITH: Do you have any more
7 questions? It's your notice.
8 MR. HOWSER: I may have a few.
9 MR. SMITH: Okay. I'd like for you to
10 ask those now, if we could, and then conclude
11 this. You can notice your own, if you'd like.
12 MR. HOWSER: Yeah.
13 MR. SMITH: You can certainly notice
14 your own -- on --
15 MR. MARSHALL: Maybe Jim and -- we can
16 notice ours for the same day.
17 MR. MYRICK: Yeah, we could do that and
18 I can finish up this stuff on -- on the -- this
19 30(b)(6) notice, and then I can move into mine.
20 Be fine.
21 THE DEPONENT: Yeah.
22 MR. MYRICK: We can --
23 THE DEPONENT: That's fine.
24 MR. MYRICK: I'll provide you with a
25 separate notice.

1 THE DEPONENT: Yeah. That's fine.
2 MR. SMITH: That -- that would be -- I
3 think that -- it -- I know to do that --
4 MR. MYRICK: That makes sense to me.
5 I'm agreeable.
6 MR. SMITH: Okay.
7 MR. HOWSER: That's fine.
8 THE DEPONENT: I mean, just plug
9 through as much as you can. I -- you know, it --
10 it's -- it -- it's fine with me. I just --
11 MR. MYRICK: You need to leave, what,
12 about 1:00; right?
13 THE DEPONENT: No. No, no. I mean, I
14 can leave, you know, five 'til.
15 MR. MYRICK: You have to be --
16 THE DEPONENT: I mean, I can be late.
17 I'll live through it. Look at me. I can make --
18 MR. SMITH: All right. Well, then
19 let's -- let's --
20 THE DEPONENT: Unless you --
21 MR. SMITH: Unless you've got --
22 THE DEPONENT: Unless you need to
23 leave?
24 MR. SMITH: Well, no, I've got -- I've
25 got time. I just -- I wanted to give us some time

1 to talk and I -- I -- I would anticipate the --
2 THE DEPONENT: Do you want to me to
3 see --
4 MR. SMITH: -- schedule --
5 THE DEPONENT: -- if I can push it
6 back? How -- how long do you think you're gonna
7 take?
8 MR. MYRICK: I -- I -- I would take,
9 clearly, past 2:00.
10 THE DEPONENT: Okay.
11 MR. MYRICK: I mean, maybe the smart
12 thing to do would be to reconvene. But I would
13 say this, I'm not sure you can talk about the
14 substance of it, can you?
15 THE DEPONENT: That --
16 MR. SMITH: No. I said talk about
17 scheduling --
18 MR. MYRICK: Oh, got it.
19 MR. SMITH: And I -- and I can -- I
20 think -- do think we can talk about some -- some
21 of the nature of the case. Also, why is there --
22 I mean, you can notice your own 30(b)(6) --
23 THE DEPONENT: Yeah, y'all can --
24 MR. SMITH: -- on any subject; why can
25 we not conclude this? It's his notice. You can

1 participate, but you also have an opportunity to
2 notice your own 30(b)(6).
3 MR. MYRICK: Right.
4 MR. SMITH: I would like to -- it seems
5 to make sense that we could conclude this -- this
6 notice today and let -- let Mr. Howser --
7 MR. MYRICK: Well, as you know --
8 MR. SMITH: -- exhaust his -- his --
9 MR. MYRICK: Sure. But my -- I'm just
10 still on topic 6, 'cause there are a lot of the
11 things that he talked about I don't think affect
12 my client, but some in the notice did, so that --
13 that's basically what --
14 THE DEPONENT: Right.
15 MR. MYRICK: -- I was going on.
16 THE DEPONENT: Well, let's try to --
17 and I'm sorry --
18 MR. MYRICK: Uh-huh.
19 THE DEPONENT: -- being an attorney. I
20 need to watch that.
21 MR. SMITH: Yeah. I -- I would like it
22 if we could conclude it. I mean, you're free to
23 re-notice --
24 MR. MYRICK: I respect that.
25 MR. SMITH: -- those items, but I think

1 it would be preferable if we could conclude this
2 one, 'cause you have plenty of opportunities to
3 notice whatever you want to notice --
4 MR. MYRICK: Uh-huh.
5 MR. SMITH: -- so that we can conclude
6 this deposition and move on with -- do yours, and
7 you can add those topics if you like.
8 MR. MYRICK: All right. Well -- so how
9 do you want to do it? Do you want to go to 2:00?
10 Do you want him to ask his questions now?
11 MR. SMITH: I think it would be nice to
12 -- so that we -- if I could -- Mr. Howser --
13 MR. HOWSER: Whatever. You tell --
14 MR. SMITH: -- if you've got anything
15 that you would like to add, based upon what --
16 what there is, and then I'd like to reconvene
17 under a different notice.
18 THE DEPONENT: How long -- can I get an
19 -- do y'all mind if I say something as the
20 deponent?
21 MR. MYRICK: Sure.
22 THE DEPONENT: I mean, how long do you
23 -- if you want -- if we can get through the
24 30(b)(6) with you, then that would be preferable,
25 where we conclude, where I can talk to my attorney

1 between now and the next deposition.
2 MR. SMITH: Well, that's what I was
3 saying. My -- my point was is he going to
4 re-notice these topics later. I'd like to
5 conclude before you having to depart, so that we
6 can communicate, and you can re-notice under
7 whatever you'd like.
8 THE DEPONENT: I mean, if y'all want
9 me to cancel my deposition, it -- it's not the end
10 of the world. I can reschedule it.
11 MR. MYRICK: I'm okay. I -- I really
12 can tailor a lot of mine and ask questions --
13 THE DEPONENT: Okay.
14 MR. MYRICK: -- at a later date. And
15 I'm not -- I'm not here to cause difficulty for
16 anyone --
17 THE DEPONENT: Yeah.
18 MR. MYRICK: -- but I do -- it's just a
19 lot of questions to ask.
20 MR. SMITH: Yeah, sure.
21 MR. MYRICK: Yeah.
22 MR. HOWSER: Okay. So you -- you want
23 me to finish up? Is that we -- we want to do?
24 MR. MYRICK: Do you want me to go
25 through this --

1 THE DEPONENT: Yeah, sure.
2 MR. MYRICK: -- shorter list --
3 THE DEPONENT: Yeah.
4 MR. MYRICK: -- and then --
5 MR. SMITH: Why don't you go through
6 the shorter list, and then --
7 MR. MYRICK: All right.
8 MR. SMITH: -- and then we'll --
9 MR. MYRICK: Okay.
10 MR. SMITH: -- get Mr. Howser to --
11 THE DEPONENT: Y'all just need to -- if
12 it's a problem around 1:30... Just so I don't get
13 a court reporter and all that.
14 BY MR. MYRICK:
15 Q Did Dorothy Connelly provide directly
16 to you any information -- and when I say to you,
17 I'm speaking to you as the representative of --
18 A Right.
19 Q -- the company, ATMES -- with regard to
20 the finances of Abacare?
21 A No.
22 Q Okay. Topic 8 was any due diligence
23 investigation undertaken by Plaintiff of the
24 financial condition of Abacare prior to
25 consummation of sales transactions referred to in

1 the complaint. What was your due diligence
2 comprised of?
3 A Of hiring Art Bradham.
4 Q Okay. Is that it, in total?
5 A And having the attorneys communicate, I
6 would presume. Yeah.
7 Q Anything else?
8 A Not that I'm aware of.
9 Q Okay.
10 A Now -- and let me back up and tell you
11 this also, is Kim Cuce was involved in a lot of
12 the -- also in the negotiations at this point too.
13 Q Uh-huh.
14 A But she's no longer with us, so I can't
15 obviously produce her.
16 Q Got it. Was the 25 percent to
17 DeClemente, 25 percent to Reed, 25 percent to you
18 and 25 percent to Cuce -- was that an ownership of
19 the new company that was determined prior to the
20 purchase of Abacare?
21 A Correct.
22 Q Okay. And that's why you all four
23 signed off as purchasers --
24 A Correct.
25 Q -- on the contract? Okay. Do you know

1 if any of the other purchasers -- those three
2 purchasers I just listed other than you --
3 performed any due diligence on their own?
4 A I think Kim Cuce told me she did. Yes.
5 Q Okay. Do you know what that was
6 comprised of?
7 A Market analysis and, you know --
8 whatever, all that industry-wide stuff. And
9 that's what she said. And let me -- honestly, I'm
10 -- I'm gonna tell you, what Kim Cuce said and
11 Phillip DeClemente said are always two different
12 things than what occurred.
13 Q Okay. They were --
14 A I later found that out. Yeah.
15 Q I understand. And Kim Cuce is also no
16 longer a member?
17 A That's correct.
18 Q When did that occur?
19 A I want to say either 2010 -- late 2010,
20 early 2011. I think it -- I think it was late
21 2010.
22 Q And why is she no longer a member?
23 A Because of this deal here and then just
24 -- and obviously there was -- you know, the
25 company went through a whole lot of financial

1 conditions and we had to make capital
2 contributions to survive through this. And she
3 could not make capital contributions and so she
4 was offered the forgivance (sic) for -- we -- I
5 think we paid her like 15,000 dollars and, you
6 know, forgave her negative capital count, and that
7 was the end of -- that was the end of our
8 relationship.
9 Q Okay. Was there any other reason,
10 other than the capital cause, that Kim Cuce is no
11 longer a member --
12 A Well, I mean, because of --
13 Q -- or an owner of the company?
14 A Because of -- in my opinion, you know,
15 the way she was -- she was -- when we set up the
16 corporate structure, she and DeClemente were
17 supposed to be the operating partners, and they
18 ended up wrecking the business. And they -- they
19 each, in their own individual way, in addition to
20 what's happening with this sales tax, I mean, this
21 just -- you know, it's one thing after another
22 with them. I mean -- you know, they -- the two of
23 them didn't renew our -- our Medicare billing
24 number when they were supposed to, and so for like
25 three or four months we couldn't bill Medicare.

1 Q Yeah.
2 A And Abacare -- I mean, it just one --
3 it was just one thing after another. You know,
4 DeClemente got put out of the business real early.
5 I mean -- you know, we had a -- we had to -- we
6 had to get rid of him, 'cause he was threatening.
7 And then we found out that the two of them were
8 sleeping together and they didn't bother to tell
9 us that. And, you know, I had specifically asked
10 Kim Cuce whether they were doing that. And so,
11 then, we -- the -- Synergy or something like that
12 -- some human resources thing that -- I think both
13 of them were smoking marijuana. I mean, it's just
14 -- it was like a soap opera, so we disassociated
15 ourselves from those two people.
16 Q Okay. Did Mr. Reed do any separate due
17 diligence that you know of?
18 A You'd have to ask him that.
19 Q Would his -- was the information also
20 fed from Bradham -- is it Bradham or Bradtham?
21 A I think Bradham.
22 Q Bradham? Okay. I got it. That's what
23 I thought.
24 A I hope so. I'm --
25 Q All right. So was the information that

1 came through Bradham -- that was for Reed as well;
2 correct? He was supplying that to both of y'all
3 or just to you?
4 A To both of us. 'Cause both of us have
5 different businesses that we are enga--- primarily
6 engaged in.
7 Q Okay. So as we sit here today, there's
8 no other source of information that's come to you,
9 other than the ones we've already discussed.
10 Correct?
11 A I would presume that's correct.
12 Q Okay. And I may have already asked you
13 this and I forget. Forgive me, because I know
14 we've got -- time is short and we've got a lot of
15 people with other interests. But did DeClemente
16 do any due diligence, that you know of, on his
17 own?
18 A Again, what was represented and what
19 they -- what actually occurred, I -- I --
20 Q Fair enough.
21 A -- don't know. So --
22 Q And was anything represented to you
23 that he said he did?
24 A You know, again, it -- it -- what they
25 did -- and when I say they, it was Cuce and

1 DeClemente -- you know, put together business
2 plans. You know, this is how we're gonna operate,
3 this is what we're gonna do and things to that
4 effect. You know, when you're getting into the
5 financials of Abacare, I don't recall any specific
6 representations. Now, how you -- we were gonna
7 move the business forward, there were rep---
8 discussions and representations about that.
9 Q Before you purchased Abacare, was it
10 your understanding that he was the chief operating
11 officer of Abacare?
12 A I --
13 MR. SMITH: Objection.
14 THE DEPONENT: I -- I don't know the
15 answer --
16 MR. SMITH: Object to the form.
17 THE DEPONENT: -- to that, 'cause it --
18 that -- that was a -- seemed to be a con--- a bone
19 of contention between him and the Connellys.
20 MR. MYRICK: Okay.
21 THE DEPONENT: I mean, I will say he
22 was the manager of the location; okay?
23 MR. MYRICK: Uh-huh.
24 THE DEPONENT: Now, I -- I don't -- he
25 kept saying he didn't know anything about the

1 finances of it and I know the Connellys say that
2 he did, so who -- who knows.
3 BY MR. MYRICK:
4 Q Well, did -- he signed the purchase
5 agreement as the COO, didn't he?
6 A He wrote that in there. That's the
7 first I was ever aware of that.
8 Q Okay.
9 A I didn't --
10 Q And he also signs as a purchaser along
11 with you and Mr. Reed and Ms. Cuce, and you each
12 indicate yourselves as managers.
13 A Right. Because under the LLC, that's
14 -- we were all termed managers under the LLC
15 agreement.
16 Q Okay.
17 A And I don't know why DeClemente -- I --
18 I -- he might have written COO, but I've never
19 seen anything with -- saying he was a COO of the
20 company. Now, it may be in the corporate
21 documents of Abacare, but I'm not aware of that.
22 Q Okay. Are you aware of any
23 representations that Donna Cash made on behalf of
24 Abacare to ATMES?
25 A Donna Cash personally? Is that what

1 you're asking me?
2 Q Yeah.
3 A No, I'm not aware of what Donna Cash
4 did or didn't do. I -- I don't know.
5 Q Okay. Topic 14, damages claimed by the
6 Plaintiffs in this case. The -- the e-mail that
7 you checked on your phone in here today listed
8 Bradham's calculation of about 774,000 dollars, on
9 top of the underlying tax liability to --
10 A Right.
11 Q -- to Department of Revenue; correct?
12 A That's what he said.
13 Q Okay. And it -- and did you say
14 there's a written report that accompanies that?
15 A There -- no. He e-mailed something --
16 it's just saying he -- my name -- there is a
17 report -- I don't know if I have it here or there,
18 but it's -- I -- I have it somewhere. I -- yeah,
19 I sent it to James at some point. And it just
20 says I'm -- it says, I calculated the damages at
21 X, you know, whatever it was. So that can
22 obviously be provided to you in discovery.
23 Q Okay. What I'm doing now is going
24 through what you've said before.
25 A Okay.

1 Q And I'm not going to ask you a lot of
2 these questions in this setting, because I
3 understand everybody wants to conclude this
4 deposition and we want to give them an
5 opportunity. It's 1:10. And I think I can save a
6 good amount of these for the -- for the next
7 deposition. Are there any writings about the
8 meetings that you had with your three partners for
9 the establishment of ATMES?
10 A No. Not to my knowledge.
11 Q Okay.
12 A You know, if there were, it would be in
13 the possession of Kim Cuce.
14 Q Okay. And where -- where is she now?
15 A That's a wonderful question.
16 Q Okay.
17 A She appeared in Sumter for some period
18 of time. I understand she's gone back up north.
19 Where it's -- so where that is, I don't know.
20 Q Okay. Do you have a -- was she ever an
21 employee of the company?
22 A No -- yeah, she -- she may have been --
23 employee of what company?
24 Q Any of your companies. Reliable --
25 A She --

1 Q -- or either ATMES.
2 A She was an employee of Reliable.
3 That's how we first met her.
4 Q Uh-huh.
5 A And she came in and managed it for
6 awhile. And then we gave her a 5 percent
7 ownership interest to manage it from day to day
8 and for -- you know, and for us not to have to be
9 involved in the management.
10 Q Does Reliable keep personnel files for
11 all the people that it has employed?
12 A I don't -- we do now, and it would be
13 with whoever the HR firm is that we use. Back
14 then we were a smaller operation, so we didn't --
15 we --
16 Q Is --
17 A -- didn't do that.
18 Q Is there a file on Kim Cuce?
19 A I bet you Emmett Scully has a file on
20 her.
21 Q Who?
22 A Emmett Scully. He's a -- the HR firm
23 over here.
24 Q Okay.
25 A So I bet you he's got some file on her,

1 'cause he had to go tell her that she could no
2 longer be a part of -- she couldn't come in and
3 run the company anymore, at some point.
4 Q Okay. It -- when did you first
5 discover the sales tax issue? Or how -- if you
6 can't give me a date, just tell me how it first
7 came to your attention.
8 A After the Supreme Court case and then
9 at -- following that, the Department of Revenue
10 started sending out random audits of every DME
11 company and -- and that's how it got discovered.
12 Once they -- once the case was concluded, they
13 just started auditing all the DMEs.
14 Q Okay. And when that first happened and
15 it comes on your radar that there might be a sales
16 tax issue with Abacare, did you go and discuss
17 that with Phillip DeClemente first?
18 A I don't think at that point -- no. I
19 think I went and discussed it with Sam Applegate
20 first.
21 Q Okay. Why didn't you discuss it with
22 DeClemente, who --
23 A 'Cause he was out of the business,
24 by --
25 Q Okay. He was already --

1 A -- that time.
2 Q -- out by that time?
3 A Yes.
4 Q He was already gone?
5 A Yeah. We purchased his interest out as
6 -- you know, very shortly after this happened.
7 Q And what document reflects that?
8 A There's a sale -- some type of
9 agreement.
10 Q Okay. And that would give us the date?
11 A Of DeClemente being out?
12 Q Yeah.
13 A Yes.
14 Q Are there any other written records
15 that pertain to his exit from the company?
16 A Other than the documents, no. Other
17 than the sales documents.
18 Q Are there any minutes for either
19 Reliable or ATMES?
20 A Minutes on DeClemente or minutes in
21 general?
22 Q Minutes in general.
23 A I don't -- Kim Cuce would have done
24 those.
25 Q Did she do them?

1 A Who knows? I can check and see whether
2 there's a file of minutes at the medical equipment
3 company. That would be the only place they
4 would -- I'm not in possession of any minutes.
5 Q Where is the valuation that Burkett,
6 Burkett & Burkett did? Do you have a copy in your
7 file?
8 A Uh-huh.
9 Q Okay. Something --
10 A Yes.
11 Q -- like that?
12 A But let me back up. I have the draft
13 copy. The Connellys and/or Mr. Applegate have the
14 final copy, I would presume.
15 Q And earlier we were talking about how
16 you were looking at the profitability of Abacare
17 before you made a purchase of it and you said, I
18 hired Art Bradham -- there was Art, there was
19 David Selander, there was Burkett and Burkett.
20 And you were asked about whether there was
21 information that came through Phillip DeClemente,
22 and you said DeClemente and the Connellys were at
23 odds, DeClemente was with us. What -- what did
24 that mean --
25 A Well, that --

1 Q -- at that time?
2 A That probably was a bad statement,
3 'cause it -- there was something going on, and I
4 want to say that -- maybe they broke up at some
5 point, the granddaughter -- I can't remember when
6 all that happened. There was something that
7 really caused a strain and I -- it -- it's -- was
8 the granddaughter -- and I -- I know you can't
9 answer, but is the -- maybe it was Donna Cash's
10 daughter. I don't know who it was. And so there
11 was -- and I think there was some allegations of
12 maybe some abuse or something like that, that I --
13 and I'm just -- it -- something -- something was
14 strange. And there was some -- some issue,
15 because it really broke down at the end, where
16 DeClemente and -- and Applegate -- or something --
17 people weren't speaking. But -- so, you know,
18 that's what -- I think that's what I'm meaning by
19 that point. But, you know, I may have it mixed up
20 to right after -- there was some dispute with them
21 and I don't know whether it was before or after.
22 Q And you said then DeClemente was
23 communicating with David Selander but not the
24 Estate of Connelly?
25 A DeClemente would -- I don't -- he would

1 talk to Sam Applegate a bunch. I know that.
2 Q Uh-huh.
3 A And I don't know before or after. I
4 just remember him saying Applegate says, Applegate
5 says. If I heard that once, I heard it a hundred
6 times. And -- and I know he talked to Selander a
7 lot too. But it -- the timeframe, I can't recall.
8 Q And my understanding of the deal is you
9 -- the -- you told me your understanding of how it
10 worked. He had a 20 percent ownership interest in
11 Abacare, and what he did was he traded that in
12 effectively for 25 percent interest in the new
13 company in which you were a partner?
14 A Correct.
15 Q Is that basically how that worked?
16 A That's correct.
17 Q Okay.
18 A And let me add -- 'cause, you know, I
19 -- the more I think about it, I think that
20 probably we -- DeClemente was telling us what the
21 sales of -- of Abacare was. 'Cause, you know, you
22 talk about what your gross sales are when you're
23 looking at companies, so I -- I think he said
24 something about that.
25 Q And he never disclosed from you -- to

1 you, to your recollection, nor did you ever ask
2 him, depart -- before he departed, about any
3 controversy within the business about whether
4 sales had to be reported based -- I mean, taxes
5 were to be paid based on sales or if they were to
6 be based on collections?
7 A I -- I -- I just -- you know, they were
8 -- there were the sales tax discussions over the
9 issues of sales tax; okay, that was going on in
10 the industry with him. And I think I referenced
11 it earlier, about, you know, what we need to do
12 and we need to pay. But, you know, I don't -- I
13 -- I can't say whether there was or wasn't. I
14 just don't recall.
15 Q Okay.
16 A I just don't recall that being an
17 issue.
18 Q And did you ever, for lack of a better
19 term, confront him and say, why wasn't the company
20 paying sales taxes according to this computer
21 program?
22 A Yeah. After it was over with,
23 certainly I did.
24 Q And what did he say?
25 A He said David Selander was handling all

1 that and he knew it. He tried to, of course, push
2 the blame off on someone else.
3 Q Tell me, on your -- in your 7th --
4 actually, I think it may be your 9th cause of
5 action, civil conspiracy. I did not understand
6 how there was a special -- what the special damage
7 alleged was. What -- what was the theory behind
8 the civil conspiracy piece, that everybody
9 conspired to injure ATMES?
10 A When -- they conspired by not reporting
11 the sales tax liability that they obviously had
12 some questions and some -- and knew of its
13 existence beforehand.
14 Q And that's the civil conspiracy piece?
15 A That's my interpretation of it. I
16 don't -- it may be some more as -- from other
17 witnesses.
18 Q And the purpose of the conspiracy was
19 to do what?
20 A Was to sell us a company and make more
21 money off of it. I mean, they sold us a company
22 with a sales tax liability that the minutes
23 obviously reflect they knew there were some
24 problems with that. And that would be the
25 Estate --

1 Q Well, the minutes reflect -- and
2 correct me if I'm wrong, because it's real
3 important that I get this. The minutes reflect
4 that there was controversy about whether sales
5 taxes were to be paid on what was collected versus
6 what was charged out -- whatever the sales. But
7 what you told me is that the problem for sales tax
8 was really much larger. They were just
9 underreporting what they owed taxes on, and that
10 those were separate issues. Did I --
11 A They're sep---
12 Q -- misunderstand that?
13 A No, you -- you're correct. They are
14 separate issues. And at that point the -- I think
15 the question between collections and -- and the
16 accrual or --
17 Q Yeah, but --
18 A -- cash method -- you know, method was
19 a -- was an issue back then, which, you know,
20 obviously gave them notice. But, you know, you
21 can't tell me that -- that these people were not
22 sitting there with -- with -- knowing that they
23 were reporting X on the tax return -- say 1
24 million dollars on a tax return, or 1.2 million on
25 a tax return, and then tell the Department of

1 Revenue they were only making 300,000 dollars. I
2 mean, you know, it -- that -- that -- that just
3 doesn't make sense.
4 Q And were those about the figures that
5 you just recanted?
6 A No, I -- no.
7 Q Okay.
8 A I'm using examples. Sorry.
9 Q Do you remember what they were
10 generally?
11 A No, I do -- I --
12 Q Like what the sales actually were
13 versus what they --
14 A I do not.
15 Q -- reported?
16 MR. MYRICK: Okay. I think I will ask
17 you my further questions --
18 THE DEPONENT: Okay.
19 MR. MYRICK: -- when we next meet.
20 MR. MARSHALL: Let me ask you just
21 three or four, if I might. Mr. Smith, do you have
22 any evidence that prior to your purchase of
23 Abacare, during that timeframe, do you have any
24 evidence that Phillip DeClemente had knowledge of
25 indebtedness for sales tax?

1 MR. SMITH: Mr. Marshall, I -- I'm
2 going to object and I'm going to instruct
3 Mr. Smith not to answer any questions that don't
4 relate solely to damages. Your client, as of
5 March 12th, I think -- March 30th, is in default,
6 which limits your discovery solely to the issue of
7 damages.
8 MR. MARSHALL: Well, I don't -- I
9 didn't see any default order. Are you --
10 MR. SMITH: Yeah. No, it's in default.
11 It's entered in default.
12 MR. MARSHALL: There's been a default
13 signed?
14 MR. SMITH: The -- the clerk enters the
15 default. Yes. Your client's in default.
16 MR. MARSHALL: Well, I hadn't been
17 served with that.
18 MR. SMITH: Well --
19 MR. MARSHALL: But I did file a default
20 motion against Mr. Smith, as you're aware.
21 MR. SMITH: And you have not been
22 allowed to enter an appearance in response to it,
23 because you haven't been relieved from default, so
24 that won't be granted and it's certainly not
25 granted. But I'm going to instruct him not to

1 answer any questions that don't relate purely to
2 the issue of my client's damages against your
3 client.
4 MR. MARSHALL: Okay. Well, he's
5 already testified to that, so...
6 MR. SMITH: Well, he -- by virtue of
7 questions asked by someone else other than -- than
8 you or your client, so --
9 MR. MARSHALL: Right. So I don't need
10 to ask him about that.
11 MR. SMITH: Okay. Well, then -- so do
12 you have any questions then?
13 MR. HOWSER: I've got a few. And
14 then --
15 MR. SMITH: All right.
16 MR. HOWSER: -- we'll get him out of
17 here.
18 F U R T H E R E X A M I N A T I O N
19 BY MR. HOWSER:
20 Q Do you have any information that David
21 Selander prepared any sales tax returns for
22 Abacare?
23 A Do I have information? I -- I -- I was
24 told that by -- by DeClemente.
25 Q All right. And the -- the sole source

1 of that information that you had came from
2 Mr. DeClemente?
3 A It -- I have to -- I would have to look
4 at the sales tax returns and see if they were
5 signed -- who they were signed by. So it may be
6 that too. I -- I can't recall.
7 Q Okay. But -- but your information, as
8 you sit here, is based solely on what Phillip
9 DeClemente told you about who prepared the sales
10 tax returns?
11 A Somebody told -- it -- it's just my
12 understanding, where I think -- I -- I know
13 DeClemente told me that, and I may have seen a
14 sales tax return. I can't tell you where -- I
15 know, but I just -- that's -- that's my
16 understanding.
17 Q Okay. Did you have any conversations
18 with anyone at Hood and Selander, other than
19 Mr. Selander?
20 A You mean the -- as the corporation?
21 Q Corporation.
22 A That's correct. That's -- that's the
23 only person that the corporation communicated
24 with, was Mr. Selander.
25 Q Okay. And did the corporation have

1 conversations with Mr. Selander before November
2 2008, when the transaction closed?
3 A You would -- I did not. Mr. Reed may
4 have. I doubt he did. I would -- Mr. Declem---
5 DeClemente may have, but I don't know the answer
6 to that. But...
7 Q Okay. Did Assistive Technology make a
8 profit in 2009?
9 A No, sir. That I -- I recall. I do not
10 think so.
11 Q All right. Absent any sales tax
12 liability, would it have made a profit for 2009?
13 A Oh, no. No. No. No. No.
14 Q Did Assistive Technology make a profit
15 in 2010?
16 A No.
17 Q Absent any potential sales tax
18 liability, would it have made a profit in 2010?
19 A I don't think so. And that would
20 better be directed to Mr. Bradham, but I do not --
21 in my opinion, I do not think so.
22 Q All right. Did Assistive Technologies
23 make a profit in 2011?
24 A No, sir.
25 Q Has Assistive Technology made a profit

1 through the first ten months of 2012?
2 A Yes, sir.
3 Q How much has the profit been?
4 A I think the last report I saw maybe was
5 a range of a -- plus or minus 150,000 dollars.
6 Q Okay. To what do you attribute not
7 making a profit in the year 2010 -- 2009?
8 A Starting a new business, a number of
9 business decisions by DeClemente and Cuce, and the
10 loss of a billing number for that year where I
11 lost hundreds of thousands of dollars in billing.
12 Q All right. When did the decision from
13 the Supreme Court come down?
14 A After the sale of it. I don't -- I --
15 I would say maybe '08 or '09.
16 Q To what do you attribute the failure to
17 make a profit in 2010?
18 A Just the business.
19 Q What about the business?
20 A That it just was not a -- not a good
21 business.
22 Q To what do you contribute the failure
23 to make a profit in 2011?
24 A I think the sales tax liability had a
25 large part in that, in 2011, and then -- and then,

1 you know, just the business in general. Same
2 problem. I mean, it's just -- was not a -- the
3 business was not there to support a
4 eight-hundred-and-something-thousand-dollar
5 purchase.
6 Q You indicated that one reason that
7 Ms. Cuce no longer became associated with the
8 business was that she was unable to make a capital
9 call.
10 A Right.
11 Q How many capital calls had the other
12 members of the LLC had to make?
13 A A number.
14 Q Okay. How much was the capital call
15 that she could not make?
16 A She never made any capital call.
17 Q How much was the capital call that she
18 would have had to have made to remain a member of
19 the LLC?
20 A We -- we went through different capital
21 calls and put in different money when we needed
22 it, but I -- you know, I want to say I put in
23 somewhere between a hundred and a hundred and
24 fifty, and same with Jeff Reed.
25 Q Okay. Did Mr. DeClemente ever make an

1 additional capital call?
2 A No.
3 Q Did Ms. Cuce ever make an additional
4 capital call?
5 A No.
6 Q How many conversations would you have
7 had with David Selander on behalf of Assistive
8 Technologies?
9 A Me, personally?
10 Q You, personally.
11 A Zero.
12 Q And you are not aware of any
13 conversations that anyone else who was a member of
14 -- well, let me strike that. Other than --
15 A Mr. Reed?
16 Q -- Mr. Reed, are you aware -- you --
17 you don't -- you have no personal knowledge of any
18 conversation Mr. Reed had with Mr. Selander, are
19 you?
20 A Probably the one he told me.
21 Q Okay. And how many conversations did
22 he have?
23 A A couple, I think.
24 Q Okay. Anyone else associated with
25 Assistive Technology have any conversation with

1 David Selander?
2 A Other than Phillip DeClemente and maybe
3 Kim Cuce, I -- I wouldn't know whether she did or
4 not.
5 Q All right.
6 A I think she may have, but I don't know.
7 Q All right. You -- you told us that
8 Emmett Scully may have an -- a personnel file for
9 Ms. Cuce, but what -- what do you know remember as
10 being her last known address?
11 A I don't -- it -- she -- she liv--- it
12 was a Mill Run address, where she lived with her
13 husband, and they got divorced and so I know she
14 doesn't live there. And then from that point, I
15 -- she's just -- I -- I don't know where she's
16 been going.
17 Q All right. Did -- did she li--- ever
18 live in Sumter?
19 A Yes, sir. She always lived in Sumter.
20 Q Okay.
21 A Her husband is an orthopedic sur--- or
22 was an orthopedic surgeon over in Sumter.
23 Q All right. Is he still in Sumter?
24 A Yes, sir.
25 Q And his last name is Cuce too?

1 A That's correct.
2 MR. HOWSER: Okay. All right. Thank
3 you, sir.
4 THE DEPONENT: All right.
5 MR. MYRICK: I'm gonna let you go.
6 MR. HOWSER: Yeah.
7 THE DEPONENT: Good job.
8 MR. SMITH: This is what I'd -- I'd
9 like to not waive and sign --
10 MR. HOWSER: Christy?
11 MR. SMITH: -- waive the reading --
12 MR. MYRICK: Christy?
13 MR. SMITH: Christy --
14 MS. ALLEN: Still here.
15 MR. MYRICK: You got anything?
16 E X A M I N A T I O N
17 BY MS. ALLEN:
18 Q I have two quick -- very quick
19 questions. Mr. Smith, you said that Mr. Holler
20 and Mr. Erter in your firm negotiated the stock
21 purchase with Mr. Applegate?
22 A They worked with Mr. Applegate -- had
23 discussions with him. That's correct.
24 Q Okay. And in doing that I guess they
25 were working on behalf of ATMES?

1 A I would -- yes. ATMES and/or us
2 individually. Yeah, it -- you know, it would --
3 depending upon when the corporation was formed.
4 Q Okay. And do you anticipate Mr. Holler
5 and Mr. Erter being on your witness list?
6 A I do not.
7 Q You do not?
8 A I do not.
9 Q You said no?
10 A No.
11 MS. ALLEN: Okay. That's all I have.
12 Thank you.
13 MR. SMITH: Okay. We're concluded.
14 THE DEPONENT: All right.
15 (Deponent excused.)
16 (Whereupon, at 1:34 p.m., the
17 taking of the foregoing
18 deposition was concluded.)
19
20
21
22 (*This transcript may contain quoted material.
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24 the speaker.)
25 (**Certificate accompanies sealed original only.)

Bradham depo

In The Matter Of:

ASSISTIVE TECHNOLOGY MEDICAL EQUIPMENT SERVICES, LLC v.

DONNA C. CASH, ET AL

ART BRADHAM, CPA

October 18, 2013

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Original File BRADHAM.prn

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STATE OF SOUTH CAROLINA) IN THE COURT OF
COUNTY OF CHARLESTON) COMMON PLEAS
CASE NO: 11-CP-10-8011

ASSISTIVE TECHNOLOGY MEDICAL EQUIPMENT SERVICES, LLC,

PLAINTIFF,

vs.

DONNA C. CASH, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DOROTHY CONNELLY, KIMBERLY CUCE, PHILLIP DECLEMENTE,

DEFENDANTS.

DEPOSITION OF:

ART BRADHAM
October 18, 2013

Given before Debbie Rayl, Court Reporter and Notary Public in and for the State of South Carolina, in the offices of Art Bradham, CPA, Sumter, South Carolina, on Friday, the 18th day of October, 2013, commencing at 10:01 a.m.

APPEARANCES:

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FOR THE DEFENDANT:
DONNA C. CASH AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DOROTHY A. CONNELLY

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APPEARANCES:

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STIPULATIONS

Pursuant to Notice and/or consent of the parties, the deposition hereon captioned was conducted at the time and place mentioned before Debbie Rayl, Court Reporter and Notary Public in and for the State of South Carolina.

The deposition was taken for use in accordance with the South Carolina Rules of Civil Procedure unless herein stipulated and agreed to by the parties.

It is stipulated by and between counsel for the respective parties that all objections are reserved until the time of trial save as to the form of the question.

The reading and signing of the deposition by the deponent was expressly RESERVED by the deponent.

1 PROCEEDINGS
2 Whereupon,
3 (ART BRADHAM, CPA, having been duly
4 sworn, testified as follows:)
5 +++++++++++++++
6 EXAMINATION
7 BY MR. HOWSER:
8 Q. Would you give us your full name,
9 please?
10 A. My name is Arthur Falk Bradham, B-R-
11 A-D-H-A-M.
12 Q. Mr. Bradham, my name is Dave Howser
13 and I represent one of the defendants in this
14 case, Hood and Selander, who are CPAs, and we're
15 going to be asking you some questions. I don't
16 know whether you've ever given a deposition
17 before or not?
18 A. I have.
19 Q. The rules of court nevertheless
20 require me to give you certain instructions.
21 If I should ask a question that you
22 do not understand, you should tell me that and I
23 will rephrase or restate the question, rather
24 than addressing that to someone else.
25 A. I understand.

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1 Q. If during the course of this
2 deposition you want to take a break, please let
3 us know and we'll take a break. This is not
4 going to be an endurance contest, so you just
5 tell us. Is that agreeable?
6 A. Yes, sir.
7 Q. And do you understand that if we take
8 a break, you're not entitled to discuss your
9 testimony with anyone?
10 A. Yes, sir.
11 Q. And if you do, we're entitled to ask
12 what was discussed.
13 A. I understand.
14 Q. Now you understand further that
15 you're under oath just as if you were in the
16 courtroom?
17 A. Yes, sir.
18 Q. And you understand if I should ask
19 you a question today and ask you that same
20 question at any trial of this case, if the
21 answers differ, you may be asked to explain why
22 they differ.
23 A. I understand.
24 Q. For the benefit of everyone here, I
25 would ask that you give us an audible response,

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1 such as yes or no, and then you can explain your
2 answer, rather than a huh-uh or an uh-huh or a
3 shake of the head because that involves some
4 interpretation by the court reporter and I think
5 we all want a full and complete record.
6 A. I understand.
7 Q. I would also ask that you allow me to
8 complete my question before you answer and
9 likewise, I will allow you to answer before I ask
10 my next question.
11 A. Agreed.
12 Q. Are you on any medication that would
13 impair your ability to understand my questions
14 and give me true and correct responses?
15 A. No, sir.
16 Q. Would you give me your business
17 address?
18 A. My business is at 2 Law Range,
19 Sumter, South Carolina 29150.
20 Q. And your home address?
21 A. 402 North Salem Avenue, Sumter, South
22 Carolina 29150.
23 Q. And you are a certified public
24 accountant?
25 A. Yes, sir.

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1 Q. What is the name of your firm?
2 A. Art Bradham, CPA, PC.
3 Q. How long have you been a certified
4 public accountant?
5 A. I was certified in 1978.
6 Q. Would you give us your educational
7 background?
8 A. Yes, sir. I graduated with a BS in
9 accounting from the University of South Carolina
10 in 1978. I returned to school in approximately
11 2002 and received a master of taxation in 2004.
12 Q. Where did you receive the master of
13 taxation?
14 A. I'm sorry. Florida Atlantic
15 University.
16 Q. From the time you began practicing as
17 a CPA, would you tell me the firms with which you
18 have practiced and where they're located.
19 A. Yes, sir. I initially started -- my
20 father was a CPA. I practiced with his firm,
21 Bradham and Company, CPAs in Manning, South
22 Carolina from approximately 1978 until 1989. My
23 father got cancer. We sold out. I moved to
24 Hilton Head and did not practice public
25 accounting again until I returned to the business

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1 approximately 2002.
2 For most of the period continuing to
3 that, I practiced as Art Bradham, CPA, PC. I was
4 in a short term joint venture, I guess is the
5 best way to put it, with Van Bullock and Company,
6 CPAs somewhere in that 2006-7 area. I'm not
7 certain of those dates.
8 Q. Between 1989 and 2002, what did you
9 do?
10 A. I owned a group of retail stores. We
11 had -- we sold fine linens in Hilton Head and we
12 had a store in Avon, which is just outside of
13 Vail, Colorado.
14 Q. Just curious, how did you wind up in
15 Vail or near Vail?
16 A. We started going out there on
17 vacations during the summer and absolutely fell
18 in love with it, moved out there for some number
19 of years.
20 Q. Do you still have those retail stores
21 or ---
22 A. No, sir. They were sold.
23 Q. What documents have you reviewed in
24 this case?
25 A. How would you like me to list them,

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1 chronologically or ---
2 Q. Any way you prefer.
3 A. Okay. Well, I'm going to go back in
4 time then, if you will, and the first document
5 that I was presented with was Mr. Burkett's
6 valuation of Abacare, which you have a copy of.
7 Q. All right.
8 A. Shortly after that, I -- there's not
9 a huge amount of time lapse. There was a tax
10 return that was prepared by Hood and Selander for
11 Abacare. The tax return is dated March 12, 2009.
12 The owners of Abacare at that point were also the
13 owners of ATMES.
14 Q. All right. And just for the record,
15 ATMES is an acronym for Assistive Technology
16 Medical Equipment Services?
17 A. I believe that's correct.
18 Q. And the tax return that you looked at
19 was a 2002 tax return?
20 A. No, sir.
21 Q. I mean, 2008 tax return?
22 A. There were a number of tax returns
23 that were included in the valuation report by Mr.
24 Burkett. I reviewed them, and then this
25 particular tax return was the final tax return

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1 prepared by Hood and Selander for Abacare.
2 Q. All right. But that's a 2008 tax
3 return?
4 A. Yes, sir, that's correct.
5 Q. And when did the transaction with
6 which we're going to be discussing take place or
7 when was it consummated? Was it on or about
8 either November 5th or November 7th, 2008?
9 A. That sounds correct; yes, sir.
10 Q. All right. Now I interrupted you,
11 what else did you review?
12 A. Primarily the financial documents
13 that I needed to review to do due diligence for
14 my clients were contained in Mr. Burkett's
15 report. Mr. Burkett had obtained that
16 information from various sources, including Hood
17 and Selander and management of Abacare.
18 Q. We'll get to that in just a moment.
19 We've been furnished with an
20 affidavit that you executed.
21 A. Yes.
22 Q. Have you prepared any other document
23 related specifically to this case, other than the
24 affidavit?
25 A. Yes, sir.

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1 Q. What else have you prepared?
2 A. There was a summary letter that I
3 prepared for Mr. Smith.
4 Q. And what is the date of that summary
5 letter?
6 A. I'm sorry, I don't have it in front
7 of me.
8 Q. Is it included in this packet?
9 A. It actually is not, and --
10 MR. MYRICK: Can we go
11 off the record for a moment?
12 (Off the record briefly.)
13 BY MR. HOWSER:
14 Q. Now you made reference to the report
15 prepared by Burkett, Burkett and Burkett?
16 A. Yes, sir.
17 Q. Let me show you a document and ask
18 you if this is an opinion letter dated July 14,
19 2008 that is part of that valuation prepared by
20 Burkett, Burkett and Burkett?
21 A. It appears to be identical to the
22 package that I have.
23 MR. HOWSER: Let's get
24 that marked as Exhibit Number 1.
25 ++++++++++++++++

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1 (OPINION LETTER
2 DATED 7-14-08 FROM
3 BURKETT BURKETT
4 & BURKETT CPAS
5 TO CONNELLY
6 WAS MARKED FOR
7 IDENTIFICATION AS
8 DEPOSITION EXHIBIT
9 NUMBER 1)
10 BY MR. HOWSER:
11 Q. This document, the opinion letter,
12 is, as we have established, part of the valuation
13 of -- prepared by Burkett, Burkett and Burkett,
14 correct?
15 A. Yes, sir.
16 Q. All right. And ---
17
MR. MYRICK: I'm sorry,
18 I need to interrupt you just for a second.
19 (Off the record discussion was held.)
20 BY MR. HOWSER:
21 Q. This letter begins with a sentence,
22 "The enclosed valuation report has been developed
23 for the exclusive and confidential use of Mrs.
24 Connelly and Mr. Phillip DeClemente."
25 Did I read that correctly?

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1 A. Yes, sir.
2 Q. Do you know if any of the purchasers
3 of the stock or of Abacare were given a copy of
4 this evaluation report?
5 A. Absolutely.
6 Q. Prior to the consummation of the
7 sale?
8 A. Yes, sir.
9 Q. All right. By whom were they given
10 this report?
11 A. I do not know.
12 Q. This letter also recites that your
13 report is based on historical and prospective
14 financial information provided by management;
15 does it not?
16 A. And other third parties; yes, sir.
17 Q. Well, I'll get to that.
18 A. Okay. If you pause, yes, I would
19 agree.
20 Q. What historical information do you
21 understand was provided?
22 A. I received the report and when I read
23 the report, there are financial statements and
24 tax returns that are inserted in this report, and
25 as is standard practice, used to complete the

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1 report.
2 Q. So if there were other historical
3 information furnished beyond what is in that
4 report, you're not aware of that? Would that be
5 a fair statement?
6 A. Let me answer your question slightly
7 different and if I don't answer it, ask it so you
8 get me precise.
9 Typically when a report like this was
10 prepared, you present all the information that
11 you relied on and you would include that either
12 in the body of the report as exhibits. Whether
13 there was any other information, I would have no
14 way to know that.
15 Q. Who prepared the financial
16 information, to your knowledge?
17 A. Per Mr. Burkett's report and as cited
18 repeatedly in various places in this report, it
19 was prepared by Hood and Selander and management,
20 and they don't parse out who did what.
21 Q. Okay. And what is your understanding
22 of who was management?
23 A. I'm not sure I know how active the
24 Connellys, et cetera were, I know that Phillip
25 DeClemente was involved in management, but who --

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1 there was a lady named Joy that's mentioned in
2 numerous e-mails and conversations, but I don't
3 know the answer to your question.
4 Q. It also recites in this letter that
5 certain key people were interviewed -- or in this
6 report, it says certain -- and I believe that's
7 really a little further down in the report, and
8 you have to look at the Table of Contents.
9 If you'll look at sources of
10 information on Page 3, it talks about interviews
11 with key people.
12 A. Yes, sir.
13 Q. Do you know what key people were
14 interviewed?
15 A. I do not. When I look at Schedule D
16 or Appendix D that's referred as the complete
17 listing, that appears to be the complete listing
18 of the financial information, not the complete
19 listing of key people interviewed.
20 Q. Have you interviewed any key people
21 associated with Abacare?
22 A. I would answer that as either I don't
23 know or no.
24 Q. Did you ever interview Mr.
25 DeClemente?

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1 A. I had conversations with Mr.
2 DeClemente, but I would not -- I did not prepare
3 this valuation, so I guess my answer would be is
4 I did not interview Mr. DeClemente.
5 Q. When you had conversations with him,
6 was this before or after November 5, 2008?
7 A. I don't know the answer to that.
8 Q. When did you become involved with
9 this particular transaction?
10 A. I think this report was the first
11 tangible document that I saw. I had heard
12 conversation, but this was the first time I saw
13 any financial information.
14 Q. When did you see that financial
15 information?
16 A. I do not know.
17 Q. Was it before or after November 5,
18 2008?
19 A. What happened on November 5, 2008?
20 Q. Either November 5 or November 7, 2008
21 is when I understand this transaction was
22 consummated.
23 A. I will answer your question. It was
24 definitely before that date because I was
25 presented with this to assist the management of

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1 ATMES in preparing some projections, proformas,
2 et cetera to be able to get the bank loan to buy
3 this business.
4 Q. And am I correct that the only
5 financial information that you had with respect
6 to Abacare, and you understand when I use the
7 term Abacare, I'm using Abacare Home Medical,
8 Inc.?
9 A. Yes, sir.
10 Q. Was the 2008 return and any
11 information appearing in the Burkett, Burkett and
12 Burkett report?
13 A. I believe that to be true.
14 Q. If there were other financial
15 information that you were furnished, what would
16 be the nature of that financial information?
17 A. Well, if I don't know what that
18 financial information is, I don't know how I can
19 answer that.
20 Q. All right. Fine.
21 Now, let's go back to the opinion
22 letter, and it says as we discussed, and I'm
23 looking at Paragraph 3 of this letter, "My report
24 is based on historical and prospective financial
25 information provided to me by management and

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1 other third parties."
2 What financial information was
3 provided to you by other third parties?
4 A. Now this is not my opinion, Mr.
5 Howser.
6 Q. I understand.
7 A. All I got was this report and this
8 tax return.
9 Q. Did you ever discuss with Mr.
10 Selander financial information or tax returns of
11 Abacare before this transaction closed?
12 A. I'm not certain of that. I don't
13 know.
14 Q. Is there any way that you could go
15 back now and reconstruct whether or not you
16 talked to Mr. Selander before, let's say November
17 2008 about this transaction?
18 A. I honestly don't know the answer to
19 that.
20 Q. Other than the 2008 tax return, which
21 was obviously not prepared until, as you say,
22 March of 2009 for Abacare, to your knowledge what
23 documents prepared by David Selander did the
24 purchasers or anyone acting on their behalf look
25 at or examine in connection with this

Page 23

1 transaction?
2 A. I can't comment on what they may or
3 may not have seen. I don't know.
4 Q. Were you asked by ATMES to do any due
5 diligence in connection with this transaction?
6 A. Yes.
7 Q. Tell me what due diligence you were
8 asked to perform?
9 A. I reviewed these reports.
10 MR. SMITH: Can we take
11 a break for just one second, please?
12 (Off the record briefly.)
13 BY MR. HOWSER:
14 Q. Okay. You reviewed the reports in
15 the Burkett, Burkett and Burkett --
16 A. Yes, sir.
17 Q. -- document? All right. What else
18 did you do?
19 A. To my knowledge that was the extent
20 of the work that I did. I relied on reputable --
21 two reputable CPA firms.
22 Q. All right. That would be Burkett,
23 Burkett and Burkett, and Hood and Selander?
24 A. Yes, sir.
25 Q. Do you have any knowledge as to

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1 whether or not Hood and Selander ever prepared
2 financial statements for Abacare?
3 A. No, sir.
4 Q. Just to go a step beyond that, for
5 the record, would you describe for us the
6 difference between an audited financial statement
7 and a compilation?
8 A. Sure. The -- an audited financial
9 statement involves an extensive amount of
10 investigation. The auditor takes all manner of
11 steps to ascertain if the information is accurate
12 and completely presented fairly. A compilation,
13 you're simply assisting the client in preparing
14 financial statements that are their financial
15 statements. You're an expert who assists them in
16 putting their information in the proper form and
17 format.
18 Q. In other words, in preparing a
19 compilation, you rely solely on the
20 representations of management?
21 A. I'm not going to agree with that
22 statement entirely and let me explain why.
23 If someone told me I got $10 million
24 in cash and no debt, I probably would ask to say,
25 show me a bank statement before I would be

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1 associated with a compilation -- even a
2 compilation statement that made those sort of
3 statements. So the answer is, no, I'm not going
4 to throw out my judgment, my experience just
5 because it's a compilation.
6 Q. All right. Let me modify it then and
7 say, is it true that in preparing a compilation,
8 you rely primarily on the representations of
9 management?
10 A. I'll agree with that statement.
11 Q. Did you ever have any discussions
12 about the report prepared by Burkett, Burkett and
13 Burkett with anyone at Burkett, Burkett and
14 Burkett?
15 A. No, sir.
16 Q. Let's turn for a minute to your
17 affidavit and that affidavit is -- I'm not going
18 to get it marked, but it's dated -- it says
19 executed the 4th day of August 2011, and the
20 notary is -- says it was sworn to and subscribed
21 before the notary on the 26th of September 2011.
22 A. I don't have that copy, but that
23 appears to be my signature.
24 Q. Your affidavit states that defendants
25 knew that Abacare Home Medical, Inc. had

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1 overstated their sales as a result of
2 understating their sales tax and was indebted to
3 the South Carolina Department of Revenue.
4 A. Could you repeat that?
5 Q. I'll point that out to you.
6 A. Thank you.
7 Q. If you look on Page 2 at Paragraph 8,
8 beginning on the second sentence.
9 A. Okay.
10 Q. It begins, "For example."
11 A. Yes, sir.
12 Q. When you say defendants, what
13 defendants are you talking about?
14 A. To the information that I have and my
15 knowledge and belief, all of the owners of
16 Abacare and Mr. Selander --is it Selander, am I
17 pronouncing that right?
18 Q. That's the way I say it.
19 A. And Mr. Selander were aware that they
20 had a sales tax under-reporting issue and that it
21 had not been addressed.
22 Q. And so, that -- the basis for your
23 statement -- what is the basis for that
24 statement?
25 A. May I present this?

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1 Q. Sure.
2 A. These are minutes that were prepared
3 on Hood and Selander letterhead for reasons I
4 can't comprehend, and you'll notice at Page 3,
5 which I marked there, and if you read that
6 section, Mr. Selander has been crystal clear in
7 telling ownership and management that they are
8 underreporting sales tax, that they're using the
9 wrong method of calculation. There's -- in
10 other words, there's no -- absolutely no tax
11 authority whatsoever to support the method
12 they're using -- purportedly using to report
13 sales tax and that their sales tax are
14 understated.
15
MR. HOWSER:
Okay, maybe
16 we could get some copies made.
17
MR. SMITH: That's in
18 your packet. That's in the packet everybody has.
19 MR. HOWSER: Let's get
20 this marked as Exhibit Number 2.
21 ++++++++++++++++
22 (EMAIL FROM SELANDER
23 TO CONNELLY AND
24 DECLEMENTE DATED
25 7-31-07 WITH

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1 MINUTES OF THE
2 SHAREHOLDERS MEETING
3 DATED 7-24-07
4 WAS MARKED FOR
5 IDENTIFICATION AS
6 DEPOSITION EXHIBIT
7 NUMBER 2)
8 ++++++++++++++++
9 BY MR. HOWSER:
10 Q. I have marked as Exhibit Number 2 the
11 shareholder meeting of July 24, 2007, correct?
12 A. Yes, sir.
13 Q. Have you reviewed any other minutes
14 of Abacare in connection with this transaction?
15 A. No, sir.
16 Q. Now, let's talk for a moment about
17 this transaction. What percentage of stock in
18 Abacare did Dorothy Connelly own?
19 A. I do not know.
20 Q. What percentage of stock in Abacare
21 did James B. Connelly or his estate own?
22 A. I do not know.
23 Q. Do you know what percentage of stock
24 in Abacare Mr. DeClemente owned?
25 A. It is my understanding and

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1 recollection that he owned twenty percent.
2 Q. Do you know if anyone else owned
3 stock in Abacare?
4 A. I do not know that, sir.
5 Q. To your knowledge does Abacare Home
6 Medical still do business?
7 A. Let me answer that question this way.
8 The difficulty in this industry is with reporting
9 ID numbers, and you have provider numbers and it
10 is extraordinarily difficult to change federal ID
11 numbers to -- for the various payors to recognize
12 a different entity, the correct entity. This has
13 been a challenge over the years, so to answer
14 your question, I'm not certain.
15 Q. If this document is correct, which I
16 printed this morning, is correct, the Web site of
17 the Secretary of State for South Carolina shows
18 that Abacare Medical is still a viable entity,
19 does it not?
20 A. Yes, sir.
21 Q. And who is the registered agent?
22 A. I'm reading from this, I believe --
23 help me here, I think it's G. Murrell Smith, Jr.
24 Q. Now, is it in existence still, to
25 your knowledge, because of Medicare and Medicaid

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1 provider numbers? Are those the numbers you're
2 describing?
3 A. Yes, sir.
4 Q. Now, who -- strike that.
5 In this transaction, was it a
6 purchase of assets, was it a purchase of stock,
7 was it a purchase of assets and liabilities, what
8 was it?
9 A. It was a purchase of stock.
10 Q. From whom was the stock purchased?
11 A. I don't know that with certainty.
12 Q. What percentage of stock in Abacare
13 was purchased?
14 A. I don't know that for a certainty,
15 but it's my understanding that a hundred percent
16 of the stock of Abacare was purchased by the
17 owners of ATMES.
18 Q. Was that stock purchased in November
19 2008?
20 A. Yes, sir, to my knowledge.
21 Q. After the purchase, was Mr.
22 DeClemente involved with ATMES?
23 A. To my knowledge, yes, sir.
24 Q. How was the transition from his
25 ownership of stock in Abacare to ownership

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1 interest in ATMES accomplished?
2 A. The value of Abacare was taken, plus
3 an agreed upon amount, I believe $250,000 was
4 assigned to Mr. DeClemente -- if I mispronounced
5 your name, I'm sorry -- to his interest in
6 Abacare and that was the total amount that was
7 paid for owning a hundred percent of Abacare.
8 Q. So that I make sure, what was the
9 total amount that was paid?
10 A. Just one second.
11 Q. Okay.?
12 A. I'm reading from my report, and I
13 believe this information to be accurate, is the
14 ATMES Group paid $809,500 for the Connelly
15 portion of Abacare Home Medical, Inc. In
16 addition, they assigned capital of $250,000 to
17 Phillip DeClemente for his ownership portion in
18 Abacare. This means the ATMES Group paid a total
19 of a $1,059,500 for a business that was valued,
20 and we'll get into that.
21 Q. Okay.
22 MR. MYRICK: I'm sorry,
23 what is the report you're reading from?
24 MR. HOWSER: It's like
25 the third document down, I think.

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1 THE WITNESS: And this
2 is off the last page of that report.
3 BY MR. HOWSER:
4 Q. How long did Mr. DeClemente remain
5 associated with ATMES?
6 A. I don't know the answer to that.
7 Q. How did his relationship with ATMES
8 terminate?
9 A. To my knowledge, his interest was
10 purchased by Mr. Reed and Mr. Smith.
11 Q. And how much did Mr. Reed and Mr.
12 Smith pay for his interest?
13 A. I do not recall. I don't know.
14 Q. Was a value assigned to Abacare as a
15 going entity in connection with the purchase of
16 this stock?
17 A. Yes.
18 Q. What was the amount of value assigned
19 to Abacare?
20 A. I think that it was the $1,059,500.
21 Those would be reflected in the financial
22 statements that ATMES prepared after the
23 purchase.
24 Q. What was the value of the business
25 placed on it by Burkett, Burkett and Burkett?

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1 A. Just one minute. I believe that the
2 correct number is $975,000.
3 Q. And is it your understanding that
4 that $975,000 represented the value assigned to
5 the business as opposed to the stock of the
6 Connellys?
7 A. I don't know that those two things
8 could be separated. In other words, the
9 Connellys owned a hundred percent. Mr.
10 DeClemente had some sort of arrangement. He
11 either had an option, he either owned stock; I
12 can't recall, but $975,000 was the value -- the
13 total value of the business, per Mr. Burkett.
14 Q. And yet the combined assigned price
15 for the purchase by Mr. Reed, Mr. Smith, and I
16 guess interest that Mr. DeClemente got, was a
17 $1,059.000?
18 A. And Ms. Cuce, yes.
19 Q. Did Hood and Selander ever prepare
20 any tax return for Assistive Technology, to your
21 knowledge?
22 A. For ATMES Assistive Technology, no,
23 sir.
24 Q. Did Hood and Selander, to your
25 knowledge, ever do any accounting work for ATMES?

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1 A. I'm going to have to answer that in a
2 different way than your question's asked and if
3 you find that it is not responsive, I understand.
4 They prepared a tax return for
5 Abacare, Inc. that was owned by the same owners
6 of ATMES. ATMES's owners owned this company when
7 Hood and Selander prepared this tax return.
8 Q. Other than preparing the 2008 tax
9 return for Abacare, are you aware of any other
10 accounting work that Hood and Selander did for
11 ATMES?
12 A. I'm going to answer that this way.
13 There was a transition between Abacare and
14 ATMES's ownership, and that transition required
15 the two CPA firms to communicate and cooperate,
16 and we did, no problems. They handed us a trial
17 balance and we picked up the trial balance and
18 went forward with it.
19 So I'm not sure if I'm being
20 responsive to your question, but ATMES could not
21 have done their accounting work without the
22 information from the Hood and Selander firm at
23 that point in November, which did not occur --
24 none of this work occurred until after the sale.
25 Q. All right. And you talk about the

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1 two CPA firms, you're talking about the Hood firm
2 and your firm?
3 A. Yes, sir.
4 Q. Describe for me what your role in
5 this transaction was.
6 A. When I was initially presented with
7 the packet from Mr. Burkett; I was asked to
8 evaluate it, to do some due diligence as to
9 whether this report made sense; whether ATMES
10 could make money paying this price for this
11 company under the assumptions that I was given to
12 help them borrow the money from the National Bank
13 of South Carolina to pay for this purchase.
14 Q. And in connection with your role,
15 what financial information did David Selander or
16 Hood and Selander provide to you on Abacare other
17 than the documents that you have put in the
18 packet?
19 A. There were -- there was a trial
20 balance and a lot of detailed financial
21 information as of that date that was agreed upon
22 as a transition date. This is not a simple
23 transaction, it required communication.
24 Q. All right. And how many times would
25 you have communicated verbally with Mr. Selander?

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1 A. Most of our communication was e-mail.
2 I would say there could easily be a dozen or more
3 e-mails.
4 Q. Do you still have copies of those e-
5 mails?
6 A. I do.
7 Q. Are they included in this packet?
8 A. They are not.
9 MR. HOWSER: We would
10 ask for Mr. Smith that we be furnished copies of
11 those e-mails.
12 MR. SMITH: On the
13 record, we'll get those to you.
14 MR. HOWSER: Okay.
15 BY MR. HOWSER:
16 Q. To your knowledge, when was
17 Assistive Technology or ATMES formed?
18 A. I'm not sure, but that information is
19 available here.
20 Q. If I said on or about November 5,
21 2008, would that sound ---
22 A. That sounds correct; yes, sir.
23 Q. To your knowledge, who are the
24 present members of ATMES?
25 A. To my knowledge at this time, Jeffrey

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1 and Murrell Smith.
2 Q. Do you still perform accounting work
3 or tax work for ATMES?
4 A. Yes, sir.
5 Q. Now, what is your understanding of
6 the nature of the business of Abacare?
7 A. They are what's called a DME, Durable
8 Medical Equipment. They provide -- it can be --
9 range from as simple as wound care, I think, to
10 as complicated as a wheelchair -- a $25,000
11 wheelchair. It's a fairly sophisticated
12 business, prosthetics.
13 MR. HOWSER: Let me
14 show you a document, which we will mark as
15 Exhibit Number 3.
16 ++++++++++++++++
17 (EXCERPT FROM THE
18 BURKETT, BURKETT
19 AND BURKETT REPORT
20 WAS MARKED FOR
21 IDENTIFICATION AS
22 DEPOSITION EXHIBIT
23 NUMBER 3)
24 ++++++++++++++++
25 BY MR. HOWSER:

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1 Q. This is shown as Page 3 of 55 of the
2 Burkett, Burkett and Burkett report.
3 A. Page 6, I believe you mean.
4 Q. Yes. What did I say, Page 5? Page
5 6, I'm sorry, of 55.
6 A. All right.
7 Q. Does this accurately, insofar as you
8 know, describe the nature of Abacare?
9 A. Yes, sir.
10 Q. To your knowledge, did Abacare sell
11 any of the following medical products, CPAP
12 machines?
13 A. I don't know, sir.
14 Q. Do you know what a CPAP machine is?
15 A. I do.
16 Q. Did it sell bilevel positive airway
17 pressure machines or BiPAP machines?
18 A. I do not know, sir.
19 Q. Did it sell ventilator devices?
20 A. I do not know, sir.
21 Q. Did it sell nasal intermediate --
22 excuse me, nasal intermittent positive pressure
23 ventilation devices?
24 A. I do not know, sir.
25 Q. Did it sell nebulizer devices?

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1 A. I've heard all of those terms in
2 connection with these businesses, but I wouldn't
3 know one if it -- so, no, sir.
4 Q. Okay. Did it sell certain
5 nutritional formulas?
6 A. I don't know, sir.
7 Q. What was Reliable Medical Equipment
8 of South Carolina, LLC?
9 A. Very similar. We call them DMEs,
10 Durable Medical Equipment.
11 Q. Who are the members of Reliable
12 Medical Equipment of South Carolina, LLC?
13 A. I'm going to struggle with the answer
14 to that because I think that ATMES, LLC is the
15 sole owner of Reliable Medical.
16 Q. Do you perform accounting services
17 for Reliable Medical?
18 A. Yes, sir.
19 Q. What type of services?
20 A. We would do accounting and tax
21 returns.
22 Q. And when you say accounting, would
23 that include preparing financial statements?
24 A. On Reliable, I'm not sure whether a
25 financial statement is prepared. I know we

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1 prepare financial statements on ATMES.
2 Q. And with regard to the financial
3 statements on ATMES, do you do audited financial
4 statements or do you do compilations?
5 A. No, sir, we do compilations, I
6 believe, quarterly or periodically as required by
7 the bank, and then we do what's called a reviewed
8 statement, which is an intermediary statement
9 between a compilation and audit.
10 Q. But you do not audit -- prepare audit
11 financial statements for ATMES?
12 A. We do not audit.
13 Q. Do you audit for other clients? That
14 is, do you perform auditing work?
15 A. Yes, sir.
16 Q. Did Reliable Medical exist prior to
17 ATMES?
18 A. Yes, sir.
19 Q. Did Reliable Medical sell any of the
20 products that I mentioned with regard to Abacare;
21 that is, the CPAP machine or the BiPAP machine or
22 the ventilator devices?
23 A. It's my understanding that they did;
24 yes, sir.
25 Q. Let me show you two documents that I

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1 believe come from your file material, and ask you
2 -- and I'm sorry, I only have one of these
3 because of its size.
4 MR. SMITH: Okay.
5 THE WITNESS: When you
6 say, my file material, what do you mean by that
7 exactly because this is not a document that we
8 would have ever prepared.
9 BY MR. HOWSER:
10 Q. Is this not your document?
11 A. No, sir. That looks to be an
12 internally generated document from one of the
13 companies. If you're willing to ask that young
14 lady in the corner, she could identify.
15 Q. That's all right. She's not being
16 deposed.
17 A. Okay. That didn't -- to my
18 knowledge, that didn't come from me because I --
19 that's not something we would have prepared.
20 BY MR. HOWSER:
21 Q. Okay. That's fine.
22 A. Can I expand on that? There was a
23 huge file related to the South Carolina
24 Department of Revenue's examination of both of
25 these companies. It's possible that that was

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1 part of the South Carolina Department of
2 Revenue's report, but that doesn't mean that I
3 prepared it.
4 Q. All right. Well, would you ever have
5 had access to it?
6 A. It's possible; yes, sir.
7 Q. Now, let me direct your attention now
8 to ATMES. Did ATMES or does ATMES sell the CPAP
9 machines?
10 A. It is my understanding that they do
11 or did.
12 Q. BiPAP machines?
13 A. It's my understanding they did or do.
14 Q. Ventilator devices?
15 A. Same answer.
16 Q. Nasal intermittent positive pressure
17 ventilation devices?
18 A. (Shrugs) I'm sorry to shrug, but
19 that's literally, I don't know.
20 Q. Nebulator devices?
21 A. I do not know.
22 Q. Nutritional formulas?
23 A. I do not know.
24 Q. Let me show you a document entitled,
25 Audit.10/2006 through 9/2009, and ask if that's

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1 some document that you prepared?
2 A. It's possible. During the
3 examination from South Carolina Department of
4 Revenue, we worked with Ms. Martha Jo Smith and
5 her staff extensively, and so, whether this came
6 from my office, this looks like one of her
7 documents, but this is -- this is certainly not
8 foreign to me.
9 Q. Well, let's discuss this. If it's
10 not foreign, do you understand what it is?
11 A. It appears to be a listing of what
12 gross sales were and what sales tax -- what was
13 taxable and the tax paid. I'm assuming from
14 looking at this that this is one of -- larger
15 document. This is one page, an intermediate step
16 in determining what was owed on sales tax as a
17 result of the examination.
18 Q. Okay. If we look, it has gross sales
19 from October 2006 through -- it looks like June
20 of '09 because there's nothing for July, August
21 or September, correct?
22 A. Yes, sir. Now, I must point out a
23 few deficiencies in this document. It has no
24 name. It has no date of preparation. I don't
25 know what company this is. I don't know who

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1 prepared it, and I don't know what the sources of
2 this information are.
3 Q. At any rate, it shows gross sales and
4 then next to that it shows what?
5 A. Well, the columns are gross sales,
6 respiratory, misspelled, prosthetics, total, net
7 taxable and paid.
8 Q. And if you look under respiratory,
9 that's misspelled, will you accept that these
10 items -- I think there's seven of them, total
11 $551,824.38?
12 A. Mr. Howser, I'll accept that your
13 math is correct, but there's nothing on this
14 paper that shows that number.
15 Q. I'll agree with that. And if you
16 would like to add it up, I'll be happy for you to
17 add it up.
18 A. Okay. I don't have any reason to
19 doubt you, but it appears that that looks like
20 about the right number.
21 Q. Do you know what these numbers would
22 represent?
23 A. I have -- I don't know what company
24 this is. I don't know who prepared this document.
25 I don't know where it came from. I have no

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1 knowledge of this document.
2 Q. Give me just one second.
3 A. Okay. Looks like something you just
4 passed that's in the right area. That's the
5 sales tax audit right there.
6 Q. Well, I can't put my hands on it, but
7 it came out of this material, but anyway, rather
8 than ---
9 Prior to June 2009, how did Reliable
10 Medical treat the sale of respiratory products
11 for sales tax purposes?
12 A. I do not know.
13 Q. From November 2008 to June 24, 2009,
14 how did Assistive Technology treat the sale of
15 respiratory products for sales tax purposes?
16 A. I do not know.
17 Q. At least in a file that I have, is
18 South Carolina Revenue ruling 10. or 10-2, a copy
19 of which I will show you ---
20 MR. HOWSER: And I'm
21 sorry I don't have more than two copies.
22 BY MR. HOWSER:
23 Q. Are you familiar with this Revenue
24 ruling?
25 A. I've read it. It's been a long time;

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1 yes, sir.
2 Q. Was Reliable treating the reporting
3 of sales tax consistent with South Carolina
4 Revenue ruling 10.2 prior to June 24, 2009?
5 A. I do not know.
6 Q. Was Assistive Technology treating the
7 reporting of its sales tax consistent with
8 Revenue ruling 10.2 prior to June 24, 2009?
9 A. I do not know.
10 Q. Was Abacare reporting its sales tax
11 consistent with Revenue ruling 10.2?
12 A. I still don't know.
13 Q. What is your understanding of what
14 Revenue ruling 10. or 10-2 addressed?
15 A. I'm simply not prepared to offer an
16 opinion on that. I don't know.
17 Q. And dealing with the South Carolina
18 Department of Revenue over the tax liability
19 arising from Abacare, did you consult Revenue
20 ruling 10.2 or 10-2?
21 A. I did not represent Abacare Home
22 Medical for their sales tax examination.
23 Q. All right. How about Assistive
24 Technology?
25 A. I did.

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1 Q. Did you rely on Revenue 10. or 10-2?
2 A. I simply do not remember.
3 Q. Do you know whether or not Revenue
4 ruling 10-2 gave companies such as Abacare,
5 ATMES, Reliable favorable treatment for sales tax
6 liability on the sale of respiratory equipment?
7 A. I do not know, I'm sorry.
8 Q. Do you know if ATMES, up until June
9 24, 2009 -- in just a minute I'll get to the
10 significance of that date, that is, ATMES till
11 that date, Reliable Medical, to that date, was
12 treating the sale of respiratory equipment the
13 same way that Abacare had treated it prior to the
14 purchase of this stock?
15 A. I do not know the answer to that.
16 Mr. Howser, you have to understand, I didn't
17 prepare the sales tax returns for ATMES or
18 Abacare.
19 Q. You were involved with the Department
20 of Revenue in the assessment of taxes and sales
21 tax interest and penalties ---
22 A. For the ---
23 Q. --- for the surviving entity?
24 A. Yes, sir.
25 Q. And Reliable?

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1 A. For the ATMES Reliable side of the
2 house, it was my understanding that the -- prior
3 to the purchase, Abacare folks wanted to hire
4 their own specialized people to handle that.
5 Q. All right. Let me show you two
6 documents and ask you if this is -- they're not
7 identical, but maybe address the similar subject
8 matter.
9 The first one is called Abacare Home
10 Medical, Inc. recap of SCDOR exam results. Are
11 you familiar with that?
12 A. I'm assuming that that -- that
13 appears to be a document that I prepared.
14 Whether those are where it ended up or not, I
15 can't -- I have no idea.
16 MR. HOWSER: Let's get
17 that marked as -- which is Exhibit 4.
18 ++++++++++++++
19 (ABACARE HOME MEDICAL
20 RECAP OF SCDOR
21 EXAM RESULTS WAS
22 MARKED FOR
23 IDENTIFICATION AS
24 DEPOSITION EXHIBIT
25 NUMBER 4)

1 ++++++++++++++++
2 BY MR. HOWSER:
3 Q. While we're at it, let me show you
4 another document that appears to be somewhat
5 similar, although the figures differ slightly.
6 Are you familiar with that document?
7 A. That appears to be something that I
8 prepared; yes, sir.
9 MR. HOWSER: Let's get that
10 marked as Exhibit Number 5.
11 ++++++++++++++++
12 (ABACARE HOME MEDICAL,
13 INC., RECAP OF
14 SALES TAX RESULTS
15 WAS MARKED FOR
16 IDENTIFICATION AS
17 DEPOSITION EXHIBIT
18 NUMBER 5)
19 ++++++++++++++++
20 BY MR. HOWSER:
21 Q. All right. Looking at Exhibit Number
22 4, it says, total per exam report, tax $142,316;
23 interest $17,611; for a total of $159,978,
24 correct?
25 A. That's what it says; yes, sir.

1 Q. And then it says, less amounts owed
2 by ATMES Group, amounts from 11/2008 to 12/2009.
3 A. Yes, sir, I see ---
4 Q. Do you see that -- I believe that
5 total sum, what, $50,000 and some odd dollars?
6 A. Close to sixty; yes, sir.
7 Q. What is the reason that ATMES Group
8 owed this amount?
9 A. When the auditors came in, there were
10 several issues that were controversy. For
11 example, they charged ATMES for -- they had a
12 software service and they considered that to be
13 use tax, and none of us had ever heard of that
14 application and that was a substantial amount of
15 money.
16 Second, they had customers that one
17 might think would normally be exempt, but they
18 somehow found that they were not exempt according
19 to their regulations, et cetera.
20 Third, there were errors. Flat out,
21 this should have been taxable and tax was not
22 remitted.
23 Q. All right. And so, the total amount
24 of that tax with interests was roughly, it looks
25 $59,000 and some change?

1 A. Yes, sir. That's correct.
2 Q. Initially the South Carolina
3 Department of Revenue sought to impose penalties.
4 Do you know if those penalties were waived?
5 A. All I can tell you is what I recall.
6 Q. What do you recall?
7 A. There was an -- some type of amnesty
8 program that if you report it and you did these
9 things, that they would waive the penalties.
10 Apparently the notification to the ATMES Group
11 didn't go to the right address, didn't go to the
12 right person. They didn't -- they didn't apply
13 within the right period of time. Now whether
14 that waiver was ultimately granted or not, I
15 cannot recall, but there was an amnesty
16 program.
17 Q. And the amnesty program, do you
18 recall it being a period of time in August 2009?
19 A. I can't recall but that does sound
20 correct.
21 Q. And so, as I understand it right now,
22 you don't know the status of whether any
23 penalties were assessed or whether those
24 penalties were waived?
25 A. I do not recall; no, sir.

1 Q. Now, your documents make reference to
2 a decision of the South Carolina Supreme Court
3 and Home Medical Systems versus SCDOR.
4 A. You're going to have to show me my
5 document that says that.
6 Q. All right. Give me just a minute.
7 A. I'm not denying, but I'm just saying
8 you're going to have to show it to me.
9 Q. That's fair enough. Let me show you
10 a letter of December 9, 2009 to Mr. Roger Watson,
11 it appears on your letterhead.
12 A. Okay.
13 MR. HOWSER: Off the
14 record.
15 (Off the record briefly.)
16 THE WITNESS: In the
17 course of prosecuting this examination, we were
18 doing absolutely everything we could possibly do
19 to reduce the amount that was owed. There had
20 been an amnesty program, ATMES, whichever company
21 we're talking about here, Reliable, had failed to
22 comply with one of the deadlines and I was simply
23 -- I know Mr. Watson, he and I work together well
24 and respectfully, and I said, there are good and
25 valid reasons why DOR should grant this amnesty

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1 and reduction of penalties, even though we did
2 not comply with the deadlines. I wrote that
3 letter. I hope I was successful.
4 BY MR. HOWSER:
5 Q. But just to recap and not to be
6 repetitious, what is Exhibit Number 5 that varies
7 slightly in the dollar amount, it's also labeled
8 Abacare Home Medical, Inc., recap?
9 A. I understand the question.
10 Q. What's the difference in the
11 documents?
12 A. I don't know the -- why there's $300
13 difference between the two. May I explain?
14 Q. Sure.
15 A. The DOR refused to deal with two
16 different groups of representatives for a single
17 examination of a single entity, Abacare,
18 Charleston, and so, we were -- we had to put this
19 together.
20 At the end of the process when the
21 calculations were done and agreed, at that point
22 we wanted to be able to differentiate between
23 that sales tax penalties and interest that had
24 been -- that was owed as of the date of the
25 purchase and those that accrued after the day of

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1 the purchase, and that's what this document
2 calculates.
3 Q. Let's refer back to the minutes,
4 which I believe was Exhibit Number 2.
5 A. Yes, sir.
6 Q. Did you ever make any determination
7 as to whether or not the position of Abacare, as
8 relayed to Mr. Selander and reported in the
9 minutes, was consistent with Revenue ruling
10 10-2?
11 A. I'm going to answer, no, but can I
12 expand my answer?
13 Q. You can.
14 A. This -- the conversation here doesn't
15 have anything to do with 10.2. What it has to do
16 with, Mr. Selander understood absolutely and
17 completely that the method that Abacare was using
18 to report sales tax was incorrect. There was no
19 tax authority whatsoever at that time to report
20 sales tax based on collections rather than on
21 charges, and he is telling them absolutely
22 positively you're not paying -- reporting the
23 right amount of sales tax. That's just wrong.
24 It's wrong for two reasons.
25 One, there's no tax authority under

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1 DOR regulations to support that, and two, you're
2 violating cash versus accrual rules on the
3 financial statements and the tax returns. So
4 when ATMES got a set of financial statements,
5 part of it was being presented on the accrual
6 basis and a substantial liability was being
7 calculated based on the cash basis as per Mr.
8 Selander.
9 Mr. Selander suggested, and I
10 wholeheartedly agreed with what he suggested,
11 that if they wanted to fight that battle, if they
12 wanted to have that argument with DOR, they
13 should set up a reserve and that they should
14 record what was -- what may be owed, but only pay
15 what they thought was owed.
16 If Mr. Selander had communicated that
17 to Mr. Burkett, if it had been in the part of the
18 tax returns, we wouldn't be here today.
19 Q. Let me -- and I don't mean to be
20 casting any dispersions at you, but if you or
21 anyone else on behalf of ATMES or Reliable or
22 whoever was purchasing the stock, had gone to Mr.
23 Selander and said, do you know of any potential
24 tax liabilities ---
25 A. They did. I did not. In your

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1 purchase document you're going to find a
2 paragraph that long that says that the sellers
3 represent that there are no liabilities and we'll
4 find that document so we know what they are. In
5 Mr. Burkett's report repeatedly he states that no
6 one has informed him that there were any
7 violations. We'll look at his exact words.
8 Q. All right. But the question is, did
9 anybody ever address that issue to Mr. Selander,
10 to your knowledge?
11 A. To my knowledge, no, sir.
12 Q. And had they done so, you will
13 acknowledge that Mr. Selander could have
14 expressed to them what it appears in those
15 minutes?
16 MR. SMITH: Object to
17 the form. You can answer.
18 THE WITNESS: May I
19 answer a little more fully?
20 BY MR. HOWSER:
21 Q. Sure.
22 A. Hood and Selander are a reputable,
23 thoroughly competent CPA firm. I would no more
24 ask them, did you prepare the sales tax returns
25 correctly than I would ask you, are you

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1 practicing law properly? I would have assumed,
2 and I had a right to assume, that they were
3 following the law. They knew what the law was,
4 they told their client.
5 So going back to the issue, if we in
6 hindsight had gone back and we all flashed back
7 to that day, would I ask that question? No,
8 sir.
9 Q. All right. But my question is a
10 little different. If you had asked him, Mr.
11 Selander, are you aware of any potential tax
12 liability of Abacare?
13 A. I did not, but Mr. Burkett did.
14 Q. Did he ask that of Mr. Selander?
15 A. I -- you're going to have to look at
16 Mr. Burkett's report and you're going to have to
17 ask Mr. Burkett.
18 Q. But from Mr. Burkett's report, you
19 cannot establish that he, in fact, asked that of
20 Mr. Selander?
21 A. I'm going to answer that differently.
22 I'm going to say that you can't positively
23 identify that he did not ask that question, but
24 there's -- it's simply crystal clear that
25 representations have been made that there are no

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1 taxes that are not recorded.
2 Q. But your answer is like asking, when
3 did you quit beating your wife?
4 A. I understand that.
5 Q. And that assumes that you beat your
6 wife.
7 A. The answer I would give you is, I am
8 not aware if anyone in this chain of accountants,
9 et cetera, responsible parties, ever asked Mr.
10 Selander, Mr. Selander, are sales taxes
11 understated?
12 Q. Okay.
13 A. Mr. Selander had reported that to the
14 board in the minutes of that meeting.
15 Q. And do you understand that Mr.
16 Selander was told that we -- "we," being Abacare,
17 are reporting it consistent with the way it's
18 done in the industry?
19 A. He may -- I can't speak for what he
20 may have been told. I can only speak for what's
21 in the minutes of the shareholders meeting.
22 Q. Now, to your knowledge, did Hood and
23 Selander have any information that, in fact,
24 Abacare Home Medical owed sales tax ---
25 A. Yes, sir.

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1 Q. --- that had been accessed by the
2 South Carolina Department of Revenue at the time
3 of the sale?
4 A. Those are two different questions.
5 If you ask me, did they have knowledge that sales
6 tax were owed, if we can agree to that be the
7 question, I would answer, yes. Assessment did
8 not come until they were examined.
9 Q. That's what I'm saying. You're not
10 aware of any audit or any ---
11 A. There were no notices ---
12 Q. --- directive from SCDOR notice or
13 whatever that, hey, you are not reporting your
14 taxes properly and ---
15 A. I'm not aware of any assessments or
16 notices.
17 Q. And would it be fair to say that you
18 have no knowledge that Hood and Selander had
19 knowledge that there were, in fact -- in fact,
20 unpaid sales tax owed by Abacare?
21 A. I would refer you to these minutes in
22 which they tell them absolutely, positively that
23 they have unpaid sales tax.
24 Q. Or they have potential for liability
25 from unpaid sales tax.

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1 A. Well, if you have a CPA for the
2 company who's telling the Board of Directors that
3 you have liability, whether you hang potential on
4 the front of it or not, it's a liability.
5 Q. Now, would you agree that Hood and
6 Selander did not provide to Assistive Technology
7 or ATMES a financial evaluation of Abacare Home
8 Medical as part of the sales transaction.
9 A. The only valuation that was prepared
10 was by Mr. Burkett's form.
11 Q. And the only financial evaluation or
12 statement that ATMES received on Abacare was from
13 Burkett, Burkett and Burkett?
14 A. Yes, sir.
15 Q. Do you have any knowledge of ATMES or
16 the purchasers of the stock of Abacare asking
17 Hood and Selander for any financial information
18 on Abacare?
19 A. I don't have any knowledge of that;
20 no, sir. I'm not sure that answer is entirely
21 correct.
22 There was -- we had that transition
23 period and there is no question that I, I guess
24 acting as their representative, we exchanged a
25 significant amount of financial information for

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1 us to do our respective jobs here after -- from
2 the date of the purchase forward.
3 Q. But not prior to the date of the
4 purchase?
5 A. I have no knowledge of that.
6 Q. Now let me show you a copy of the
7 complaint of the lawsuit in this matter.
8 A. Yes, sir.
9 Q. And if you would, turn to Paragraphs
10 16, 17 and 18, which are on the third page of the
11 complaint itself.
12 A. I believe I'm there.
13 Q. And this refers to a stockholders
14 meeting of July 24, 2007 which we have discussed?
15 A. Yes, sir.
16 Q. Do you have any knowledge as to how
17 Assistive Technology acquired those minutes?
18 A. I do not.
19 Q. Do you have any knowledge as to when
20 Assistive Technology acquired those minutes?
21 A. I do not.
22 Q. Do you know of any reason that
23 Assistive Technology or the purchasers of the
24 stock could not have asked for those minutes
25 before November 2008?

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1 A. I assume they could have asked for
2 anything.
3 Q. And you have no knowledge that they
4 did or did not?
5 A. I do not have any knowledge.
6 Q. And you, again, this is maybe a
7 slightly different question. If it's not I
8 apologize for being repetitious.
9 But do you have knowledge that anyone
10 with Assistive Technology or the stock purchasers
11 asked Selander -- Hood and Selander whether it
12 had any knowledge that Abacare might have
13 potential liability for unpaid taxes?
14 A. Well, sir, I keep coming back to this
15 meeting in which he told them in no uncertain
16 terms that the -- "David noted that the taxable
17 sales reported on the June sales tax form
18 appeared significantly understated."
19 Q. All right. My question is, do you
20 know whether Assistive Technology or ATMES or the
21 purchasers of the stock asked Hood and Selander
22 whether it had knowledge?
23 A. I do not know the answer to that.
24 Q. And let's look at Paragraph 13 of the
25 complaint. The purchase price for the stock paid

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1 by the plaintiff, and did the plaintiff buy the
2 stock or did someone else buy the stock?
3 A. I'm not sure I know how to answer
4 that. As far as I know, the -- I don't know the
5 answer to that in the degree of certainty that
6 you want.
7 Q. What I'm asking is, did Murrell Smith
8 and Jeff Reed, was it ---
9 A. Yes.
10 Q. --- buy the stock or did Assistive
11 Technology or ATMES buy the stock?
12 A. I know that's easily determined, but
13 I don't know. I think ATMES bought the stock.
14 Q. But anyway, so is the purchase price
15 for the stock paid by plaintiff was based on a
16 host of considerations, including corporation's
17 profitability, assets and liabilities. Do you
18 know what those host of considerations were?
19 A. I do.
20 Q. What were they?
21 A. May I -- this is going to take a
22 little while to answer.
23 Q. Sure.
24 A. If you look at Mr. Burkett's report,
25 it's industry standard. It's properly prepared;

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1 he did a fine job. When one values a company,
2 you look at multiple ways of valuing it. You
3 don't just total up the assets and say this is
4 it. You look at what has been the profitability
5 of the company in the past. If the company has
6 been consistently profitable over the past,
7 that's information that would help you value the
8 company because you'd anticipate those profits
9 would continue.
10 If the company has identifiable
11 intangible assets that one can go out into the
12 marketplace and do comps, do comparables based on
13 similar DME companies that have sold, then that's
14 another source of information.
15 The final one and the one that the
16 most weight was placed on in Mr. Burkett's report
17 is a projection of future earnings. They took,
18 in his report, and I can show you the pages, they
19 took a four-month period which was very
20 profitable and they made the assumption that that
21 profitability was going to go forward out into
22 forever. That four-month profitability had
23 overstated sales numbers, which also over --
24 significantly overstated the net income.
25 So the foundation from Mr. Burkett's

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1 valuation is based on those projective -- on the
2 net present value or the -- sorry for the
3 technical term, the net present value of the
4 discounted future cash flows, and he weighted all
5 the factors and calculated what he thought this
6 company was worth based on all those factors.
7 Q. I've got several follow-ups, but let
8 me ask you. Were the assets of the company
9 properly listed?
10 A. If you're asking me did the balance
11 sheet balance and the assets and the liabilities
12 agree, I would say, yes, sir. The liabilities
13 were understated by a sales tax amount that we
14 now, in hindsight, know was understated.
15 Q. Okay. But what I'm saying is, were
16 the assets of the corporation properly stated?
17 A. I agree. Yes.
18 Q. And the profitability of the company
19 was understated because of the tax liability that
20 was not reported for whatever period those
21 profits are shown, correct?
22 A. No, sir, I'm going to disagree and
23 let's get that straight.
24 The profitability was overstated
25 because sales tax that were properly owed were

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1 not -- were included in sales as sales and not
2 deducted back out as a liability.
3 Q. Right. But the only sales tax that
4 would affect the profitability would be the sales
5 tax liability for the given accounting period,
6 correct?
7 A. We've got two issues that we're
8 working with. We've got one, we're looking back
9 in time and ---
10 Q. Sure.
11 A. --- all right. And those profits
12 were overstated. The one that Mr. Burkett relied
13 on primarily was a look forward, was a
14 projection, and those -- the error was
15 exponentially higher because we used a very short
16 period of time, four months, we annualized it and
17 then we projected that forward out into forever.
18 Q. All right. What was the tax
19 liability period for which the Department of
20 Revenue sought to collect taxes?
21 A. It's in these reports; I don't know.
22 Q. If the profitability was overstated
23 because of the potential liability for the sales
24 tax, and if Mr. Burkett determined the value of
25 the company to be $975,000, have you gone back

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1 and determined what you thought the value of the
2 company was?
3 A. I did.
4 Q. And what did you determine the value
5 to be?
6 A. I'll get to that number in half a
7 second. Can I walk you through it? I'll go
8 quick. I took ---
9 Q. Why don't you give me the bottom line
10 and then go through it.
11 A. Thank you. I concluded that the
12 company was worth $285,000.
13 Q. All right. How did you arrive at
14 that figure?
15 A. Thank you. I did -- what I did is I
16 didn't challenge any of Mr. Burkett's assumptions
17 and underlying principles or methods. I simply
18 put myself into Mr. Burkett's shoes and said, had
19 I known what he should have known, I took one
20 column and said Burkett, and I said corrected,
21 based on he started with a $99,000 profit. The
22 accurate profit should have been fifty-two. I
23 calculated under one method using that method.
24 I did the exact same thing Mr.
25 Burkett did in his next section, and this right

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1 here is a summary of -- this is what the Burkett
2 report had, exactly verbatim. I've done -- used
3 the same assumption, same cost of capital
4 calculations and just applied the corrected
5 numbers and he had 975, I would conclude 285.
6 Q. Now, let me ask you, assuming that
7 penalties were waived, and if someone had come in
8 and paid the $100,644 that you had determined was
9 the net sales tax and interest obligation of
10 Abacare, would the value of the company be
11 $975,000 as Mr. Burkett calculated?
12 A. No, sir.
13 Q. Why not?
14 A. That's -- we've calculated a
15 liability and if you'll remember, we went back --
16 when we were valuing the company, we used
17 multiple methods to value the company. We had
18 assets, less liabilities, so under your theory,
19 our liabilities would have been greater and our
20 net tangible value of the company would have been
21 less. But that was only one of four methods that
22 Mr. Burkett used. The method that Mr. Burkett
23 relied on was net income, was future cash flows
24 and that -- if you look here, is where all of the
25 values coming in that -- that the value of the

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1 company was zero, was negative, was nothing. I
2 mean, the net tangible assets, all of the value
3 of the company was based on its potential to earn
4 future cash.
5 Q. All right. For tax purposes, does
6 ATMES file a separate return from Reliable?
7 A. I think that's changed over the
8 years, but to answer your question, Reliable
9 flows into ATMES and there's only one real tax
10 return filed.
11 Q. Is there any way of determining
12 whether ATMES versus Reliable is profitable?
13 A. It is profitable; yes sir.
14 Q. That is, ATMES is profitable?
15 A. I don't think that we're operating
16 Reliable as an entity, we're retaining it because
17 we need the federal ID numbers for reporting
18 payor purposes.
19 Q. Let's look at the -- what was the --
20 let's go back, let's say 2011. What was the net
21 income of ATMES?
22 A. If you'll let me look at that
23 document, I'll be delighted to.
24 Q. Sure. Okay.
25 We've been going about an hour and 45

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1 minutes, do you want to take a break while we
2 look for that?
3 A. That would be great.
4 (Off the record briefly.)
5 BY MR. HOWSER:
6 Q. What Abacare documents do you have
7 related to this transaction?
8 A. I'm sorry, but I don't know how to
9 answer that question that broad.
10 Q. Okay. Can you give me some idea by
11 category of documents you have? Do you have
12 minutes of Abacare? Do you have tax returns? Do
13 you profit and loss statements? Do you have
14 financial statements of ---
15 A. Let me walk down that list, if you
16 don't mind. Minutes, no, and I presume your
17 question is from the date of ATMES Group purchase
18 back?
19 Q. Right.
20 A. To my knowledge and in my possession,
21 I do not.
22 Q. Okay.
23 A. Financial statements and tax returns,
24 as far as I know, the only thing we have are the
25 tax return that was prepared by Hood and Selander

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1 for 2008 and the documents that are included in
2 Mr. Burkett's reports.
3 Q. Okay.
4 A. What was next?
5 Q. Well, I guess, minutes, tax returns,
6 financial reports, which you've now answered,
7 correspondence?
8 A. There's a handful of e-mails that was
9 all connected with that 2008 tax returns.
10 Q. And Mr. Smith said he would furnish
11 those to us. Anything else that you can think
12 of?
13 A. No, sir, not that I ---
14 Q. All right. With regard to Reliable,
15 do you have minutes of stockholders meetings?
16 A. I don't get those, no, sir. If they
17 have them, I don't have them.
18 Q. You would have tax returns?
19 A. Yes, sir.
20 Q. Do you have correspondence?
21 A. I'm sure there would be e-mails.
22 Now, again, we're going to have to kind of
23 bracket our timeframes because there's been some
24 name changes and entity structure changes, but
25 the answer to your question is, whatever e-mails

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1 we have and you identify, we would provide.
2 Q. And what information do you have on
3 Abacare with the South Carolina Department of
4 Revenue?
5 A. Well, I think I furnished the entire
6 file that was respect to the -- my part of that
7 examination.
8 Q. And so, you don't have any other
9 documents other than what's related to your part
10 of the examination?
11 A. That's correct.
12 Q. All right. And do you have any
13 documents with SCDOR related to Reliable with the
14 tax issue?
15 A. As far as I know it was all handled
16 as one -- one group of entities, Abacare and
17 ATMES -- I don't know how to answer your question
18 precisely.
19 Q. All right. Now, how would we
20 determine, as far as sales tax on Durable
21 Medical Equipment, how will you determine the
22 liability allocated between Abacare and ATMES and
23 Reliable?
24 A. I believe in the work papers that you
25 have and that report that was provided, you will

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1 find that information because the little piece of
2 paper that we've banded around here, we've
3 buried, I compiled that from those combined
4 reports from DOR.
5 Q. Is that 45?
6 A. Yes, sir. That was a summarization
7 of a report that was that thick.
8 Q. Where it says "total per exam
9 report", as I understood it on Exhibit Number 4,
10 a number of these items related to ATMES were for
11 things other than the sale of Durable Medical
12 Equipment?
13 A. That's correct. Now, if you look at
14 the top of that, you'll see Abacare Home Medical,
15 Inc.
16 Q. Right.
17 A. And this references Abacare Home
18 Medical, Inc. They audited that entity which had
19 a change in ownership, and this document relates
20 only to Abacare, it does not relate to ATMES.
21 Q. All right. Did ATMES have any tax
22 liability independent of Abacare for the sale of
23 -- sales tax on Durable Medical Equipment?
24 A. It did.
25 Q. How much was it?

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1 A. I don't know the answer to that, but
2 it was provided to you in that documentation.
3 You got the entire DOR file on everything that I
4 did or that Martha Jo -- in other words, the
5 whole team of us would have done. That's part of
6 it, so.
7 Q. How do we determine ---
8 A. What did ATMES owe versus what did
9 Abacare owe; is that ---
10 Q. Right.
11 A. If you let me look at that, I may be
12 able to answer that.
13 Q. Okay.
14 MR. MYRICK: While he's
15 doing that, can we go off the record?
16 (Off the record briefly.)
17 THE WITNESS: I would
18 prefer if you don't mind, to get back to you.
19 These -- in other words, they say what they say,
20 but looking at them here cold today after however
21 long this has been, I ---
22 MR. HOWSER: Well, let
23 me just -- and if you'll make a note, James, that
24 he's going to get back to us ---
25 MR. SMITH: What's the

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1 question that you wanted to ask?
2 MR. HOWSER: The
3 question is, what was the tax liability of ATMES
4 and Reliable, is what I want to know, for the way
5 they treated durable medical equipment?
6 MR. SMITH: Any
7 particular timeframe you're looking at or just
8 any time?
9 MR. HOWSER: I just --
10 I mean, I guess we're concerned up until the time
11 the Revenue ruling came down, which was in June
12 of 2009 -- the decision. I'm talking about the
13 decision, I'm sorry.
14 MR. SMITH: We will --
15 you had asked questions related to that a good
16 bit earlier.
17 MR. HOWSER: Let me
18 just make sure, so I can understand.
19 MR. SMITH: I think at
20 this point it's been asked and answered to the
21 best of his ability.
22 BY MR. HOWSER:
23 Q. For example, we're looking at a
24 Reliable Medical Equipment of South Carolina
25 form. Would it be fair to say that everything

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1 after ---
2 A. The effective date of that 10-2?
3 Q. --- right? Everything after 11 --
4 and I'm talking about, anything after 11/5 --
5 well, no, that would be -- all the way back would
6 be ---
7 A. What they didn't examine -- they came
8 in and examined a chunk of time without regard to
9 the change in law, is my understanding, and so,
10 all I can tell you is this is what the results of
11 that examination were and you've got it by the
12 month if you want to parse it down any
13 differently than that.
14 I actually believe there is an Excel
15 worksheet, and it may be included in that, that
16 we prepared that showed that summarized data by
17 the month totaling -- to make sure that we agreed
18 with their report. I don't know that for a fact,
19 but I think so.
20 Q. All right. I guess what I'm trying
21 to establish is if you look at this particular
22 document -- I understand you've given this to us.
23 If we look at Reliable Medical Equipment, this
24 shows that the tax liability here is $20,968.07,
25 correct?

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1 A. I would agree that's what it says.
2 Q. Is that what was paid?
3 A. I don't know the answer to that.
4 Q. Do you know if they paid?
5 A. I don't know the answer to that.
6 Q. On any of these you don't know
7 whether ATMES or Reliable has paid any money to
8 the South Carolina Department of Revenue?
9 A. No, sir, that's not true. I do know
10 that ATMES -- as far as I know, ATMES, Reliable
11 -- the liabilities owed by ATMES, Reliable and
12 Abacare have been paid.
13 Q. Okay. And how much was paid?
14 A. I don't know the total of that.
15 Q. And you don't know a breakdown
16 between Abacare, ATMES and Reliable?
17 A. I don't know that, but it can be
18 determined.
19 Q. How would you go about determining
20 that?
21 A. Go back to those DOR reports that you
22 have there. That may already be done, I don't
23 know. If it's been done, it was provided.
24 Q. I was asking you about the tax return
25 for ATMES?

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1 A. Yes, sir.
2 Q. All right. And according to this, in
3 2011 it had total income of a $1,607,136;
4 correct?
5 A. Do you mind?.
6 Q. Be happy to?
7 A. The gross income was $2.4 million.
8 The loss for that year was $430,000.
9 Q. And that loss shows, however, that
10 one of the factors dealing with the loss is
11 salaries and wages paid of six hundred and
12 something thousand dollars?
13 A. Well, certainly they have employees
14 and payroll and other expenses; yes, sir.
15 Q. To whom was the $688,292 paid? Was
16 any of it paid to Mr. Reed or Mr. Smith?
17 A. No, sir, they are members of this
18 LLC.
19 Q. And so they get a K-1?
20 A. That's correct.
21 Q. And the K-1 shows?
22 A. Their proportionate share of the
23 loss. The K-1 for Mr. Reed shows a negative 215
24 and there may be some -- let me see what Mr.
25 Smith shows. Mr. Smith shows the same thing.

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1 Q. All right.
2 A. Can I tell you some more about this?
3 Q. Sure. Yeah.
4 A. One of the items that's contained in
5 the return is a loss on discontinued operations.
6 If you'll recall ATMES paid this $1,059,500
7 cumulative for its share of -- for the purchase
8 of Abacare, and we determined, based on good and
9 valid reasons, that that no longer was an asset
10 and we expensed it.
11 Q. Okay. Now, tell me why you expensed
12 it, as opposed to treating it as a capital
13 expenditure?
14 A. Sure. We have two sets of rules. We
15 have generally accepted accounting principles and
16 we have income tax regulations. Generally
17 accepted accounting principles suggest that
18 annually you -- any kind of investment in an
19 intangible, which is what this is, you evaluate
20 for fair market value. Is it impaired? Is it
21 still worth what you -- when you bought it, is it
22 still worth that? Our answer to that question
23 was, no, it's not. For income tax purposes the
24 answer is not -- clearly it's not as
25 straightforward, but the answer would be, I've

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1 got an asset that's worth zero, why should I be
2 having to amortize it, and the decision was made
3 to expense it for tax purposes.
4 Q. All right. Why was the asset worth
5 nothing?
6 A. Because they had -- were -- pardon
7 the vernacular, but they were losing their ass in
8 Charleston on this whole Abacare purchase. They
9 over -- they paid too much for it. The
10 operations were not profitable, et cetera, and
11 there was no hope of sale. They had explored
12 sale multiple times, they could not sell the
13 business. You name it, they were -- every
14 indication they were shutting down and have now
15 closed or completely gotten out of that
16 Charleston market.
17 Q. So that I understand this loss of
18 $430,080 includes a write-off of $921,654 because
19 Abacare was valued at zero?
20 A. That's correct.
21 Q. In 2012, Assistive Technology shows
22 that it had sales of $2,361,642?
23 A. That's correct.
24 Q. And it had ordinary income of
25 $384,826?

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1 A. That's correct.
2 Q. In 2009, what was the ---
3 A. I'm sorry, I didn't anticipate your
4 asking me that. I will be in just a minute.
5 Gross income for the combined
6 companies was five million and sixty-four of the
7 $5,065,000. Net income was a loss of $175,000.
8 Q. So you have -- in 2009 you have five
9 million plus in sales?
10 A. Yes, sir.
11 Q. Versus?
12 A. 2.4 in 2011
13 Q. Do you know how much of the five
14 million was attributable to the Abacare market?
15 A. Not on this return, but that could be
16 determined.
17 Q. In 2010?
18 A. You've got $4,078,000 in gross
19 income. I have a profit of $92,249.
20 Q. And do you know how much of the
21 $4,078,000 was attributable to the Charleston
22 market?
23 A. Not from this document. It can be
24 determined.
25 Q. Well, that would be significant to

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1 know insofar as whether or not Abacare was worth
2 zero, wouldn't it?
3 A. Oh, absolutely, and as a part of the
4 year-in review procedures that I do, I do an
5 impairment consideration. This is an accounting
6 technical term in which I will stop and say,
7 we've got a million dollar intangible asset, the
8 investment in Abacare, what is it really worth
9 today? And we'll make a reasoned and supported
10 argument to value it according to what its fair
11 market value is today, and those work papers are
12 readily available.
13 Q. All right. For tax years 2001 -- I
14 mean, tax years 2009 and 2010, was the purchase
15 of Abacare amortized?
16 A. It was for tax purposes. The
17 accounting treatment changed during that period
18 of time and we went from amortizing in intangible
19 to not amortizing, so the answer to your question
20 is yes and no. Sorry.
21 Q. So, in 2009, how much was amortized?
22 A. I may be able to tell you that.
In
23 2009 you had net amortization of $40,000. You're
24 going to ask this question, so let me go ahead
25 and answer it in advance.

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1 The purchase price that ATMES paid
2 for Abacare was split into parts. Those parts
3 that could be clearly identified as tangible
4 assets, the amount purchased was allocated to
5 them based on the fair market value of those
6 assets. The difference between the purchase
7 price paid and the identifiable fair market value
8 of the assets was the intangible goodwill. So
9 for book and tax purposes, the intangible was
10 booked at a different -- it's not all -- in other
11 words, they paid a million, let's say, some of
12 that was net assets and reallocated it
13 accordingly.
14 Q. All right. And that's -- you say
15 purchased goodwill, the purchased goodwill was
16 $606,000?
17 A. Yes, sir. May I explain?
18 Q. Okay.
19 A. What you do is you take the purchase
20 price and then you have different assets that you
21 can put your finger on. We know we've got
22 furniture and fixtures. We know we have accounts
23 receivable or inventory.
24 Q. You got inventory?
25 A. You got all of those kinds of things

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1 and then you assume some notes payable, you
2 assume some liabilities for payroll and sales tax
3 and so, you -- the difference between what you
4 paid and what you can put your finger on is
5 goodwill and it's as simple as that.
6 Q. I understand.
7 A. And we're going to continue to have
8 goodwill amortization for tax purposes until we
9 write it off.
10 Q. Which you've now done?
11 A. That's correct.
12 Q. And so, of the -- do I understand of
13 the million dollars -- well, I think we said
14 $1,059,000. Of that $1,059,000, you attribute
15 $815,106 to goodwill?
16 A. No, sir. You need to -- just this
17 $8,606 is attributable to the Abacare. These are
18 other goodwill transactions.
19 Q. I see. So about 55, 56 percent of
20 the purchase price was allocated to goodwill?
21 A. I believe that -- your math is
22 correct.
23 Q. We mentioned the lawsuit that was
24 reflected in your report and a copy of which I
25 showed you, the suit against SCDOR?

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1 A. Yes, sir.
2 Q. Do you know if Reliable or ATMES
3 joined in that lawsuit?
4 A. I don't know that.
5 Q. Do you know if Abacare joined?
6 A. I don't know that.
7 Q. At the time that the amnesty came
8 down, amnesty provision, let's assume it's August
9 of 2009, do you know if any members of ATMES were
10 on the board of the -- I'll call it the trade
11 organization for this Durable Medical Equipment?
12 A. Not directly, no, sir.
13 Q. Do you know if any members in
14 management of ATMES had actual knowledge of the
15 amnesty program?
16 A. It's my understanding that Jeff Reed
17 was aware of this situation, but all I'm telling
18 you is whether that's hearsay or where that
19 falls, gentlemen, that's y'all's precinct. All I
20 knew is that Jeff Reed had some knowledge.
21 Q. Okay. As part of any due diligence
22 that ATMES undertook or the purchasers of the
23 stock, did they seek to determine the value of
24 the assets of Abacare?
25 A. I would say, yes, and that was done

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1 primarily by reviewing the report from Mr.
2 Burkett and I think they had some actual
3 knowledge of what -- you know, in other words,
4 they know that business, they know, yeah, they've
5 got about this much in inventory, et cetera.
6 Q. As part of that due diligence, do you
7 know whether ATMES or the purchasers of stock
8 sought to determine liabilities of Abacare?
9 A. I don't know whether any efforts were
10 made beyond accepting the financial statements
11 and representations of the sellers.
12 Q. And with regard to any due diligence,
13 are you aware of any inquiry that was made of
14 Abacare, Selander or anyone else about the
15 potential tax liabilities?
16 MR. SMITH: Object to
17 the form You can answer anyway.
18 MR. HOWSER: What's the
19 objection? Is it because of compound?
20 MR. SMITH: Yes.
21 MR. HOWSER: All right.
22 Let me break it up.
23 BY MR. HOWSER:
24 Q. With regard to the due diligence, do
25 you know what investigation was made by ATMES or

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1 the purchasers of the stock of Abacare about
2 potential tax liabilities?
3 A. I do not.
4 Q. The same question with regard to
5 inquiry of Hood and Selander?
6 A. I do not.
7 Q. Do you know about whether inquiry was
8 made to any other source as to potential tax
9 liability?
10 A. I do not.
11 Q. And as we've established, you do not
12 know whether Reliable, for example, and ATMES --
13 when Reliable was treating taxability for sales
14 tax purposes of the Durable Medical Equipment any
15 differently than Abacare?
16 A. I was not involved in their sales tax
17 computations.
18 Q. And the same would be true for ATMES
19 between November and June -- of November 2008 and
20 June 2009?
21 A. Are you asking me did I know anything
22 about sales tax or after the preparation?
23 Q. Right.
24 A. No, I do not.
25 Q. Let's look for a moment at your

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1 affidavit. Give me just a minute.
2 Mr. Bradham, it would help me
3 understand your affidavit if I pose this question
4 to you: You're the accountant for ATMES, and I
5 want to enter into a contract to purchase the
6 assets from the stock of ATMES. As the
7 accountant for ATMES, do you view it as your
8 responsibility to tell me if there's a potential
9 tax liability of ATMES without me asking?
10 A. Let me rephrase to make sure I
11 understand the question.
12 You're my client?
13 Q. I'm not your client.
14 A. All right.
15 Q. ATMES is your client.
16 A. Okay.
17 Q. I'm entering into a contract to
18 purchase ---
19 A. I'm sorry, I didn't mean you, as in,
20 ATMES is my client.
21 Q. Correct?
22 A. My client is here.
23 Q. Yes.
24 A. And they are entering into a
25 transaction as a potential tax liability did I

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1 know exists?
2 Q. Yes.
3 A. Do I think I have a duty and a
4 standard of care to tell you and to make sure
5 that that amount is disclosed?
6 Q. Yes.
7 A. Absolutely.
8 Q. Okay. Despite that it's your client
9 and I'm a third party to the transaction?
10 A. I've got a standard of care and
11 here's why. It's called certified public
12 accountant, and I represent not just this -- if I
13 were the in-house accountant, maybe I do, maybe I
14 don't, but I don't just represent you. Part of
15 my job is to protect the fiscal as a whole, and
16 so to answer your question, yes, sir, I think I
17 have a standard of care to say, Mr. Client,
18 you've got a potential liability here. You're
19 going to disclose it or I'm going to put it on a
20 tax return or I'm not going to let this go
21 without being reported or I'm going to withdraw
22 from the engagement.
23 Q. But you wouldn't go directly to me
24 and ---
25 A. I wouldn't go and tell you, hey, my

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1 client has underreported his income tax by a
2 million dollars. I have no -- I don't have the
3 right to do that, but I do have the right to tell
4 my client, I'm withdrawing from this engagement
5 if you don't come clean.
6 Q. What do you understand the engagement
7 of Hood and Selander to be?
8 A. All I can say is it would be similar
9 to what we would do is that they represented the
10 company in preparing -- as I understand, they
11 prepared their sales tax returns from the
12 information they were supplied. they prepared
13 their general ledger accounting, perhaps their
14 payroll, they prepared their income tax returns.
15 Where we run into trouble is that they supplied
16 the information to Mr. Burkett and Mr. Burkett
17 prepared a valuation report based on information
18 that was incomplete.
19 Q. If you, as an accountant, raise an
20 issue with your client as to whether or not
21 you're properly reporting sales tax, and the
22 client tells you, yes, we are because we're doing
23 it consistent with the way the industry does it.
24 Do you, as a certified public accountant, go make
25 inquiry of others in the industry as to how.

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1 they're handling it?
2 A. That would certainly be one step to -
3 - in our industry we call it threats, and we
4 would -- you know, we want to mitigate as many
5 threats as we possibly can, and one thing we
6 might do might be to go and inquire.
7 If I come to the conclusion that
8 everyone in the industry is doing it wrong and
9 I'm the only that knows the right way, I might
10 stick to my guns and say, no, heck, no. this is -
11 - we need to do something about that, and we can
12 do it through disclosure; we can do it through
13 booking a reserve, which is what Mr. Selander
14 recommended; we could do it through
15 communication. We don't have to write a check to
16 be in disagreement with the taxing agency.
17 Q. All right. And if the client says
18 this is the way we want it reported because this
19 is the way it's done in the industry, what do you
20 as the accountant -- certified public accountant
21 do as far as reporting it?
22 A. It would depend. It would depend on
23 the materiality, how big is it? How big is it in
24 relation to the overall income of the company?
25 How serious -- how egregious is the violation?

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1 How wrong are there? If there's simply no tax
2 authority to support the position that I want to
3 write off my dog because he keeps burglars away,
4 I'm going to say, I'm not filing that tax return.
5 So, to answer your question, there's
6 not a single factor. Would I quit an account
7 over a disagreement? It depends on the amount
8 and size.
9 Q. The tax liability, as you calculated,
10 was approximately $100,000 attributable to
11 Abacare. Over what period of time was this
12 $100,000 tax liability?
13 A. I don't know the answer to that
14 question, but there's a -- I'd love to give you
15 an answer that perhaps I think you need to hear,
16 so do I have your permission?
17 Q. Sure.
18 A. When Mr. Burkett did the financial
19 projection, he based -- this whole projection is
20 based on a forecast of future incomes, and that
21 forecast was based on a very short period of
22 time, four months that was annualized and was
23 projected forward from -- I'll show you where the
24 report from his -- that was projected forward. I
25 think this is the report, yes.

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1 Here's why this is so critical. That
2 small, relatively small error, was multiplied
3 many, many times. It was exponentially
4 compounded because every number on that report is
5 wrong because sales tax were wrong.
6 Q. What was the small error that you say
7 that was ---
8 A. We're getting back to the $100,000
9 worth of sales tax.
10 Q. Well, let me ask you this. What was
11 the sales tax liability or potential sales tax
12 liability for the four month period?
13 A. I don't know the answer to that.
14 Q. But wouldn't that be significant?
15 A. Yes, it would.
16 Q. I mean, it's significant to know?
17 A. If Mr. Burkett had known, he would
18 have come to different conclusions.
19 Q. But you don't know how that would
20 have affected his overall conclusion?
21 A. That's correct.
What I have done is
22 I have used a bigger period of time to try to
23 estimate how that would have affected his
24 conclusion. Now you'd have to ask Mr. Burkett,
25 okay, given these facts, how would that have

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1 affected your valuation, and I think that's a
2 valid way of doing it.
3 Q. But you don't know what the sales
4 tax liability would be for that four month period
5 that he used?
6 A. I don't. I have thoughts about that.
7 Q. What are your thoughts about it?
8 A. If I'm the owner of a company that
9 we're contemplating selling and I'm in control of
10 sales tax and, therefore, net income that's being
11 reported, I want to get the highest possible
12 purchase price I can. If there ever was a time
13 to understate sales tax and overstate net income,
14 I've got a really big inducement to do so, and no
15 one's counting the chickens after the fox makes
16 the report.
17 Q. You say in your affidavit in
18 Paragraph 9 that Mr. Selander dismissed the sales
19 tax liability and other considerations. What are
20 the other considerations that you think he
21 dismissed?
22 A. The impact on the overall
23 profitability. I don't have a one, two, three on
24 that.
25 Q. But you said, dismissing the sales

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1 tax liability and other considerations. You
2 don't know what those other considerations are?
3 A. No, sir.
4 Q. And again, looking at Paragraph 10,
5 it said, you think that a certified public
6 accountant should disclose to the purchaser known
7 tax liabilities of the company.
8 That is, I'm the purchaser of ATMES
9 and as you told me, you don't have an obligation
10 to come to me and say they are tax liabilities
11 that I know about that aren't accurately
12 reflected?
13 A. I'm not going to agree with where we
14 went on that. I agree with what I've said on
15 Item B. If Mr. Selander had said -- he handed me
16 a trial balance, and if he had said, there's a
17 potential sales tax due to a disagreement between
18 the CPA firm and management, fill in the blank.
19 I could have taken that information at its face
20 value and that would have probably been the end
21 of the conversation. Management contends that
22 this is the right way to do it, we're not so
23 sure. And Selander, in his minutes has said, you
24 have no tax authority for the position you're
25 taking. You're doing this wrong.

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1 Q. But my question is, is he under an
2 obligation to come to me as a purchaser and
3 disclose that without my making inquiry?
4 A. At this point in this transaction,
5 yes, sir, I think he had that obligation because
6 the company has been bought. He should have said
7 he -- I think he definitely had an obligation to
8 report.
9 Q. And since you find that Hood and
10 Selander is a reputable firm, as you've told me,
11 that if someone had gone to him and specifically
12 asked, do you know of any tax liabilities, you
13 would have expected him to disclose that to you,
14 wouldn't you?
15 A. Your question implies that the duty
16 of disclosure relies on the ability of the
17 purchaser to question.
18 Q. Absolutely.
19 A. And I would say, I -- if we went back
20 to that day, would I -- and David Selander was
21 sitting across the table from me, would I say,
22 did you do the sales tax returns right? I would
23 not have asked that question, no, sir, because I
24 would have expected that the sales tax returns
25 were done correctly because he knows the law,

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1 he's demonstrated that with the notes to
2 management -- he went to the Board of Directors
3 and told them they were doing it wrong.
4 Q. But you would say, do you know of any
5 potential tax liabilities? Had you asked that or
6 somebody asked that on behalf of ATMES, you would
7 have expected Mr. Selander to ---
8 A. Told the truth.
9 Q. --- told the truth?
10 A. Oh, yeah. I don't doubt it. Like I
11 say, I have no ---
12 Q. And don't you think -- well, strike
13 that.
14 A. Can we go to 10B while we're there?
15 Q. I thought that's just where we were?
16 A. All right. Well, if you don't mind,
17 are you okay?
18 Q. Sure.
19 A. This is the tax return that was
20 signed by Hood and Selander for that period of
21 time that understates the tax liabilities under
22 penalty of perjuries, and it says, "To the best
23 of my knowledge and belief, it is true, correct
24 and complete."
25 Q. That's not -- but who is signing the

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1 statement under penalty of perjury is the company
2 itself, not Mr. Selander?
3 A. No, sir. When I sign that return,
4 it's just as applicable to me as it is to the
5 company. I can't sign a tax return -- Mr.
6 Howser, with all respect, I practice in tax court
7 and I can assure you that they will go after you
8 if you sign a tax return that you know is
9 incorrect.
10 Q. They go to you as making an error as
11 a tax preparer and it is the actual filer ---
12 A. I'm not going to argue that point
13 with you, but I disagree.
14 Q. What is the basis in view of the
15 letter that I showed you, which I believe is
16 Exhibit Number 1, it says that this valuation is
17 for the exclusive benefit ---
18 A. Of -- of the people that are listed?
19 Q. Right.
20 A. Well ---
21 Q. You understand that's what the
22 engagement says, doesn't it?
23 A. That's what his opinion says.
24 Q. All right. And if that is true, what
25 is the basis of your statement in Paragraph 13 of

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1 your affidavit that Mr. Selander knew or should
2 have known that the information he provided or
3 failed to provide to Burkett, Burkett and Burkett
4 would be relied on by the plaintiff?
5 A. You can stamp draft on a report, you
6 can limit a report all you want to, but I got it,
7 and if I get it, you've got an obligation to me,
8 and he knew the purpose of this valuation was to
9 sell the company. He had an obligation that went
10 beyond just the Connellys because he knew what
11 they were going to do with this report.
12 Q. How did he know that?
13 A. He knew they were selling the
14 company.
15 Q. Well, how did he know that the report
16 was going to be given to the purchasers?
17 A. Unfortunately in my side of the
18 field, we do financial statements and we don't
19 know what's going to happen to them when they
20 leave our hands. That's why we have compilation
21 review, audit statements, that's why we have a
22 whole body of opinions.
23 Q. And that's why you, as a certified
24 public accountant, would put in there, this is
25 for the exclusive use of -- in this instance, Ms.

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1 Connelly and Mr. Selander -- or Mr. DeClemente?
2 A. I'm too tired to discuss that point,
3 I'm sorry.
4 Q. Well, don't you agree that his letter
5 is a limitation of to whom that report was to be
6 relied upon?
7 A. That may have been his intention, but
8 the bank, NBSC got this, I got this and as far as
9 I know, everybody that was associated with ATMES
10 and Abacare got this. So they didn't pay -- they
11 didn't heed his limitation.
12 Q. Do you have a copy of the stock
13 purchase and assignment agreement that's referred
14 to in Paragraph 10 of the complaint?
15 A. I've seen it, but I don't have it in
16 front of me; no, sir.
17 Q. Do you know if you have a copy of
18 that in your files?
19 A. I do. Would you like me to get that?
20 Q. That would be great. And in this
21 report, who is the seller?
22 A. It appears to me the estate of
23 Dorothy Connelly, Phillip DeClemente and ---
24 Q. So that seller is designated as one
25 person, isn't it? Isn't Ms. DeClemente assignor?

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1 A. It says estate of Dorothy A. Connelly
2 is what mine says.
3 MR. HOWSER: Can we get
4 a copy of that, James, at some point?
5 MR. SMITH: Sure.
6 MR. HOWSER: Let's get
7 that marked as Exhibit 6.
8 ++++++++++++++++
9 (STOCK PURCHASE
10 AND ASSIGNMENT
11 AGREEMENT WAS
12 MARKED FOR
13 IDENTIFICATION AS
14 DEPOSITION EXHIBIT
15 NUMBER 6)
16 +++++++++++++++)
17 BY MR. HOWSER:
18 Q. Now, the minutes that you referred to
19 are from July 2007, correct?
20 A. I don't know. Yes, sir.
21 Q. All right. Let me show you a
22 document and I believe it's from your file from
23 the McNair firm dated May 12, 2008.
24 A. Didn't they do the case all the way
25 to the Supreme Court?

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1 Q. They did.
2 A. Okay.
3 Q. Do you recognize that letter?
4 A. Yes, sir.
5 Q. All right. Look at Page 2 of this
6 letter, it's the first paragraph. It says, "On
7 August 28, 2007, the South Carolina
8 Administrative Law Court, ALC, issued a decision
9 in the case of anonymous corporation versus South
10 Carolina Department of Revenue with a citing
11 there.
12 The ALC granted the taxpayer's motion
13 for summary judgment ruling that the taxpayer's
14 sale of certain durable medical equipment
15 specifically, CPAP, BiPAP, NIPPV devices,
16 ventilators, nebulizers and other
17 intermutritional formulas were exempt from sales
18 and use taxes under the statute."
19 Do you see that?
20 A. I do see that you've read it
21 accurately; yes, sir.
22 Q. And isn't that ruling consistent with
23 the position taken by management at Abacare in
24 July 2007?
25 A. No, sir.

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1 Q. Why not?
2 A. If I may read what Mr. David Selander
3 -- he wrote this. "David noted that taxable
4 sales reported on the June sales tax form
5 appeared to be significantly understated." Okay.
6 He stressed important to report.
7 He says, "The other thing is that
8 sales tax forms are to be completed based on
9 collections rather than billing."
10 That has absolutely nothing to do
11 with this right here.
12 Q. All right. Well, let me ask you
13 this.
14 A. This is an accounting convention,
15 this is a point of law.
16 Q. When they went to assess taxes, past
17 due, unpaid sales taxes, wasn't that based on the
18 fact that they had -- that sales taxes had not
19 been paid on certain medical devices sold by
20 Abacare?
21 A. If you'll allow me to answer that
22 question with a degree of this is what I know?
23 Q. Okay.
24 A. When I -- it's my understanding that
25 the gross sales as were reported on the return

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1 did not agree with the gross sales that the
2 company was reporting, that the numbers were not
3 equal.
4 The way you report a sales tax return
5 is you put the gross took in or gross charged or
6 gross sold, less items that are not taxable, and
7 that they were manipulating the sales tax returns
8 to not have to pay the sales tax because of cash
9 flow problems. That is my understanding of what
10 Abacare's sales tax issue -- one of Abacare's
11 sale tax issues is.
12 Q. Now what's the basis of that
13 knowledge?
14 A. Only what I've been told.
15 Q. Who told you?
16 A. I can't tell you. I don't know.
17 Q. Well, if there was sales tax
18 unreported for the sale of certain Durable
19 medical equipment, such as CPAP machines and
20 BiPAP and these other devices, if that was
21 understated because they took the position they
22 were exempt from sales and used taxes, wouldn't
23 you agree with me that that would be a correct
24 statement of existing law until the Supreme Court
25 reversed the ACL -- or ALC in June 2009?

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1 A. If that were the singular issue, I
2 would.
3 Q. And you think that there's an issue
4 beyond that in the sense that they were not
5 paying the sales tax because they were
6 calculating it on an accrual basis rather than on
7 a cash basis?
8 A. They didn't want to pay the sales tax
9 and they were -- the returns may or not have been
10 correct. And that's not my opinion, that's the
11 opinion of the Department of Revenue Examiners.
12 Q. Well, I'm saying the issue is -- not
13 only ---
14 A. There are at least two issues.
15 Q. All right. One would be whether or
16 not certain devices were exempt from sales and
17 use taxes, and the second issue is whether or not
18 the taxes should have been paid on a cash basis
19 rather than accrual basis?
20 A. I agree those are two different
21 issues.
22 Q. All right. And those are the two
23 issues in this case in as far as you see them?
24 A. I'm going to add one more.
25 Q. Okay.

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1 A. What other items were discovered as a
2 result of the examination? Were there just flat
3 out they made errors in their reporting of sales
4 tax ---
5 Q. But that would not be the
6 accountant's responsibility?
7 A. Well, the accountant is telling them
8 flat out unequivocally he wrote this, "taxable
9 sales reported on the June sales tax forms appear
10 to be significantly understated."
11 He's not saying I think you're making
12 the wrong determination based on this law. He's
13 saying I think you're filling out your sales tax
14 returns wrong and I'm bringing it to the Board's
15 attention.
16 Q. All right. But the third item
17 correlates to issues, for example, with ATMES or
18 Reliable in that they had failed to pay certain
19 taxes properly ---
20 A. For whatever reason.
21 Q. --- for whatever reason and that's
22 not your responsibility or not the CPA's
23 responsibility?
24 A. I disagree with that, and if Mr.
25 Selander is bringing to the Board's attention

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1 that they're not preparing their sales tax
2 returns correctly period.
3 Q. But if they make a mathematical
4 error ---
5 A. I don't think he would bring -- I
6 can't speak for him.
7 Q. I'm addressing your third category.
8 A. Yes, sir.
9 Q. If somehow the client makes a mistake
10 in reporting, for example, sales, that's not your
11 responsibility as a CPA?
12 A. That would depend. If every single
13 time I looked at a sales tax return and I -- and
14 see, Mr. Selander's office is preparing the
15 returns, they're also preparing the general
16 ledger, so they're comparing what's on the sales
17 tax return with what's on the general ledger and
18 he -- I would not go to the Board and say, what
19 you're reporting is incorrect if it were
20 immaterial or it was a matter of we did it in
21 June and we should have done it in July. This
22 was a serious issue that he was reporting to the
23 Board. This is management is not doing its job.
24 They're understating, you've got a problem. This
25 is drop dead serious. If I were to do something

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1 like that, it would be -- I'm ready to quit the
2 account is where I would be.
3 Q. Do you have any knowledge as to
4 whether or not the sales price was based on the
5 report prepared by Burkett, Burkett and
6 Burkett ---
7 A. Absolutely. To my knowledge it
8 absolutely formed the foundation of the sales
9 price.
10 Q. And what do you base that on?
11 A. Because -- if somebody will hand me a
12 calculator, I don't have one, we'll do a
13 little ---
14 Q. Well, as opposed to a report that was
15 done subsequently to the Burkett, Burkett and
16 Burkett report by some other person or entity.
17 A. Anything's possible.
18 Q. Would you have made any inquiry of
19 that?
20 A. I had no reason to. As far as I
21 know, my clients went to the bank and borrowed
22 $809,000 as a result of this.
23 Q. All right. Do you know if the sales
24 price was impacted at all by the death of Ms.
25 Connelly?

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1 A. No. As far as I know the Burkett
2 report was it.
3 Q. Are you the outside accountant for
4 ATMES now?
5 A. Yes, sir.
6 Q. And Reliable?
7 A. Yes, sir.
8 Q. Are you the accountant for Mr.
9 Smith's law firm?
10 A. No, sir.
11 Q. What other accounting work have you
12 done for businesses in which Mr. Smith has an
13 interest?
14 A. I'm not certain. As far as I know, I
15 do his individual return and I think the only
16 other one is ATMES, which Reliable and Abacare
17 are owned by ATMES, so as far as I know, that's
18 it.
19 Q. And do you do individual returns for
20 other members of Mr. Smith's family?
21 A. Not that come to mind. I don't --
22 for example, Martha Jo is his sister, I don't do
23 their return. I don't do the father, the
24 brother. I don't think I do any other family
25 members.

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1 Q. How about his wife's family?
2 A. I don't think so, but there -- we
3 probably do a thousand tax returns, so it's not
4 easily -- if you could be a little more specific?
5 Q. McCauley ---
6 A. That's his wife. The Shaws, we don't
7 do any of the work for the Shaws.
8 Q. Have you done other accounting work
9 for businesses in which Mr. Smith had an interest
10 in the past?
11 A. That's possible, but you have to be
12 more specific. I don't know.
13 Q. And the individual return, ATMES,
14 Reliable and Abacare are the only returns you're
15 doing now?
16 A. For Mr. Smith?
17 Q. Yeah.
18 A. As far as I know; yes, sir.
19 Q. And what other accounting work or
20 services do you do for Mr. Smith?
21 A. I'm not aware of any.
22 Q. Have you ever been a witness in any
23 other matter in which Mr. Smith has been
24 involved, either as a party or as an attorney?
25 A. I have been -- let me see how to

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1 answer that. I have prepared some expert opinion
2 reports that never went anywhere. I don't know
3 what y'all's definition of that -- in other
4 words, I was not deposed in those cases, they did
5 not go to trial. I -- there has been some
6 others, but none that have either have gone to
7 deposition or to trial either one to my
8 knowledge.
9 Q. Have you ever testified in a trial?
10 A. Yes, sir.
11 Q. How many times?
12 A. I would say less than six.
13 Q. And where have they been?
14 A. Primarily ---
15 Q. Here in Sumter?
16 A. I'm sorry, but the problem is, I'll
17 go to a jury -- I don't know when I go to
18 Beaufort County and I go to a courthouse, I have
19 no clue what jurisdiction or anything that is,
20 but I have testified in Beaufort County, in --
21 wherever Bishopville is ---
22 Q. Lee County.
23 A. --- okay. I'm almost certain in some
24 sort of action in Sumter County, but I don't know
25 for a fact.

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1 Q. And you've given expert testimony in
2 those cases?
3 A. Yes, sir.
4 MR. HOWSER: Thank you,
5 sir. I think I'm going to pass you to somebody
6 else.
7 THE WITNESS: Thank
8 you, sir.
9 MR. HOWSER: Do we want
10 to take a break for lunch or what do we want to
11 do?
12 (Whereupon, a luncheon recess was
13 taken.)
14 ++++++++++++++++++++++++
15 AFTERNOON SESSION
16 EXAMINATION
17 BY MR. MARSHALL:
18 Q. Mr. Bradham, my name is Cameron
19 Marshall, I represent Phillip DeClemente. I want
20 to have a brief chat with you on the record and
21 give you my thoughts on the issue of whether or
22 not I'm going to ask you questions. Okay.?
23 A. Okay.
24 Q. I think, Mr. Smith, he has an
25 objection to me asking you questions today, which

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1 is based on a legal issue, and I won't go into
2 that. That will get resolved, but it's your
3 right to either submit to questions to me today
4 or you could say, no, I don't care to answer your
5 questions today, but if the judge rules in my
6 favor, I need to know if you're in agreement with
7 reconvening your deposition at a later date and
8 answering questions from me at that point?
9 A. I don't have a clue. I'm here to
10 answer questions, and as far as I'm concerned, it
11 doesn't matter who asks them.
12 MR. SMITH: And I will
13 interpose, you know, my position on it. As we
14 talked over once and I'm happy to put on the
15 record at this time and we'd just respectfully
16 say it's our -- my position that in the current
17 status of the matter, you're limited to questions
18 related to damages, and so I would instruct him
19 not to answer. He could not follow my
20 instructions, I would ask him not to answer
21 unless and until such time as that issue is
22 resolved.
23 I would also agree that if it is
24 resolved in your favor, that I would, you know,
25 make him available inasmuch as he is our expert

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1 witness for your questions at that time.
2 MR. MARSHALL: I
3 understand, but if I'm understanding the law
4 correctly, it's his right -- you -- it's not
5 since you don't represent him, it's not your
6 right to instruct him not to answer.
7 MR. SMITH: Well, I'm
8 going to do that inasmuch as it is my expert
9 witness in my case, so it's not based on a
10 privilege, which is what the rule requires, but
11 also based upon the limited scope of discovery
12 given that you're limited solely, I believe, to
13 issues related to damages.
14 MR. MARSHALL: Well, if
15 you'll agree to answer my questions at a later
16 date if I prevail on a legal issue, then I don't
17 have to get a ruling from a judge right now. If
18 you don't agree to that, I have to try to get a
19 judge on the phone to get a ruling.
20 THE WITNESS: I have no
21 problems answering questions at a later date if
22 that's what is decided.
23 ++++++++++++++++++
24 EXAMINATION
25 BY MR. MYRICK:

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1 Q. Mr. Bradham, my name is Jim Myrick.
2 I'm here today representing Donna Cash, as a
3 representative of the estate of Connelly, and I -
4 - a lot of the questions I had to ask you have
5 already been asked, thanks to the talented Mr.
6 Howser, but I also do have some follow-up
7 questions of my own.
8 First thing I want to understand is
9 what exactly is this packet that I received when
10 I walked in today? What is this grouping?
11 A. Those were notes for me to be able to
12 answer your questions.
13 Q. Okay. So is this a copy of your file
14 as pertains to this matter?
15 A. Those are selected documents from our
16 files to respond to questions.
17 Q. That you brought with you today for
18 your use?
19 A. That's correct, for my use.
20 Q. Describe for me or just list for me
21 the universe of documents that you have in your
22 file that pertain to this controversy, that you
23 have in your offices?
24 A. Okay. I've done tax returns for
25 quite a number of entities, whatever they may

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1 have been called at the time. There's Abacare
2 Home Medical, Inc. since that 2008, there's
3 Reliable, and it has a longer name. There's
4 ATMES. I have accounting information related to
5 those same companies, including financial
6 statements. I have a file regarding the sales
7 tax examination. I don't know what else I might
8 have without more specifics.
9 Q. Am I understanding properly that you
10 don't have a separate segregated file for this
11 matter?
12 A. That's correct.
13 Q. Okay. You've integrated bits and
14 parts from different files that you have, that in
15 your opinion relate to this controversy?
16 A. I think that's fairly stated.
17 Q. And what this packet is, you thought
18 you'd be asked questions about some of these in
19 this sub-set held under this black binder clip
20 and so you brought that with you and you gave
21 everybody a copy?
22 A. That's correct.
23 Q. How long have you been doing -- I
24 listened carefully, I may have missed some stuff
25 that you said earlier. If I did, I apologize. I

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1 might have to ask you some things over.
2 A. That's fine.
3 Q. But one thing I didn't hear was, how
4 long have you been doing Reliable's accounting
5 work?
6 A. I'm not certain. I can answer that
7 question with just a wee bit of research, but for
8 some number of years before Abacare came on the
9 scene. Best guess would be 2006 -- perhaps 2005.
10 Q. Okay. That's perfectly fine for my
11 purposes. And then ATMES from what period would
12 you say?
13 A. Well, ATMES was the entity formed to
14 purchase and consolidate Reliable, Abacare and
15 all the other entities that they owned and
16 operated.
17 Q. So Reliable and Abacare fit
18 underneath ATMES now?
19 A. That's correct.
20 Q. So when was ATMES formed? Was that
21 November of 2008?
22 A. I believe it was right at the first
23 of November 2008.
24 Q. And then Abacare, since they came
25 under the ATMES umbrella, which would have been

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1 around November 2008 as well?
2 A. I'm not sure when they came under the
3 umbrella, but they certainly were a stand alone
4 entity from -- well, they have been and continue
5 to be.
6 Q. And you've done their work since --
7 my question is, you've done their work since
8 November of 2008?
9 A. Yes, sir.
10 Q. And I believe you said earlier that
11 those are the only Murrell Smith related entities
12 that you do any work for, that you don't do their
13 personal stuff, but you've handled these things?
14 A. No, I do Murrell Smith's individual
15 return, but I don't think any of the other
16 entities that he owns, I do the accounting. He
17 has K-1's from a number of partnerships and
18 various investments and that sort of thing. I
19 don't think I do the accounting for any of them.
20 Q. Okay. And how long have you been
21 doing Murrell Smith's individual tax returns?
22 A. Several years. I'm not sure exactly
23 how many.
24 Q. Would it go back to the era when you
25 first took on Reliable, which was 2005, 2006 or

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1 did it predate that?
2 A. It did not predate that. I think it
3 would be about 2008, but I'm not certain.
4 Q. You first started doing Reliable and
5 then a little bit later Murrell Smith brought his
6 personal stuff?
7 A. That's correct.
8 Q. And what about the accounting work
9 for -- is it Reed, is that the other ---
10 A. Jeff Reed.
11 Q. Jeff Reed. Do you do his work?
12 A. Yes.
13 Q. Tell me how long you've done Jeff
14 Reed's work.
15 A. Well, I think that started about
16 2005.
17 Q. Do you handle accounting for Jeff
18 Reed's other businesses?
19 A. Yes.
20 Q. What are the names of those
21 businesses?
22 A. There may be quite a few, and if it's
23 possible that I could slip out and get a printout
24 of ---
25 Q. Yes, that's fine, if that's easier

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1 for you, I will accept that.
2 A. -- that would be the fastest way for
3 me to answer your question.
4 Q. Okay.
5 A. All right. Do we limit him to a
6 period of time or do you ---
7 Q. Any accounting work you've done for
8 Jeff Reed's companies, so any companies that
9 you've worked for for him.
10 A. Okay. Do you want me to get that
11 now?
12 Q. If that's okay?
13 A. Sure.
14 MR. MYRICK: Maybe you
15 could ask somebody to help you with that and we
16 could continue?
17 MR. BRADHAM: Guess
18 what? At my office at the crack of two, there
19 are no other bodies.
20 MR. MYRICK: Okay.
21 (Off the record briefly.)
22 BY MR. MYRICK:
23 Q. Just hand those two sheets to me, if
24 you want.
25 A. Okay. This has his personal

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1 information in it. Is there some ---
2 Q. Do you want to redact it?
3 A. I can redact it just as easy as that
4 method right there.
5 Q. Sure.
6 A. Does that work?
7 Q. I think probably so. My question
8 will -- I will ask a question eventually about
9 how much income came from those?
10 A. Okay.
11 Q. From that work, which I assume is the
12 other part of that page.
13 A. Yes, sir. Is this for 2012 or for
14 what year? I have no problem giving you what you
15 want for whatever years, you just have to tell
16 me.
17 Q. What have we got there? Now, this is
18 -- I'm looking at a document that you've handed
19 me called, Federal Statements, Jeffrey and Billy
20 Reed, and it's got a client number up here of
21 4007, and I presume that's your client number for
22 your office?
23 A. That's right.
24 Q. And these are his different entities,
25 and if you would just read those into the records

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1 for me? These are businesses that are Jerry
2 Reed's; is that right? Jeff Reed's?
3 A. Jeff Reed, yes. Reliable Medical
4 Equipment, Miracle Solutions, Organic Products
5 International, Biozine, Biological Solutions,
6 Assistive Technology Medical Equipment, ATMES,
7 Bridging Business International, Natural Products
8 and Services and Abacare Home Medical.
9 Q. And on that sheet there's something
10 that's K-1 income to him from those businesses in
11 that year; is that correct?
12 A. For 2012, yes, sir.
13 Q. And I'm really not as interested in
14 what his income from the businesses is as what
15 your income from those businesses is, serving as
16 his accountant?
17 A. Sure.
18 Q. Can you give me an estimate of how
19 much for the Murrell Smith businesses and how
20 much for the Jeff Reed businesses you earned in
21 2012?
22 A. Okay. For the ATMES Group, which
23 would include Reliable, Abacare, et cetera, our
24 fees were probably in the neighborhood of $8,000.
25 For companies that are completely unrelated to

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1 Murrell Smith, these are just Jeff's, my best
2 guess would be we're talking somewhere in the
3 $6,000 range for companies that Jeff owns
4 independent of Murrell.
5 Q. Okay. So can we do the same thing
6 for Murrell?
7 A. I just did. In other words, the
8 ATMES, they each own fifty percent of it.
9 Q. Right.
10 A. So, if I charge them $8,000, then
11 it's $4,000 for Jeff and $4,000 for -- does that
12 make sense?
13 Q. Yes.
14 A. Okay. For the Jeff Reed companies,
15 that wouldn't have anything to do with Murrell,
16 that would just be Jeff's companies and Jeff has
17 other partners in some of those companies as
18 well.
19 Q. So the charge for the two fellows
20 combined for the ATMES Group was $8,000 in 2012;
21 for Jeff's unrelated businesses, you charged him
22 $6,000 in 2012 for businesses unrelated?
23 A. The accurate answer is I charged
24 those businesses.
25 Q. Those businesses those amounts? All

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1 right. Are there any other incomes that you
2 derived from either Murrell Smith or Jeff Reed or
3 their businesses in 2012?
4 A. Not from doing income tax returns and
5 financial statements and that sort of thing.
6 Q. Okay.
7 A. If Murrell made a referral of a
8 client to me or we mutually serve a client, yes,
9 I get income that's connected in some fashion to
10 Murrell. But that's not a material amount to the
11 size of my practice.
12 Q. Okay. That's fine. And I think
13 that's a very thorough answer. Is there any
14 other income that comes from Murrell or Jeff Reed
15 other than the ones we've talked about or their
16 businesses for 2012?
17 A. No, sir.
18 Q. Okay.
19 A. I have that listing if you want it
20 for Murrell.
21 Q. All his businesses?
22 A. Yes, he has businesses that are
23 unrelated to -- to what we're talking about.
24 Q. For whom you also do work?
25 A. (Witness nods).

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1 Q. I think that's a yes?
2 A. No -- no, that's a standby. Sorry.
3 Q. Okay. All right. Standing by.
4 A. I don't do any -- there's nothing
5 else that he owns that I do any of the accounting
6 for.
7 Q. Okay. So the only things that he
8 owns that you do accounting for are Reliable and
9 ATMES?
10 A. And his personal return.
11 Q. And a personal return. So that's
12 three -- those three items? Thank you very much,
13 that's what I wanted to know.
14 In this packet right here that you
15 brought with you, there's a 2008 tax return for
16 Abacare. There's an email from David Selander to
17 you dated March 11, 2009. There are the
18 shareholder minutes dated July 24th, 2007.
19 There's a letter on your letterhead, Arthur
20 Bradham, CPA, PC. I'm going to come back to that
21 in a moment. And the final thing in this
22 grouping that you brought with you today is
23 valuation of the stock of Abacare Home Medical,
24 Inc. The valuation report is dated July 14th,
25 2008; am I correct?

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1 A. There's one other document there that
2 you didn't mention and that's just my simple
3 definition of an accountant's standard of care.
4 Q. Okay. Got you. The last page?
5 A. The last page.
6 Q. All right. I notice in this grouping
7 that I don't see it. Is your -- this is your
8 expert report I'm thinking that's in this
9 grouping that is the letter under your letterhead
10 Art Bradham, CPA PC; is that correct?
11 A. Yes, sir.
12 Q. Okay. There's no date on that. When
13 was this completed?
14 A. There was a summary document that was
15 prepared and if we can locate that, plus there's
16 metadata in that that we can determine what that
17 date was.
18 The process, just to explain, is that
19 in order to provide a summary letter my process
20 is I will do the full report. Attorneys
21 generally don't want the full report, they want
22 the summary letter. And then when they're asked
23 for the full report you provide it.
24 Q. Okay.
25 A. So I'd be delighted -- in other

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1 words, we can look at that summary letter it
2 would have been prepared the same date or we can
3 look at the metadata in that document and find
4 out when it was created.
5 Q. I don't know that -- do we have a
6 copy of the summary letter? I'm not sure that we
7 do. I don't think I have that letter.
8 MR. SMITH: I don't
9 have it.
10 BY MR. MYRICK:
11 Q. Okay. I don't think I have that
12 letter. Is that letter just like this or are
13 there differences?
14 A. It's a much shorter version. It's a
15 one-page version which draws the same conclusion,
16 but basically says I have the qualifications to
17 testify as an expert. I came to the following
18 conclusion.
19 Q. Okay. Well let's do this. If you
20 don't have any objection I'd love to see that.
21 But I don't want you to have you disturb yourself
22 right now and get up and do that again. So why
23 don't we just put a note "get summary letter" and
24 we'll do that at the conclusion of the deposition
25 or you can send it to me.

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1 A. That will be fine.
2 Q. Is that okay?
3 A. Yes, sir, thank you.
4 MR. SMITH: Why don't I
5 just prepare to get the summary letter, as well
6 as the email packet we discussed earlier.
7 MR. MYRICK: Okay.
8 Thank you.
9 BY MR. MYRICK:
10 Q. Do you have a general idea about when
11 you created this letter?
12 A. It would -- I'm sure it was about the
13 exact same time that this affidavit was prepared.
14 Q. Okay. And what's the date on the
15 affidavit?
16 A. Well there are a couple of dates.
17 One's in August and one's in September.
18 Q. It's notarized as September, but you
19 signed in August?
20 A. I think I created this -- I don't
21 know the timeline here. I'm sorry.
22 Q. That's my highlighting. I'm just
23 talking about the underlying document.
24 Okay. Generally speaking either
25 August or September or right around that time

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1 period of 2011?
2 A. That would be correct. Yes, sir.
3 Q. I'd like to go now to your opinion
4 letter and I'd like to go to Page 2 of it. And
5 I'd like to go to the heading that says "sales
6 tax limit liability omitted". I'll read three
7 sentences.
8 "In the fall of 2009, the South
9 Carolina Department of Revenue conducted a sales
10 tax examination of Abacare Home Medical, Inc.
11 The net result of the examination was that sales
12 tax owed to the SCDOR was understated by
13 $142,316.41."
14 I'll read four sentences.
15 "The examination period overlapped
16 ownership of Abacare Home Medical, Inc. with the
17 period from January 2007 to October 2008, being
18 the period under the Connelly ownership. Of this
19 total, $100,644 was the sales tax understated
20 prior to the purchase of Abacare by the ATMES
21 Group. Okay. Is that correct?
22 A. Yes, sir.
23 Q. Now that hundred thousand dollars
24 we're talking about that number, that's the
25 amount that you've explained was in -- really an

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1 overstatement of profit because it was an
2 understatement of what they really owed; right?
3 A. That's correct.
4 Q. Okay. And what you've said is that
5 because they looked at it during that period and
6 you're looking at the value of the business over
7 time about what projected monies would come from
8 that business when you -- it grew exponentially,
9 in terms of what the value of the business was?
10 A. Perfectly.
11 Q. Okay. So when I -- as I go through
12 this and I'm attempting to understand that, that
13 one hundred thousand, six hundred, forty-four
14 dollars here's my very specific question to you.
15 We talked about that might have different
16 components. One might be that the durable
17 medical equipment may or may or not be taxed
18 depending on the court's ruling, that that was a
19 legal issue.
20 Then you distinguished and said well
21 there was also an accounting issue based on
22 reported gross sales that whether it was accrual
23 or cash.
24 And then there was a third category
25 that could be errors. Errors that were made that

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1 created the wrong number.
2 Did I understand that properly?
3 A. That's accurately stated.
4 Q. Okay. Now are you able to determine
5 by looking at your material how much of that
6 hundred thousand was a result of the durable
7 medical equipment that looking back should have
8 been subject to tax?
9 A. I don't know if that determination
10 could be made. The sale -- the auditors did not
11 examine it in that fashion. They didn't say oh,
12 this was errors on equipment, to my recollection.
13 And this was errors in reporting. They simply
14 said this is what should have been reported and
15 this is what you reported. You owe us this
16 much.
17 Q. Did you -- I understand. Did you do
18 an independent determination of what fell into
19 those three buckets that composed that hundred
20 thousand, six hundred, sixty-seven dollar figure?
21 A. No, sir.
22 Q. Okay. Do you have a sense of which
23 of those three was the chief reason for the
24 hundred thousand dollars and which two reasons
25 were less important?

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1 A. I understand your question, but no, I
2 don't.
3 Q. Okay. Could be any of the three that
4 was the chief reason?
5 A. Yes, sir.
6 Q. And is there a way -- I'm not asking
7 you if you know it, but is there a way to
8 determine that?
9 A. I don't know, but I think that's an
10 excellent question.
11 Q. How would one go about that process
12 if I would assign that to you and you said I got
13 this, how would you go about doing it?
14 A. The first place I would go back to
15 the DOR's report and try to parse out the
16 individual transactions that they identified.
17 They did do some in-depth, okay, this customer
18 you've claimed to be exempt and they're not
19 exempt. This item you've claimed to be exempt
20 and it's not exempt. Whether that can be
21 compiled and accurately reported I don't know.
22 But I think there's possibly a process.
23 Q. Okay. In your -- when you first
24 undertook your work here, how were you contacted
25 for doing the analysis as an expert in this case

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1 as opposed to the other work you're doing for Mr.
2 Reed or Murrell Smith?
3 A. Well I'll just talk out loud about
4 the process. I think there was probably a phone
5 call from Mr. Smith and the conversation was
6 that, and then a quote, "the Connellys are not
7 going to pay the hundred thousand dollars. We're
8 going to be held liable and we've got to pay it."
9 And he said "it's a lot of money."
10 And I said, "yes, but you need to
11 understand that the sales tax is not all that
12 we're talking about here. The overstatement of
13 the value of the business is the more -- is the
14 real money, not the relatively small amount of
15 sales tax."
16 And so that was the back and forth
17 conversation that led us down this sort of
18 report.
19 Q. Okay. And is the root of the
20 difference in value, the total value of the
21 business, is the root of that the difference in
22 the sales tax issue?
23 A. Yes, sir.
24 Q. Okay. And so if we ---
25 A. You're almost there.

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1 Q. Yes, I think I understand what you're
2 saying that if you look at it sort of in that
3 smaller sense of what the sales tax issue then
4 you look at the value of the business over time
5 because the formula that you would apply would
6 extend the life of the business and you would
7 look to see what impact that would have, it would
8 grow.
9 A. And it grew not just by that simple
10 omission, but because we've projected that sales
11 are going to go up at this substantial rate,
12 we've made the error worse by projecting it
13 forward. There was nothing to support that
14 projection going forward and it was wrong.
15 Q. Okay. So in a way there are the two
16 different roles. Well, there are three roles.
17 The first role was doing the work as their
18 trusted accountant for both Reed and Smith.
19 A. Yes.
20 Q. The second role is when they asked
21 you to step in and help with the due diligence
22 analysis of this deal where you had to go to the
23 bank to get funded, and I think you mentioned
24 this. Well tell us -- help us do the due
25 diligence on the acquisition of numbers and

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1 acquisition of this company Abacare; correct?
2 A. That's accurate.
3 Q. And then the third role is now as
4 expert witness where you would come in and say
5 I've looked at this in a master sense after we
6 determined that this hundred thousand dollars Mr.
7 Smith told you had to be paid. And you've
8 analyzed it and come up with this report that is
9 in the materials that we've been discussing?
10 A. I'm going to add one more part to
11 that.
12 Q. Okay.
13 A. They bought this company and nothing
14 that was predicted to happen took place. The
15 company was a dismal failure. They were losing
16 their money -- losing money hand over fist and
17 they stopped and say why are we losing money?
18 And they come to find out that basically they had
19 paid too much for the -- for the business and
20 then they began to understand why they had paid
21 too much for the business.
22 Q. And in your words, why have they paid
23 too much for the business?
24 A. And in my words?
25 Q. Yes.

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1 A. Well I think that this projection was
2 wrong.
3 Q. From Burkett & Burkett?
4 A. Right. Not because of the work that
5 Mr. Burkett did, but because of the information
6 that was provided to him and that he relied on.
7 Q. Okay. In your -- when they were
8 asking you to look at the deal, 2008; right?
9 A. (Witness nods).
10 Q. You have to say yes or no.
11 A. Oh, I'm sorry, yes.
12 Q. When they were asking you to look at
13 the deal and do a due diligence on your part, did
14 you speak with anybody and the elderly lady, Mrs.
15 Connelly, was she still alive at that time?
16 A. I have no idea, but I didn't talk to
17 anyone from the -- from the seller's side.
18 Q. Okay. So I would take from that that
19 you didn't speak with a woman named Donna Cash?
20 A. I did not.
21 Q. Have you ever spoken with a woman
22 named Donna Cash?
23 A. Not that I'm aware of.
24 Q. Have you even spoken with Mrs.
25 Connelly?

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1 A. Not that I'm aware of.
2 Q. Okay. Did you speak with Mr.
3 DeClemente who's here today?
4 A. I'm sure, but I can't recount
5 conversations or emails or -- or phone calls.
6 There were -- there were conversations.
7 Q. Okay. Generally what was the topic
8 of those conversations with Mr. Clemente?
9 A. Well let me rephrase your question if
10 you don't mind. My primary contact in this was
11 Kim Cuce.
12 Q. Okay.
13 A. And she and Mr. DeClemente were the
14 leading forces in the acquisition of this
15 business.
16 Q. Right. Okay. And do you have emails
17 with Ms. Cuce or was it mostly by telephone?
18 A. I don't know the answer to that.
19 Q. All right. And you said they were
20 the leaders in the acquisition of it. They came
21 to you in their capacity as purchasers?
22 A. Ms. Cuce was a partial owner in what
23 was called Reliable at that time. And my
24 recollection of the transaction was we found this
25 wonderful business in Charleston called Abacare.

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1 We have an inside person, Phillip DeClemente,
2 he's running the business. He knows the
3 business. We think this is a great acquisition.
4 And -- and that basically that's where it started
5 and what transpired.
6 Q. And so if you had questions about the
7 acquisition of Abacare. one of the people that
8 you would call was Kim Cuce?
9 A. Absolutely.
10 Q. And another person, because he was
11 already employed by Abacare, would have been
12 Phillip DeClemente?
13 A. I don't know that I had contact with
14 him before the acquisition. I could have. I
15 don't know.
16 Q. Okay. All right. If you had
17 questions in doing the analysis doing your due
18 diligence, who would you ask about, was it Kim?
19 A. Yes.
20 Q. Okay. Do you know where she is now?
21 A. No.
22 Q. Okay. Did you ever, in your due
23 diligence period, and I will call that the 2008
24 era, did you ever talk with a man named Sam
25 Applegate?

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1 A. Now was Mr. Applegate after the --
2 was he -- you're going to have to tell me who he
3 was again. He's the attorney for ---
4 Q. The Estate of -- the Connelly Estate.
5 A. I -- I don't recall talking to him,
6 no. That would have probably been a Murrell or a
7 Jeff level conversation.
8 Q. Okay. Did you feel like in doing the
9 due diligence on the acquisition that the Burkett
10 report that you had, and what was the other
11 document, you had the tax return?
12 A. Well, primarily the Burkett Report it
13 had virtually everything we would have asked for
14 in due diligence.
15 Q. Exactly.
16 A. It was there.
17 Q. So you had that and you had the 2008
18 tax return?
19 A. That wasn't done yet.
20 Q. It wasn't done yet. So really the
21 document that was in your hand when they asked
22 you to do the due diligence was the complete
23 Burkett Report?
24 A. That's correct.
25 Q. Did you feel like that that gave you

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1 enough to do due diligence on your part?
2 A. I did because I felt like the CPA
3 firms that were associated with this were
4 reputable, they were -- I had no reason to
5 believe that they weren't top notch.
6 Q. Right. Do you remember when the
7 first time it was that you got the minutes from
8 Abacare's meetings? Are they in there? Are
9 they in Mr. Burkett's report?
10 A. No, sir.
11 Q. No. You didn't get those until
12 later?
13 A. That's correct.
14 Q. But we're not sure exactly when you
15 got those?
16 A. I -- I have no -- I don't know.
17 Q. Okay. But that -- those minutes are
18 important to you because those minutes to you are
19 what show that David Selander had information
20 that had not been conveyed to Burkett?
21 A. I couldn't put it better.
22 Q. Isn't that what my understanding of
23 the problem?
24 A. You're saying it perfectly, yes, sir.
25 Q. Okay. When you were asked to do the

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1 due diligence in 2008, did it occur to you or
2 cross your mind or did you have any sort of
3 present idea at that time well maybe I should
4 look elsewhere? Maybe I should call some of
5 these other people? Maybe I should call the
6 Estate of Connelly or speak with DeClemente or
7 speak with I don't know who else you would have
8 contacted? But did that occur to you at the time
9 or did you look at that Burkett Report and say
10 this is complete?
11 A. I looked at this report and felt that
12 it was complete and accurate.
13 Q. Yes. Right. And they've got offices
14 all over the State; right?
15 A. Well they're a highly respected firm.
16 Q. Yes. I want to talk to you now a
17 little bit more specifically about the sales tax
18 issue. In your own words, what was the sales tax
19 issue?
20 A. Which company are we going to talk
21 about?
22 Q. Abacare. The idea that it wasn't
23 sufficiently reported, it didn't come into the
24 Burkett & Burkett Report.
25 A. Okay. They took a very aggressive

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1 position with respect to this court case. They -
2 - they took -- there were -- it seemed that
3 among the statewide organization, there were two
4 groups. One group said we think we're going to
5 be absolved of paying sales tax on this entirely
6 and so we're not going to set up any reserves,
7 we're not going to do anything. We think we're
8 going to win.
9 And then there was another group that
10 said you know we might not win. If this court is
11 going to the Supreme Court we might better be a
12 little more conservative.
13 Q. Right.
14 A. Abacare took the least amount of
15 money out of pocket now. That's one issue. The
16 second issue is per Mr. Selander, they were doing
17 some things on those sales tax returns that
18 benefited the current checkbook. I don't have to
19 pay sales tax this month, nobody's standing there
20 checking behind me and the accounting did not
21 match up with what was being reported on the
22 sales tax return. Mr. Selander told them that
23 loud and clear.
24 So there are two completely separate.
25 One's a technical, will we be taxed on this? Do

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1 we have an obligation to set something aside?
2 And the second is, are we accurately preparing
3 our sales tax returns? Forget about the court
4 case.
5 Q. Got it. Was the issue regarding --
6 and I'm going to break that up because I
7 understand the distinction that you're drawing.
8 On the sales tax issue that relates
9 to whether CPAP, BIPAP fits into the exemption,
10 on that issue was Reliable facing those same
11 issues in 2007-2008?
12 A. I would say yes.
13 Q. Okay. Is that your memory?
14 A. That's my memory, yes, sir.
15 Q. Okay. And how was Reliable handling
16 it? Were they in the more aggressive camp where
17 they were saying we're not even -- we're riding
18 bareback. We're not going to put anything --
19 money in reserve. Or were they more conservative
20 where Reliable said we're going to put money
21 aside in an escrow account?
22 A. I don't know the answer to that. I
23 know they were very, very concerned about that
24 and that they were anticipating that --- I think
25 it was that we hope for the best but we're going

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1 to play for the worst. No, there was no escrow
2 account, but I think that they were paying tax on
3 some of these items.
4 Q. Okay. And you said, I think you said
5 that you didn't do the sales tax returns for
6 them, somebody else had that charged?
7 A. They did that internally.
8 Q. They did that internally. Okay. And
9 who in their company would know for sure how they
10 were handling it?
11 A. I would say either Jeff Reed or
12 Martha Jo.
13 Q. Okay. Does Martha Jo -- she was in
14 here today; wasn't she?
15 A. Yes.
16 Q. Does she have a tax background?
17 A. She's an attorney.
18 Q. She's an attorney.
19 (Off the record briefly.)
20 BY MR. MYRICK:
21 Q. Let's go to the second issue and
22 this one I understand less well. That there was
23 an under reporting in addition to the sales tax
24 issue, that there was some sort of under
25 reporting of monies coming into the business that

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1 David Selander recognized and brought up with
2 them.
3 Can you fill me in on that a little
4 bit? What are they saying what should have been
5 done and what were they doing instead?
6 A. Okay. And I'm going to reference
7 these minutes because he puts it dead on.
8 Q. All right.
9 A. And I'm going to draw a simple little
10 diagram.
11 Q. The minutes are already an exhibit.
12 I think they're Exhibit 1, are they not, or 2,
13 Exhibit 2 just for clarity.
14 A. Okay. Mr. Selander is both, his firm
15 is preparing the sales tax return on behalf of
16 Abacare, that's my understanding. And he is
17 getting information as to what is taxable from
18 the Abacare folks. He's comparing that to what's
19 being reported on the general ledger because he's
20 doing both. And he's reporting back to the
21 Board, hey, these don't jive up.
22 The top number on both should be the
23 same. Now whether you're entitled to take away,
24 take some exemptions before you apply sales tax
25 or not, that's a legal issue. That's your

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1 position on 10-2, that's those sort of issues.
2 But the top numbers should match. There's no
3 excuse for them not to. He's telling them loud
4 and clear they don't and there's not an
5 acceptable excuse that I've heard for why they
6 don't match.
7 Q. And I'm going to read just this one
8 paragraph from the minutes because I think it's
9 so important to have it. And this is Page 3 of
10 the minutes dated July 31st, 2007. These are
11 from David Selander to Dorothy Connelly and
12 Phillip DeClemente. Because Phillip DeClemente
13 was an owner both an owner and a purchaser of
14 Abacare; is that correct?
15 A. That's my understanding.
16 Q. He was an owner before and then after
17 the transaction he was a purchaser and owner.
18 A. He either had an option or he had
19 some type of ownership type position.
20 Q. Okay. So this is a heading on Page 3
21 that says Sales Taxes.
22 "David asked to discuss sales taxes -
23 - asked to discuss sales taxes next. David noted
24 that the taxable sales reported on the June sales
25 tax forms appear significantly understated.

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1 David stresses the importance to report as
2 accurately as possible the taxable state --
3 taxable sales on the monthly forms. Phillip
4 stated that the sales tax forms are completed
5 based on collections rather than billings. David
6 stressed."
7 And this is David Selander
8 throughout; correct?
9 A. Yes, sir.
10 Q. "David stressed that sales tax is
11 computed on sales for the month regardless of
12 actual collections. Phillip explained that all
13 DME companies that he is aware of use collections
14 for the sales tax returns. David advised that
15 Abacare should set aside a reserve in case of an
16 audit. If an audit determines the company should
17 use sales rather than collections, then Abacare
18 could owe a substantial amount of the tax
19 penalties and interest." That completes the
20 reading.
21 But what -- do you understand this
22 sentence, Phillip explained that all DME
23 companies that he's aware of use collections for
24 the sales tax returns.
25 A. Okay. Well there's a couple of

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1 issues that are, and we're going to parse them
2 out one by one.
3 Q. Okay.
4 A. David Selander is the expert. He
5 knows sales tax, he knows sales tax authority.
6 Mr. DeClemente has a vested interest in paying
7 less sales tax, not more or not the correct
8 amount. Mr. Selander's tax advice is absolutely
9 accurate and authoritative. They did change the
10 law during -- at some point that you could use
11 the cash basis of accounting. But for years and
12 years, however long sales tax has been in
13 existence, charge sales were a sale. You owed
14 sales tax on it even if it turned into a bad
15 debt.
16 Q. Or even if there was an exemption
17 that applied?
18 A. Well the exemption would still come
19 off. But, for example, if I sold you a taxable
20 item and you didn't pay me well tough, the state
21 still gets their sales tax. I just lose a little
22 more money.
23 Q. Okay.
24 A. The fact that it's kind of like well,
25 mommy, everybody else is doing it, that doesn't

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1 mean that it's acceptable behavior. And Mr.
2 Selander's being absolutely professional in his
3 advice here.
4 Q. So let me ask you this question.
5 Have you spoken with Mr. Selander at all about
6 this paragraph in the minutes?
7 A. No.
8 Q. Do you know if his take on what he
9 was representing is the same as yours?
10 A. No.
11 Q. Do you know what he thought about Mr.
12 DeClemente's position?
13 A. No.
14 Q. At some point were you called upon to
15 help Reliable or maybe ATMES or maybe Abacare go
16 to the South Carolina Department of Revenue and
17 attempt to reduce the amount the South Carolina
18 Department of Revenue said was owed?
19 A. Yes.
20 Q. Tell me a little bit about that.
21 A. I did a lot. What I -- first of all
22 when they got the notice of examination, I went
23 to the ATMES folks. I didn't have anything to do
24 with Abacare. Abacare said we're going to hire
25 our own experts. And we said fine.

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1 Went to the ATMES people and said
2 "Here's what you're facing." This is a
3 documentation game. And I prepared them, I
4 continued to go back and say you need these
5 proofs, you need this documentation, you need
6 these reports. This is a records and proofs kind
7 of examination.
8 Second, I think there was a letter
9 that we talked about here earlier in the day in
10 which I wrote Roger Watson, who I've had good
11 relationships with years and he's a fair and
12 equitable person with the DOR and said, "Look,
13 they didn't comply with the amnesty period, but
14 how about -- how about giving it to us anyway?"
15 I don't remember what happened, but I
16 think that they did.
17 Q. Yes. Okay. And remind me. because I
18 know, but is it ATMES and underneath that
19 Reliable and Abacare?
20 A. Currently, yes.
21 Q. Okay. All right. So when you say
22 you undertook it on behalf of ATMES, wouldn't
23 that necessarily mean taking it on behalf of
24 Abacare as well?
25 A. Well, here's what happened. When the

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1 examination notice came down, Murrell Smith got
2 it and said well, you know, we didn't -- you
3 know, okay guys, how do you want us to handle
4 this because all of the records through the North
5 Charleston through a certain period are down
6 there. And all the records for this -- for the
7 rest of this operation for this period of time
8 are down here.
9 Well the Department of Revenue said
10 that ain't our problem. We're going to make an
11 assessment as a whole and you two can fight it
12 out. You, meaning the current owners of Abacare,
13 which was ATMES, owe the whole amount. And you
14 two can fight out who owes what portion. And
15 they hired their own folks to represent them on
16 the sales tax for their part and ---
17 Q. Do you know who Abacare hired?
18 A. I've seen it, but I can't recall.
19 Q. Okay. Do you have somewhere a giant
20 SCDOR ATMES controversy file.
21 A. I think that was what was uploaded to
22 the drop box was the -- the whole file.
23 Q. Okay. That's the whole file.?
24 A. Who ---
25 Q. That would probably be my paralegal.

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1 A. Okay.
2 Q. Debbie Fisher?
3 A. I'm not sure. I know Ms. Diaz.
4 Murrell's paralegal got it up on the drop box
5 finally and from there I don't know who got it.
6 Q. Got it. Okay.
7 A. Well, we get -- the entire file is
8 there, everything.
9 Q. Let me ask you some questions just
10 briefly about the Burkett Report. What was the
11 purpose, the original purpose of the Burkett
12 Report?
13 A. It was my understanding they wanted
14 to sell the company. Whether they were going to
15 sell it to Mr. DeClemente or they were going to
16 sell it to a third party, this valuation was done
17 to aid them in a sale.
18 Q. Okay. And I've understood what
19 you've said was these things get away from people
20 and it could end up in the hands of somebody who
21 did rely on it. I understand that part of your
22 testimony.
23 A. It's in my hands.
24 Q. But let me ask you this, couldn't it
25 be true that that Burkett Report was prepared for

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1 Mr. DeClemente and Ms. Connelly for their
2 education in determining a sales price for them
3 to ask as opposed to something a purchaser would
4 use?
5 A. I certainly understand your point and
6 your question. The problem is it may -- whatever
7 its intention whatever was intended it ended up
8 going to NBSC and supporting the loan that ATMES'
9 folks bought the company with. I got it. If it
10 wasn't intended for me to get it, how did I get
11 it?
12 Q. I understand. And it sounded like
13 when you were approached in 2008 to do the due
14 diligence on valuing the business and you looked
15 at the Burkett Report, from where I was sitting
16 over there it sounded like your involvement
17 really had to do with creating a package for the
18 lender because the lender is the one that wants
19 to know if there is financial support for this
20 deal. Am I understanding that properly?
21 A. I think you've got the idea exactly.
22 There are two -- we had -- Kim Cuce, who's a
23 force of nature if you've not met her and she's a
24 very powerful woman. And she had decided that
25 she wanted to do this deal. And she came and she

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1 says well we can get the bank to loan us the
2 money and I said they asked me, "Well can we pay
3 for this?"
4 And Kim kept coming back with
5 financial projections and forecasts and that sort
6 of thing that would support that this -- this was
7 a viable business and that the Charleston market
8 was wide open and they were just going to make
9 tons and tons of money.
10 I didn't -- of course, I didn't care
11 whether they bought it or they didn't buy it.
12 I'm just trying to protect my clients from making
13 an error. The financial statements did support
14 purchasing this business.
15 Q. The financial statement being the
16 Burkett Report?
17 A. The Burkett Report, the subsequent
18 projections that we prepared for the bank. But
19 again, you can prepare -- if you prepare
20 projections on the wrong information you get what
21 you ---
22 Q. So Kim Cuce was coming in with these
23 projections saying this is the deal we, Reliable,
24 want to do because Kim Cuce was a part of
25 Reliable at that time?

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1 A. Yes.
2 Q. So what was her link up with Phillip
3 DeClemente? He wasn't in Reliable at that time;
4 right?
5 A. I don't know.
6 Q. But was she accessing information
7 through Phillip DeClemente? Did she ever tell
8 you how she was getting information about the
9 company?
10 A. I -- I don't have any comment on
11 that.
12 Q. Okay. You don't know? It is under
13 oath if you do know.
14 A. It was my understanding they were
15 having an affair.
16 Q. Okay. So there was a relationship
17 between, and I understand you've said you're not
18 saying that you know that first hand, you're just
19 saying that's what you understand. But that
20 provided a conduit of information between
21 Reliable and Abacare?
22 A. Yes.
23 Q. Okay. It would be so helpful if I
24 could always read my writing. It really would,
25 I'm just saying. Do you know this -- tell me

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1 about when these evaluations like this are
2 created, is there any other purpose for them that
3 you know of, aside from helping determine a
4 price?
5 A. No, sir, it's strictly a price
6 oriented thing. One value -- you do valuations
7 for estate purposes, either estate planning, et
8 cetera for sales. To justify loan applications,
9 although banks have gotten to where they don't,
10 you know, you got the collateral or you don't
11 have anything.
12 Q. Yes.
13 A. But generally it's estate planning
14 and sale.
15 Q. Okay. And who ---
16 A. And divorce.
17 Q. What is the name of the banker that
18 was involved in lending the money on this deal?
19 A. Melissa White with NBSC.
20 Q. And she's here in Sumter?
21 A. Yeah, she's the city exec, I believe.
22 Q. Okay.
23 A. She's first rate by the way.
24 Q. Earlier you mentioned that you had
25 testified as an expert in some other lawsuits.

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1 Have they had to do with valuation of businesses?
2 A. Yes.
3 Q. Okay. Can you remember the names of
4 the suits or the lawyers you were working with?
5 MR. MYRICK: And if
6 it's not -- maybe what we could do because I
7 don't want him to have to waste a bunch of time,
8 James. Can I just get him to give you a list and
9 you just give it to me?
10
MR. SMITH: I have my
11 list and we'll find the best way to get that.
12 THE WITNESS: Yes, sir.
13 Oftentimes my involvement will be we'll do all of
14 this work and then they'll settle the case.
15 BY MR. MYRICK:
16 Q. I know.
17 A. So you say how many valuations did
18 you do in a lawsuit environment? Well, a lot of
19 them -- how many of them ended up in court? Very
20 few.
21 Q. Right. But my understanding was that
22 you've done about six valuations; was that wrong?
23 A. I was trying to estimate the number
24 that it actually ended up in some sort of
25 hearing, whether it was a mediation, an actual

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1 courtroom testimony, et cetera. I actually can
2 provide that information fairly accurately.
3 Q. Okay. Thank you very much. If you
4 can provide that information to James, he'll give
5 it to us. Thank you so much.
6 (A brief recess was taken.)
7 BY MR. MYRICK:
8 Q. I'm interested in asking you as
9 directly as I can what it was that Ms. Connelly
10 or Dorothy Connelly did that was in the form of
11 any kind of non-disclosure to I guess Burkett &
12 Burkett?
13 A. I understand your question and I can
14 see where an older client who is used to relying
15 on professional people and them living up to
16 their -- to the standards of their profession,
17 would not question signing off on a
18 representation which she did when she got this
19 report that -- that they disclosed everything
20 that needs to be disclosed. Let's see if I can
21 find that page.
22 One of the things when you do a
23 valuation report is that you will generally, I'm
24 speaking from for Mr. Burkett, but I would sit
25 with the people who are ultimately responsible

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1 before I would release the report and go over it
2 and make sure now is there anything that I need
3 to be that I don't know that you should tell me.
4 And let's see if I can find it quicker here.
5 Well, let's go here. Mr. Burkett's
6 reliance on the information submitted and
7 discussions with Mr. DeClemente and David
8 Selander are referenced throughout the opinion
9 letter and it's on and on and on. In the --
10 those are throughout Mr. Burkett's report and
11 they're cited.
12 In the sales document there's a
13 seller's representation. And I take that very
14 seriously as a seller. And I would probably go
15 back to my professional advisors and ask them am
16 I covered if I sign this? So am I answering your
17 question?
18 Q. I think so. That Ms. Connelly even
19 if she didn't have the ability to understand
20 complicated accounting rules would have -- should
21 have asked her professionals is she covered on
22 this.
23 A. That's right. Have we been
24 conservative in this? Have we -- are we
25 realistic in our valuations, in our approach, in

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1 our just -- just being responsible.
2 Q. Okay. I think I understand that
3 response. Let me just ask this for
4 clarification. Are there any -- there's a
5 signature on the seller's representation that you
6 just commented on. Were there any
7 representations aside from that very specifically
8 that you know of that she made that were non-
9 disclosures or untruths or misrepresentations?
10 A. I'm not sure I'm qualified to say
11 that.
12 Q. Just what you do know.
13 A. No, I do not know.
14 Q. Okay. What about Donna Cash, would
15 the same statement apply to Donna Cash, who was
16 her daughter?
17 A. My biggest problem is that Selander
18 brought these folks' attention big time to this
19 sales tax issue and I don't know what, if
20 anything, was done about it. Now that if they
21 did or did not do something about it, they've got
22 some -- in my book, some exposure there, so ---
23 BY MR. MYRICK:
24 Q. I'm not sure when James Connelly
25 died, but I guess your answer would apply to him,

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too, if he were living?
A. Whoever is the owner of the company. I think Mr. Selander considered it so important, he wrote these minutes and he wrote a big long section, as far as I'm concerned, that was CYA.
Q. And back to my question about this one specific line where Phillip explained that all DME companies and he's aware of these collections for the sales tax returns. You say that later that might have been the case, but ---
A. There was a change in sales tax law at some point, but at the time that he said that (a) it was not tax authority. There was no authority to support that. And (b) Mr. Selander's right. I mean that's just -- just because they're doing it doesn't make it right.
Q. Were you ever, during the period of investigating this deal on behalf of Murrell Smith, did you, on Murrell Smith's behalf or on Mr. Reed's behalf or on both or on Reliable's behalf?
A. All of them.
Q. All of those three. Did you ever ask people at Abacare for any type of documentation that was not provided to you?

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A. I did not ask. So the answer to your question is no, I did not ask and it was -- there was nothing that wasn't provided.
Q. Okay. And I don't know what you asked Kim Cuce, but she wasn't in Abacare at the time and I don't know if you had any conversation with Phillip DeClemente where you requested anything.
A. I don't know.
Q. Okay. But it stands out in your mind that there's nothing that you requested of DeClemente or else wise that was not provided to you?
A. That's true.
Q. Okay. Have you done other business valuations for Reliable, Reed or Smith for acquisition of other companies other than Abacare?
A. I've done -- yes. Not acquisitions, but some sales.
Q. Okay. Where they were on the selling side of the equation?
A. Yes.
Q. All right. And what would the name of those companies be, if you recall them?

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A. Sure, Biological Solutions is a huge one. We've had some conversations about the sales of -- sales of ATMES and another one is called -- I don't know whether the current name of it is OPI, LLC. I think that's the name of it. And that was litigation oriented.
Q. And did you actually write valuations of those three businesses, Biologic Solutions, ATMES and OPI?
A. I believe so, yes, sir. I don't have any problem providing a list of valuations done in the last period of time.
Q. That would be great. Those are the ones I'm particularly interested in those ones that you did for them. And we can just add that to the list. And I hope somebody has a tally of the list going on. Do you? I think there are four things on that so far. You do? Okay.
This might put too fine a point on it, but sometimes I really need that. I need to understand, because you weren't handling the sales tax piece for Reliable you were really never called upon to say to them you need to escrow money or you need to just run the risk of whether these -- they've been called modern day

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prosthetics fall under the exemption or not; is that correct?
MR. SMITH: Object to the form. Object to the form. Go ahead and answer.
THE WITNESS: There were conversations. I cannot recall any specific positions. Martha Jo is extremely conservative. I would suggest that they came down on the side of let's be conservative.
BY MR. MYRICK:
Q. And create an escrow account or ---
A. Pay it.
Q. Pay it up front and hope that it's refunded?
A. I -- I don't know the answer to that.
Q. But Reliable had to take some position on it from 2006 to 2009; right?
A. That's correct.
Q. Okay. And you think they paid it?
A. I don't know that.
Q. Okay. I guess we'll find out.
A. You understand the issue here is that the -- the seller was not collecting sales tax

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1 from the purchaser. The purchaser was exempt.
2 South Carolina was extracting sales tax from the
3 purchaser that -- from the seller that they had
4 never collected. Does that make sense?
5 Q. Yes.
6 A. Normally sales tax -- you buy
7 something for a dollar and they charge you eight
8 cents sales tax and well you send it in. In this
9 case they came along and retroactively said this
10 is taxable and the people said, but we didn't
11 collect the sales tax. And they said we don't
12 care, we need the money. And that was the
13 political solution. So that's why this all hurt
14 so bad, it went straight from the top to bottom.
15 Q. Because the money was never
16 collected?
17 A. That's correct.
18 Q. I see. That does teach me. Do you
19 know this, do you know if Reliable's method for
20 handling sales tax changed in any way after the
21 Supreme Court decision in Home Medical Services,
22 Inc. versus SCDOR?
23 A. My -- I would suspect, knowing Martha
24 Jo that it's being done absolutely according to
25 the law.

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1 Q. Yes. But my question is a little
2 different. Do you know if it changed? And I
3 know you said you don't know how they were
4 behaving in 2008. Now I'm just asking separately
5 do you know if their behavior on the issue
6 changed?
7 A. I do not know.
8 Q. Okay. Was it Murrell -- I guess it
9 was Murrell and not Reed that approached you to
10 do the due diligence on the purchase of Abacare?
11 Is that what you told me that it was Murrell and
12 not Reed?
13 A. I will tell you the way the deal came
14 about that this was Kim's -- Kim and Phillip's or
15 Kim's idea and that basically she talked Murrell
16 and Jeff into doing it.
17 Q. But -- and then who said to you do
18 the due diligence? Who said that?
19 A. That would probably have been Kim.
20 Q. That would have been Kim. And the
21 bank didn't -- they didn't ask you to do it, they
22 didn't pay you to do it, it was done at the
23 behest of Kim probably for Reliable?
24 A. Yes.
25 Q. Okay.

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1 A. Now Murrell and Jeff were absolutely
2 involved in this. I mean there wasn't a -- she
3 was running a solo act or anything. They knew,
4 but she was the lead.
5 Q. All right. Was she under any sort of
6 time constraint?
7 A. I don't know.
8 Q. Were you?
9 A. Everybody had their hair on fire.
10 They wanted it done right away.
11 Q. Yes. And do you remember a little
12 bit more about that? Was it a short period of
13 time in which it had to be done or they just
14 wanted it ---
15 A. I don't know whether there was some
16 time deadline or whether it was just an urgency
17 created by desire.
18 Q. And what did that do in terms of your
19 role? Did that put pressure on you to get it
20 done fast?
21 A. You don't press me -- you don't push
22 me to do things faster than I'm willing to do
23 them. I'm going to do it at -- you know, if you
24 want me to do it, I'm going to do it and I'm
25 going to do it my way. So if I'm answering your

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1 question is I don't -- if you wanted it done
2 before now you should have started sooner.
3 Q. Okay. How did you acquire the
4 Burkett Report in the first place?
5 A. I don't know.
6 Q. Who put it in your hands?
7 A. I do not know.
8 Q. Do you ever remember making calls to
9 get it or did Kim present it to you maybe?
10 A. I do not know.
11 Q. Okay. Do you believe -- this is
12 tough, but you're a straight shooter. Do you
13 believe that it is sufficient due diligence to
14 look just at this valuation report by Burkett in
15 order to give them an opinion? Do you think
16 that's sufficient?
17 A. I'm -- I'm pulling from your question
18 is it my -- my -- am I responsible for this screw
19 up because I didn't do -- because I didn't do
20 enough due diligence? And I'm sorry but I'm
21 going to reject that.
22 Q. Fine. So you think that it is enough
23 to rely on the Burkett Report?
24 A. Especially based on the foundation of
25 Hood & Selander and Burkett I had no reason.

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1 They're top notch firms, no reason to doubt them.
2 Q. Yes. Got it. Did you travel
3 anywhere in doing the due diligence? Did you go
4 to Charleston?
5 A. No, sir.
6 Q. Did you look at the Abacare building?
7 A. No, sir.
8 Q. Did you look at any back-up financial
9 documentation at all from Abacare?
10 A. No, sir.
11 Q. Did anybody on the purchaser's side
12 of the equation and not you necessarily, but did
13 anybody go back and harvest the minutes from
14 Abacare to figure out what the issues the
15 business was facing during the couple of years
16 ahead of acquisition?
17 A. I don't know the answer to that.
18 Q. Okay. One thing I just want to seek
19 some clarity on that -- you've asserted
20 challenges against Hood & Selander but none as
21 against Burkett, Burkett & Burkett. What is the
22 distinction in your mind?
23 A. Okay. And -- and I covered that in
24 this report.
25 Q. Okay. That's the one I got today?

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1 A. Yes, sir.
2 Q. Okay.
3 A. And essentially just to -- just to --
4 I've read Mr. Burkett's report. He followed
5 industry standards. In my opinion he did what
6 was required based on the information that he was
7 provided. I don't have a quarrel with his report
8 based on the information that he was provided.
9 But if they had disclosed the sales tax issue, it
10 could have been dealt with simply and easily. He
11 -- he's quite competent and capable of making an
12 adjustment to take that uncertainty into account
13 in doing his calculation. But he was not made
14 aware of it. That's all they had to do.
15 It's not unusual at all when you do
16 an evaluation for them to tell you oh, we got
17 some things over here on the, you know, on the
18 side. There are some issues that are unresolved
19 and you're going to find. And you put in a
20 valuation allowance or a provision or you make
21 some adjustment for that because there are things
22 that we just don't know what the outcome of it
23 will be.
24 Q. A lot of these questions have been
25 asked so I'm not going to ask them again. It

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1 just takes me awhile to go through and make sure
2 I'm being complete.
3
MR. MYRICK: What's the
4 next number.
5
COURT REPORTER: Seven.
6 ++++++++++++++++
7 (LETTER FROM BRADHAM
8 TO WATSON DATED
9 12-9-09 WAS MARKED FOR
10 IDENTIFICATION AS
11 DEPOSITION EXHIBIT
12 NUMBER 7)
13 ++++++++++++++++
14 BY MR. MYRICK:
15 Q. I made a request of Murrell Smith for
16 all documents that he has that related to
17 Reliable. And he said he didn't have documents
18 and he pointed the request to you and you
19 complied for me, Mr. Bradham, and sent me a
20 family of documents. This is in that subset.
21 This is a letter dated Wednesday, December 9th,
22 2009. It's to Roger Watson. Who is Roger
23 Watson?
24 A. He's -- I don't know if he still is,
25 but he was the head of the Florence office for

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1 sales tax. Super guy.
2 Q. Okay. And what is this letter about?
3 A. What we're doing here is -- there was
4 a amnesty period for penalties. I believe it
5 was.
6 Q. That you referred to earlier?
7 A. That's right.
8 Q. Right.
9 A. And I was making the case to Mr.
10 Watson that for a variety of good and valid
11 reasons that the company did not comply with the
12 amnesty and here's why and would they consider
13 granting amnesty in arrears if you will.
14 Q. Okay. And of this letter I'm just
15 going to ask you about a few sentences. I'll
16 read it and then I'll just ask you for a little
17 insight.
18 Second paragraph, "Reliable Medical
19 is a durable medical equipment supplier and was
20 affected by the confusion in application of sales
21 tax to their products."
22 What do you mean by confusion in
23 application of sales tax? What did you mean when
24 you wrote the letter?
25 A. When the -- the two cases came along

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1 there was a decision and if I cite this
2 incorrectly someone please correct me, that all
3 this stuff was not taxable; all right. And the
4 case was immediately appealed to the Supreme
5 Court and the Supreme Court sometime later
6 decided that it was taxable.
7 And so that as we've talked about
8 there was a period of time in which DME Suppliers
9 were kind of up in the air. All well, great we
10 don't have to pay tax on this anymore and another
11 group said it's not yet decided. So there was a
12 period of time in which there was no this is the
13 law. That was the confusion.
14 Q. Okay. And when were you first aware
15 of the confusion?
16 A. I don't know the answer to that.
17 Q. Okay. 2007-2008 in your role for
18 Reliable or you just don't know?
19 A. I just -- I flat don't know.
20 Q. Okay. Because I know you didn't do
21 their sales tax you told me that.
22 A. That's right.
23 Q. The second sentence I'll ask you
24 about; first sentence of the next paragraph, "The
25 taxation of DME Products has been subject to

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1 strong controversy over the past few years with
2 taxpayers taking positions that nothing is
3 taxable to fully taxable and no guidance has been
4 available until he South Carolina Supreme Court
5 reversed an earlier decision of an administrative
6 law judge in 266-38 Home Medical Systems versus
7 SCDOR filed April 20th, 2009."
8 When you wrote the letter, this
9 letter in December of 2009, had you recognized
10 that there had been a controversy about this
11 thing over the past few years?
12 A. I was aware that there was -- there
13 was -- of the status of the case. That they had
14 a case, that they won and they were all
15 celebrating. And then the second that it was
16 appealed the celebration quieted down.
17 Q. Right.
18 A. So ---
19 Q. Do you remember the celebration when
20 they won in 2007?
21 A. I do.
22 Q. Okay.
23 A. My position was you ain't won
24 anything yet. This ain't over.
25 Q. Okay.

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1 A. The purpose of this letter was to
2 build a support for the Reliable ATMES group
3 should have done something within a timeframe
4 that they did not. They didn't get an email that
5 -- I mean in other words there was an email that
6 went out that notified them of this and I was
7 making the point that I didn't think that was
8 proper notification, et cetera, et cetera and
9 that he had the authority to grant some relief.
10 Q. It's a good letter. If I had the
11 authority I would have responded favorably to
12 that letter.
13 A. Thank you.
14 ++++++++++++++++
15 (ENGAGEMENT LETTER
16 FROM BRADHAM DATED
17 10-19-09 WAS
18 MARKED FOR
19 IDENTIFICATION AS
20 DEPOSITION EXHIBIT
21 NUMBER 8)
22 ++++++++++++++++
23 BY MR. MYRICK:
24 Q. All right. Let's go now to Exhibit
25 8. Similar thing, it's a letter from you ---

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1 A. These letters will trip you up every
2 time.
3 Q. Then this one is a little different.
4 This is October -- the first letter is December
5 9th, 2009, so they're not in chronological order.
6 This one is called engagement letter and it's
7 dated Monday, October 19, 2009, to Martha Jo.
8 A. Yes.
9 Q. It's very -- the woman who had joined
10 us here today earlier, sister of Murrell Smith
11 employed at Reliable. What is this letter?
12 A. When ATMES group received the
13 notification of the sales tax they were up in
14 arms, what do we do. And I generally don't work
15 by the hour. And so what I said is I will
16 undertake all these tasks with the understanding
17 that my compensation, if any, will be based on
18 the reduction in sales tax that I might be able
19 to achieve. By the way, I lost my shirt on this
20 deal.
21 Q. Okay. So you were engaged. Martha
22 Jo Johnson signed and accepted your offer where
23 you said look I'll go and see if I can get you
24 some of this sales tax back from SCDOR or you're
25 not obligated to pay it? And I'll take it --

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1 I'll do it on a contingency. You don't have to
2 pay me anything unless I succeed for you and then
3 it will be eighteen percent of the tax amount
4 reduced; is that accurate?
5 A. That's correct. Yes, sir.
6 Q. Now what I didn't find anywhere is
7 your presentation to the South Carolina
8 Department of Revenue about why these monies
9 should not be assessed against your client.
10 A. Well what we did, the actual services
11 rendered were (1) preparing them for this
12 examination. They were totally without a clue.
13 Q. Preparing whom?
14 A. The ATMES folks. The internal
15 accounting staff, they had no clue what they
16 needed to get, how they presented it. We went
17 over iteration after iteration of no, no you're -
18 - you're dealing with someone that doesn't want
19 to understand this has got to be clean and simple
20 and we just went through and again they were
21 going through the information and I was helping
22 them put it in a form and format that it could be
23 examined, that we might have favorable results
24 and then arguing if there were cases, you know,
25 points that we might have some position to argue

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1 with the agents that were involved. And then
2 lastly trying to reduce any penalties that might
3 be involved.
4 Q. Okay. Did you ever take the position
5 with SCDOR, hey, these are -- this is an
6 exception for prosthetic devices. Prosthetic
7 devices have evolved. A CPAP or a BIPAP is
8 something, it's a new way of -- it's a new
9 machine to help replace the function of the lung.
10 These other things like the nebulizer are in the
11 same area. And so this assessment should fall in
12 the exemption. Did you ever take that position
13 with the Department of Revenue?
14 A. It was my understanding at this time
15 that this audit was done that issue had been
16 decided by the Supreme Court. So I'm not going
17 to go and say the Supreme Court is wrong, Mr.
18 Auditor. You know, they decided -- they came
19 down and made it an error. I don't -- don't
20 believe that's a good idea.
21 Q. And I agree with you. So I guess my
22 question is, what possible service could you
23 provide to them that might even result in a
24 victory to them? If the Supreme Court has said
25 all these monies are due, what did you do to

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1 attempt to earn this contingency fee?
2 A. Ninety-five percent of any
3 examination is preparation. It's not point of
4 law. It's not you're right and I'm wrong and
5 it's according to code section so and so. It's
6 getting -- you've got hundreds of -- perhaps
7 hundreds of thousands of documents, but certainly
8 thousands of documents that are in tumultuous who
9 knows where shape. The auditors, if you hand
10 them that, they're going to write you a ticket
11 and walk out the door.
12 So my job first was to prepare the
13 client to get them ready to be examined. And the
14 auditors in this were very appreciative of the
15 work that was done so they could do their job and
16 get on down life's road. And I think that's
17 reflected in the results that they got. They --
18 they didn't give them a thing that they weren't
19 entitled to, but they didn't go out of their way
20 to hammer this company which they could of just
21 because of the lack of preparation.
22 Q. So what I'm hearing you say is you
23 helped them organize the documents so that the
24 Department of Revenue wouldn't have to do it so
25 to make the process smoother? You really didn't

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1 have an argument to make on the merits because
2 the Supreme Court had made that decision.
3 A. There's more to it than just that one
4 issue. There's here's our general ledger that
5 shows this much in gross income, here's our sales
6 tax. Do we have the support for the exemptions
7 we claimed in the form and format that the
8 Department of Revenue is looking for? Can we
9 reconcile our income to our sales tax returns?
10 Prove it.
11 Sales -- the Department of Revenue
12 wanted here's your bank deposits, here's what you
13 reported on the tax return, why are there
14 differences? Okay. Just exactly what we were
15 talking about with the Abacare case. So we
16 needed to be able to explain each and every
17 difference between what went in the bank and what
18 was reported on the sales tax return. We claimed
19 we didn't -- that this particular customer even I
20 think Tuomey Hospital, some of their operations,
21 some were exempt and some were not. There's so
22 many inconsistencies in this tax -- tax law.
23 It's -- it's not a simple law.
24 Q. Did the period for the assessment
25 that you were arguing against, this $187,838 did

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1 it cover a period while Abacare was not owned by
2 the Reliable Group out of Sumter?
3 A. I think that this is just related to
4 Reliable and not -- not the Abacare overflow
5 issue, but I'm not certain of that. I think this
6 is just the Reliable side of the house.
7 Q. And did Reliable -- was Reliable
8 based on your experience there, was Reliable
9 facing the same challenge that they had to pay
10 back sales tax because they thought an exemption
11 was going to apply and the Supreme Court says no
12 an exemption doesn't apply?
13 A. That's true.
14 Q. So from this can we deduce that Mary
15 Jo did not deduct those monies in 2008-2007?
16 A. I'm not sure I understand the
17 question.
18 Q. Well we talked about the fact that
19 Reliable was facing the same issue.
20 A. I'm going to generally agree with
21 that statement, but there was a lot more to it
22 than just that singular you didn't pay sales tax
23 on these items. There were customers are taxable
24 or non-taxable, you know. Use tax on software,
25 there were all kinds of issues that -- so you

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1 can't just narrow it down and say it's the
2 Supreme Court. It's the application of the
3 Supreme Court decision. There was more to it.
4 Q. Do you believe in your analysis that
5 Abacare might have similar issues with whether
6 customers are exempt or whether software usages
7 might have been categorized in the way you just
8 described them when it presented its valuation to
9 Reliable? When it had the valuation done by
10 Burkett, Burkett & Burkett, that's what I should
11 say.
12 A. Would they have had similar issues?
13 Q. Yes.
14 A. More than likely, yes, sir.
15 Q. Okay. We talked about the fact that
16 in 2007 you were aware of the celebration about
17 hey, they finally recognized that DME is not --
18 fits under the exemption for let's just say for
19 example, respiratory devices. There was a
20 celebration in 2007; you remember that?
21 In 2008, you were called upon to help
22 them evaluate another business that they're going
23 to draw into their family of businesses that is
24 also durable medical equipment. Did you bring to
25 their attention having remembered that

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1 celebration when you told them look, this isn't
2 over. When you were looking at valuing bringing
3 in Abacare, did you talk with Murrell Smith and
4 say there maybe risk here because remember you've
5 got that administrative law court decision, but
6 you don't have a Supreme Court decision yet.
7 A. I would say no, sir. That was --
8 that was not the only risk and I would definitely
9 tell you no, I didn't say hey, you know you might
10 have a sales tax issue here. I was worried about
11 you're paying eight hundred thousand dollars for
12 a company that's never shown a profit, or shown
13 minimal profit.
14 Q. So you were worried about kind of
15 bigger things?
16 A. The bigger issues.
17 Q. The bigger issues. Okay, things like
18 that because it hadn't shown a profit?
19 A. Exactly.
20 Q. Is what you said. Is that true that
21 Abacare had not shown a profit by the time it
22 came in?
23 A. Well, let's give me just a minute. I
24 apologize this writing is in about two font. But
25 if you look at the bottom lines you can see how

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1 erratic the profits were.
2 Q. Page 19 of 55 of the Burkett Report.
3 And these are -- the title is -- the page title
4 is Abacare Home Medical, Inc. historical income
5 statements adjusted for the years ending and then
6 it goes 2004, 2005, 2006, 2007, 2008.
7 And the columns at the bottom, 2004
8 negative eighteen thousand, I'm rounding. Year
9 2005, negative fifty-five thousand, year 2006,
10 ninety-six thousand. That would be rounded to
11 ninety-seven thousand. 2007, negative eleven
12 thousand. And annualized for 2008 a positive
13 one, twelve, five-thirty.
14 A. Now the annualized is the point I've
15 been trying to make. They took four months and
16 disregarded all the losses from all the prior
17 years and said oh, well it'll be different in the
18 future based on these four months.
19 And then the way they valued this
20 company is they took that annualized net income
21 and they exploded it forward and said this
22 company in the year -- let's see -- if I'm
23 belaboring this y'all tell me to be quiet. But
24 they exploded it forward to projected income of
25 like two and three hundred thousand dollars. And

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1 there's just simply nothing to support that
2 forecast. I mean there needed to be some more
3 risk considered here.
4 This is the projected income
5 statement. And as you can see ---
6 Q. This is Page 54 of 55.
7 A. They're taking from a hundred and
8 fourteen, which is where we left off their tax
9 affecting it to they're projecting them at five
10 hundred and ten thousand. And that's why I say
11 this error of this four-month period of time, if
12 there was an error there has gone from showing a
13 profit of a hundred and fourteen to projecting
14 that number out there and that just ---
15 Q. That five-eighteen?
16 A. It blows the balance -- what the
17 balance of this -- what this company is worth it
18 just makes it much more.
19 Q. Got it. I've asked this once, but
20 just for clarity in my mind specific acts that
21 you know of where incomplete information was
22 conveyed by my client, that is Dorothy Connelly
23 or the Estate of Dorothy Connelly or even Donna
24 Cash her daughter, the signature on the seller's
25 representation is what you have pointed to and I

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1 heard that loud and clear. Are there any other
2 specific instances that you have information
3 about that you want to recount?
4 A. No, sir.
5 Q. Okay. That's the one that you know
6 of?
7 A. I mean when I know when I present a
8 tax return to a taxpayer, that taxpayer is
9 looking me in the eye and going is this right?
10 And if I say it's right they're going to sign it.
11 Very few taxpayers are going challenge what's
12 been done. So ---
13 Q. Thank you. Do you remember making
14 any recommendations to Murrell Smith or Mr. Reed
15 about the purchase of the business? Did you make
16 any recommendation to them?
17 A. I was not in favor of it.
18 Q. What did you say to them?
19 A. I said it's too big a risk.
20 Q. And what did you base that on?
21 A. I just felt that it was outside of
22 their market, that it all ---
23 Q. Geographically?
24 A. Geographically. That it was, you
25 know, it was bigger than they could digest. But

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1 that -- that was pretty much it.
2 Q. Yes. When you say bigger than they
3 could digest, tell me what that means?
4 A. Well, an eight hundred thousand
5 dollar purchase on a company with the net worth
6 that this one had was a huge increase in
7 business. I think we saw from the projections we
8 went from two million approximately to four or
9 five million dollars and all the associated
10 overhead and everything else. So if the business
11 had produced the profits that were projected, we
12 wouldn't be here today, but it didn't. By the
13 way, Reliable is back to being a profitable
14 company again.
15 Q. I think that's all the questions I
16 have for you. I really appreciate your time.
17 A. Thank you, sir.
18 ++++++++++++++++++++++++
19 EXAMINATION
20 BY MR. HOWSER:
21 Q. I've got a few follow ups. Let's
22 look at the 2008 tax return. And I realize that
23 this was prepared in March of 2009. With regard
24 to the gross sales of Abacare, $1,921,885. Do you
25 have any information that that figure is

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1 incorrect?
2 A. Do I have a proof that that's the
3 wrong number?
4 Q. Do you have any information that that
5 is incorrect?
6 A. My answer to that would be that the
7 Department of Revenue said that that was the
8 wrong number.
9 Q. What does the Department of Revenue
10 say the amount should be?
11 A. They said that there was -- I don't
12 that.
13 Q. Looking at Page 19 of the Burkett
14 Report ---
15 A. All right, sir.
16 Q. Do you see the sales for 2004, 2005,
17 2006, 2007? Do you have any information that
18 those figures are incorrect?
19 A. All I know is that the South Carolina
20 Department of Revenue said that sales tax were
21 understated which means that gross income was
22 overstated.
23 Q. Well I'm asking about sales, not
24 gross income.
25 A. Well it would be overstated because

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1 sales tax are part of sales and that would mean
2 that the sales should be a lower number and the -
3 - you're collecting sales tax whether it's
4 collected or deemed collected. That would mean
5 your sales are higher -- what you've put on your
6 tax return is higher than what it should have
7 been because you were under reporting your sales
8 tax liability.
9 Q. And what was the sales tax liability
10 at this point in time?
11 A. I don't know. I mean I really don't
12 know what percent. It's changed a lot over the
13 years.
14 Q. Well, let's assume that the
15 liability, the sales tax of Abacare was
16 approximately one hundred thousand dollars,
17 including interest; okay?
18 A. Yes, sir.
19 Q. Now let's say that on January 1,
20 2009, Abacare or the stockholders of Abacare
21 before the sale said we'll pay the one hundred
22 thousand dollars. Wouldn't that make the Burkett
23 Report and their valuation of nine hundred and
24 seventy-five thousand dollars correct?
25 A. No, sir.

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1 Q. Why not?
2 A. Because what Burkett used to project
3 and create the value was overstated income. They
4 -- the -- the income that's on this tax return is
5 overstated because sales tax is incorrectly
6 reported.
7 Q. But what -- as I understand it what
8 you're telling me is that Burkett used a four-
9 month period for projecting future income;
10 correct?
11 A. Yes, sir.
12 Q. What was the four-month period?
13 A. January through April.
14 Q. Of what year?
15 A. 2008.
16 Q. All right. And how much was the
17 sales tax understated for that period of time?
18 A. I don't know.
19 Q. Well if you don't know how much it
20 was understated, what is the basis for your
21 saying that the Burkett valuation of nine,
22 seventy-five wasn't correct?
23 A. Your question was how much was the
24 sales tax understated for that four-month period.
25 Q. Right.

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1 A. The report from the South Carolina
2 Department of Revenue does not parse out the four
3 month period of time. It gives it to you over a
4 much more extended period of time. I presume
5 that one could calculate that four month period
6 of time and I think that would be a useful
7 process to arrive at well how far overstated or
8 understated was this valuation.
9 Q. Okay. Have you made any attempt to
10 do that?
11 A. No, sir.
12 Q. How would you go about doing that?
13 A. I'm not sure. I'd go back to the DOR
14 reports and see if you could -- whether they've
15 done that by the month. And if they didn't, one
16 could come up with a reasonable method. In other
17 words, okay, DOR audited X number of month and
18 came up with -- and I think I actually did that.
19 They came up with four thousand dollars a month.
20 That means -- that's what I did. I'm smarter
21 than I look.
22 In my calculations, I said let's
23 assume that the sales tax -- I'm on Page -- the
24 stupid page is not numbered, but at Page 3 of
25 this report and down towards the bottom sales tax

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1 omission.
2 Q. Let me make sure I've got that.
3 A. Oh, I do have it. All right. If you
4 follow that paragraph down you're say the
5 accounting impact of this determination is that
6 sales are overstated from January 1, 2007 through
7 10/31/2008 by eighty-seven thousand, five,
8 twenty-five or roughly four thousand dollars a
9 month.
10 Q. I'm sorry, maybe I don't have it.
11 What's the date of that?
12 A. This is that report.
13 Q. Page 3, you think?
14 A. Impacted sales --- It starts on the
15 bottom of Page 3.
16 Q. Okay.
17 A. And then what I did is I said well
18 for the period of time from January 1st, 2007
19 through 10/31 the sales tax were overstated by
20 eighty-seven thousand -- sales are overstated by
21 eighty-seven thousand or thirty-nine. Give me
22 four thousand dollars a month if you will.
23 Q. Okay.
24 A. Then if you follow down to my --
25 under the next section where it says Burkett ---

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1 and correct, what I've attempted to do was to
2 take that four thousand dollars a month out of
3 the Burkett calculations.
4 Q. Okay.
5 A. And if you follow those through I
6 believe that will -- that will make all the way
7 through using his same capitalization rate,
8 marketability discounts and others.
9 Q. Were there any other liabilities
10 other than the potential for this sales tax
11 liability?
12 A. Yes, sir. They had notes payable. I
13 think they had leases payable.
14 Q. Were there any other liabilities that
15 were misstated?
16 A. Not that have come to our attention.
17 Q. That's what I ---
18 A. Sorry.
19 Q. Okay. Thank you.
20 MR. MARSHALL: Can we take a
21 break before you rest your examination?
22 MR. HOWSER: I was through,
23 but anyway.
24 MR. MARSHALL: Can we take a
25 break and maybe you leave your option open.

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1 BY MR. HOWSER:
2 Q. Let me refer you to Exhibit 7. If
3 we look at the third paragraph down, and this is
4 the paragraph that discusses the Home Medical
5 Systems case. In the last sentence of your
6 letter it says this court case established the
7 taxability and a the number of DME products that
8 have long been considered non-taxable. Did I
9 read that correctly?
10 A. The reversal did.
11 Q. Yes.
12 A. Right.
13 Q. Okay. And then you say in the next
14 paragraph as a result of "the victory in the
15 Supreme Court case, SCDOR began a process to
16 offer taxpayers an opportunity to voluntary
17 report and correct any errors'; correct?
18 A. Yes, sir.
19 Q. The fourth paragraph says, "As a
20 result of the victory in the Supreme Court, SCDOR
21 began a process to offer taxpayers an opportunity
22 to voluntarily report and correct any errors as a
23 result of the 'changed'" -- the quote being my
24 quote, "taxation due to the case."
25 Do you agree with that?

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1 A. That is what I wrote, yes, sir.
2 Q. All right. Do you agree that that's
3 a correct statement? Not just of what you wrote,
4 but is it a correct statement as you understand
5 the situation to exist on December the 9th, 2009?
6 A. Well, let me restate it in case what
7 I've said here is not accurate. I felt that the
8 South Carolina Department of Revenue having won
9 the case was trying to be magnanimous and offer
10 these taxpayers some means to come clean, get the
11 taxes paid and offer -- and they offered a
12 clemency period via email. That's -- that was
13 what that paragraph was meant to say regardless
14 of how it's being read today.
15 Q. And that was because of a changed
16 taxation due to the case?
17 A. The DOR wanted to clean up all this
18 process. The taxation changed, yes.
19 Q. And insofar as Reliable was concerned
20 you don't know, as I understand it, how they were
21 handling the sales tax that might be due and
22 payable because you just simply got from them
23 figures?
24
MR. SMITH: Object to
25 the form, but go ahead and answer.

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1 THE WITNESS: I agree
2 with that, yes.
3 BY MR. HOWSER:
4 Q. And with regard to the valuation
5 report of Burkett & Burkett, do all of your pages
6 of the report, which I believe are fifty-five
7 pages?
8 A. This isn't my report. This is
9 Mr. ---
10 Q. The report you have in your
11 possession.
12 A. It -- it says fifty-five pages and
13 I've got fifty-five.
14 Q. And all of the pages have draft ---
15 A. Stamped all over it, yes, sir.
16 Q. Did you ever get a final report from
17 Burkett, Burkett & Burkett?
18 A. I did not, no, sir.
19 Q. Did you ever ask anybody why you only
20 had a draft report and not a final report from
21 Burkett, Burkett & Burkett?
22 A. I did not ask.
23 Q. Were you curious about that?
24 A. Yes.
25 Q. All right. And why were you curious

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1 about it?
2 A. There are some CPA firms that are
3 under the belief that if they issue a draft
4 report they don't have responsibility for what
5 they wrote. It was just a draft. I don't know
6 whether that was the logic here or not.
7 Q. Did you ever think about calling
8 Burkett, Burkett & Burkett and asking them if
9 they had issued a final report?
10 A. I was not in a position to
11 independently pick up the phone and call Mr.
12 Burkett and say I've got a document I wasn't
13 supposed to have and whatever. So, no.
14 Q. Did you consider that you had a
15 document you weren't supposed to have?
16 A. I had it. When I got it, it's too
17 late.
18 Q. Well did you consider that you had a
19 document that maybe you shouldn't have?
20 A. No, sir. When it's in general
21 circulation, how it got to me is -- I -- I got
22 it. The bank got it, everybody had it.
23 Q. All right. How did the bank get it?
24 Did the bank get it from you?
25 A. No, sir, not that I'm -- I don't

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1 think so.
2 Q. How did the bank get it?
3 A. I don't know. Well, I'd ask the
4 question how did it get out of the Connelly's
5 possession?
6 Q. Mr. DeClemente's possession?
7 A. Well, is it addressed to him? Yes.
8 I -- I don't know how it got out of their
9 possession. I know that Mr. DeClemente was
10 attempting to become a twenty-five percent owner
11 in this new entity, as was Ms. Cuce. So I assume
12 there was some motivation.
13 Q. And I believe you told me you don't
14 know how you got the report?
15 A. I do not.
16 MR. HOWSER: Okay.
17 Thank you.
18 MR. SMITH: Anybody
19 else? Has this been marked yet, the report?
20 ++++++++++++++++
21 (DRAFT REPORT:
22 VALUATION OF THE
23 COMMON STOCKS OF
24 ABACARE DATED 7-14-08
25 FROM BURKETT,

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1 BURKETT & BURKETT, CPAS
2 WAS MARKED FOR
3 IDENTIFICATION AS
4 DEPOSITION EXHIBIT
5 NUMBER 9)
6 ++++++++++++++++
7
MR. SMITH: Gentlemen,
8 what I have marked thus far to keep everybody in
9 order I'm going to try to go fairly quickly. But
10 I -- Number 9, Exhibit 9 is the draft report from
11 Burkett.
12 Ten is the 2008 return prepared by
13 Hood & Selander for Abacare.
14 ++++++++++++++++
15 (2008 TAX RETURN
16 FOR ABACARE
17 WAS MARKED FOR
18 IDENTIFICATION AS
19 DEPOSITION EXHIBIT
20 NUMBER 10)
21 ++++++++++++++++
22 MR. MYRICK: It's the
23 one page?
24 ++++++++++++++++
25 (AFFIDAVIT OF

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1 MR. BRADHAM
2 WAS MARKED FOR
3 IDENTIFICATION AS
4 DEPOSITION EXHIBIT
5 NUMBER 11)
6 ++++++++++++++++
7 MR. SMITH: One page,
8 yes. Eleven is the affidavit of Mr. Bradham
9 which you all have seen.
10 ++++++++++++++++
11 (EMAIL, SELANDER
12 TO BRADHAM
13 WAS MARKED FOR
14 IDENTIFICATION AS
15 DEPOSITION EXHIBIT
16 NUMBER 12)
17 ++++++++++++++++
18 MR. SMITH: Twelve is
19 an email from David Selander to Mr. Bradham.
20 ++++++++++++++++
21 (MEETING MINUTES
22 BY HOOD & SELANDER
23 WAS MARKED FOR
24 IDENTIFICATION AS
25 DEPOSITION EXHIBIT

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1 NUMBER 13)
2 ++++++++++++++
3 MR. SMITH: Thirteen is
4 the meeting minutes prepared by Hood & Selander.
5 MR. SMITH: Fourteen is
6 the report by Mr. Bradham.
7 ++++++++++++++
8 (MR. BRADHAM'S
9 REPORT WAS
10 MARKED FOR
11 IDENTIFICATION AS
12 DEPOSITION EXHIBIT
13 NUMBER 14)
14 ++++++++++++++
15 EXAMINATION
16 BY MR. SMITH:
17 Q. Mr. Bradham, I understand from your
18 earlier testimony that you have served as an
19 expert witness on previous occasions?
20 A. Yes, sir.
21 Q. And on how many occasions have you
22 served as an expert witness?
23 A. I'm not certain. If you talked about
24 testimony in court I would say six or less.
25 Q. And in all of those cases you were

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1 qualified by the judge to serve as an expert?
2 A. Yes, sir.
3 Q. And about how many times were you
4 serving as a plaintiff versus a defendant in the
5 case?
6 A. I don't know the answer to that.
7 Q. You were asked a number of questions
8 by Mr. Myrick about the work that you do for Mr.
9 Smith and Mr. Reed. As an overall percentage of
10 your practice, how much does that amount to your
11 entire practice?
12 A. Probably less than three percent.
13 Q. Okay. I'm going to ask you a couple
14 of questions regarding your opinions in this
15 case.
16 First is I'm presenting you what's
17 been marked as Plaintiff's exhibit -- or Exhibit
18 13. Not Plaintiff's exhibit, just Exhibit 13.
19 And you've been testifying to this earlier. What
20 is it?
21 A. These appear to be notes to a
22 shareholders meeting dated July 31st. And they
23 appear to be prepared by Hood & Selander, CPAs.
24 Q. And does it give you any concern as
25 an expert witness the fact that it's on Hood &

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1 Selander letterhead?
2 A. Absolutely.
3 Q. And what is that concern?
4 A. Independence.
5 Q. And what does it mean independence?
6 Is this a professional standard or what are you
7 addressing?
8 A. Yes, sir. We have standards in our
9 accounting practice that we -- there are certain
10 things that we are permitted to do and that we
11 are not permitted to do. And independence is one
12 of the issues that comes up frequently of whether
13 we can do certain tasks for a client if we are
14 not independent.
15 Q. And what does it mean when say
16 someone loses their independence within
17 relationship to the work that they do for their
18 client?
19 A. Well there are downright prohibitions
20 under current guidance against actually being
21 able to issue a financial statement. For
22 example, you can't issue a reviewed financial
23 statement if you're not independent. There are a
24 lot of hoops that one must jump through to be
25 able to issue a compiled statement if you are not

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1 independent.
2 You have to indicate, for example, on
3 the face of this statement that you're not
4 independent. It brings into question, from a
5 third party standpoint, well, if you're not
6 independent you're doing all these tasks, are you
7 really the external accountant or are you part of
8 management?
9 Q. And does the minutes in this -- do
10 you have an opinion as to whether or not there's
11 been a breach of the standard of independence in
12 viewing this document?
13 A. I think -- well that's a lot I think
14 about those minutes. First, I think it was a
15 terrible idea for Hood & Selander to prepare the
16 minutes for their own client. Perhaps I would
17 have offered a draft of those minutes and they
18 would have had to accept responsibility and made
19 sure they were correct. But I certainly would
20 not have prepared a set of minutes under my
21 letterhead, et cetera.
22 The second part that I focus on is
23 this is big time telling a client you've got a
24 problem. You -- there's not unusual to have a
25 private meeting in which you say you know you've

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1 got some exposure to such an so a problem and we
2 should mitigate that. We can do this, this and
3 this. But to put it in the minutes to the
4 shareholders annual -- to shareholder meeting is
5 extraordinary. I -- I just can't believe they
6 did that.
7 Q. And the effect of these minutes, they
8 put the shareholders on notice of what?
9 A. That they've got -- they've got an
10 extraordinary amount of exposure to sales tax,
11 that management is not doing things in accordance
12 with the law. The CPA is the expert on the law,
13 not the manager and that they should be doing
14 what they're saying or taking action to mitigate
15 and eliminate this problem.
16 Q. And does that problem, if not
17 disclosed, does it have an affect on the value of
18 the company?
19 A. Absolutely.
20 Q. I'm showing you what's been marked as
21 Exhibit 10. You've already been testifying a
22 bit to this, but this is the 2008 return;
23 correct?
24 A. Yes, sir.
25 Q. Go ahead. Well, and this was

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1 prepared for whom?
2 A. This was prepared for Abacare Home
3 Medical, Inc. It's prepared after the date that
4 the ATMES group had purchased the stock of
5 Abacare Home Medical and it apparently was signed
6 by someone who was no longer an officer of
7 Abacare Home Medical because Mr. Smith, Reed, et
8 al should have been the one to receive this tax
9 return and approve its filing. And they did not.
10 Q. And so you know for a fact that they
11 did not approve this filing?
12 A. They were -- they did not sign this
13 tax return. It was presented as this is the
14 Connelly's tax return and I've prepared it.
15 Q. And at the time, March 12th, 2009,
16 who owned Abacare Home Medical?
17 A. The ATMES Group.
18 Q. And that included Mr. Smith and Mr.
19 Reed; correct?
20 A. And I believe Mr. DeClemente and Ms.
21 Cuce.
22 Q. And you testified to this earlier,
23 but I want to make sure I understand. The duty
24 that Hood & Selander had to prepare an accurate
25 return with correct and truthful information was

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1 to Abacare Home Medical; is that correct?
2 A. Yes, sir.
3 Q. Is also to the ATMES group; is that
4 correct?
5 A. ATMES owned Abacare Home Medical so
6 yes, sir.
7 Q. And as a matter of fact, when
8 preparing this Exhibit 10 and Hood & Selander, at
9 that time did they have notice of the
10 inaccuracies in the value of Abacare and its tax
11 liability?
12 MR. HOWSER: Object to
13 the form.
14 MR. SMITH: You can go
15 ahead and answer.
16 THE WITNESS: I don't
17 know the answer to that. I don't know when the
18 sales tax thing -- the sales tax audit was later,
19 but the sales tax misreporting problem had been
20 reported through the minutes.
21 BY MR. SMITH:
22 Q. Right. So the date of these minutes
23 were what?
24 A. July 24th, 2007.
25 Q. And the date of this return was?

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1 A. 2008.
2 Q. And they would have had notice of
3 this issue at that time?
4 A. Absolutely.
5 Q. And uncorrected this would have an
6 impact on the numbers on the 2008 return?
7 A. Absolutely.
8 Q. As you with your own knowledge you
9 know that it was not corrected in March 12th of
10 2009?
11 A. I know that because when the
12 Department of Revenue examined it they said we
13 want money.
14 Q. And they said that those numbers on
15 the 2008 return were not correct because they
16 didn't reflect the tax liability?
17 A. That's correct.
18 Q. And so in effect Hood & Selander
19 filed an incorrect return?
20 MR. HOWSER: Object to
21 the form.
22 MR. SMITH: You can
23 answer the question.
24 THE WITNESS: In my
25 opinion, yes, sir.

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1 BY MR. SMITH:
2 Q. And they did so with knowledge they
3 were filing an incorrect return?
4 MR. HOWSER: Object to
5 the form.
6 MR. SMITH: You can
7 answer the question.
8 THE WITNESS: In my
9 opinion, yes, sir.
10 BY MR. SMITH:
11 Q. And would you consider all of that
12 also a breach of the standard of care and their
13 duty to Abacare Home Medical?
14 MR. HOWSER: Object to
15 the form.
16 MR. SMITH: You can
17 answer the question.
18 THE WITNESS: Yes, sir.
19 And that duty could have been satisfied in a
20 relatively simple manner, but they did not.
21 BY MR. SMITH:
22 Q. And it was also by filing this
23 incorrect return a breach of their standard of
24 care and duty to ATMES as well?
25 MR. HOWSER: Object to

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1 the form.
2 MR. SMITH: Go ahead
3 and answer.
4 THE WITNESS: Yes, sir.
5 I -- I think so very much so.
6 BY MR. SMITH:
7 Q. And after preparing that return I'm
8 going to provide you with Exhibit 12 and ask you
9 if you can identify that?
10 A. I can.
11 Q. What is it?
12 A. This is an email between Dave and
13 myself that the bottom half is the first part and
14 the top half is the response. And much has been
15 made about whether Hood & Selander had an
16 engagement with ATMES Group. And this email
17 documents not only did they have an engagement
18 with the ATMES Group that they say we are
19 processing the return this morning and will email
20 you an invoice. I expect to be -- the fee will
21 be sixteen, fifty. So they weren't going to give
22 the ATMES Group the tax return that they prepared
23 unless they got paid by the ATMES Group. So if
24 you ask me were they engaged, darn tooting.
25 Q. And are you aware of whether or not

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1 they received payment for this service?
2 A. They were paid. We didn't the return
3 until they paid it.
4 Q. Just providing you with a copy of
5 Exhibit 11. This is your affidavit; is that
6 correct?
7 A. Yes, sir.
8 Q. I just want to have that added as a
9 part of the record. Anything you care to add to
10 that other than your other testimony today?
11 A. No, sir.
12 Q. Okay. So we'll add that as an
13 exhibit to your deposition. Also Exhibit 14 is a
14 copy of your report. Anything that you would
15 like to add to that?
16 MR. HOWSER: Object to
17 the form.
18 MR. SMITH: Go ahead,
19 please answer.
20 THE WITNESS: No, sir.
21 Sometimes the listing of -- of your belong to
22 this group or that professional association will
23 change over time so with -- with the exception of
24 that the qualifications, et cetera are accurate.
25 But the opinions contained I think are accurate

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1 and I stand by them.
2 BY MR. SMITH:
3 Q. Now, Mr. Bradham, the impact of the
4 sales tax issue I believe you testified earlier
5 had an impact on the value of the company;
6 correct?
7 A. Yes, sir.
8 Q. And those that had knowledge of that
9 prior to the sale included David Selander;
10 correct?
11 MR. HOWSER: Object.
12 THE WITNESS: Yes.
13 BY MR. SMITH:
14 Q. And Hood & Selander?
15 MR. HOWSER: Object.
16 THE WITNESS: Yes.
17 BY MR. SMITH:
18 Q. Also -- that would also include those
19 others, those folks on the minutes; correct, who
20 were advised of that during the annual meeting;
21 right?
22 A. Yes, sir. In my opinion unless those
23 take some -- taken some remedial action they were
24 aware.
25 Q. And so that would include Ms. Dorothy

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1 Connelly; correct?
2 A. Yes.
3 Q. And Mr. Phillip DeClemente?
4 A. Yes, sir.
5 Q. And that issue, the whole sales tax
6 issue effective upon the value, would you
7 consider that material to a decision to purchase
8 the business?
9 A. Can you ask me that differently?
10 Q. Yes, would the -- that information,
11 the knowledge of the information of the tax issue
12 encapsulated in minutes, would you consider that
13 information material to your client's decision in
14 deciding whether or not to purchase the business?
15 A. Did the omission of that information
16 and its impact on the valuation affect my
17 client's decision? It did. If -- if they had
18 known this, the valuation would have been
19 different. They may have purchased the business,
20 but it would certainly have been at a different
21 value.
22 Q. And you have an opinion as to what
23 that value would have been; correct?
24 A. I do.
25 Q. And what is that?

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1 A. Assuming for a minute that the
2 Connelly group had paid the sales tax that they
3 owed, the hundred thousand dollars, I would say
4 that the remaining business was worth two hundred
5 and eighty-five thousand, not the value that Mr.
6 Burkett came up with of nine hundred and seventy-
7 five thousand.
8 Q. And you're referring to your report,
9 which is Exhibit Number 14; correct?
10 A. Yes, sir.
11 Q. And the calculation you used to come
12 up to that number, that is the same calculation
13 that was used by Burkett in Exhibit 9; is that
14 correct?
15 A. It is. I took his exact same
16 methodology, adopted his marketability discount,
17 his earnings multiples, his EBITDA multiples, all
18 of those kinds of technical issues that are used
19 in evaluation. I did not challenge them. I just
20 applied corrected net income and then applied the
21 same steps that he did in concluding a value.
22 Q. And that difference between the
23 Burkett -- well, the purchase price and then what
24 you've calculated is a measure of some of the
25 damages associated in this case?

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1 A. That's correct.
2 Q. Okay. And lastly I just -- this is
3 Exhibit 9, it is the draft report; correct?
4 A. Yes, sir.
5 Q. I'd like this added as an exhibit.
6 These tabs you have added in here, they have any
7 significance as to why it's here?
8 A. No, sir.
9
MR. SMITH: So let's
10 remove those. That's all I have. I do, just to
11 reiterate, we're going to read and sign. Thank
12 you.
13 ++++++++++++++++++
14 EXAMINATION
15 BY MR. HOWSER:
16 Q. Do I understand, based on that email,
17 that the tax return was sent to Abacare here in
18 Sumter? That is the 2008 tax return?
19 A. No, sir. My understanding was that
20 Hood & Selander had the return prepared and that
21 they, I'm not sure who signed it, but it was part
22 of the Connelly Group if you'll allow me that.
23 It was dated March the 12th. The Connelly Group
24 had no right to sign this income tax return.
25 MR. MARSHALL: Let me

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1 object to the characterization of the Connelly
2 Group. Please continue.
3 BY MR. HOWSER:
4 Q. Looking at Exhibit Number 10, who
5 signed that return as an officer of the LLC or
6 the taxpayer of the LLC?
7 A. It's not signed.
8 Q. So you don't know who signed it?
9 Could be anybody?
10 A. I know that -- that the ATMES Group
11 members did not sign it, but I don't know who did
12 sign it.
13 Q. Has ATMES filed any amended tax
14 returns as a result of the sales tax issue?
15 A. I know they filed some amended
16 returns, but I don't think as a result of the
17 sales tax issue.
18 Q. As a result of the nine hundred and
19 ninety-one thousand dollar write off, did the
20 members of ATMES Group get a tax benefit?
21 A. Absolutely.
22 Q. How much tax benefit did they get?
23 A. Well that depends on their individual
24 bracket, but I'll answer your question. Mr.
25 Smith is in a fairly high bracket. I would

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1 estimate about thirty percent. Mr. Reed has had
2 some losses from other business and he's in a
3 very low bracket. So you'd have to bifurcate
4 that benefit. But there is some benefit from ---
5 In other words, if you paid me a fee of a million
6 dollars, yes, sir, you would have a tax benefit
7 from that. So they did -- they did enjoy some
8 benefit from that loss.
9 MR. HOWSER: That's all
10 I've got.
11 (Whereupon, the deposition was
12 concluded.)

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1 CERTIFICATE
2 STATE OF SOUTH CAROLINA
3 COUNTY OF HORRY
4 I, Debbie Rayl,
5 Professional Verbatim Reporter and Notary Public
6 for the State of South Carolina, certify that I
7 did have Art Bradham, CPA to appear before me at
8 10:02 a.m. on the 18th day of October, 2013, in
9 the office of Art Bradham, CPA, Sumter, South
10 Carolina; that the witness was duly sworn to tell
11 the truth, the whole truth and nothing but the
12 truth; that the foregoing pages constitute a true
13 and accurate transcript of the testimony given at
14 that time and place.
15 I further certify that I am not of
16 counsel or kin to any of the parties to this
17 cause of action, nor am I interested in any
18 manner in its outcome.
19 IN WITNESS WHEREOF I have hereunto
20 set my hand and seal this 4th day of November,
21 2013.
22
23 _____
24 Debbie Rayl, Notary Public
25 My Commission expires January 24, 2021

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Opinion Letter to Mrs. Connelly from Burkett

Dated July 14, 2008, appears in this Record on Appeal at page 140

HOOD & SELANDER, CPA'S PA

TO: DOROTHY A. CONNELLY AND PHILIP DECLEMENTE

FROM: DAVID E. SELANDER, CPA

SUBJECT: ABACARE HOME MEDICAL SHAREHOLDER MEETING

DATE: 7/31/2007

CC:

Abacare Home Medical

Shareholder Meeting

Date: 07/24/07

Attendees: Dorothy A. Connelly (Shareholder)

Philip DeClemente (Shareholder)

David E. Selander (Accountant)

The shareholders of Abacare Home Medical met on July 24, 2007 to discuss the bookkeeping, financial health of the company and various other company issues. The following memo is the written minutes of this meeting.

Financial Statements

Philip opened the meeting by handing out the June 30, 2007 Balance Sheet and Profit & Loss statements prepared internally. The financial statements were reviewed and discussed. Several adjustments including depreciation, and inventory have not been posted. If these adjustments were posted, they could influence the shareholders conclusions. Based on the financial statements as presented, the company appears to net approximately $147,002.36 in net income for the six months ended June 30, 2007.

Philip expects year-end gross sales to be 1.2 to 1.5 million and net profit to be 20% of Sales for the year end.

Joy will be asked to print financial statements with percentages in the future.

Exhibit 2
Wit: Bradham
Date: 10-18-13
Rep: Pebbie Rayl

New Billing System and Accounts Receivable

The company started a new billing system early in February. The Company is still working on converting all the old receivables to the new system. There have been several set-backs in the conversion and Philip expects the conversion to be complete in the next couple of months. Abacare is currently 60 days behind in billing.

Philip explained the following reasons for the problems on the billing software conversion:

1 – Lack of time to do proper training.

2 – Initial set up of daily billing items were incorrectly entered and had to be corrected.

3 – CMS has been auditing several (approx 30) claims. The result of these audits has not been settled at this point.

4 – Billing must bill old system receivables and new system receivables until the old systems claims are transferred or paid.

Accounts receivable at present appears to be approximately $335,970 plus $50,000 outsourced to the delinquent account collector. This is an approximate $110,000 increase in receivables since January 31, 2007. Dorothy asked when the billing/collection problems will be corrected. Philip did not have a projected date. The shareholders agreed to review the progress at the next meeting.

Philip reported no software problems have been noted with the new system. If they cannot correct the billing problems soon, then he is considering outsourcing the billing.

Philip has assigned Nikki and Michael to focus on catching up the billing.

Philip expects billing to average $130,000 to $150,000 per month in the future.

Delinquent Accounts

Philip gave a progress report on the delinquent accounts collection. In the last meeting, Philip noted all accounts receivable over 90 days would be outsourced to a delinquent account collector. Currently, Philip terminated the arrangement with the first collection agency and has entered an arrangement with a new agency, Vengroff Collection, a FL company.

The collection company currently holds approximately $50,000 in receivables. No reports were provided at the shareholder meeting to review.

Last meeting, the shareholders were advised to report to Joy the balances turned over to the collection company. Philip should provide Joy a list of the receivables that are turned over to collections. Joy will include a journal entry to post the accounts to an "allowance for bad debts" account on the company Balance Sheet. Joy should be provided with a monthly schedule of accounts held by the Collection Company and actual collections. Currently, none of this activity is reported to Joy. The importance for accountability of these amounts was stressed again. Additionally, an approval form should be developed to move the deemed uncollectible account to the agency.

New Employee – Rehab Specialist

Philip hired John Friend, a rehab specialist. John is expected to market rehab equipment and develop a new high profit center for Abacare. Abacare is currently purchasing the equipment and has not billed any yet. We will review this area at the next shareholder meeting.

Sales Taxes

David asked to discuss sales taxes next. David noted that the taxable sales reported on the June sales tax forms appeared significantly understated. David stressed the importance to report as accurately as possible the taxable sales on the monthly forms.

Philip stated the sales tax forms are completed based on collections rather than billing. David stressed that sales tax is computed on Sales for the month regardless of actual collections. Philip explained that all DME companies, that he is aware of, use collections for the sales tax returns. David advised that Abacare should set aside a reserve in case of an audit. If an audit determines the company should use sales rather than collections, then Abacare could owe a substantial amount of tax, penalties and interest.

David noted last meeting, and repeated this meeting, that a system needs to be set up as soon as possible that will support the gross sales number posted on the sales tax returns. This information will be needed in case of an audit.

Finally, David noted that a couple of sales tax returns since the last shareholder meeting were filed and paid late. There is a penalty up to 25% of the tax for late filing and payment.

New Equipment

Philip is negotiating the purchase of new equipment and reviewing leasing options. David advised Philip to seek a revolving line of credit from a bank as a financing alternative. This is usually a lower cost alternative. Lease arrangements tend to have high financing costs. Dorothy inquired on the current lease arrangements and requested that the financing percentage be listed on the financial statements.

New Building

The new building is behind schedule. Philip is checking on it daily and will continue to push the contractor to complete the building as timely as possible.

Payroll

Payroll responsibilities will be moved to Joy in the near future.

Conclusion

The meeting was concluded. The shareholders agreed to meet early in December to discuss the progress on the items discussed.

Exhibit 3
Wit: Bradham
Date: 10-18-13
Rep: Debbie Rayl

COMPANY

ABACARE is located in Mount Pleasant, South Carolina and is one of that area's largest retail suppliers of home health products and services. They also have a small location in Little River, South Carolina. ABACARE offers equipment for both sale and rent. The products ABACARE provide include durable medical equipment, aids, and supplies. These include, but are not limited to:

- mobility products;
- wheelchairs and components;
- ambulatory aids;
- compression therapy;
- incontinence products;
- maternity supplies;
- wound and skin care products;
- respiratory products;
- pediatric equipment;
- orthopedic supports and braces;
- bathroom safety products;
- rehabilitative products; and,
- vehicle and home modifications.

ABACARE's staff includes Mobility Specialists, Clinical Specialists, and Billing Associates who are able to evaluate the customers' needs, answer questions, and work with physicians and insurance customers to recommend the best products that will serve the customers purpose.

ABACARE is able to deliver its products to most of South Carolina and provide, among others, the following services:

- 24-hour emergency service;
- Repair and cleaning of equipment;
- In-store health clinics (blood pressure, respiratory, etc.); and,
- Product and technology training for therapists and physicians.

ABACARE participates in most major insurance plans and is a Medicare and Medicaid provider. It is important to note that on a national level, state and federal government programs provide almost 65 percent of industry revenue, including more than 30 percent from Medicare and 25 percent from Medicaid. As such ABACARE's revenue is very much dependent on the payments it receives from Medicare and Medicaid. Currently, South Carolina is contemplating cutting Medicaid reimbursements by 9.5%. If they do, it is likely that insurance carriers will follow suit, as they have done in the past.

Over the past few years ABACARE's sales have increased from $33,614 in 2004 to $1,472,971 in 2007 and ABACARE is on course to have $1.8 million of sales in 2008. This is significant growth over a 4-year period. They are currently looking to stabilize this growth and are no longer aggressively pursuing new clients, but rather growing the

clients they have. Further, management represents that the Little River location is not doing as well as planned and if sales do not improve, the location may likely be closed.

DRAFT

Abacare Home Medical Inc
Recap of SCDOR Exam results

	Tax	Interest	Total
Total per exam report	$ 142,316	$ 17,661	$ 159,978
Less amounts owed by Atmes Group			
Amounts from 11/2008 to 12/2009			
Sales Tax	$ (26,238)	$ (2,179)	$ (28,417)
Durable Medical Goods	$ (16,633)	$ (1,401)	$ (18,034)
Charleston County	$ (3,926)	$ (320)	$ (4,246)
Charleston County	$ (7,994)	$ (643)	$ (8,637)
Net sales tax and interest obligation Of Abacare Home Medical Inc (Connelly ownership)	$ 87,525	$ 13,118	$ 100,644

Exhibit 4
Wit: Bradham
Date: 10-18-13
Rep: Debbie Rayl

Abacare Home Medical Inc
Recap of sales tax results

	Tax	Interest	Total
Total per exam report	$ 142,316	$ 17,661	$ 159,978
Less amounts owed by Atmes Group			
Amounts from 11/2008 to 12/2009			$ (59,657)
Net sales tax and interest obligation			$ 100,321

Exhibit 5
Wit: Bradham
Date: 10-18-13
Rep: Debbie Rayl

Depo Exh. #6

STATE OF SOUTH CAROLINA	)	STOCK PURCHASE AND
	)	ASSIGNMENT AGREEMENT
COUNTY OF CHARLESTON	)	

THIS STOCK PURCHASE AND ASSIGNMENT AGREEMENT (the "Agreement") is made as of the 7th day of November 2008, by and among the Estate of Dorothy A. Connelly (the "Seller"), Phillip L. DeClemente ("Assignor"), and Assistive Technology Medical Equipment Services, LLC, a South Carolina limited liability company (the "Purchaser").

RECITALS:

WHEREAS, Seller currently owns one hundred and four (104) shares of Abacare Home Medical, Inc.'s (the "Corporation") outstanding common stock (the "Stock") which constitute 80% of the Corporation's issued and outstanding shares; and

WHEREAS, Assignor hereby wishes to assign his rights to acquire the Stock, pursuant to that certain Employment Agreement by and between himself and ABACARE HOME MEDICAL, INC., a South Carolina Corporation, dated January 1, 2008 (the "Employment Agreement"); and

WHEREAS, Purchaser wishes to purchase the Stock from Seller, and Seller wishes to sell the Stock to Purchaser as more particularly provided herein; and

WHEREAS, Seller, Purchaser, and Assignor would like to more fully set forth the terms and conditions of the purchase of the Stock in this Agreement.

NOW, THEREFORE, in consideration of the mutual promise and for other good and valuable undertakings herein contained, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. Recitals. The above recitals are true and correct and are incorporated herein.

2. Assignment of Rights. Assignor hereby assigns his right to purchase the Stock, under the Employment Agreement, to Purchaser.

3. The Stock Purchase.

(a) Sale of Stock. Upon the terms and subject to the conditions contained in this Agreement, Seller shall assign, transfer, and deliver to Purchaser, and Purchaser shall acquire from Seller the Stock, indicated below, free and clear of all liens, claims, charges and encumbrances of any nature whatsoever as follows:

(b) Purchase Price. The purchase price for the Stock shall be Eight Hundred Nine Thousand, Five Hundred and No/100 ($809,500.00) Dollars (the "Purchase Price"), payable in full in immediately available United States funds at the Closing.

(c) The Corporation shall, following the Closing, continue to lease the land and building located at 2553 Highway 17 North, Mount Pleasant, South Carolina, TMS No. 580-14-00-006 (the "Building"), pursuant to that certain lease agreement, attached hereto as Exhibit A.

Exhibit 6
Wit: Bradham
Date: 10-18-13
Rep: Debbie Payl

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(d) All the Corporation's loans, leases, and other credit arrangements will be amended to remove James B. Connelly, his heirs and assigns, and his Estate, and Dorothy A. Connelly, her heirs and assigns, and her Estate, from personal guarantees or personal collateral.

(e) The December 31, 2008 tax return for the year of the sale will be prepared by Hood & Selander CPAs, LLC and paid for by the Corporation.

4. **Representations and Warranties of Seller.** Seller represents and warrants to Purchaser, with the knowledge that Purchaser is purchasing the Stock in full reliance thereon:

(a) Organization and Good Standing. The Corporation is duly organized, validly existing and in good standing under the laws of the State of South Carolina. All of the Stock have been duly authorized and validly issued and is fully paid and nonassessable.

(b) Authority and Validity. Seller has the capacity and right to execute, deliver and perform Seller's obligations under this Agreement and the other documents executed or required to be executed by Seller in connection with this Agreement.

(c) Title to Stock. At the Closing or as otherwise contemplated in the Agreement, Seller shall convey to the Purchaser good, marketable and exclusive title to the Stock, free and clear of all liens, claims, charges and encumbrances of any nature whatsoever, except claims, if any, for estate taxes for which Seller shall indemnify and hold harmless Purchaser, and Seller shall warrant and defend Purchaser's title to the Stock against the lawful claims of all persons. Seller also represents and warrants that the Stock represents all shares of ownership that Seller possesses in the Corporation.

(d) No claim to assets of Corporation. Seller warrants that it does not have any ownership or equitable interest in any of the assets used by the Corporation and that it has not assigned or conveyed any such interest to a another person or entity.

(e) Material Omissions or Nondisclosure. Seller's representations and warranties, and all statements, certificates, schedules, documents or other information furnished or to be furnished by the Seller to the Purchaser pursuant to this Agreement are true, correct and complete in all material respects, and neither contain nor will contain any untrue statement of a material fact or omit nor will omit to state any material facts necessary to make the statements contained therein not misleading.

5. **Representations and Warranties of Purchaser.** Purchaser represents and warrants to the Seller the following facts with the knowledge that Seller is selling the Stock in full reliance thereon:

(a) Organization and Good Standing. The Purchaser is duly organized, validly existing and in good standing under the laws of the State of South Carolina. All of the Stock have been duly authorized and validly issued and is fully paid and nonassessable.

(b) Authority and Validity. Seller has the capacity and right to execute, deliver and perform Seller's obligations under this Agreement and the other documents executed or required to be executed by Seller in connection with this Agreement.

(c) Investment Intent. Purchaser is acquiring the Stock owned by Seller in the Corporation for Purchaser's own account.

(d) Knowledge of Risks. Purchaser is aware of the substantial risks that he is accepting by his investment in the Stock. The Purchaser is aware that the Corporation is a small,

privately held company with an illiquid market for its shares and with no guaranteed return on its shares outstanding either through dividends, distributions, etc.

(e) Financial Conditions. Purchaser is fully familiar with the financial conditions of the Corporation and has been provided with and has reviewed the financial statements, including but not limited to, balance sheets and income statements of the Corporation since inception of the Corporation including interim statements as well as the tax returns for the Corporation since its inception.

(f) Material Omissions or Nondisclosure. Purchaser's representations and warranties, and all statements, certificates, schedules, documents or other information furnished or to be furnished by Purchaser to Seller pursuant to this Agreement are true, correct and complete in all material respects, and neither contain nor will contain any untrue statement of a material fact or omit nor will omit to state any material facts necessary to make the statements contained therein not misleading.

6. **Survival of Representations and Warranties**. All representations and warranties made by the parties, each to the other, in this Agreement or pursuant thereto shall survive the consummation of the transactions contemplated by this Agreement notwithstanding investigation heretofore or hereafter made by a party hereto.

7. **Closing**. The closing shall take place on or before November 7, 2008 or at such time and place as the parties hereto shall mutually agree (the "Closing"), time being of essence.

8. **Termination**. This Agreement shall terminate upon the mutual agreement of all parties hereto.

9. **Default**. If either of the parties hereto fails to meet his or her obligations hereunder, he or she, as the case may be, shall be deemed to be in default and the non defaulting party shall have the right to seek damages and/or specific performance or such other legal remedies as may be allowed by law.

10. **Expenses and Absence of Commissions**. Purchaser and Seller each agree to bear their own legal, accounting, and other expenses in connection with the preparation and consummation of this Agreement. Purchaser and Seller also acknowledge and warrant to the other that neither has incurred any liability for commissions, finder's fees, or similar claims in connection with this transaction.

11. **Attorneys' Fees**. If either party brings or commences any legal action or proceeding to enforce any of the terms of this Agreement (or for damages by reason of an alleged breach of this Agreement), the prevailing party, if any, in such action shall be entitled to recover from the non-prevailing party all reasonable attorneys' fees that may have been incurred, including any and all costs and expenses incurred in enforcing, perfecting and executing such judgment, and including all costs of appeal.

12. **Article, Section, and Paragraph Headings**. The article, section, and paragraph headings contained in this Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement.

13. **Entire Agreement**. This Agreement, and the attachments referred to herein or delivered pursuant hereto, which form a part hereof, contain the entire understanding of the parties with respect to its subject matter. This Agreement supersedes all prior agreements and understandings between the parties with respect to the subject matter of this Agreement.

14. Governing Law. This Agreement shall be construed and enforced in accordance with the laws of the State of South Carolina. Venue shall lie in Charleston County.

15. Amendment. No provision hereof may be amended, modified, supplemented, changed, waived, forfeited, discharged or terminated except pursuant to a writing executed by the party or parties against whom or which the enforcement of such amendment, modification, supplementation, change, waiver, forfeiture, discharge or termination is sought.

16. Waiver. A party hereto may, at its option, waive in writing any and all of the conditions herein contained to which its obligations hereunder are subject, without waiving the future application of such conditions.

17. Binding Effect. This Agreement shall be binding upon the parties hereto, their heirs, legal representatives, and permitted assigns.

18. Counterparts. This Agreement may be executed in multiple counterparts which in the aggregate shall constitute one (1) agreement. A facsimile of an executed Agreement shall be enforceable.

19. Miscellaneous. Notwithstanding anything in this Agreement to the contrary, Assignor hereby agrees that if Purchaser defaults in its obligations under this Agreement, Assignor's right to acquire the Stock, as provided in the Employment Agreement or any other agreement shall terminate, and further, he shall immediately tender his shares in the Corporation for purchase by Seller at a price of Two Hundred Two Thousand, Three Hundred Seventy-Five and No/100^{ths} ($202,375.00) Dollars. The Seller, in his sole discretion, may elect, but notwithstanding anything to the contrary in the Employment Agreement, shall not be obligated to purchase the Stock of Assignor.

[SIGNATURES ON FOLLOWING PAGE.]

IN WITNESS WHEREOF, Seller, Purchaser, and Assignor have duly executed this Agreement as of the day and year first hereinabove written.

SELLER:

(Witness #1)

(Witness #2)

The Estate of Dorothy A. Connelly
By: Donna C. Cash
Its: Personal Representative

ASSIGNOR:

(Witness #1)

(Witness #2)

Phillip L. DeClemente
Its: COO

PURCHASER:

Assistive Technology Medical Equipment Services, LLC, a South Carolina limited liability company

(Witness #1)

(Witness #2)

By: Phillip L. DeClemente
Its: Manager

(Witness #1)

(Witness #2)

By: G. Russell Smith Jr.
Its: Manager

(Witness #1)

(Witness #2)

By: JEFFREY JOE REED
Its: MANAGER

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(Witness #1)

By: Kimberly L. Cuce

Its: manager

(Witness #2)

EXHIBIT A
TO STOCK PURCHASE AGREEMENT

Lease Agreement

Art Bradham Letter to Mr. Rodger Watson

Dated December 9, 2009, appears in this Record on Appeal at page 141-142

Art Bradham CPA PC
2 Law Range
Sumter SC 29150

Phone: (803) 774-1040 Fax: (803) 753-9508
E-mail: art@artbradham.com Website: www.artbradham.com

Engagement Letter

Monday, October 19, 2009
Dear Martha Jo Johnson,

The purpose of this letter is to outline the specifics of an engagement to represent Reliable Medical to resolve outstanding sales tax issues.

My understanding of the brief facts and circumstances:

The company's internal review of the sales tax returns that have been filed indicate that a One Hundred and Eighty-Seven Thousand, Eight Hundred and Thirty-Eight Dollars and Seventy Cents ($187,838.70) underpayment is indicated, based on a realistic review of the

- Company's gross income
- Billing codes and applicable tax status according to those codes
- Other information or authority that is known to management at this time.

If engaged, I will provide the following professional services:

I will become an expert on DME sales tax in SC during the tumultuous period in sales tax application to DMEs and during the upheaval that occurred in Reliable during this same period of time.

I will review the financial information currently available; pull together a comprehensive review for reasonableness of the present sales tax reporting. Should additional information be required (almost a certainty), I will request and direct Company personnel in gathering this information.

I will prepare and present the company's best case for the determination of the accurate sales tax that is owed; prepare the amended returns or worksheets for same; prepare the documentation to demonstrate the company's position; and represent the company in the review of the amended returns with SCDOR representatives.

It is understood that we will be working together to accurately determine the company's sales tax liability and making every collaboratively to reduce that liability.

Compensation:

Contingency based. If after effort, I an unable to reduce the total tax owed, you will owe me nothing. If we are able to reduce the total tax owed through any and all efforts that are exerted, I will be paid a contingency based fee of 18% of the tax amount reduced. As way of example, if the total owed before I start is $200,000 tax, and after our efforts are finished you owe $150,000, I would be paid a fee of $9000 (18% of $50000). Interest and penalty will not be considered, but obviously any applicable penalties and interest will be less if the underlying tax is less.

Admitted to Practice in US Tax Court

Exhibit 8
Wit: Bradham
Date: 10-18-13
Rep: Debbie Rayl

If this accurately states your understanding of our arrangement, please sign below.

Thank you

Art Bradham CPA CVA EA Mtax

Accepted:

Martha Jo S. Johnson

VALUATION OF THE COMMON STOCK OF:

ABACARE HOME MEDICAL, INC.
2353 NORTH HIGHWAY 17
MOUNT PLEASANT, SOUTH CAROLINA 29466

Valuation Date: APRIL 30, 2008
Report Dated: JULY 14, 2008

DRAFT

Exhibit 9
Wit: Bradham
Date: 10-18-13
Rep: Debbie Rayl

OPINION LETTER

July 14, 2008

Mrs. Dorothy Connelly
2353 North Highway 17
Mount Pleasant, SC 29466

Dear Mrs. Connelly:

The enclosed valuation report has been developed for the exclusive and confidential use of Mrs. Connelly and Mr. Phillip Declemente. The report has been prepared by Burkett Burkett & Burkett CPAs, P.A. dated July 14, 2008 and was made by and/or under the direct supervision of the undersigned. The purpose of the valuation is to render an opinion as to the fair market value of the common stock interest, as of April 30, 2008.

In preparing my business valuation report, I have relied upon historical financial information provided to me by management and derived from tax returns and internal financial statements. This financial information has not been audited, reviewed, or compiled by me and accordingly I do not express an opinion or any form of assurance on this financial information.

My report is based on historical and prospective financial information provided to me by management and other third parties. Users of this valuation report should be aware that business valuations are based on future earnings potential that may or may not materialize. Therefore, the actual results achieved during the projection period will vary from the projections used in this valuation, and the variations may be material. The accompanying report discusses all assumptions and limiting conditions that apply to this opinion of value and are integral to the understanding of the opinion.

Based upon my study and analytical review procedures, I have concluded that a reasonable estimate of the fair market value of a 100% common stock interest of ABACARE Home Medical, Inc. as of April 30, 2008 is $975,000.

This engagement was not contingent upon developing or reporting predetermined results. My compensation for completing this assignment is not contingent upon the development or reporting of a predetermined value or direction in value that favors the cause of the client, the amount of the value opinion, the attainment of a stipulated result, nor the occurrence of a subsequent event directly related to the intended use of this appraisal. My analyses, opinions, and conclusions were developed, and this report has been prepared, in conformity with the *National Association of Certified Valuation Analysts, Professional Standards* and the guidelines established by the American Institute of Certified Public Accountants.

Sincerely yours,

Ronald H. Burkett CPA, CVA

Ronald H. Burkett, CPA, CVA
Burkett Burkett & Burkett CPAs, P.A.

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EXECUTIVE SUMMARY

Governing Standard:	Revenue Ruling 59-60
Prepared In Accordance	National Association of Certified Valuation Analysts Professional Standards
Purpose:	Sale of Common stock
Standard of Value:	Fair Market Value
Premise of Value:	Value as a going concern
Client Name:	Connelly Management, Inc.
Business Name:	ABACARE Home Medical, Inc.
Type of Entity:	S corporation
Business Interest Valued:	100%
Valuation Date:	April 30, 2008
Report Date:	July 14, 2008
Appraiser Name:	Ronald H. Burkett, CPA, CVA
Appraiser Firm:	Burkett Burkett & Burkett CPAs, P.A.
Conclusion of Value:	$975,000

DRAFT

INTRODUCTION

SPECIFICS

Burkett Burkett & Burkett CPAs, P.A. has been retained by Mrs. Connelly to estimate the fair market value of ABACARE Home Medical, Inc. (herein referred to as ABACARE or the Company). ABACARE is an S corporation located at 2353 North Highway 17 in Mount Pleasant, South Carolina. Furthermore, an interest of 100% is being valued as of April 30, 2008.

The appraisal will be used by Mrs. Connelly and Mr. Phillip Declemente for transactional and/or negotiation purposes only. The distribution of this report is restricted to Mrs. Connelly and Mr. Declemente, legal and tax professionals advising each, and any regulatory agencies whereby reporting is required. Any other use of this report is unauthorized and the information included in the report should not be relied upon.

Definitions

Appendix F has a glossary of terms that is applicable to this engagement.

Standard of Value

The standard of value for this report is fair market value, which is consistent with the definition of fair market value as defined by Revenue Ruling 59-60:

> Fair market value is the amount at which property would change hands between a willing seller and a willing buyer when neither is under compulsion and when both have a reasonable knowledge of the relevant facts.

In addition, the hypothetical seller and buyer must be able and willing to trade and be well informed about the property and issues concerning the market for such property.

Premise of Value

This report is prepared using the premise that the subject company is a going concern. This means that it is presumed that in the future the assemblage of assets, resources and income producing items will continue in use to produce income and cash flow. The subject company is a going concern business enterprise.

SOURCES OF INFORMATION

The primary sources of information were research on the economy, industry and company, analysis of financial statements, tax returns, acconting reports and interviews with key people. Please see Appendix D for a complete listing.

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APPROACH

Revenue Ruling 59-60 states:

> It is advisable to emphasize that in the valuation of the stock of closely held corporations or the stock of corporations where market quotations are either lacking or too scarce to be recognized, all available financial data, as well as all relevant factors affecting the fair market value, should be considered. The following factors, although not all-inclusive, are fundamental and require careful analysis in each case:
>
> - The nature of the business and the history of the enterprise from its inception;
> - The economic outlook in general and the condition and outlook of the specific industry in particular;
> - The book value of the stock and the financial condition of the business;
> - The earning capacity of the company;
> - The dividend paying capacity;
> - Whether or not the enterprise has goodwill or other intangible value;
> - Sales of the stock and the size of the block of stock to be valued;
> - The market price of stocks of corporations engaged in the same or a similar line of business having their stocks actively traded in a free and open market, either on an exchange or over-the-counter.

Business valuation theory promulgates three basic approaches to value.

Asset Based Approach: A general way of determining a value indication of a business's assets and/or equity using one or more methods based directly on the value of the assets of the business less liabilities.

Income Approach: A general way of determining a value indication of a business's assets and/or equity using one or more methods wherein a value is determined by converting anticipated benefits.

Market Approach: A general way of determining a value indication of a business's assets and/or equity using one or more methods that compares the subject to similar investments that have been sold.

The various methods of valuation that appraisers use in practice are typically considered as subdivisions of these broad approaches. Valuation methods under the Market and Income approaches generally contain common characteristics such as measures of benefit streams, discount rates and/or capitalization rates and multiples.

As corroborating calculations we have included "Rules of Thumb" methods. These methods are not strong, but they are sometimes a worthy resource for comparisons.

As Certified Public Accountants (CPAs) and business valuators, our work was completed in accordance with the guidelines established by the American Institute of Certified Public Accountants (AICPA), and the National Association of Certified Valuation Analysts (NACVA).

Assumptions

No one provided significant personal property appraisal assistance, as such, for purposes of this report, it is assumed that the fair market value of the company's assets equal book value.

This valuation report has been prepared in accordance with the *National Association of Certified Valuation Analysts Professional Standards*. In accordance with these standards, a Statement of Contingent and Limiting Conditions is provided as Appendix B and a Statement of Appraiser Qualifications is included in Appendix C.

Scope Limitation

This report is not intended to serve as a basis for expert testimony in a court of law or other governmental agency without further analysis and resulting documentation.

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COMPANY

ABACARE is located in Mount Pleasant, South Carolina and is one of that area's largest retail suppliers of home health products and services. They also have a small location in Little River, South Carolina. ABACARE offers equipment for both sale and rent. The products ABACARE provide include durable medical equipment, aids, and supplies. These include, but are not limited to:

- mobility products;
- wheelchairs and components;
- ambulatory aids;
- compression therapy;
- incontinence products;
- maternity supplies;
- wound and skin care products;
- respiratory products;
- pediatric equipment;
- orthopedic supports and braces;
- bathroom safety products;
- rehabilitative products; and,
- vehicle and home modifications.

ABACARE's staff includes Mobility Specialists, Clinical Specialists, and Billing Associates who are able to evaluate the customers' needs, answer questions, and work with physicians and insurance customers to recommend the best products that will serve the customers purpose.

ABACARE is able to deliver its products to most of South Carolina and provide, among others, the following services:

- 24-hour emergency service;
- Repair and cleaning of equipment;
- In-store health clinics (blood pressure, respiratory, etc.); and,
- Product and technology training for therapists and physicians.

ABACARE participates in most major insurance plans and is a Medicare and Medicaid provider. It is important to note that on a national level, state and federal government programs provide almost 65 percent of industry revenue, including more than 30 percent from Medicare and 25 percent from Medicaid. As such ABACARE's revenue is very much dependent on the payments it receives from Medicare and Medicaid. Currently, South Carolina is contemplating cutting Medicaid reimbursements by 9.5%. If they do, it is likely that insurance carriers will follow suit, as they have done in the past.

Over the past few years ABACARE's sales have increased from $33,614 in 2004 to $1,472,971 in 2007 and ABACARE is on course to have $1.8 million of sales in 2008. This is significant growth over a 4-year period. They are currently looking to stabilize this growth and are no longer aggressively pursuing new clients, but rather growing the

clients they have. Further, management represents that the Little River location is not doing as well as planned and if sales do not improve, the location may likely be closed.

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APPRAISAL OF ECONOMIC CONDITIONS

INDUSTRY OVERVIEW

The US home healthcare industry includes about 12,000 companies and agencies with combined annual revenue of $40 billion. Large companies include Apria Healthcare, Gentiva Health Services, and Lincare Holdings. About a quarter of industry revenue is generated by nonprofit organizations, such as hospital-based agencies and visiting nurse associations. The industry is highly fragmented: the 50 largest companies hold less than 25 percent of the market.

COMPETITIVE LANDSCAPE

Demand is driven by demographics and medical developments that encourage home healthcare. The profitability of individual companies depends on effective marketing and efficient operations. Large companies have some economies of scale in sales and marketing. Small companies can compete successfully by serving a local market. The industry is highly labor-intensive: average annual revenue per worker is about $50,000.

Because of the relatively low revenue per employee, companies focus on cost control. Another consequence of the low revenue is that even small cuts in reimbursement rates have a large effect on revenue. Many home healthcare companies went bankrupt after Medicare reimbursements were cut in the late 1990s.

PRODUCTS, OPERATIONS & TECHNOLOGY

The four major types of services are general home visits, respiratory therapy, infusion therapy, and medical equipment rental. Home visits are for general nursing care, including limited physical examinations, physical therapy and personal care such as bathing, and account for 75 percent of industry revenue. Respiratory therapy (sometimes called inhalation therapy) consists mainly of oxygen treatment for patients with chronic obstructive pulmonary disease (COPD) and other lung diseases. Infusion therapy includes injections and intravenous delivery of nutrition fluids, anti-bacterial solutions, chemotherapy, and pain medication. Medical equipment rental includes items like beds, respirators, and wheelchairs. Companies treat both patients who have a short-term need for care, such as after a hospital stay, and those with chronic diseases like COPD that require long-term treatment. Most patients are elderly.

The operations of companies are very basic, involving mainly personnel management and appointment scheduling, equipment maintenance, and insurance billing. Operations are highly local. Large companies generally operate a network of branch offices. Apria Healthcare operates almost 500 branch offices in 50 states. Services are provided by nurses, aides, therapists, and medical technicians as part of a care plan prescribed by a doctor.

Similar to other healthcare providers, home healthcare companies rely heavily on computer systems for scheduling and billing. Because care is provided in patient homes, wireless communication systems are becoming an important source of efficiencies.

SALES & MARKETING

Although patients are the users of home healthcare services, marketing is focused on those who authorize treatments or who pay for them, including doctors, hospitals, insurers, and managed care companies. Sales are usually handled by a field sales force. The large companies in the industry are advantaged in being able to provide services to insurers with regional or national needs.

State and federal government programs provide almost 65 percent of industry revenue, including more than 30 percent from Medicare and 25 percent from Medicaid. About 20 percent of revenue comes from private health insurers, the rest from individuals in the form of co-payments. The Medicare program pays for 2.5 million patients per year, with an average of 35 visits per patient and an average payment per visit of about $85. Many Medicare and private insurance plans closely follow the Medicare payment schedule. Under its Prospective Payment System (PPS), Medicare pays a maximum fee per 60-day period, no matter how many home visits are made.

FINANCE & REGULATION

Home healthcare companies tend to have high receivables, close to 60 days sales, mainly from high quality sources. Cash management is an important function because of the large number of small transactions. Companies that rent out equipment have high inventory and high annual investment in new equipment.

The industry is highly regulated because of the large participation by Medicare and Medicaid. The Balanced Budget Act of 1997 (BBA); the Medicare Balanced Budget Refinement Act of 1999; and the Medicare, Medicaid and SCHIP Benefits Improvement and Protection Act of 2000 affected reimbursement levels for various home healthcare services. Detection of numerous instances of fraud in billing prompted legislation, including the "anti-kickback statute," the "physician self-referral" provision of the Omnibus Budget Reconciliation Act of 1993 (known as Stark II), the False Claims Act, the Health Care Fraud statute of 1996, and the False Statements statute of 1996.

Most larger home healthcare companies have accreditation from the private Joint Commission. Companies need state licenses and must meet eligibility standards for certification as Medicare and Medicaid providers.

REGIONAL & INTERNATIONAL ISSUES

Because home healthcare is provided mainly to older patients, the size of the local market varies across the country. Medicare pays for home healthcare for 1.1 percent of the

population of Florida and 0.9 percent in New York and Illinois, but only 0.4 percent of the population in Nevada and Arizona.

RECENT DEVELOPMENTS

QUARTERLY INDUSTRY UPDATE

Medicare Approves At-home Sleep Apnea Testing - At-home sleep testing for obstructive sleep apnea has been approved by the Centers for Medicare and Medicaid Services (CMS), which may benefit home healthcare services prepared to provide the service. Industry experts say that the decision will lead to increased coverage of obstructive sleep apnea testing by insurance companies.

Medicare Bidding Program Threatens Some Companies - A new Medicare bidding program for durable medical equipment will put many providers out of business and will disrupt services, according to the American Association for Homecare (AAH). The program will be implemented in 10 metropolitan areas starting July 1, 2008. Hundreds of durable medical equipment providers say that they've been improperly disqualified and removed by CMS from the bidding process. The competitive bidding program was designed to reduce the number of durable medical equipment providers and reduce reimbursement rates for several types of home-based equipment and care.

Legislation Would Mandate Bonding for Some Companies - A bill introduced in the Senate that's intended to deter Medicare fraud and abuse would impose a $500,000 surety bond requirement on durable medical equipment providers. The Medicare Fraud Prevention Act of 2008 would also increase civil and criminal fines for Medicare fraud and abuse. The AAH says that the legislation, if passed, would put thousands of small home care companies out of business.

BUSINESS CHALLENGES

CRITICAL ISSUES

Dependence on Reimbursement Rates - The industry depends highly on the reimbursement rates that insurers allow for specific home healthcare services, especially Medicare. The rapid rise in national healthcare costs in recent years has made Medicare reimbursement a political issue. Because the industry already operates with low costs, any cuts in reimbursement rates directly affect profitability.

- US consumer prices for the care of invalids and elderly at home, a reflection of reimbursement rate trends, increased 5 percent in March 2008 over year earlier levels.

OTHER BUSINESS CHALLENGES

Customer Concentration - Many companies in the industry have reimbursement arrangements with just a few third-party payers, and therefore depend highly on those relationships. Payers like insurance companies, managed care companies, and Medicare can terminate contracts for various reasons. Disqualification from a large program like Medicare would devastate most home healthcare companies.

Increased Regulation - A number of companies and individuals have been prosecuted for billing fraud and other illegal practices, such as self-referrals and kickbacks. As with other healthcare providers, home healthcare companies face a greater level of regulation, especially as the aging population increases Medicare spending on home services.

TRENDS AND OPPORTUNITIES

BUSINESS TRENDS

Home Healthcare for Chronic Conditions - Initially conceived as transitional care after hospitalization, home healthcare now serves mainly elderly patients with chronic conditions who require periodic treatment, and patients who require extended treatment that can be given outside a hospital.

Payers: Greater Involvement in Home Treatments - Managed care organizations (MCOs) and Medicare are taking a greater direct role in determining home treatments. Most home healthcare companies are required to provide information that can be used to determine the outcomes of different treatments, leading to better care strategies.

Surveillance Technology for Home Patients - Surveillance, including monitoring and tracking/feedback technologies to help the elderly and disabled live more independently, are being tested. Monitoring technologies use sensors or video cameras to monitor a person's well-being. Demand for medical monitoring systems for at-home patients is increasing.

Quality Control Measures - Medicare uses Outcome Based Quality Improvement (OBQI), a new method to improve the health of home healthcare patients. The method monitors specific goals of home care, such as reduced hospitalization rates. Doctors collect patient data to measure outcomes, and then compare company or agency results to benchmarks, enabling healthcare providers to determine the strength and weakness of their performance.

INDUSTRY OPPORTUNITIES

Services to Large MCOs - The growth of national and regional MCOs is an opportunity for large home healthcare companies to provide them a complete range of services for their members. Rather than deal with multiple smaller companies, national and regional MCOs prefer to deal with a single vendor.

Pediatric Home Healthcare More Profitable - Home healthcare for pediatric patients with long-term conditions is preferred by both doctors and parents over long hospitalizations. Pediatric courses of treatment often last for years. The rates that can be charged for pediatric services are generally higher than for geriatric patients because of the higher levels of nursing and technological skill required. Pediatric Services of America on average provides 10 hours of treatment per day for eight months.

Favorable Demographics - Demand for home healthcare will increase from the sheer numbers of older Americans. The number of people older than 65 will grow more than 50 percent from 2000 to 2020. Because of medical advances, many of the medical conditions these people may suffer from will be better treated at home than in a hospital or nursing home.

Mobile Technology Improves Efficiency - Mobile computing, scanners, and electronic computerized forms allow home healthcare providers to make more home visits than with a paper-based system, and to reduce errors. Onsite data entry also eliminates errors in data transcription, contributing to faster reimbursement.

EXECUTIVE INSIGHT

Executive:
CHIEF EXECUTIVE OFFICER - CEO

Key Focus:

Supporting Industry Positions on Regulations

State and federal government agencies, in their role as regulators, inspectors, and insurers, are a major factor in the home healthcare industry. Rapidly rising healthcare costs and numerous cases of billing fraud prompted a series of legislative initiatives. These initiatives have resulted in additional paperwork, which has become burdensome to the point of diminishing the quality of care. Companies, through their industry associations, are actively supporting needed reforms and reduced paperwork burdens.

Key Focus:

Evaluating Expansion Opportunities

With the population aging and the cost of home healthcare lower compared to hospitalization, opportunities for industry growth are significant. Numerous studies conclude that offering increased services in the home is less stressful and more convenient to the patient, and less costly for both the patient and the third-party payer. Companies are exploring unfilled medical opportunities and adding new services as their cost-effectiveness is demonstrated.

Executive:
CHIEF FINANCIAL OFFICER – CFO

Key Focus:

Managing High Receivables

Receivables can be high as most patients are covered by Medicare or state Medicaid plans and private insurance. Receivables can approach 60 days sales or more as past industry abuses and billing fraud have caused third-party payers to ask questions that require follow-up paperwork. Most companies are submitting insurance claims electronically to expedite processing, and some payers are using electronic funds transfer to speed payment.

Key Focus:

Controlling Costs

Third-party payers that pay the vast majority of home healthcare costs are under tremendous pressure to reduce costs. Home healthcare revenues are relatively low per employee, so companies focus on controlling materials and expenses to enhance profitability, as better inventory monitoring can improve operating efficiencies.

Executive:
CHIEF INFORMATION OFFICER – CIO

Key Focus:

Implementing Back-Office Automation Systems

Since billable activities are performed away from the office and, for the most part, outside the range of function of supervisory staff, administrative systems that don't

require excessive overhead are essential. Most companies are implementing back-office automation systems that permit online capture of patient diagnostics and treatment. Companies implement field information systems for proper contract administration, inventory management, and patient outcome analysis, and to ensure accurate order entry and pricing, billing, and collections. The systems enable management to monitor and evaluate contract profitability.

Key Focus:

Using Mobile Computing

Home visits are time-consuming and require careful scheduling to optimize caregiver time. Many companies are digitizing patient records, which allows home healthcare providers to access them from the homes they visit using mobile computing. Mobile computing, which many companies are using, is more efficient than a paper-based system because it allows more home visits in the same amount of time. Companies use mobile computing for onsite data entry to speed claims processing and reimbursement.

Executive:
HUMAN RESOURCES – HR

Key Focus:

Conducting Employee Background Checks

Due to the high cost of medical and liability insurance, and due to workers entering private homes, most companies insist that new employees have background checks. Checks include verifying the academic records, as well as certification of nurses and other professionals. Criminal records are checked for all new workers and drug testing conducted.

Executive:
VP SALES/MARKETING – SALES

Key Focus:

Marketing to MCOs

The increased willingness of MCOs to pay for home care is an opportunity for home healthcare providers to expand their services. Sales teams call on MCOs and structure contracts for a variety of services throughout the MCO's geographic area. Home healthcare providers note the savings in dealing with just one vendor, including reduced claims processing and costs for MCOs and their members.

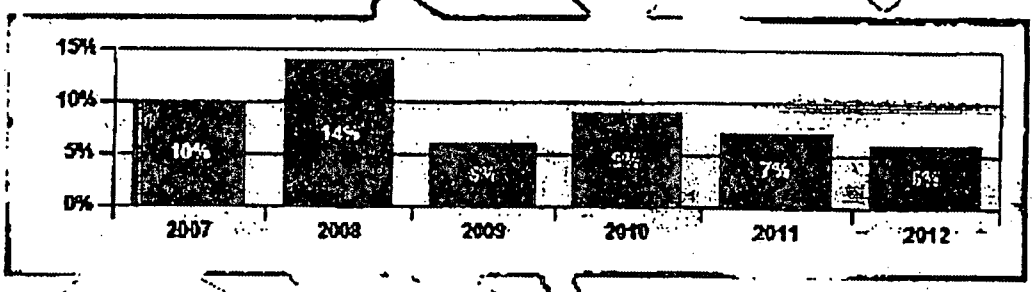
Promoting Services

Home healthcare is much cheaper than hospitalization, and organizations efficient in providing home healthcare services can grow. Companies market their areas of specialization to payers and physicians for referral. Companies also develop initiatives to increase customer awareness of their clinical and operational programs to gain market share through senior centers and retirement communities. Given the favorable demographics of aging baby boomers, companies continue to market their services and reduced costs.

INDUSTRY FORECAST

US personal consumption expenditures for home healthcare services are forecast to grow at an annual compounded rate of 8.4 percent between 2007 and 2012.

Consumer Spending Growth Very Strong for Home Healthcare



First Research forecasts are based on INFORUM forecasts that are licensed from the Interindustry Economic Research Fund, Inc. (IERF) in College Park, MD. INFORUM's "interindustry-macro" approach to modeling the economy captures the links between industries and the aggregate economy.

(Source: Data provided by First Research, Inc.)

COMPANY BALANCE SHEETS

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ABACARE HOME MEDICAL, INC.
HISTORICAL BALANCE SHEETS

	12/31/04	12/31/05	12/31/06	12/31/07	04/30/08	Adjustment to FMV	Operating Assets
CURRENT ASSETS:							
CASH	$ 4,988	$ 17,706	$ 45,093	$ 68,169	$ 53,481	$ -	$ 53,481
ACCOUNTS RECEIVABLE	13,066	35,809	260,873	612,732	639,793	-	639,793
ALLOWANCE FOR BAD DEBTS	-	-	(24,397)	(288,434)	(283,434)	(20,349)	(308,783)
INVENTORY	8,422	12,083	237,918	112,968	112,968	13,733	126,701
PREPAID INSURANCE	-	-	1,165	5,080	9,166	-	9,166
PREPAID PROPERTY TAXES	-	-	-	-	2,000	-	2,000
SECURITY DEPOSIT ON UTILITIES	-	-	-	1,383	1,383	-	1,383
SECURITY DEPOSIT ON LEASE	-	-	1,045	1,045	1,045	-	1,045
TOTAL CURRENT ASSETS	26,494	65,337	521,495	513,545	331,424	(6,616)	324,808
FIXED ASSETS:							
PROPERTY AND EQUIPMENT	-	88,670	289,050	437,373	-	-	-
LEASEHOLD IMPROVEMENTS	-	-	-	-	5,200	-	5,200
OFFICE EQUIPMENT	-	-	-	-	12,811	-	12,811
WAREHOUSE EQUIPMENT	-	-	-	-	23,040	-	23,040
FURNITURE & FIXTURES	-	-	-	-	23,481	-	23,481
2004 DODGE SPRINTER VAN 2500	-	-	-	-	34,745	-	34,745
2006 DODGE CARAVAN SE	-	-	-	-	21,538	-	21,538
2008 DODGE SPRINTER VAN 2500	-	-	-	-	38,088	-	38,088
COMPUTER SOFTWARE	-	-	-	-	14,960	-	14,960
EQUIPMENT FOR RENTAL	-	-	-	-	277,074	24,059	301,133
ACCUMULATED DEPRECIATION	-	(11,009)	(153,459)	(271,278)	(271,278)	-	(271,278)
TOTAL PPE	-	77,661	111,591	166,095	177,659	24,059	201,718
TOTAL ASSETS	$ 26,494	$ 143,998	$ 633,086	$ 679,640	$ 509,083	$ 17,443	$ 526,526
CURRENT LIABILITIES:							
ACCOUNTS PAYABLE	$ 29,202	$ 18,887	$ 74,829	$ 128,319	$ 121,481	$ -	$ 121,481
A/P - COOPER HALL HOME CARE	25	-	-	-	-	-	-
A/P - CM	-	-	-	5,052	-	-	-
SALES TAX PAYABLE	361	577	1,841	2,044	-	-	-
NESCO LINE OF CREDIT	-	-	-	60,000	25,000	-	25,000
OTHER ACCRUED EXPENSES	-	1,071	1,121	3,021	2,485	-	2,485
ACCRUED PAYROLL	-	3,968	13,103	16,818	18,718	-	18,718
TOTAL CURRENT LIABILITIES	29,588	24,513	90,895	207,054	167,684	-	167,684
LONG TERM LIABILITIES:							
LEASE - PUGET SOUND	-	(700)	38,887	31,128	-	-	-
LEASE - INVACARE CREDIT CORP	-	-	1,279	-	28,406	-	28,406
LEASE - MANIFEST FUNDING	-	-	42,291	34,878	31,925	-	31,925
LEASE - AIR SEP	-	-	-	-	5,514	-	5,514
LEASE - VGM FINANCIAL 9114001	-	-	6,875	-	-	-	-
LEASE - VGM FINANCIAL 9114002	-	-	3,994	-	-	-	-
LEASE - VGM FINANCIAL 9114003	-	-	13,293	7,495	6,437	-	6,437
LEASE - VGM FINANCIAL 9114004	-	-	11,075	6,443	4,798	-	4,798
LEASE - VGM FINANCIAL 9114005	-	-	2,928	-	-	-	-
LEASE - VGM FINANCIAL 9114006	-	-	16,769	-	-	-	-
NP - DOROTHY CONNELLY	-	-	-	28,357	28,357	-	28,357
NP - VEHICLES - 2005 SPRINTER	-	24,436	26,232	21,738	19,455	-	19,455
NP - VEHICLES - 2006 CARAVAN	-	-	19,427	18,313	14,149	-	14,149
NP - VEHICLES - 2008 SPRINTER	-	-	32,575	26,041	23,782	-	23,782
NP - SHAREHOLDERS	-	140,000	297,000	297,000	297,000	-	297,000
NP - SHAREHOLDERS - BEFORE PHILIP	21,708	21,708	21,708	21,708	21,708	-	21,708
TOTAL LONG TERM LIABILITIES	21,708	185,444	525,863	480,297	470,511	-	470,511
TOTAL LIABILITIES	50,296	219,957	616,348	687,351	638,195	-	638,195
STOCKHOLDERS' EQUITY:							
COMMON STOCK	100	100	100	100	100		
ADDITIONAL PAID IN CAPITAL	-	-	-	-	-		
RETAINED EARNINGS	(73,902)	(76,059)	16,638	(7,811)	70,788	Net FMV of Assets	$ 88,331
TOTAL STOCKHOLDERS' EQUITY	(73,802)	(75,959)	16,738	(7,711)	70,888		
TOTAL LIABILITIES AND STOCKHOLDERS' EQUITY	$ 26,494	$ 143,998	$ 633,086	$ 679,640	$ 709,083		

Company Balance Sheets

COMPANY PROFIT AND LOSS

DRAFT

ABACARE HOME MEDICAL, INC.
HISTORICAL INCOME STATEMENTS - ADJUSTED
FOR THE YEARS ENDING:

	12/31/04	%	12/31/05	%	12/31/06	%	12/31/07	%	Annualized 04/30/08	%	Normalized Income	%
SALES	$ 33,015	100.00%	$ 118,167	100.00%	$ 1,108,436	100.00%	$ 1,473,871	100.00%	$ 1,830,877	100.00%	$ 1,800,000	100.00%
COST OF GOODS SOLD	25,793	78.13%	91,919	77.78%	343,883	31.00%	428,078	29.05%	645,030	35.23%	630,000	35.00%
GROSS MARGIN	9,222	21.87%	26,242	22.20%	765,555	69.00%	1,044,826	70.94%	1,236,847	65.77%	1,242,000	69.00%
OPERATING EXPENSES:												
SALARIES - OFFICERS	-	0.00%	-	0.00%	68,309	6.16%	91,843	6.23%	80,000	4.37%	80,000	4.44%
SALARIES	12,895	38.00%	40,431	34.22%	207,744	18.73%	313,846	21.30%	431,819	23.59%	430,000	23.89%
ADVERTISING	2,184	6.43%	4,367	3.70%	12,259	1.10%	6,007	0.41%	11,056	0.60%	11,053	0.61%
AUTO AND TRUCK EXPENSE	-	0.00%	1,960	1.10%	24,083	2.17%	42,523	2.89%	65,458	3.58%	65,300	3.63%
BANK CHARGES	-	0.00%	38	0.03%	757	0.05%	694	0.05%	738	0.04%	907	0.05%
COMPUTER EXPENSE	-	0.00%	2,132	1.80%	5,250	0.48%	3,436	0.23%	-	0.00%	2,829	0.16%
COMMISSIONS	30	0.09%	-	0.00%	-	0.00%	-	0.00%	-	0.00%	-	0.00%
CONTRACT LABOR	-	0.00%	-	0.00%	55	0.00%	-	0.00%	-	0.00%	-	0.00%
CONTRIBUTIONS - CHARITABLE	-	0.00%	-	0.00%	200	0.02%	1,665	0.11%	300	0.02%	1,700	0.09%
CREDIT CARD FEES	-	0.00%	1,005	0.85%	578	0.05%	2,844	0.19%	3,903	0.21%	3,900	0.22%
DEPRECIATION	-	0.00%	11,008	9.32%	149,412	13.47%	104,219	7.08%	73,773	3.92%	73,773	4.10%
DUES AND SUBSCRIPTIONS	-	0.00%	746	0.63%	4,982	0.45%	9,082	0.62%	4,031	0.21%	7,338	0.41%
EMPLOYEE BENEFITS	-	0.00%	-	0.00%	5,483	0.54%	1,008	0.07%	159	0.01%	820	0.05%
EMPLOYEE PROCUREMENT	-	0.00%	-	0.00%	2,917	0.03%	2,329	0.16%	1,838	0.09%	1,918	0.10%
INSURANCE - LIABILITY	-	0.00%	-	0.00%	3,421	0.31%	4,291	0.29%	8,277	0.44%	8,300	0.46%
INSURANCE - GROUP	-	0.00%	-	0.00%	7,344	0.66%	3,218	0.22%	27,360	1.46%	27,400	1.52%
INSURANCE - PROPERTY	-	0.00%	-	0.00%	-	0.00%	-	0.00%	10,800	0.58%	10,500	0.58%
INSURANCE - WORKERS COMP	-	0.00%	2,121	1.79%	4,045	0.36%	11,057	0.75%	12,198	0.65%	12,600	0.69%
INSURANCE - VEHICLE	-	0.00%	625	0.53%	6,180	0.56%	7,391	0.50%	6,024	0.32%	7,564	0.42%
INTEREST EXPENSE	-	0.00%	720	0.61%	20,876	1.89%	19,877	1.35%	15,057	0.80%	15,260	0.85%
PENALTY	-	0.00%	-	0.00%	-	0.00%	1,122	0.08%	658	0.03%	738	0.04%
LICENSE FEES	-	0.00%	896	0.31%	968	0.04%	3,370	0.23%	5,298	0.29%	4,020	0.22%
MEALS AND ENTERTAINMENT	-	0.00%	3,823	3.23%	10,833	0.98%	11,077	0.75%	9,624	0.53%	10,538	0.59%
MISCELLANEOUS	-	0.00%	-	0.00%	669	0.06%	327	0.02%	709	0.04%	853	0.04%
OFFICE EXPENSE AND POSTAGE	170	0.51%	1,708	1.45%	8,340	0.75%	22,676	1.54%	34,806	1.92%	23,410	1.30%
PAYROLL EXPENSE	-	0.00%	-	0.00%	-	0.00%	303	0.02%	414	0.02%	450	0.03%
PROFESSIONAL FEES	1,615	4.81%	3,854	3.26%	11,681	1.05%	13,898	0.95%	38,678	2.05%	37,308	1.93%
RENT - BLDG	4,987	14.89%	2,330	1.97%	30,127	2.72%	26,000	2.04%	104,400	5.55%	104,400	5.80%
RENT - STORAGE	-	0.00%	-	0.00%	-	0.00%	1,093	0.07%	2,484	0.13%	2,300	0.14%
REPAIRS AND MAINTENANCE	-	0.00%	-	0.00%	247	0.02%	1,115	0.08%	1,003	0.05%	1,031	0.06%
RETIREMENT CONTRIBUTION	-	0.00%	-	0.00%	-	0.00%	119	0.01%	882	0.05%	800	0.05%
SECURITY EXPENSE	-	0.00%	-	0.00%	-	0.00%	-	0.00%	2,305	0.12%	2,300	0.13%
SERVICES PURCHASED	-	0.00%	-	0.00%	-	0.00%	2,253	0.15%	28,850	1.58%	28,850	1.60%
SHOWROOM EXPENSE	-	0.00%	-	0.00%	-	0.00%	2,387	0.16%	38	0.00%	991	0.05%
SUPPLIES	-	0.00%	-	0.00%	1,288	0.12%	-	0.00%	-	0.00%	-	0.00%
STATE TAX	-	0.00%	-	0.00%	-	0.00%	-	0.00%	75	0.00%	75	0.00%
SALES TAX	561	1.67%	-	0.00%	546	0.05%	1,034	0.03%	1,380	0.07%	1,400	0.08%
TAXES - PROPERTY	-	0.00%	508	0.43%	1,851	0.19%	4,863	0.33%	6,615	0.30%	6,650	0.31%
TAXES - PAYROLL	-	0.00%	4,000	3.39%	22,698	2.04%	33,870	2.31%	43,008	2.44%	45,900	2.56%
TRAINING	-	0.00%	258	0.22%	5,883	0.53%	4,088	0.28%	16,300	0.81%	15,800	0.85%
TRAVEL	693	2.63%	111	0.09%	5,837	0.53%	5,907	0.40%	4,754	0.25%	6,663	0.38%
TELEPHONE	1,707	5.07%	2,718	2.30%	4,401	0.40%	14,837	0.00%	15,777	0.84%	15,800	0.88%
UNIFORMS	-	0.00%	294	0.25%	3,131	0.28%	1,656	0.11%	3,009	0.16%	2,921	0.16%
UTILITIES	-	0.00%	433	0.32%	3,828	0.35%	5,650	0.40%	7,294	0.39%	7,800	0.41%
WAREHOUSE EXPENSE	-	0.00%	-	0.00%	447	0.04%	8,636	0.60%	5,199	0.28%	6,207	0.34%
TOTAL OPERATING EXPENSES	23,290	69.29%	91,409	68.06%	628,699	56.69%	766,041	53.39%	1,062,278	58.49%	1,069,354	59.24%
INCOME FROM OPERATIONS	(13,068)	-53.75%	(65,167)	-46.06%	136,856	12.32%	258,854	17.57%	173,577	9.23%	173,646	9.76%
OTHER INCOME:												
SERVICE CHARGES	-	0.00%	-	0.00%	-	0.00%	-	0.00%	-	0.00%	-	0.00%
GAIN ON ASSET DISPOSAL	-	0.00%	-	0.00%	(16,503)	-1.49%	-	0.00%	-	0.00%	-	0.00%
UNREALIZED GAINS (LOSSES)	-	0.00%	-	0.00%	-	0.00%	-	0.00%	-	0.00%	-	0.00%
DIVIDEND INCOME	-	0.00%	-	0.00%	-	0.00%	-	0.00%	-	0.00%	-	0.00%
INTEREST INCOME	-	0.00%	-	0.00%	-	0.00%	90	0.01%	-	0.00%	-	0.00%
TOTAL OTHER INCOME	-	0.00%	-	0.00%	(16,503)	-1.49%	90	0.01%	0	0.00%	-	0.00%
OTHER EXPENSES:												
BAD DEBT EXPENSE	-	0.00%	-	0.00%	(24,306)	-2.20%	(260,706)	-18.02%	(91,047)	-3.23%	(91,047)	-3.39%
NET INCOME BEFORE TAXES	(13,068)	-53.75%	(65,167)	-46.06%	95,877	8.65%	(10,852)	-0.74%	112,530	6.08%	114,599	6.37%
INCOME TAXES	-	0.00%	-	0.00%	-	0.00%	-	0.00%	-	0.00%	-	0.00%
NET INCOME	$ (13,068)	-53.75%	$ (65,167)	-46.06%	$ 95,877	8.65%	$ (10,852)	-0.74%	$ 112,530	6.08%	$ 114,599	6.37%

Interest	15,260
Depreciation	73,773
EBITDA	$ 203,632

NORMALIZATION ADJUSTMENTS

Normalization adjustments are required to adjust the historical financial statements so that they are representative of a normal condition as of the valuation date.

Balance Sheet Adjustments

Balance Sheet Adjustments

The Company's reported book value at the date of valuation, April 30, 2008, was $75,081. Adjustments were made to the balance sheet to more accurately reflect the net asset value of the company. These included adjustments to the "Inventory" and "Equipment for Rental." These adjustments were made after discussions with Phillip Declemente and David Selander, CPA and are consistent with the adjustments made at year-end for financial statement and tax return purposes. An adjustment was also made to "Allowance for Bad Debts." This adjustment was made after an analysis of the Aged Accounts Receivable was performed and discussed with ABACARE's management and accountants.

Income Statement Adjustments

The Company's reported profit and loss statement was annualized using the profit and loss statement for April 30, 2008. This annualized statement was then normalized based on discussions with management, including an adjustment to estimate annual bad debt expenses based on the accounts receivable analysis performed.

Methodologies Considered But Rejected

While there are many methods that can be used to determine the fair market value of a company, the fact pattern in the specific case of ABACARE dictates that certain methodologies are inappropriate. The following lists those methods and the reasons why they are not used.

Economic Balance Sheet Method

The economic balance sheet value method determines value by restating assets and liabilities to reflect the current fair market value of all balance sheet items. Company value is then determined by subtracting the fair market value of total liabilities from the fair market value of total assets. This method takes as fact that the underlying assets are the driving factor in the valuation of the company.

The economic balance sheet methodology was rejected for determining the value of ABACARE because my review indicates that the value of the enterprise is driven by the ability of the collection of assets in place to generate a benefit stream that is more important in terms of valuation than the value in the underlying assets themselves. In other words, the value of the individual assets and their associated liabilities are less important than the manner in which management has utilized them.

Capitalization of Excess Net Cash Flows to Equity Holders Method

The capitalization of excess earnings method develops a value by blending pieces of the asset approach and the income approach. During Prohibition in the 1920's, this method was introduced to estimate the intangible value of breweries and distilleries lost as a result of enacting Prohibition laws. The US Treasury Department, in Appeals and Review Memorandum 34, established the methodology. Its current version is found in Revenue Ruling 68-609.

The primary methodology adds the present value of the excess portion of a benefit stream over the normal benefit stream provided by the assemblage of the assets to the fair market value of those assets generating the benefit stream. Capitalization of excess earnings requires estimates of the adjusted net asset value, ongoing benefit stream, normal benefit stream return and a capitalization of future earnings. This method was rejected as it too places an emphasis on the value of the company's individual assets.

Determination of Fair Market Value

Capitalization of Net Cash Flows to Equity Holders Method

This method determines value by applying a capitalization rate to the expected free cash flow from one period.

Capitalization of cash flow requires an estimate of an ongoing benefit stream and a capitalization rate. The capitalization rate represents the required rate of return minus the sustainable growth rate. Capitalization of cash flow effectively determines the present value of the Company's ongoing economic benefit stream growing perpetually at a fixed rate and discounted at the required rate of return. The present value is representative of the amount a willing buyer and a willing seller would exchange for the business.

A cash flow stream needs to define the changes in working capital, capital expenditures and long term debt. The cash flow stream used for this valuation and the profit and loss projections used to calculate the cash flow streams may be found at Exhibits 1 and 2, respectively.

The ongoing increase in working capital is calculated for purposes of this valuation as 15% of the increase in gross sales from one year to the next. The ongoing increase/decrease in capital expenditures was determined based on discussions with management and are as follows:

- $15,000 in year 1 for new car
- $10,000 in year 2 for copier/printer/fax
- $40,000 in years 2-5 for new delivery trucks

No new long-term debt is expected to be incurred over the next five years. Lastly the debt principal repayments were determined based on the amortization schedules provided by management as well as estimated amortization schedules for the financing of the delivery trucks that are projected to be purchased in the future. These estimated amortization schedules assumed a 5-year note with an annual interest rate of 7%.

Capitalization Rates

The discount rate represents the risk an investor is willing to accept for the potential reward an investment in the subject company will return. It can also be considered the rate of return that an investor requires on an ongoing basis. This risk is not calculated in a vacuum or a sterile environment but rather it is calculated based on the factors that can be contrasted against the investment in other vehicles that are available and in the specific environment as of the valuation date.

The build-up method layers different risk estimates to build up a discount rate. The appropriate discount rate components for the Company are the risk free rate, equity risk premium, size premium and company specific premium. Subtracting sustainable growth from the discount rate develops the capitalization rate.

Risk Free Rate

The risk free rate measures the rate of return an investor can earn without taking any additional risk. Examples of risk free returns are United States Treasury bonds. As of the valuation date April 30, 2008, the yield on a 20-year United States Treasury Bond was 4.49%. The rate applied to the buildup was 4.49%.

Equity Risk Premium

The equity risk premium represents the risk an investor accepts for investing in large public companies. This risk is measured by taking the returns of public companies over the last 80 years and subtracting the risk-free return over the last 80 years (average annual returns for large capitalization stocks minus average annual returns for long term government bonds). This information is published by Morningstar in *Ibbotson SBBI – 2008 Valuation Yearbook*. As of December 31, 2007, the equity risk premium was 7.1%. The rate applied to ABACARE was 7.1%.

Size Risk Premium

Empirical evidence shows that the risk reward principle (the greater the risk the greater the reward) holds true in the size or capitalization of the company. The size premium represents average annual returns for small capitalization stocks minus average annual returns for large capitalization stocks. Based on *Ibbotson SBBI – 2008 Valuation Yearbook*, a publication of Morningstar, the small stock risk premium averaged 3.65% from 1926 to 2006. The rate applied to ABACARE was 3.65%.

Industry Risk Premium

Based upon the industry of the subject company as reported in *Ibbotson SBBI – 2008 Valuation Yearbook*, a publication of Morningstar, the industry risk premium was calculated as 1.52%. The rate applied to ABACARE was 1.52%.

Specific Company Risk Premium

Based upon Company specific factors the summation requires an additional risk premium of 4.00%. These factors include ABACARE's high dependence on the reimbursement rates that insurers allow for specific home healthcare services, especially Medicare and Medicaid. The steep increase in healthcare costs during the past few years has made these reimbursements a political issue and any cuts in reimbursement rates will directly affect ABACARE's profitability. As already stated, ABACARE depends highly on its relationship with third-party payers such as insurance companies, managed care companies, and Medicare. These companies can terminate contracts for various reasons. Disqualification from a large program could have a large negative impact on ABACARE's business. Also, as with other healthcare providers, ABACARE faces a greater level of regulation, especially as the aging population increases and companies and individuals continue to be prosecuted for billing fraud and other illegal practices, such as self-referrals and kickbacks.

Expected Sustainable Growth Rate

We estimate 3.00% long term compound annual growth. This cash flow growth estimate is based upon my assessment of the Company's prospects for sustained growth in relationship to the estimate of ongoing cash flow power developed above.

Calculation of the Rate

The capitalization rate used for the purposes of this valuation is 18.00%. The schedule below shows how the rate was calculated.

BUILD- UP METHOD – CAPITALIZATION RATE	
RISK FREE RATE:	
20-YEAR U. S. TREASURY YIELD	4.49%
EQUITY RISK PREMIUM	7.10%
SIZE PREMIUM	3.65%
INDUSTRY RISK PREMIUM	1.52%
SPECIFIC RISK	4.00%
EQUITY DISCOUNT RATE	**20.76%**
EQUITY DISCOUNT RATE (rounded)	**21.00%**
LESS: LONG TERM GROWTH RATE	3.00%
CAPITALIZATION RATE	**18.00%**

Application of Minority Interest Discount

A minority interest discount is a reduction in the initial indicated value due to a lack of control prerogatives such as declaring dividends, liquidating the company, going public, issuing or buying stock, directing management, setting management's salaries, etc. In this case, a minority interest discount is not appropriate because we are valuing a 100% interest in ABACARE.

Application of Marketability Discount

In my opinion, a discount of 15.00% is required for lack of marketability. The discount reflects an expectation for the lack of a secondary market in which to negotiate a quick sale.

Appendix E contains further information on the lack of a marketability discount.

Application of Excess or Non-Operating Assets

Excess or non-operating assets represent the value of resources the company has control of, but that are not required to operate the business. Examples are excess cash on hand and real estate or other securities not used in the production of goods or services. In my judgment, excess and non-operating assets that need to be added back and are a part of the business's value total $0.

Indicated Value Calculation

The following schedule presents the indicated value using the capitalization of net cash flow to equity holders method. As calculated, the indicated fair market value is $470,889 which has been rounded to $471,000.

PROJECTED CASH FLOW		$ 99,718
÷ CAPITALIZATION RATE		18.0%
		$ 553,987
MARKETABILITY DISCOUNT	15%	(83,098)
INDICATED EQUITY VALUE		$ 470,889
SELECTED EQUITY VALUE		$ 471,000

Discounted Cash Flows Method

The discounted cash flows method was applied and the fair market value of ABACARE as of April 30, 2008 was determined to be $930,000. This income method is the most appropriate method to use because the method focuses on the present value of the forecasted future cash flows that would accrue to the hypothetical owner of the company that vary greatly in the short run, but are still estimable in the long run. This method requires an explicit forecast of the future cash flows over a reasonably foreseeable short term and an estimate of a long term cash flow that is stable and sustainable, i.e. not varying from period to period and determined to continue into the future without compromise. An appropriate discount rate and an estimate of long term growth beyond the forecast period allow discrete present values to be calculated and summed for all the cash flows to determine the entity value.

Key Assumptions in Forecast

The basic forecast assumptions are developed within the context of the Company's historical experience during the past 5 years. The assumptions are summarized below:

- Sales Growth – 10% growth per year
- Gross Profit Margin – 69%
- Operating Expenses – increase 7% over the prior
- Officer's Compensation – Increase by $10,000 per year

A cash flow stream needs to define the changes in working capital, capital expenditures and long term debt. The cash flow stream used for this valuation may be found at Exhibit 1. The ongoing increase in working capital is calculated for purposes of this valuation as 15% of the increase in gross sales from one year to the next. The ongoing increase/decrease in capital expenditures was determined based on discussions with management and are as follows:

- $15,000 in year 1 for new car
- $10,000 in year 2 for copier/printer/fax
- $40,000 in years 2-5 for new delivery trucks

No new long-term debt is expected to be incurred over the next five years. Lastly the debt principal repayments and interest expenses were determined based on the amortization schedules provided by management as well as estimated amortization for the financing of the delivery trucks that are projected to be purchased in the future. These estimated amortization schedules assumed a 5-year note with an annual interest rate of 7%.

Income Tax Rate(s) Assumptions

In valuing S corporations, it is important to understand the tax benefit that S corporation shareholders receive. In 1958 Congress adopted Subchapter S in the Technical

Amendments Act of 1958. Under Subchapter S all corporate earnings would be treated as if they were distributed, and taxed once. When Congress enacted Subchapter S it had no intention of removing taxes on corporate income. Personal and corporate income tax rates are nearly equal, and the S corporation investor must pay taxes on the entire corporate income, whether it is distributed or not. No corporate taxes are being avoided. However, the investor will not have to pay dividend tax on any amount that is distributed to him. Therein lies the benefit of investing in an S corporation.

As such, the corporate/individual income tax rate used in our analysis is 40%. For purposes of calculating the benefit/premium an S corporation shareholder receives over a C corporation shareholder a tax rate of 20% is used. To see how this benefit is calculated see Exhibits 1 and 2.

Discount Rate

The discount rate represents the risk an investor is willing to accept for the potential reward an investment in the subject company will return. Different rates apply to different types of businesses. It is also known as the return that an investor requires by generating the investment. This risk is not calculated in a vacuum or a sterile environment but rather it is calculated based on the factors that can be contrasted against investing in other vehicles that are available and in the specific environment as of the valuation date.

The buildup method layers different risk estimates to build up a discount rate. The appropriate discount rate components for the Company are the risk free rate, equity risk premium, size premium and company specific premium.

Risk Free Rate

The risk free rate measures the rate of return an investor can earn without taking any additional risk. Examples of risk free returns are United States Treasury bonds. As of the valuation date April 30, 2008, the yield on a 20-year United States Treasury Bond was 4.49%. The rate applied to the buildup was 4.49%.

Equity Risk Premium

The equity risk premium represents the risk an investor accepts for investing in large public companies. This risk is measured by taking the returns of public companies over the last 80 years and subtracting the risk free return over the last 80 years (average annual returns for large capitalization stocks minus average annual returns for long term government bonds). This information is published by Morningstar in *Ibbotson SBBI – 2008 Valuation Yearbook*. As of December 31, 2007, the equity risk premium was 7.1%. The rate applied to ABACARE was 7.1%.

Size Risk Premium

Empirical evidence shows that the risk reward principle (the greater the risk the greater the reward) holds true in the size or capitalization of the company. The size premium represents average annual returns for small capitalization stocks minus average annual returns for large capitalization stocks. Based on *Ibbotson SBBI – 2008 Valuation Yearbook*, a publication of Morningstar, the small stock risk premium averaged 3.65% from 1926 to 2006. The rate applied to ABACARE was 3.65%.

Industry Risk Premium

Based upon the industry of the subject company as reported in *Ibbotson SBBI – 2008 Valuation Yearbook*, a publication of Morningstar, the industry risk premium was calculated as 1.52%. The rate applied to ABACARE was 1.52%.

Specific Company Risk Premium

Based upon Company specific factors the summation requires an additional risk premium of 4.00%. These factors include ABACARE's high dependence on the reimbursement rates that insurers allow for specific home healthcare services, especially Medicare and Medicaid. The steep increase in healthcare costs during the past few years has made these reimbursements a political issue and any cuts in reimbursement rates will directly affect ABACARE's profitability. As already stated, ABACARE depends highly on its relationship with third-party payers such as insurance companies, managed care companies, and Medicare. These companies can terminate contracts for various reasons. Disqualification from a large program could have a large negative impact on ABACARE's business. Also, as with other healthcare providers, ABACARE faces a greater level of regulation, especially as the aging population increases and companies and individuals continue to be prosecuted for billing fraud and other illegal practices, such as self-referrals and kickbacks.

Discount Rate Calculation

The schedule below shows how the discount rate was calculated. The discount rate chosen for ABACARE is 21%.

BUILD - UP METHOD – DISCOUNT RATE	
RISK FREE RATE:	
20-YEAR U. S. TREASURY YIELD	
EQUITY RISK PREMIUM	4.49%
SIZE PREMIUM	7.10%
INDUSTRY RISK PREMIUM	3.65%
SPECIFIC RISK	1.52%
EQUITY DISCOUNT RATE	4.00%
EQUITY DISCOUNT RATE (rounded)	20.76%
	21.00%

Terminal Growth Rate and Benefit Stream

One of the key elements to the discounted cash flow method is that an estimate of a long term benefit stream that is stable and sustainable can be determined. Put another way, this benefit stream is continuing into the future without change. In the short term, the benefit stream can vary wildly due to circumstances in the fact pattern. However, at the end of the reasonably foreseeable future a terminal benefit stream must be estimated.

We estimate 3.00% terminal compound annual growth. This growth estimate is based upon my assessment of the Company's prospects for sustained growth in relationship to the estimate of ongoing cash flow power developed above.

The cash flow in the fifth period of the discrete forecast was $287,991. Applying the growth rate of 3.00%, I estimate the continuing stream should be $1,647,946.

The stream is then discounted to present value and summed with the discrete present values in determining the fair market value of ABACARE.

Midyear Convention

In the normal discounting process it is assumed that the benefit stream is available to the hypothetical buyer at the end of the period. This is not always the case since sales occur over the course of a period and expenses occur over the course of a period. The benefit stream is then available during the period and not only at the end. To implement this logic, a midyear convention is used. The midyear convention calculates the present value of a benefit stream using arithmetic that presumes half is available before the midyear and half is available after the midyear.

Application of Marketability Discount

In my opinion, a discount of 15.00% is required for lack of marketability. The discount reflects an expectation for the lack of a secondary market in which to negotiate a quick sale.

Appendix E contains further information on the lack of a marketability discount.

Indicated Value Calculation

The following schedule presents the indicated value using the discounted cash flows method. As calculated, the indicated fair market value of ABACARE is $929,789 which has been rounded to $930,000.

		END YEAR 1	END YEAR 2	END YEAR 3	END YEAR 4	END YEAR 5	RESIDUAL
NET CASH TO EQUITY HOLDERS		$ 99,718	$ 98,363	$ 182,900	$ 235,773	$ 287,991	$ 1,647,946
PRESENT VALUE FACTOR @	21%	0.904977	0.747915	0.618112	0.510836	0.422179	0.348908
PRESENT VALUE		90,242	73,567	113,053	120,441	121,584	574,982
SUM OF PRESENT VALUES		1,093,869					
MARKETABILITY DISCOUNT	15%	(164,080)					
INDICATED EQUITY VALUE		$ 929,789					
SELECTED EQUITY VALUE		$ 930,000					

Market Data Method – Mid-Market Comps

Guideline companies are companies that provide a reasonable basis for comparison to the relevant investment characteristics of a company being valued. Guideline companies are most often publicly traded companies, although they may be private, in the same or similar business as the subject of this valuation. Guideline companies are used as a basis to develop valuation conclusions with respect to a subject company under the presumption that a similar market exists for the subject company as exists for the guideline companies.

Ideal guideline companies should be in the same business as the company being valued. However, if there is insufficient transaction evidence in the same business, it may be necessary to consider companies with an underlying similarity of relevant investment characteristics such as markets, products, growth, cyclical variability and other salient factors.

The guideline company method uses a group of public companies and/or privately held companies selected for their ability to provide valuation guidelines for the analyst. The most commonly used version of the guideline company method develops a price/earnings ratio with which to capitalize net income.

I searched the Midmarket Comps database for transactions involving privately held and publicly traded guideline companies. The Midmarket Comps database is a study of transactions involving publicly traded and privately held businesses with annual sales between $1 million and $100 million. The study is compiled by World M&A Network. I researched guideline companies by first identifying the industry in which ABACARE operates and, using the Standard Industrial Classification Code (SIC Code), 8082, for the industry, I performed a search for a group of companies in a similar line of business as that of the subject company. I screened this group further through the use of key words and phrases that are unique to and describe the subject Company's product or operations. The search parameters used in determining whether or not a particular transaction in the Midmarket database was comparable to the subject Company were:

SIC	Closing Date	Price (Millions)	Seller's Revenues (Millions)	Seller's Net Income	P/E	P/R	P/EBITDA
8082	01/01/1996	2.500	1.800	0.193	12.953	1.389	0
8082	01/04/1996	2.600	2.300	0.147	17.687	1.130	0
8082	01/01/1996	3.750	2.000	0.558	6.720	1.875	0
8082	01/01/1996	4.000	3.600	0.566	7.067	1.111	0
8082	02/01/1996	2.600	0.986	0.098	26.531	2.637	0
8082	06/30/1996	0.330	0.698	-0.172	0.000	0.355	0
8082	07/17/1996	2.000	2.700	0.227	4.405	0.370	0
8082	05/13/1996	4.100	4.800	0.214	19.159	0.854	0
8082	01/01/1997	2.000	18.000	-0.386	0.000	0.083	0
8082	04/09/1998	0.000	6.700	-0.951	0.000	0.000	0
8082	01/01/1998	1.200	9.200	-1.800	0.000	0.130	0
8082	08/10/2000	1.750	4.000	0.257	3.405	0.219	1.846
8082	08/20/2001	3.300	12.900	-1.100	0.000	0.128	0
8082	09/08/2005	0.904	2.200	0.182	4.967	0.411	3.798
8082	04/03/2007	0.775	2.200	0.515	1.505	0.352	1.294

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The average of the price/earnings (P/E) ratios shown above is 10.44 and the median is 6.894. The P/E ratio used for purposes of this report is 10.44. The average of the price/revenue (P/R) ratios shown above is 0.789 and the median is 0.391. The selected P/R ratio for this report is 0.789. The price/EBITDA (P/EBITDA) ratios shown above average 2.313 and the median is 1.846. The selected P/EBITDA ratio is 2.313.

Application of Marketability Discount

In my opinion, a discount of 15% is required for lack of marketability. The discount reflects an expectation for the lack of a secondary market in which to negotiate a quick sale.

Appendix E contains further information on the lack of a marketability discount.

Indicated Value Calculation

The following schedule presents the conclusions of value using the market data Mid-Market Comps ratio methods. As calculated, the indicated fair market value ranges from $400,351 to $1,207,170.

MID MARKET COMPS		
NORMALIZED NET INCOME		$114,599
EARNINGS MULTIPLE		10.4
SUBTOTOTAL		1,196,414
MARKETABILITY DISCOUNT	15.00%	(179,462)
INDICATED EQUITY VALUE		$ 1,016,952
GROSS REVENUE		$ 1,800,000
REVENUE MULITPLE		0.789
SUBTOTAL		1,420,200
MARKETABILITY DISCOUNT	15.00%	(213,030)
INDICATED EQUITY VALUE		$ 1,207,170
NOMALIZED EBITDA		$ 203,632
EBITDA MULITPLE		2.3
SUBTOTAL		471,001
MARKETABILITY DISCOUNT	15.00%	(70,650)
INDICATED EQUITY VALUE		$ 400,351

RULES OF THUMB METHOD

As previously indicated we applied various Rules of Thumb for corroboration. They are summarized as follows.

VALUATION MULTIPLES

GROSS SALES		$ 1,800,000
MULTIPLIER		0.50
SUBTOTOTAL		900,000
MARKETABILITY DISCOUNT	15.00%	(135,000)
INDICATED EQUITY VALUE		**$ 765,000**
GROSS PROFIT		$ 1,242,000
MULTIPLIER		0.90
SUBTOTOTAL		1,117,800
MARKETABILITY DISCOUNT	15.00%	(167,670)
INDICATED EQUITY VALUE		**$ 950,130**
EBITDA		$ 203,632
MULTIPLIER		3.70
SUBTOTOTAL		753,439
MARKETABILITY DISCOUNT	15.00%	(113,016)
INDICATED EQUITY VALUE		**$ 640,423**

Note that the above Rules of Thumb values fall within the range of values that our other more reliable methods have indicated. Thus, these Rules of Thumb corroborate the valuation methods we are using to determine our conclusion of value.

CONCLUSION OF VALUE

In the schedule below, I have assigned weights to the values indicated by the various valuation methods. The weights are intended to reflect my opinion of the relative importance or reliability of the methods when determining fair market value.

Weights are assigned as follows:

VALUATION INDICATION BY METHOD	INDICATED VALUE
CAPITALIZATION OF NET CASH FLOW TO EQUITY HOLDERS METHOD	$ 471,000
DIRECT VALUATION OF EQUITY BY DISCOUNTED CASH FLOWS METHOD	$ 930,000
MID-MARKET COMPS	
Earnings Multiple	$ 1,016,952
Revenue Multiple	$ 1,207,170
EBITDA Multiple	$ 400,351
CONCLUSION OF EQUITY VALUE	**$975,000**

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OPINION

Therefore, based upon the facts and circumstances of the valuation and subject to the limitations in both conditions and scope listed in this report, my opinion of the resultant fair market value of ABACARE on a control, non-marketable basis as of April 30, 2008 is:

$ 975,000

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APPENDIX A: VALUATION CERTIFICATION AND SIGNATURE OF THE ANALYST

I certify to the best of my knowledge:

1. The statements of fact contained in this report are true and correct.
2. The reported analyses, opinions, and conclusions are limited only by the reported assumptions and limiting conditions, and are my personal, impartial, and unbiased professional analyses, opinions, and conclusions.
3. I have no present or prospective interest in the property that is the subject of this report and no personal interest with respect to the parties involved.
4. I have no bias with respect to the property that is the subject of this report or to the parties involved with this assignment.
5. My engagement in this assignment was not contingent upon developing or reporting predetermined results.
6. My compensation for completing this assignment is not contingent upon the development or reporting of a predetermined value or direction in value that favors the cause of the client, the amount of the value opinion, the attainment of a stipulated result, or the occurrence of a subsequent event directly related to the intended use of this appraisal.
7. My analyses, opinion, and conclusions were developed, and this report has been prepared in conformity with the National Association of Certified Valuation Analysts Professional Standards
8. I have not made a personal inspection of the property that is the subject of this report; however, Mike Grabowski and Julie Dunn have visited the Mt. Pleasant location.
9. No one provided significant personal property appraisal assistance to the person signing this certification. As I stated in the assumptions, for the purposes of this report, I assumed that the book value of the assets was equal to the fair market value of the assets.

Signature of the Analyst:

Mr. Ronald H. Burkett, CPA, CVA

Shareholder

Burkett Burkett & Burkett CPAs, P.A.

APPENDIX B: LIMITING CONDITIONS

Preparation of this report involved the review of substantial documentation with respect to the Company, the industry and the national economy. Information reviewed relative to the Company is summarized in Appendix C. Sources of information related to the industry and the national economy are cited specifically at appropriate sections of the report.

In conjunction with the preparation of this report, I, Ronald H. Burkett of Burkett Burkett & Burkett CPAs, P.A., had discussions with management, which provided an important perspective to my understanding of the information reviewed and analyzed in the preparation of this valuation opinion.

In all cases, I have relied upon the referenced information without independent verification. This report is, therefore, dependent upon the information provided. A material change in critical information relied upon in this report would be cause for a reassessment to determine the effect, if any, upon my conclusion.

Users of this business valuation report should be aware that business valuations are based on future earnings potential that may or may not materialize. Therefore, the actual results achieved during the projection period will vary from the projections utilized in this valuation, and the variations may be material.

Some assumptions invariably will not materialize, and unanticipated events and circumstances may occur. Therefore, the actual performance in any areas forecasted/projected will vary from the forecast/projection, and the variations may be material. Burkett Burkett & Burkett CPAs, P.A. will not express any form of assurance on the likelihood of achieving the forecast/projection or on the reasonableness of the used assumptions. Any such forecast/projection is presented as part of the appraisal and is not intended to be used separately.

The value premise(s) cited in this report are fundamental to the value opinions rendered herein, and I reserve the right to reconsider such premise(s) should subsequent or additional information be discovered, although no such obligation exists.

We have relied upon the representations of the owners, management and other third parties concerning the value and useful condition of all equipment, real estate, investments used in the business, and any other assets or liabilities except as specifically stated to the contrary in this report. I have not attempted to confirm whether or not all assets of the business are free and clear of liens and encumbrances, or that ABACARE has good title to all assets.

The estimate of value included in this report assumes that ABACARE will maintain the character and integrity of the company through any sale, reorganization or reduction of any owner's/manager's participation in the existing activities of the company.

Since neither ABACARE management nor advisors have advised me otherwise, I assume that there is full compliance with all applicable federal, state, and local laws and regulations unless the lack of compliance is stated, defined, and considered in the appraisal report.

Public information, purchased private information and industry statistical information are from sources I deem to be reliable; however, I make no representation as to the accuracy or completeness of such information, and have accepted the information without further verification.

This report and its related calculations were prepared using various software applications potentially including Microsoft Word and Microsoft Excel, and/or various Internet-related software, third-party data (as indicated) and information.

I assume no responsibility for the legal description or matters including legal or title considerations. Title to the subject assets, properties, or business interests is assumed to be good and marketable as represented by owners, management and advisors of ABACARE unless otherwise stated.

I assume no hidden or unapparent conditions regarding the subject assets, properties or business interests.

Unless otherwise stated in this report, I did not observe, and I have no knowledge of, the existence of hazardous materials with regard to the subject assets, properties, or business interests. However, I am not qualified to detect such substances. I assume no responsibility for such conditions or for any expertise required to discover them.

No opinion, counsel or interpretation is intended in matters that require legal or other appropriate professional advice. It is assumed that such opinions, counsel or interpretations have been or will be obtained from the appropriate professional sources.

The analyses, opinions, and conclusions presented in this report apply to this engagement only and may not be used out of the context presented herein. This report is valid only for the effective date(s) specified and only for the purpose(s) specified herein.

Although I have exerted considerable diligence and applied my best efforts in constructing this document, immaterial anomalies, if any, may arise. Even so, I am confident that my overall conclusion would still fall within a materially consistent conclusion.

While the client has not informed Burkett Burkett & Burkett CPAs, P.A. of any intent to do so, any third parties to whom this report is shown may be assured that this report, while performed in the employ of the client, was materially prepared on a non-advocacy basis. Any third persons, however, are cautioned that Burkett Burkett & Burkett CPAs, P.A. has no duty to you and, therefore, no warranty is expressed or implied. Nothing in this report is intended to replace your independent sole judgment, due diligence, or decision to seek professional legal, accounting, or valuation counsel.

This report has been prepared solely for the use of the party or parties named and specifically for the purposes set out therein. In accordance with normal practice, I hereby disclaim liability to any other person. Any other person should not rely upon the information and conclusions reached nor should any statement in this report be used for any other purpose without written consent from ABACARE.

The statements and opinions given in this report are given in good faith and in the belief that such statements are not false or misleading. In preparing this report I have relied upon information believed to be reliable and accurate provided by the owners,

management and advisors of ABACARE and other sources. I have no reason to believe that any material facts have been withheld from me, nor do I warrant that my investigation has revealed all of the matters in which an audit or more extensive examination might disclose.

This valuation reflects facts and conditions existing at the date of this valuation. Subsequent events have not been considered, and I have no obligation to update my report for such events and conditions.

Burkett Burkett & Burkett CPAs, P.A. does not purport to be a guarantor of value. Valuation of closely held companies is an imprecise science, with value being a question of fact, and reasonable people can differ in their estimates of value. Burkett Burkett & Burkett CPAs, P.A., however, performed conceptually sound and commonly accepted methods and procedures of valuation in determining the estimate of value included in this report. Burkett Burkett & Burkett CPAs, P.A. is not liable for any use, reliance, financial applications, report distribution or other utilization of any kind, by any party not having written authorization from Burkett Burkett & Burkett CPAs, P.A.

The appraised estimate of fair market value in this report is based on the definition applied throughout such report. An actual transaction in the shares may be completed at a value higher, lower or equal to the value rendered herein. I make no guarantee of any kind with regard to the likely or ultimate amount that may result in any future transaction.

The opinion(s) offered in this report do not constitute an offer to buy or sell the shares.

The valuation analyst, by reason of performing this valuation and preparing this report, is not to be required to give expert testimony nor to be in attendance in court or at any government, professional or regulatory hearing, including IRS matters with reference to the matters contained herein, unless prior written arrangements have been made with Burkett Burkett & Burkett CPAs, P.A. regarding such additional engagement as to the timing, fee arrangements, and nature of the services required.

None of the partners or employees of Burkett Burkett & Burkett CPAs, P.A. have any present or contemplated future interest in the property being valued, any personal interest with respect to the parties involved, or any other interest that might prevent me from performing an unbiased valuation. My compensation is not contingent on an action or event resulting from the analysis, opinions, or conclusions in, or the use of, this report.

Possession of this report does not carry with it the right of publication. It may not be used for any purpose by any person other than the client to whom it is addressed without my written consent and, in any event, only with proper written qualifications and only in its entirety.

Neither all nor any part of the contents of this report shall be disseminated to the public through advertising, public relations, news, sales, or other media without my prior written consent and approval.

Liability of Burkett Burkett & Burkett CPAs, P.A. and its partners and employees for errors and omissions, if any, in this work will be limited to the amount of its compensation for the work performed in this assignment.

This report is further subject to any other contingencies, assumptions, and limiting conditions that may be set out elsewhere within this report.

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APPENDIX C: QUALIFICATIONS OF APPRAISER

RONALD H. BURKETT
CERTIFIED PUBLIC ACCOUNTANT
CERTIFIED VALUATION ANALYST

BACKGROUND

Born in Columbia, South Carolina, Ronny graduated from Airport High School in 1970 and from the University of South Carolina with a Bachelor of Science Degree in Accounting in May of 1974.

BUSINESS HISTORY

1977 - Present	Shareholder since 1979 of Burkett Burkett & Burkett Certified Public Accountants, P.A.
1979 - 1980	Part-time Teacher of Accounting for Columbia Commercial College
1974 - 1977	International Paper Company in Georgetown, S.C. and the Division Office in Mobile, Alabama.

CERTIFICATIONS AND PROFESSIONAL MEMBERSHIPS

Certified Public Accountant licensed in the state of South Carolina and Georgia

Member of the South Carolina Association of Certified Public Accountants

Member of the Central Chapter of Certified Public Accountants

LITIGATION ENGAGEMENTS

Ronny has been retained as an expert in over three hundred cases involving damage assessments, in breach of contract, personal injury cases, business interruption claims, receiverships, tax and financial matters, legal and accounting malpractice claims, probate disputes, forensic accounting, and business valuations. He has rendered testimony in U.S. District Court, U.S. Bankruptcy Court, S.C. Circuit Court, S.C. Court of Common Pleas, S.C. General Sessions Court, S.C. Masters in Equity Court, S.C. Magistrate's Court, S.C. Family Court, S.C. Probate Court and various county Probate Courts and Family Courts. He has also testified in various arbitration proceedings.

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APPENDIX D: SOURCES OF INFORMATION

- Analysis of the unaudited financial statements for 2005-April 30, 2008
- Analysis of the US Income Tax Returns for an S Corporation (Form 1120S) for the years 2004-2007
- Relevant company documents:
  - Real Estate and Equipment Leases
  - Employment Agreements
  - Serialized and Non-serialized inventory reports as of December 31, 2007 and April 30,2008
  - Depreciation Schedules
  - Amortization Schedules
  - Aged Accounts Receivable Reports
- Research of the overall economic conditions and industry outlook
  - First Research
  - VGM Group

This information from the above sources was accepted without further verification. See Appendix B for a complete list of the assumptions and limitations to which this valuation report is subject to.

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APPENDIX E: MARKETABILITY DISCOUNT

Marketability relates to the liquidity of an investment relative to a comparable and actively traded alternative. In essence, impairment of liquidity increases an investor's expected rate of return. As a result, the market clearing price of a nonmarketable security is discounted relative to the price of its marketable counterpart. The discount for lack of marketability is stated as a percentage of a marketable value.

The valuation of share of stock in closely held corporations typically warrants a discount for lack of marketability. Many factors affect the liquidity of an investment. Among them are the following:

1. Number of shareholders;
2. Size of the block of stock being valued;
3. Restrictions on its sale by agreement or law;
4. The absence of registration; and,
5. The anticipated dividend flow attributable to the investment.

When attempting to quantify these factors that influence liquidity into an appropriate discount for lack of marketability, it is necessary to consider the following factors:

1. The holding period. Without an active market, an investor must hold for an uncertain length of time until a liquidity event occurs. In general, longer holding periods without liquidity imply higher discounts for lack of marketability. An investor should reasonably characterize exit timing along a probability distribution. Although subjective, the relative probabilities of exit dates are reasonably related to the following:

a. Historical ownership policies (insiders, outsiders, family, investors, etc.);

b. Buy/sell or other shareholder agreements;

c. Management/ownership succession (age, health, competence, emerging liquidity needs);

d. Business plans and likely exit strategies of the controlling owner(s); and,

e. Emerging attractiveness for equity offering or acquisition.

2. Required holding period return. To overcome the unattractiveness of the lack of liquidity, an investor in such securities expects a premium return in excess of that provided by liquid alternatives. Investment features that impair marketability will exact higher expected rates of return which imply higher discounts for lack of marketability. Unattractive features of a lack of liquid security could include the following:

a. Absence, inadequacy of or inability to pay dividends;

b. Subjective uncertainties related to the duration of the expected holding period and to achieving a favorable exit date valuation;

c. Restrictive shareholder agreements; and,

d. Various other features that increase uncertainty of cash flows.

3. Growth in underlying value during the holding period. If an investment is appreciating, that growth will provide a portion of the realized return during the holding period. Growth and marketability discounts are negatively correlated. As expected capital appreciation increases, discounts for lack of marketability decrease. Growth potential should be evaluated in the context of management's business plan, historical growth, and external factors such as emerging industry conditions and market valuations.

4. Expected cash flow distributions during the holding period. Holding period returns are also provided by interim cash flows (in addition to capital appreciation). As with growth, holding period cash distributions and discounts for lack of marketability are negatively correlated. Holding period cash flows (dividends, etc.) should be evaluated in the context of historical dividend policy, ability to distribute and the cash needs implied by the business plan.

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APPENDIX F: GLOSSARY

This Glossary was developed jointly by representatives of the American Institute of CPAs, the American Society of Appraisers, the Canadian Institute of Business Valuers, the Institute of Business Appraisers, and the National Association of Certified Valuation Analysts.

Adjusted Book Value - the value that results after one or more asset(s) or liability amounts are added, deleted, or changed from their respective financial statement amounts.

Appraisal - See Valuation.

Appraisal Approach - See Valuation Approach.

Appraisal Date - See Valuation Date.

Appraisal Method - See Valuation Method.

Appraisal Procedure - See Valuation Procedure.

Asset (Asset-Based) Approach - a general way of determining a value indication of a business, business ownership interest, or security by using one or more methods based on the value of the assets of that business net of liabilities.

Benefit Stream - any level of income, cash flow, or earnings generated by an asset, group of assets, or business enterprise. When the term is used, it should be supplemented by a definition of exactly what it means in the given valuation context.

Beta - a measure of systematic risk of a security; the tendency of a security's returns to correlate with swings in the broad market.

Blockage Discount - an amount or percentage deducted from the current market price of a publicly traded security to reflect the decrease in the per share value of a block of those securities that is of a size that could not be sold in a reasonable period of time given normal trading volume.

Business - see Business Enterprise.

Business Enterprise - a commercial, industrial, service, or investment entity, or a combination thereof, pursuing an economic activity.

Business Valuation - the act or process of determining the value of a business enterprise or ownership interest therein.

Capital Asset Pricing Model (CAPM) - a model in which the cost of capital for any security or portfolio of securities equals a risk free rate plus a risk premium that is proportionate to the systematic risk of the security or portfolio.

Capitalization - a conversion of a single period stream of benefits into value.

Capitalization Factor - any multiple or divisor used to convert anticipated benefits into value.

Capitalization Rate - any divisor (usually expressed as a percentage) used to convert anticipated benefits into value.

Capital Structure - the composition of the invested capital of a business enterprise; the mix of debt and equity financing.

Cash Flow - cash that is generated over a period of time by an asset, group of assets, or business enterprise. It may be used in a general sense to encompass various levels of specifically defined cash flows. When the term is used, it should be supplemented by a qualifier (for example, "discretionary" or "operating") and a definition of exactly what it means in the given valuation context.

Control - the power to direct the management and policies of a business enterprise.

Control Premium - an amount (expressed in either dollar or percentage form) by which the pro rata value (calculated, in proportion value) of a controlling interest exceeds the pro rata value of a noncontrolling interest in a business enterprise, that reflects the power of control.

Cost Approach - a general way of estimating a value indication of an individual asset by quantifying the amount of money that would be required to replace the future service capability of that asset.

Cost of Capital - the expected rate of return (discount rate) that the market requires in order to attract funds to a particular investment.

Discount - a reduction in value or the act of reducing value.

Discount for Lack of Control - an amount or percentage deducted from the pro rata share of value of one hundred percent (100%) of an equity interest in a business to reflect the absence of some or all of the powers of control.

Discount for Lack of Marketability - an amount or percentage deducted from the value of an ownership interest to reflect the relative absence of marketability.

Discount Rate - a rate of return (cost of capital) used to convert a monetary sum, payable or receivable in the future, into present value.

Economic Life - the period of time over which property may generate economic benefits.

Effective Date - See Valuation Date.

Enterprise - See Business Enterprise.

Equity Net Cash Flows - those cash flows available to pay out to equity holders (in the form of dividends) after funding operations of the business enterprise, making necessary capital investments, and reflecting increases or decreases in debt financing.

Equity Risk Premium - a rate of return in addition to a risk free rate to compensate for investing in equity instruments because they have a higher degree of probable risk than risk free instruments (a component of the cost of equity capital or equity discount rate).

Excess Earnings - that amount of anticipated benefits that exceeds a fair rate of return on the value of a selected asset base (often net tangible assets) used to generate those anticipated benefits.

Excess Earnings Method - a specific way of determining a value indication of a business, business ownership interest, or security determined as the sum of the value of the assets obtained by capitalizing excess earnings and the value of the selected asset base. Also frequently used to value intangible assets. See Excess Earnings.

Fair Market Value - the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm's length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts. {NOTE: In Canada, the term "price" should be replaced with the term "highest price".}

Forced Liquidation Value - liquidation value at which the asset or assets are sold as quickly as possible, such as at an auction.

Going Concern - an ongoing operating business enterprise.

Going Concern Value - the value of a business enterprise that is expected to continue to operate into the future. The intangible elements of Going Concern Value result from factors such as having a trained work force, an operational plant, and the necessary licenses, systems, and procedures in place.

Goodwill - that intangible asset arising as a result of name, reputation, customer loyalty, location, products, and similar factors not separately identified.

Goodwill Value - the value attributable to goodwill.

Income (Income-Based) Approach - a general way of determining a value indication of a business, business ownership interest, security, or intangible asset using one or more methods that convert anticipated benefits into a present single amount.

Intangible Assets - nonphysical assets (such as franchises, trademarks, patents, copyrights, goodwill, equities, mineral rights, securities and contracts as distinguished from physical assets) that grant rights, privileges, and have economic benefits for the owner.

Invested Capital - the sum of equity and debt in a business enterprise. Debt is typically long term liabilities or the sum of short term interest bearing debt and long term liabilities. When the term is used, it should be supplemented by a definition of exactly what it means in the given valuation context.

Invested Capital Net Cash Flows - those cash flows available to pay out to equity holders (in the form of dividends) and debt investors (in the form of principal and interest) after funding operations of the business enterprise and making necessary capital investments.

Investment Risk - the degree of uncertainty as to the realization of expected returns.

Investment Value - the value to a particular investor based on individual investment requirements and expectations. {NOTE: In Canada, the term used is "Value to the Owner."}

Key Person Discount - an amount or percentage deducted from the value of an ownership interest to reflect the reduction in value resulting from the actual or potential loss of a key person in a business enterprise.

Levered Beta - the beta reflecting a capital structure that includes debt.

Liquidity - the ability to quickly convert property to cash or pay a liability.

Liquidation Value - the net amount that can be realized if the business is terminated and the assets are sold piecemeal. Liquidation can be either "orderly" or "forced".

Majority Control - the degree of control provided by a majority position.

Majority Interest - an ownership interest greater than fifty percent (50%) of the voting interest in a business enterprise.

Market (Market-Based) Approach - a general way of determining a value indication of a business, business ownership interest, security, or intangible asset by using one or more methods that compare the subject to similar businesses, business ownership interests, securities, or intangible assets that have been sold.

Marketability - the ability to quickly convert property to cash at minimal cost.

Marketability Discount - See Discount for Lack of Marketability.

Minority Discount - a discount for lack of control applicable to a minority interest.

Minority Interest - an ownership interest less than fifty percent (50%) of the voting interest in a business enterprise.

Net Book Value - with respect to a business enterprise, the difference between total assets (net of accumulated depreciation, depletion, and amortization) and total liabilities of a business enterprise as they appear on the balance sheet (synonymous with Shareholder's Equity); with respect to an intangible asset, the capitalized cost of an intangible asset less accumulated amortization as it appears on the accounting books of the business enterprise.

Net Cash Flow - a form of cash flow. When the term is used, it should be supplemented by a qualifier (for example, "Equity" or "Invested Capital") and a definition of exactly what it means in the given valuation context.

Net Tangible Asset Value - the value of the business enterprise's tangible assets (excluding excess assets and non-operating assets) minus the value of its liabilities. {NOTE: In Canada, tangible assets also include identifiable intangible assets.}

Nonoperating Assets - assets not necessary to ongoing operations of the business enterprise. {NOTE: In Canada, the term used is "Redundant Assets."}

Orderly Liquidation Value - liquidation value at which the asset or assets are sold over a reasonable period of time to maximize proceeds received.

Premise of Value - an assumption regarding the most likely set of transactional circumstances that may be applicable to the subject valuation; e.g. going concern, liquidation.

Portfolio Discount - an amount or percentage that may be deducted from the value of a business enterprise to reflect the fact that it owns dissimilar operations or assets that may not fit well together.

Rate of Return - an amount of income (loss) and/or change in value realized or anticipated on an investment, expressed as a percentage of that investment.

Redundant Assets - {NOTE: In Canada, see "Nonoperating Assets."}

Report Date - the date conclusions are transmitted to the client.

Replacement Cost New - the current cost of a similar new property having the nearest equivalent utility to the property being valued.

Reproduction Cost New - the current cost of an identical new property.

Residual Value - the prospective value as of the end of the discrete projection period in a discounted benefit streams model.

Risk Free Rate - the rate of return available in the market on an investment free of default risk.

Risk Premium - a rate of return in addition to a risk free rate to compensate the investor for accepting risk.

Rule of Thumb - a mathematical relationship between or among variables based on experience, observation, hearsay, or a combination of these, usually applicable to a specific industry.

Special Interest Purchasers - acquirers who believe they can enjoy post-acquisition economies of scale, synergy, or strategic advantages by combining the acquired business interest with their own.

Standard of Value - the identification of the type of value being utilized in a specific engagement, e.g. fair market value, fair value, investment value.

Sustaining Capital Reinvestment - the periodic capital outlay required to maintain operations at existing levels, net of the tax shield available from such outlays.

Systematic Risk - the risk that is common to all risky securities and cannot be eliminated through diversification. When using the capital asset pricing model, systematic risk is measured by beta.

Terminal Value - See Residual Value.

Unlevered Beta - the beta reflecting a capital structure without debt.

The Risk Management Association – Formerly know as Robert Morris Associates.

Unsystematic Risk - the portion of total risk specific to an individual security that can be avoided through diversification.

Valuation - the act or process of determining the value of a business, business ownership interest, security, or intangible asset.

EXHIBITS

DRAFT

Valuation Approach - a general way of determining a value indication of a business, business ownership interest, security, or intangible asset using one or more valuation methods.

Valuation Date - the specific point in time as of which the valuator's opinion of value applies (also referred to as "Effective Date" or "Appraisal Date").

Valuation Method - within approaches, a specific way to determine value.

Valuation Procedure - the act, manner, and technique of performing the steps of an appraisal method.

Valuation Ratio - a fraction in which a value or price serves as the numerator and financial, operating, or physical data serve as the denominator.

Value to the Owner - {NOTE: In Canada, see Investment Value.}

Weighted Average Cost of Capital (WACC) - the cost of capital (discount rate) determined by the weighted average at market value of the cost of all financing sources in the business enterprise's capital structure.

DRAFT

Exhibit 1

ABACARE HOME MEDICAL, INC.
PROJECTED INCOME STATEMENTS
FOR THE YEARS ENDING:

	PROJECTED											
	Year 0	%	Year 1	%	Year 2	%	Year 3	%	Year 4	%	Year 5	%
SALES	$ 1,800,000	100.00%	$ 1,980,000	100.00%	$ 2,178,000	100.00%	$ 2,395,800	100.00%	$ 2,635,380	100.00%	$ 2,898,918	100.00%
COST OF GOODS SOLD	558,000	31.00%	613,800	31.00%	675,180	31.00%	742,698	31.00%	816,968	31.00%	898,665	31.00%
GROSS MARGIN	1,242,000	69.00%	1,366,200	69.00%	1,502,820	69.00%	1,653,102	69.00%	1,818,412	69.00%	2,000,253	69.00%
OPERATING EXPENSES:												
SALARIES - OFFICERS	80,000	4.44%	90,000	4.55%	100,000	4.59%	110,000	4.59%	120,000	4.55%	130,000	4.48%
SALARIES	430,000	23.89%	460,100	23.24%	492,307	22.60%	526,768	21.99%	563,642	21.39%	603,097	20.80%
ADVERTISING	11,053	0.61%	11,827	0.60%	12,655	0.58%	13,540	0.57%	14,488	0.55%	15,502	0.53%
AUTO AND TRUCK EXPENSE	55,500	3.08%	59,385	3.00%	63,542	2.92%	67,990	2.84%	72,749	2.76%	77,842	2.69%
BANK CHARGES	967	0.05%	971	0.05%	1,038	0.05%	1,111	0.05%	1,189	0.05%	1,272	0.04%
COMPUTER EXPENSE	2,829	0.16%	3,027	0.15%	2,829	0.13%	2,829	0.12%	2,829	0.11%	2,829	0.10%
COMMISSIONS	-	0.00%	-	0.00%	-	0.00%	-	0.00%	-	0.00%	-	0.00%
CONTRACT LABOR	-	0.00%	-	0.00%	-	0.00%	-	0.00%	-	0.00%	-	0.00%
CONTRIBUTIONS - CHARITABLE	1,700	0.09%	1,819	0.09%	1,946	0.09%	2,083	0.09%	2,228	0.08%	2,384	0.08%
CREDIT CARD FEES	3,900	0.22%	4,173	0.21%	4,463	0.21%	4,776	0.20%	5,112	0.19%	5,470	0.19%
DEPRECIATION	73,775	4.10%	49,367	2.49%	45,196	2.08%	45,760	1.91%	46,474	1.76%	43,000	1.48%
DUES AND SUBSCRIPTIONS	7,328	0.41%	7,841	0.40%	8,390	0.39%	8,978	0.37%	9,606	0.36%	10,278	0.35%
EMPLOYEE BENEFITS	620	0.03%	663	0.03%	710	0.03%	760	0.03%	813	0.03%	870	0.03%
EMPLOYEE PROCUREMENT	1,818	0.10%	1,945	0.10%	2,082	0.10%	2,227	0.09%	2,383	0.09%	2,550	0.08%
INSURANCE - LIABILITY	8,300	0.46%	8,881	0.45%	9,503	0.44%	10,168	0.42%	10,880	0.41%	11,641	0.40%
INSURANCE - GROUP	27,400	1.52%	29,318	1.48%	31,370	1.44%	33,566	1.40%	35,916	1.36%	38,430	1.33%
INSURANCE - PROPERTY	10,900	0.56%	11,233	0.57%	12,021	0.55%	12,863	0.54%	13,763	0.52%	14,727	0.51%
INSURANCE - WORKERS COMP	12,200	0.68%	13,054	0.66%	13,968	0.64%	14,948	0.62%	15,992	0.61%	17,111	0.59%
INSURANCE - VEHICLE	7,564	0.42%	8,094	0.41%	8,660	0.40%	9,267	0.39%	9,915	0.38%	10,609	0.37%
INTEREST EXPENSE	13,260	0.88%	12,186	0.62%	10,037	0.46%	8,819	0.38%	8,754	0.37%	10,249	0.35%
PENALTY	738	0.04%	790	0.04%	846	0.04%	905	0.04%	968	0.04%	1,035	0.04%
LICENSE FEES	4,020	0.22%	4,301	0.22%	4,603	0.21%	4,925	0.21%	5,269	0.20%	5,636	0.19%
MEALS AND ENTERTAINMENT	10,838	0.59%	11,383	0.57%	12,169	0.56%	13,032	0.54%	13,944	0.53%	14,920	0.51%
MISCELLANEOUS	683	0.04%	699	0.04%	747	0.03%	800	0.03%	856	0.03%	916	0.03%
OFFICE EXPENSE AND POSTAGE	23,410	1.30%	25,048	1.27%	26,802	1.23%	28,678	1.20%	30,685	1.16%	32,833	1.13%
PAYROLL EXPENSE	450	0.03%	482	0.02%	515	0.02%	551	0.02%	590	0.02%	631	0.02%
PROFESSIONAL FEES	27,308	1.52%	28,218	1.46%	31,295	1.44%	33,453	1.40%	36,798	1.38%	38,301	1.32%
RENT - BLDG	104,400	5.80%	104,400	5.27%	104,400	4.79%	104,400	4.36%	104,400	3.96%	104,400	3.60%
RENT - STORAGE	2,580	0.14%	2,675	0.14%	2,882	0.13%	3,080	0.13%	3,277	0.12%	3,506	0.12%
REPAIRS AND MAINTENANCE	1,021	0.06%	1,092	0.06%	1,169	0.05%	1,251	0.05%	1,338	0.05%	1,432	0.05%
RETIREMENT CONTRIBUTION	800	0.03%	842	0.03%	887	0.03%	735	0.03%	780	0.03%	842	0.03%
SECURITY EXPENSE	2,300	0.13%	2,461	0.12%	2,633	0.12%	2,818	0.12%	3,018	0.11%	3,228	0.11%
SERVICES PURCHASED	29,630	1.66%	31,940	1.61%	34,173	1.57%	36,569	1.53%	39,127	1.48%	41,886	1.44%
SHOWROOM EXPENSE	991	0.06%	1,060	0.06%	1,145	0.05%	1,214	0.05%	1,299	0.05%	1,390	0.05%
SUPPLIES	-	0.00%	-	0.00%	-	0.00%	-	0.00%	-	0.00%	-	0.00%
STATE TAX	75	0.00%	80	0.00%	86	0.00%	92	0.00%	98	0.00%	105	0.00%
SALES TAX	1,400	0.08%	1,498	0.08%	1,603	0.07%	1,715	0.07%	1,835	0.07%	1,964	0.07%
TAXES - PROPERTY	5,650	0.31%	6,046	0.31%	6,469	0.30%	6,921	0.29%	7,406	0.28%	7,924	0.27%
TAXES - PAYROLL	45,900	2.55%	49,113	2.48%	52,551	2.41%	56,229	2.35%	60,166	2.28%	64,377	2.22%
TRAINING	15,300	0.85%	16,371	0.83%	17,517	0.80%	18,743	0.78%	20,055	0.76%	21,459	0.74%
TRAVEL	6,269	0.35%	6,708	0.34%	7,178	0.33%	7,680	0.32%	8,218	0.31%	8,793	0.30%
TELEPHONE	15,800	0.88%	16,906	0.85%	18,069	0.83%	19,356	0.81%	20,711	0.79%	22,160	0.76%
UNIFORMS	2,921	0.16%	3,125	0.16%	3,344	0.15%	3,578	0.15%	3,829	0.15%	4,097	0.14%
UTILITIES	7,300	0.41%	7,811	0.39%	8,358	0.38%	8,943	0.37%	9,569	0.36%	10,239	0.35%
WAREHOUSE EXPENSE	6,207	0.34%	6,642	0.34%	7,107	0.33%	7,604	0.32%	8,137	0.31%	8,706	0.30%
TOTAL OPERATING EXPENSES	1,068,354	59.34%	1,104,379	55.78%	1,167,037	53.59%	1,229,505	51.34%	1,313,107	49.83%	1,398,623	48.25%
INCOME FROM OPERATIONS	173,646	9.76%	261,821	13.22%	335,783	15.42%	413,597	17.26%	505,305	19.17%	601,631	20.76%
OTHER EXPENSES:												
BAD DEBT EXPENSE	(61,047)	-3.39%	(65,320)	-3.30%	(69,893)	-3.21%	(74,785)	-3.12%	(80,020)	-3.04%	(85,622)	-2.95%
NET INCOME BEFORE TAXES	114,599	6.37%	196,501	9.92%	265,890	12.21%	338,812	14.14%	425,286	16.14%	516,009	17.80%
INCOME TAXES (40%)	45,840	2.55%	78,600	3.97%	106,356	4.88%	135,525	5.66%	170,114	6.46%	206,404	7.12%
NET INCOME	$ 68,759	3.82%	$ 117,900	5.95%	$ 159,534	7.32%	$ 203,287	8.49%	$ 255,171	9.68%	$ 309,606	10.68%

PROJECTION ASSUMPTIONS

Fees (increase over prior year)	10.00%	10.00%	10.00%	10.00%	10.00%
Cost of Goods Sold (as percentage of fees)	31.00%	31.00%	31.00%	31.00%	31.00%
Other Expenses (increase over prior year)	7.00%	7.00%	7.00%	7.00%	7.00%
Income taxes	40.00%	40.00%	40.00%	40.00%	40.00%

Exhibit 2

ABACARE HOME MEDICAL, INC.
ESTIMATION OF NET CASH FLOW TO EQUITY HOLDERS

	YEAR 1	YEAR 2	YEAR 3	YEAR 4	YEAR 5
NET INCOME AFTER TAXES	$ 117,900	$ 159,534	$ 203,287	$ 255,171	$ 309,606
PASS-THROUGH ENTITY PREMIUM (20%) (Adjustment for dividend tax avoided)	23,580.10	31,906.85	$40,657.47	$ 51,034.25	$ 61,921.11
PLUS: DEPRECIATION	49,367	45,195	45,760	40,474	43,000
MINUS: ADDITIONS TO WORKING CAP	(27,000)	(31,050)	(35,708)	(41,064)	(47,223)
MINUS: CAPITAL EXPENDITURES	(15,000)	(50,000)	(40,000)	(40,000)	(40,000)
PLUS: NEW DEBT INCURRED	-	-	-	-	-
MINUS: DEBT PRINCIPAL REPAY.	(49,130)	(57,223)	(31,097)	(29,843)	(39,313)
NET CASH FLOW TO EQUITY HOLDERS	$ 99,718	$ 198,363	$ 182,900	$ 235,773	$ 287,991

RESIDUAL	
YEAR 5 CASH FLOW	$ 287,991
LONG -TERM GROWTH RATE	3%
YEAR 6 CASH FLOW	296,630
÷ CAPITALIZATION RATE	18%
RESIDUAL CASH FLOW	$ 1,647,948
ASSUMPTION: NET WORKING CAPITAL	15.0%

Form **1120S**

Department of the Treasury
Internal Revenue Service (77)

U.S. Income Tax Return for an S Corporation

▶ Do not file this form unless the corporation has filed or is attaching Form 2553 to elect to be an S corporation.

OMB No. 1545-0130

2008

For calendar year 2008 or tax year beginning , and ending

A S election effective date 12/06/1996	Use the IRS label. Otherwise, print or type. Name: ABACARE HOME MEDICAL, INC	D Employer identification number 57-1060962
B Business activity code number (see instructions) 621610	Number, street, and room or suite no. If a P.O. box, see instructions. 2353 N. HIGHWAY 17	E Date incorporated 12/06/1996
C Check if Sch. M-3 attached ☐	City or town, state, and ZIP code MT. PLEASANT, SC 29466-6807	F Total assets (see instructions) $ 0.

G Is the corporation electing to be an S corporation beginning with this tax year? ☐ Yes ☒ No If "Yes," attach Form 2553 if not already filed

H Check if: (1) ☐ Final return (2) ☐ Name change (3) ☐ Address change (4) ☐ Amended return (5) ☐ S election termination or revocation

I Enter the number of shareholders who were shareholders during any part of the tax year ▶ 4

Caution: *Include only trade or business income and expenses on lines 1a through 21. See the instructions for more information.*

Income	1 a Gross receipts or sales 1,921,885. b Less returns and allowances c Bal ▶		1c	1,921,885.
	2 Cost of goods sold (Schedule A, line 8)		2	536,162.
	3 Gross profit. Subtract line 2 from line 1c		3	1,385,723.
	4 Net gain (loss) from Form 4797, Part II, line 17 *(attach Form 4797)*		4	
	5 Other income (loss) *(attach statement)* STATEMENT 1		5	8,236.
	6 **Total income (loss).** Add lines 3 through 5 ▶		6	1,393,959.
Deductions (See instructions for limitations)	7 Compensation of officers STATEMENT 2		7	74,611.
	8 Salaries and wages (less employment credits)		8	413,817.
	9 Repairs and maintenance		9	1,786.
	10 Bad debts		10	197,424.
	11 Rents		11	104,231.
	12 Taxes and licenses STATEMENT 3		12	51,462.
	13 Interest		13	15,957.
	14 Depreciation not claimed on Schedule A or elsewhere on return *(attach Form 4562)*		14	71,018.
	15 Depletion (**Do not deduct oil and gas depletion.**)		15	
	16 Advertising		16	2,658.
	17 Pension, profit-sharing, etc., plans		17	
	18 Employee benefit programs		18	770.
	19 Other deductions *(attach statement)* STATEMENT 4		19	345,702.
	20 **Total deductions.** Add lines 7 through 19 ▶		20	1,279,436.
	21 **Ordinary business income (loss).** Subtract line 20 from line 6		21	114,523.
Tax and Payments	22 a Excess net passive income or LIFO recapture tax *(see instructions)*	22a		
	b Tax from Schedule D (Form 1120S)	22b		
	c Add lines 22a and 22b		22c	
	23 a 2008 estimated tax payments and 2007 overpayment credited to 2008	23a		
	b Tax deposited with Form 7004	23b		
	c Credit for federal tax paid on fuels *(attach Form 4136)*	23c		
	d Add lines 23a through 23c		23d	
	24 Estimated tax penalty (see instructions). Check if Form 2220 is attached ▶ ☐		24	
	25 **Amount owed.** If line 23d is smaller than the total of lines 22c and 24, enter amount owed		25	
	26 **Overpayment.** If line 23d is larger than the total of lines 22c and 24, enter amount overpaid		26	
	27 Enter amount from line 26 **Credited to 2009 estimated tax** ▶	Refunded ▶	27	

Sign Here Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

▶ Signature of officer Date ▶ Title

May the IRS discuss this return with the preparer shown below (see instr.)? ☒ Yes ☐ No

Paid Preparer's Use Only

Preparer's signature ▶ K Hood CPA	Date 3-12-09	Check if self-employed ☐	Preparer's SSN or PTIN P00890836
Firm's name (or yours if self-employed), address, and ZIP code ▶ HOOD & SELANDER, CPAS, LLC 198 EAST BAY STREET, STE 100 CHARLESTON, SC 29401-2612		EIN 26-1473446	Phone no. 843-577-6622

JWA 811701 12-31-08 For Privacy Act and Paperwork Reduction Act Notice, see separate instructions. Form **1120S** (2008)

1

19350312 351115 571060962 2008.03010 ABACARE HOME MEDICAL, INC 57106091

Depo exh. # 11

Exhibit 10
Wit: Bradley
Date: 10-18-13
Rep: Debbie Ray

Form **1120S**

Department of the Treasury
Internal Revenue Service (77)

U.S. Income Tax Return for an S Corporation

▶ Do not file this form unless the corporation has filed or is attaching Form 2553 to elect to be an S corporation.

OMB No. 1545-0130

2008

For calendar year 2008 or tax year beginning , and ending

A S election effective date: 12/06/1996

B Business activity code number (see instructions): 621610

C Check if Sch. M-3 attached ☐

Use the IRS label. Otherwise, print or type.

Name: ABACARE HOME MEDICAL, INC

Number, street, and room or suite no. If a P.O. box, see instructions.: 2353 N. HIGHWAY 17

City or town, state, and ZIP code: MT. PLEASANT, SC 29466-6807

D Employer identification number: 57-1060962

E Date incorporated: 12/06/1996

F Total assets (see instructions): $ 0.

G Is the corporation electing to be an S corporation beginning with this tax year? ☐ Yes ☒ No If "Yes," attach Form 2553 if not already filed

H Check if: (1) ☐ Final return (2) ☐ Name change (3) ☐ Address change (4) ☐ Amended return (5) ☐ S election termination or revocation

I Enter the number of shareholders who were shareholders during any part of the tax year ▶ 4

Caution: *Include only trade or business income and expenses on lines 1a through 21. See the instructions for more information.*

Income	1a	Gross receipts or sales 1,921,885. b Less returns and allowances c Bal ▶	1c	1,921,885.
	2	Cost of goods sold (Schedule A, line 8)	2	536,162.
	3	Gross profit. Subtract line 2 from line 1c	3	1,385,723.
	4	Net gain (loss) from Form 4797, Part II, line 17 *(attach Form 4797)*	4	
	5	Other income (loss) *(attach statement)* STATEMENT 1	5	8,236.
	6	Total income (loss). Add lines 3 through 5 ▶	6	1,393,959.
Deductions (See instructions for limitations)	7	Compensation of officers STATEMENT 2	7	74,611.
	8	Salaries and wages (less employment credits)	8	413,817.
	9	Repairs and maintenance	9	1,786.
	10	Bad debts	10	197,424.
	11	Rents	11	104,231.
	12	Taxes and licenses STATEMENT 3	12	51,462.
	13	Interest	13	15,957.
	14	Depreciation not claimed on Schedule A or elsewhere on return *(attach Form 4562)*	14	71,018.
	15	Depletion (Do not deduct oil and gas depletion.)	15	
	16	Advertising	16	2,658.
	17	Pension, profit-sharing, etc., plans	17	
	18	Employee benefit programs	18	770.
	19	Other deductions *(attach statement)* STATEMENT 4	19	345,702.
	20	Total deductions. Add lines 7 through 19 ▶	20	1,279,436.
	21	Ordinary business income (loss). Subtract line 20 from line 6	21	114,523.
Tax and Payments	22a	Excess net passive income or LIFO recapture tax *(see instructions)* 22a		
	b	Tax from Schedule D (Form 1120S) 22b		
	c	Add lines 22a and 22b	22c	
	23a	2008 estimated tax payments and 2007 overpayment credited to 2008 23a		
	b	Tax deposited with Form 7004 23b		
	c	Credit for federal tax paid on fuels *(attach Form 4136)* 23c		
	d	Add lines 23a through 23c	23d	
	24	Estimated tax penalty (see instructions). Check if Form 2220 is attached ▶ ☐	24	
	25	Amount owed. If line 23d is smaller than the total of lines 22c and 24, enter amount owed	25	
	26	Overpayment. If line 23d is larger than the total of lines 22c and 24, enter amount overpaid	26	
	27	Enter amount from line 26 Credited to 2009 estimated tax ▶ Refunded ▶	27	

Sign Here

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

▶ Signature of officer | Date | ▶ Title

May the IRS discuss this return with the preparer shown below (see instr.)? ☒ Yes ☐ No

Paid Preparer's Use Only

Preparer's signature ▶ K. Hood CPA Date 9-12-09 | Check if self-employed ☐ | Preparer's SSN or PTIN P00890836

Firm's name (or yours if self-employed), address, and ZIP code ▶ HOOD & SELANDER, CPAS, LLC
198 EAST BAY STREET, STE 100
CHARLESTON, SC 29401-2612

EIN 26-1473446

Phone no. 843-577-6622

JWA 611701 12-31-08 For Privacy Act and Paperwork Reduction Act Notice, see separate instructions. Form **1120S** (2008)

19350312 351115 571060962 2008.03010 ABACARE HOME MEDICAL, INC 57106091

Affidavit of Art Bradham

Dated September 26, 2011, appears in this Record on Appeal at pages 70-72

Art Bradham

From: David E. Selander, CPA <david@hscpasc.com>
Sent: Wednesday, March 11, 2009 9:04 AM
To: Art Bradham
Cc: 'jjreed@organicprointl.com'; 'Cindy Koeper'
Subject: RE: Abacare Fee? etc

Hi Art,

We are processing the return this morning and will email you an invoice. I expect the fee will be $1650. Please drop off a check as soon as possible so we can release the return and trial balance information.

Kind Regards,
David

US Treasury Circular 230 Notice: Any tax advice included in this written or electronic communication was not intended or written to be used, and it cannot be used by the taxpayer, for the purpose of avoiding any penalties that may be imposed on the taxpayer by any governmental taxing authority or agency.

David E. Selander, CPA
Hood & Selander
Certified Public Accountants
Limited Liability Company
198 East Bay Street, Suite 100
Charleston, SC 29401
PH 843-577-6622
FX 843-577-0232
TOLL FREE 800-758-6079

From: Art Bradham [mailto:art@artbradham.com]
Sent: Wednesday, March 11, 2009 8:57 AM
To: David E. Selander, CPA
Cc: jjreed@organicprointl.com
Subject: Abacare Fee? etc

David,

I need the trial balance etc.
you need to get paid.
I asked you to send me the invoice so I could get you paid.

What happened?

Thanks...art

Art Bradham CPA CVA EA Mtax
2 Law Range Sumter SC 29150
803-774-1040
803-753-9508 fax
art@artbradham.com

Exhibit 12
Wit:
Date: 10-18-13
Rep: Debbie Rayl

Abacare Home Medical Shareholder Meeting

Dated July 24, 2007, appears in this Record on Appeal at page 372-374

Art Bradham CPA PC

2 Law Range
Sumter SC 29150

Phone: (803) 774-1040 Fax: (803) 753-9508
E-mail: art@artbradham.com Website: www.artbradham.com

G Murrell Smith Jr
Lee, Erter, Wilson, Holler & Smith LLC
126 North Main Street
Sumter SC 29151

In regards to Atmes v Phillip D Declemente etal

Dear Mr. Smith,

Pursuant to your request, I have completed a calculation of economic damages due to the omission of disclosure of sales tax owed in this case. I calculate the damages in two parts:

1. Omission of sales tax liability owed at purchase date $100,644
2. Overstatement of value of the business $774,500

Total Damages $ 875,144

A complete analysis and discussion of these calculations is included further in this report.

Expert Opinion Qualifications

In the event an expert opinion is required, I am qualified to provide expert testimony on account of my education, training, experience and licensure, as follows:

Education: BS Accounting, University of South Carolina 1978
Master of Taxation, Florida Atlantic University 2004

Licensure: Certified Public Accountant SC

Additional Training and Certifications:
Admitted to practice US Tax Court
Certified Valuation Analyst
Enrolled Agent

Experience: Over 15 years as CPA and Tax Specialist

Exhibit 14
Wit:
Date: 10-18-13
Rep: Debbie Rayl

Application of Specialized Knowledge & Overview of Procedures:

I applied my specialized knowledge by reviewing the examination results of the sales tax audit of Abacare Home Medical Inc (Abacare) and the Valuation of the Common Stock of Abacare Home Medical, Inc prepared by Ronald H Burkett, CPA, CVA, dated July 14, 2008. My review was conducted in a manner intended to assist in presenting and understanding the financial facts of this case.

Admitted to Practice in US Tax Court

Sales Tax Liability Omitted:

In the fall of 2009 the South Carolina Department of Revenue (SCDOR) conducted a sales tax examination of Abacare Home Medical Inc. The net result of the examination was that sales tax owed to the SCDOR was understated by $142,316.41. (The examination period overlapped ownership of Abacare Home Medical Inc, with the period from Jan 2007 to Oct 2008 being the period under the Connelly ownership.) Of this total, $100,644 was the sales tax understated prior to the purchase of Abacare by the Atmes Group.

Abacare Home Medical Inc			
Recap of SCDOR Exam results			
	Tax	Interest	Total
Total per exam report	$ 142,316	$ 17,661	$ 159,978
Less amounts owed by Atmes Group			
Amounts from 11/2008 to 12/2009			
Sales Tax	$ (26,238)	$ (2,179)	$ (28,417)
Durable Medical Goods	$ (16,633)	$ (1,401)	$ (18,034)
Charleston County	$ (3,926)	$ (320)	$ (4,246)
Charleston County	$ (7,994)	$ (643)	$ (8,637)
Net sales tax and interest obligation Of Abacare Home Medical Inc (Connelly ownership)	$ 87,525	$ 13,118	$ 100,644

Impact of Sales tax understatement on valuation of Business:

I have read and reviewed Mr. Burkett's valuation of the common stock of Abacare Home Medical Inc, report dated July 14, 2008. Mr. Burkett performed the valuation using industry standard procedures and applied appropriate valuation methods to the information **that he was provided**. His report includes the language "In preparing my business valuation report, I have relied upon historical financial information provided to me by management and derived from tax returns and internal financial statements...My report is based on historical and prospective financial information provided to me by management and other third parties."[1]

Mr. Burkett's reliance on information submitted and discussions with Phillip Declemente and David Selander CPA are referenced throughout his opinion letter. Examples include:

[1] Valuation of the Common Stock of Abacare Home Medical, Inc, 14 July 2008, Burkett Ronald H. CPA, *Opinion Letter*. Pg. 1

"I have relied upon historical financial information provided to me by management and derived from tax returns and internal financial statements."[2]

"My report is based on historical and prospective financial information provided to me by management and other third parties."[3]

"These adjustments were made after discussions with Phillip Declemente and David Selander, CPA."[4] ***

"The Company's reported profit and loss statement was annualized using the profit and loss statement for April 30, 2008. This annualized statement was then normalized based on discussions with management."[5]

"In conjunction with the preparation of this report, I, Ronald H. Burkett of Burkett Burkett & Burkett CPAs, P.A., had discussions with management which provided an important perspective to my understanding of the information reviewed and analyzed in the preparation of this valuation opinion. In all cases, I have relied upon the referenced information without independent verification. This report is, therefore, dependent upon the information provided. A material change in critical information relied upon in this report would be cause for a reassessment to determine effect, if any, upon my conclusion."[6]

"Since neither ABACARE management nor advisors have advised me otherwise, I assume that there is full compliance with all applicable federal, state, and local laws and regulations unless the lack of compliance is stated, defined, and considered in the appraisal report."[7]

Included in Mr. Burkett's report were extensive financial documents including:

1. Historical Balance Sheets from 12/31/2004 through 04/30/08 (page 17).
2. Historical Income Statements from 12/31/2004 to Annualized report of 04/30/2008 (page 19).
3. Projected Income statements for 6 years, presumably beginning after the annualized report of 04/30/08 (page 54).

As is industry standard practice, Mr. Burkett did not prepare these reports, and identifies that they were prepared by others.

Sales Tax Omission

As evidenced by the completed examination report of the SCDOR, sales tax of $87,525 was omitted during the audit period of 01/01/07 through 10/31/2008. Sales tax is a tax that is either collected as a part of the sale, or as in the unusual circumstances

---

[2] Id at 1
[3] Id at 1
[4] Valuation of the Common Stock Of Abacare Home Medical, Inc, 14 July 2008, Burkett Ronald H. CPA Pg. 20
[5] Id at 20
[6] Id at 37
[7] Id at 37

surrounding the application of sales tax and durable medical equipment tax during this audit period, is deemed to have been collected. The accounting impact of this determination is that sales are overstated from 01/01/07 through 10/31/08 by $87,525, or $3978/month or $47740/yr. **The additional impact of this sales tax omission is that net profit is overstated.** The amount of sales tax owed varied by month, but that would not materially affect the impact.

Impact of Sales Tax Omission

Mr. Burkett's report uses three methods of valuing Abacare: 1) Capitalization of Net Cash Flow to Equity Holders 2) Direct Valuation of Equity by Discounted Cash Flows Method, and 3) Market Value Comparison. Each of these methods by themselves or when applied as a combination are appropriate methods to value a company except in this case as indicated below:

In my opinion, Mr. Burkett reached the wrong value (through no fault of his own) because he applied the valuation methods against an overstated income. Each of the methods Mr. Burkett used are summarized below with correction:

1. Capitalization of Net Cash Flow to Equity Holders

The following schedule is a comparison of the value originally calculated by Burkett to the calculation without the overstatement of income. The corrected cash flow was calculated by subtracting the sales tax overstatement from Burkett's projected cash flow (99,718-47,740).

	Burkett	Corrected
Projected Cash Flow	$ 99,718	$ 51,978
÷ Capitalization Rate	18.0%	18.0%
	$ 553,987	$ 288,767
Marketability Discount 15%	$ (83,098)	$ (43,315)
Indicated Equity Value	$ 470,889	$ 245,452
Selected Equity Value	**$ 471,000**	**$ 245,000**

2. Direct Valuation of Equity by Discounted Cash Flows Method

In this method, forecasting inputs are the most critical parameter to establish. The entire basis of this valuation method is to estimate future value cash flows based on current value operations. The forecasted cash flows were calculated on the basis of inaccurate data. This error affects all forecasted years AND increases more by an applied growth rate. In addition, numerous other ratios and relationships (for example, Cost of goods sold) are wrong as a result of the income overstatement. **Forecasted income and cash flow, and the resulting valuation derived therefrom, based on the wrong information, is completely useless.**

3. Market Value Comparison

The following schedule is a comparison of the indicated equity values of market comparable's calculated by Burkett to the calculated market values without the overstatement of income.

	Burkett	Corrected
Normalized Net Income	$ 114,599	$ 66,859
Earnings Multiple	10.4	10.4
Subtotal	$ 1,196,414	$ 698,008
Marketability Discount 15%	$ (179,462)	$ (104,701)
Indicated Equity Value	**$ 1,016,952**	**$ 593,307**

Gross Revenue Method	GROSS REVENUE METHOD IS INAPPROPRIATE	
Normalized EBITDA	$ 203,632.00	$ 155,892.00
EBITDA Multiple	2.3	2.3
Subtotal	$ 471,000.82	$ 360,578.20
Marketability Discount 15%	$ (70,650.12)	$ (54,086.73)
Indicated Equity Value	**$ 400,350.69**	**$ 306,491.47**

Although Mr. Burkett indicates that he assigned weights to the values developed by the various valuation methods, he does not indicate which method or the weighting. Accordingly, I have recalculated the conclusion of value reached by Mr. Burkett with the corrected net income as follows:

Value of 100% of Abacare Home Medical Inc		
	Burkett Report	With Correct info
Capitalization of Net cash flow to equity holders method	$ 471,000	$ 245,000
Direct Valuation of Equity By discounted cash Flows method	$ 930,000	not meaningful
Mid Market Comps		
Earnings Multiple	$ 1,016,952	$ 593,307
Revenue Multiple	$ 1,207,170	not meaningful
EBITDA Multiple	$ 400,351	$ 306,491
Conclusion Of Equity Value	**$ 975,000**	**$ 285,000**

Amounts paid For Abacare Home Medical Inc

The Atmes Group paid $809,500 for The Connelly portion of Abacare Home Medical Inc. In addition, they assigned capital of $250,000 to Phillip Declemente for his ownership portion in Abacare. This means that the Atmes Group paid a total of $1,059,500 for a business that would have been valued at $285,000 if all the accurate facts had been made available to Mr. Burkett, the original valuator. Total economic damage $774,500.

Summary Conclusion

It is my opinion that ATMES LLC suffered real economic damages of $875,144 as a result of the erroneous filings of sales tax returns, the omission of disclosure of the positions taken on those sales tax returns, and the failure to report the overstated income to the valuator, Mr. Burkett.

Please let me know if I can provide additional information.

Art Bradham CPA CVA EA Mtax

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)))	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CIVIL ACTION NO.: 2015-CP-10-3325
PHILLIP DECLEMENTE, a/k/a ALEC ROCHFORD, Plaintiff, v. ASSISTIVE TECHNOLOGY MEDICAL EQUIPMENT SERVICES, LLC; JEFFERY REED; MURRELL G. SMITH; ART BRADHAM, CPA, PC; and ART BRADHAM, Defendants.	))))))))))))))))	**MOTION TO AMEND JUDGMENT AND PLEADINGS**

FILED
2016 JAN 25 PM 3: 36
JULIE J. ARMSTRONG
CLERK OF COURT

A hearing was held before Judge R. Markley Dennis on January 7, 2016 addressing Defendants' Motion to Change Venue and Defendants' Motion to Dismiss Plaintiff's complaint, based upon statute of limitations. On January 15, 2016 Judge Dennis issued orders denying Defendants' Motion to Change Venue and granting Defendants' Motion to Dismiss causes of action one through five.

Plaintiff brings these motions for amendment of the judgment and amendment of the pleadings pursuant to Rules 15(a)-(c), 59 and 59(e) of the South Carolina Rules of Civil Procedure. Plaintiff asks the Court to reconsider, amend and reverse its dismissal of counts 1-5 and allow Plaintiff to amend his complaint.

The specific amendments to the complaint which Plaintiff seeks to make are as follows:

(a) Paragraph 22: Plaintiff requests leave to amend paragraph 22 to read as follows: "As of the date of this filing, A.T.M.E.S. has not made a **full** payment to Mr. DeClemente since September 2011. **Since that date, Defendants have**

made partial payment on their debt and have, on multiple occasions, acknowledged the debt in writing."

(b) Paragraph 69, add the following sentence: "**Plaintiff was not aware, and could not have been aware, that Mr. Bradham would deliver untruthful sworn testimony damaging Plaintiff until Mr. Bradham did so on October 13, 2013.**"

(c) Paragraph 91, add the following sentence: "**Mr. Bradham further owed Plaintiff a duty of care to refrain from damaging his former client by giving "expert" testimony against him.**"

Additionally, though Plaintiff believes the wrongfulness of Mr. Bradham's actions fall within the common knowledge of an average juror, in an abundance of caution Plaintiff seeks the court's permission to amend his complaint against Mr. Bradham with an expert affidavit.

Plaintiff submits the following in support of his arguments that counts 1-5 of his complaint are not barred by the statute of limitations:

FIRST ARGUMENT: SEALED INSTRUMENT

The Full and Final Release Defendants executed on July 10, 2009 is Defendants' legally binding promise to never sue Plaintiff. Defendants Smith and Reed have violated the release by filing suit against Plaintiff. Because it contains the words "signed, sealed and delivered," is witnessed, and contains the letters "L.S.," the Full and Final Release is a sealed instrument as defined by S.C. Code § 15-3-520 and 19-1-160 (Exhibit #1). The applicable statute of limitations in which Plaintiff may file suit against Defendants for violation of the Release is therefore twenty years. *See, e.g., Treadaway v. Smith*, 325 S.C. 367, 479 S.E.2d 849 (Ct. App. 1996);

South Carolina Department of Social Services v. Winyah Nursing Homes, Inc., 282 S.C. 556, 320 S.E.2d 464 (Ct. App. 1984).

SECOND ARGUMENT: DEFENDANTS' PARTIAL PAYMENTS AND WRITTEN ACKNOWLEDGEMENT OF DEBT

The statute of limitations did not begin to run against Plaintiff in September of 2011, as the Court incorrectly ruled, because subsequent to that time Defendants made partial payment to Plaintiff and acknowledged their debt in writing (Exhibits #2, #5). Therefore, pursuant to S.C. Code § 15-3-120 and 15-3-130, Plaintiff's causes of action are not time barred.

THIRD ARGUMENT: CONTRACTUAL AGREEMENT EXTINGUISHING STATUTE OF LIMITATIONS

Parties to a contract are free to agree upon the time frame for initiation of litigation to enforce their agreement and are free to waive any otherwise applicable time frames ordinarily applicable pursuant to common and statutory law. In the case at bar, the parties agreed in writing that Plaintiff would never be time barred from pursuing litigation to enforce his right to be paid for his ownership interest in A.T.M.E.S. (Exhibit #3, Promissory Note, paragraphs 6-8). Pursuant to paragraph 6(b) of the Promissory Note, on June 8, 2012 Plaintiff sent a demand letter, by certified mail, informing Defendants Smith and Reed of their payment obligation arrearage (Exhibit #4). By letter dated June 12, 2012 and received June 15, 2012 Defendants acknowledged their debt to Plaintiff and informed him of their intent to dishonor the debt (Exhibit #5). Therefore the statute of limitations for Plaintiff's causes of action could not possibly expire until June 15, 2015 at the earliest (See S.C. Code § 15-3-130). But, just as importantly, the Promissory Note the parties executed on June 30, 2009 completely extinguishes the applicability of any statute of limitations to actions brought by Plaintiff to enforce the Note. Paragraph 6(c) of the Promissory Note states: "Even if, at a time when ATMES, LLC is in

default, Note Holder does not require ATMES, LLC to pay immediately in full as described above, Note Holder will still have the right to do so if ATMES, LLC is in default at a later time." Paragraph 8 of the Promissory Note states:

> ATMES, LLC and any other person who has obligations under this Promissory Note waive the rights of Presentment and Notice of Dishonor. "Presentment" means the right to require the Note Holder to demand payment of amounts due. "Notice of Dishonor" means the right to require the Note Holder to give notice to other persons that amounts due have not been paid.

The language of the Promissory Note contains no ambiguity and Plaintiff's causes of action are not time barred.

FOURTH ARGUMENT: JURY ISSUE

All evidence in this case establishes that Plaintiff's claims against Defendants are not prohibited by the statute of limitations. But should the Court disagree, the law requires that the issue be decided by the jury. *Moriarty v. Garden Sanctuary Church*, 341 S.C. 320, 534 S.E.2d 672, 681-682 (2000).

FIFTH ARGUMENT: EQUITABLE TOLLING

Should the Court disagree with the preceding arguments, the doctrine of equitable tolling permits Plaintiff to proceed with his claims against Defendants. *Hoopee v. Ebenezer Senior Servs. & Rehab. Ctr.*, 687 S.E.2d 29 (S.C. 2009).

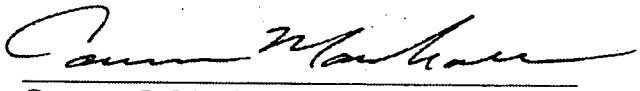
Should the Court determine that an affidavit from Plaintiff would assist the Court in its ruling then Plaintiff will provide one. Though Plaintiff's out of state residence has prevented submission of an affidavit contemporaneously with this filing, Rule 59(e) permits submission of an affidavit at a later date. *Baher v. Wolfe*, 333 S.C. 605, 510 S.E.2d 726, 730 (Ct. App. 1998).

SIXTH ARGUMENT: PERMISSIVE VERSUS COMPULSORY CLAIMS

Despite defense counsel's claim to the contrary during the January 7, 2016 hearing with Judge Dennis, pursuant to Rule 13 of the SCRCP, Plaintiff's claims are permissive, not compulsory. Defense counsel admitted this fact during the default hearing with Judge Nicholson on December 16, 2013. At that time, Smith and Reed's counsel argued that the Full and Final Release Defendants executed on July 10, 2009 is "a settlement agreement that is separate and apart entirely from the transaction... It's a separate – entirely separate process, separate event" (Exhibit #6, transcript p. 31). Plaintiff's assertion that his causes of action are permissive is confirmed by the fact that the Full and Final Release was executed on July 10, 2009, while the Promissory Note and Bill of Sale were executed on June 30, 2009.

For the reasons given, Plaintiff requests that the court permit amendment of his complaint and reinstate his claims against Defendants.

Respectfully submitted,



Cameron L. Marshall
7 Gamecock Avenue, Suite 707
Charleston, SC 29407
(843) 795-2298
(843) 795-5081 Fax
cameron@attorneymarshall.com
Attorney for Plaintiff

January 25, 2016

Charleston, South Carolina

EXHIBIT #2

Phillip DeClemente< pdeclemente@gmail.com>

SMS with Jeffrey

Jeffrey< jjreed@organicprointl.com>
To: pdeclemente@gmail.com

Sun, Nov 13, 2011 at 7:24 AM

There will be a chheck for 2 thousand cut on Monday. We have consulted a bankrupcy attorrney and money will probably be handled through attorneys at this time. You need to call scott our attorney on Monday. Thanks

Gmail by Google

Phillip DeClemente< pdeclemente@gmail.com>

Offer

4 messages

Phillip DeClemente < pdeclemente@gmail.com> Sat, Nov 19, 2011 at 10:35 AM
To: Scott@jamessmithpa.com

Scott,

After a night to think things over, I'd like to offer a solution. I dont need to be in the middle of this issue with your clients. I would like for you to talk with Jeff and murrell to see if we can resolve this. I'd be willing to take 100k for payment in full, in return I will cooperate when needed and sign the affidavit without implicating Kim Cuce or myself. I don't want to be a problem and prefer to find a hole on the other side this map and be left alone. Something has to give and I think this saves them almost 25k and it will get me out of their lives forever. Please let me know some type of answer on Monday.

PHILLIP

Scott Winburn< Scott@jamessmithpa.com> Mon, Nov 21, 2011 at 5:31 PM
To: Phillip DeClemente <pdeclemente@gmail.com>

Phillip,

I hope you got my voicemail. I've relayed your offer. Jeff is out of town for Thanksgiving and would like an opportunity get back to you after the Holiday.

Thanks,

Scott

From: Phillip DeClemente [mailto:pdeclemente@gmail.com]
Sent: Saturday, November 19, 2011 10:35 AM
To: Scott Winburn
Subject: Offer

Scott,

After a night to think things over, I'd like to offer a solution. I dont need to be in the middle of this issue with your clients. I would like for you to talk with Jeff and murrell to see if we can resolve this. I'd be willing to take 100k for payment in full, in return I will cooperate when needed and sign the affidavit without implicating Kim Cuce or myself. I don't want to be a problem and prefer to find a hole on the other side this map and be left alone. Something has to give and I think this saves them almost 25k and it will get me out of their lives forever. Please let me know some type of answer on Monday.

PHILLIP

Phillip DeClemente< pdeclemente@gmail.com>
To: Scott Winburn <Scott@jamessmithpa.com>

Mon, Nov 21, 2011 at 6:51 PM

Well good tell him to send me a check for the remainder of this month and that can give him that time. Honestly Scot this is this wrong time for this to happen. He will need to send me a check or give me an answer. Thanks.

[Quoted text hidden]

Phillip DeClemente< pdeclemente@gmail.com>
To: Scott Winburn <Scott@jamessmithpa.com>

Mon, Nov 21, 2011 at 6:53 PM

Let him know that Martha can cut the check and I will pick it up when I'm in town Wednesday at the RMS office.

[Quoted text hidden]

Phillip DeClemente< pdeclemente@gmail.com>

SMS with Jeffrey

Jeffrey< jjreed@organicprointl.com>
To: pdeclemente@gmail.com

Sat, Dec 3, 2011 at 5:27 AM

Did you not get a call from Scott yesterday when Murrell agreed as goodwill to send you a check for 2,500 bucks then try to find a number that is agreeable. We would try to borrow money, which are credit is shit, lines of credits are gone. Then you send threatening emails again to go with the other threatening voicemails make it hard to want to work this out. Did Scott not call you and tell you would be sent 2500 Monday Murrell and I would to find a number a contemplate releasing you from the suit

Phillip DeClemente< pdeclemente@gmail.com>

SMS with Jeffrey

Jeffrey< jjreed@organicprointl.com>
To: pdeclemente@gmail.com

Fri, Dec 9, 2011 at 7:37 AM

We met with bank yesterday and because abacare from 2006-08 did not pay there taxes it is going to be tough. As far as getting you some money to tie you over we will work on it. As far as the proposal we will send it next week, Murrell is making this changes. The proposal in general is we want our money that we have paid you and the money connolys owe for abacare tax and we will give back Medicare number, abacare name and leave the premises. In addition we will drop lawsuits against all parties. Conollys would be crazy not take it, selander definetly will want everyone to take it. It was Scotts idea and I have agreed Murrell has not. I will be in contact monday

Phillip DeClemente< pdeclemente@gmail.com>

SMS with Jeffrey

Jeffrey< jjreed@organicprointl.com> Tue, Dec 13, 2011 at 8:34 AM
To: pdeclemente@gmail.com

We agree it is best to solve this for all concerned. This is going to be a long drawn out battle, but we will get our money back. I agree while we wait on Murrell and Scott to do legal and Murrell to propose a possible settlement with you, you should not have to wait. I am putting a three thousand dollar check in the mail that will be applied too our offer. Same address?

Phillip DeClemente< pdeclemente@gmail.com>

ATMES Litigation

2 messages

Scott Winburn< Scott@jamessmithpa.com> Mon, Feb 20, 2012 at 8:37 AM
To: "pdeclemente@gmail.com" <pdeclemente@gmail.com>

Phillip,

Please let me know if you have an offer in mind to settle the litigation at hand. I'm happy to take such an offer to my clients. Feel free to email me or call me.

Thanks,

Scott

E. Scott Winburn

James E. Smith, Jr., P.A.

1422 Laurel Street

Columbia, South Carolina 29201

Telephone (803) 933-9800

Facsimile (803) 933-9801

Email:Scott@JamesSmithPA.com

Phillip DeClemente< pdeclemente@gmail.com> Sun, Mar 4, 2012 at 6:59 PM
To: Scott Winburn <Scott@jamessmithpa.com>
Bcc: Phillip DeClemente <pdeclemente@gmail.com>

Scott,

Please advise your clients 75k and they will need to always provide a good reference when asked. In return I will assist them with the lawsuit and will agree not to turn over any items to the other side, I also agree not to say anything negative about your clients. Please advise ASAP.

Phillip
[Quoted text hidden]
--
Phillip DeClemente

P DeClemente <pdeclemente@gmail.com>

offer

3 messages

Phillip DeClemente <pdeclemente@gmail.com> Tue, Apr 3, 2012 at 12:08 PM
To: Scott Winburn <Scott@jamessmithpa.com>

Scott,

Have you been able to get anywhere with settling our issue?

--
Phillip DeClemente

Scott Winburn <Scott@jamessmithpa.com> Wed, Apr 4, 2012 at 4:45 PM
To: Phillip DeClemente <pdeclemente@gmail.com>

I haven't heard anything in a while. I'll follow up.

Scott

From: Phillip DeClemente [mailto:pdeclemente@gmail.com]
Sent: Tuesday, April 03, 2012 12:08 PM
To: Scott Winburn
Subject: offer

[Quoted text hidden]

Phillip DeClemente <pdeclemente@gmail.com> Thu, May 3, 2012 at 11:51 AM
To: Scott Winburn <Scott@jamessmithpa.com>

where do we stand Scott?
[Quoted text hidden]
--
Phillip DeClemente

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Assistive Technology Medical Equipment Services,
Plaintiff,

Vs.

Hood & Selander, CPAS, LLC, et al,
Defendants.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 11-CP-10-8011

AFFIDAVIT OF SERVICE

FILED
2012 JAN 13 PM 3:05
JULIE J. ARMSTRONG
CLERK OF COURT
BY

WAYNE P. FREEMAN personally appeared before me, a duly appointed Notary Public for the State of South Carolina. The undersigned deponent, upon being duly sworn says that on the 6th day of January, 2012 at 1:00 P.M. he served a certified true copy of a Civil Action Coversheet, Summons and Complaint on Phillip Declemente, the Defendant herein, by leaving a copy of same with Phillip Declemente personally at: 620 Longpoint Road, Mt. Pleasant, South Carolina 29464.

That Deponent is not a party to this action.

Wayne Freeman Investigations
S.L.E.D. License No. 1340
General Investigations
Legal Process Service

SWORN to before me this

6 day of January, 2012

NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: 12-18-18

KRISTIE M. FERRELL
NOTARY PUBLIC
MY COMMISSION EXPIRES 12/18/2018
SOUTH CAROLINA

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)))	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CIVIL ACTION NO.: 2015-CP-10-3325
PHILLIP DECLEMENTE, a/k/a ALEC ROCHFORD, Plaintiff, v. ASSISTIVE TECHNOLOGY MEDICAL EQUIPMENT SERVICES, LLC; JEFFERY REED; and MURRELL G. SMITH, Defendants.	)))))))))))))	**AMENDED COMPLAINT** (Jury Trial Requested)

FILED
2016 MAR 22 AM 11: 11
JULIE J. ARMSTRONG
CLERK OF COURT

Plaintiff Phillip DeClemente, a/k/a Alec Rochford, complaining of the Defendants herein, alleges the following:

1. Plaintiff Phillip DeClemente was at all times relevant a resident of Charleston County, South Carolina.
2. Defendant Assistive Technology Medical Equipment Services, LLC (hereinafter A.T.M.E.S.) was at all times relevant a South Carolina corporation conducting substantial business in Charleston County, South Carolina.
3. Defendant Jeffery Reed was at all times relevant a resident of Sumter County, South Carolina and an owner, officer and agent of A.T.M.E.S.
4. Defendant Murrell G. Smith was at all times relevant a resident of Sumter County, South Carolina and an owner, officer and agent of A.T.M.E.S.
5. This Court has jurisdiction over the parties and subject matter, and venue is appropriate.

FOR A FIRST CAUSE OF ACTION – Breach of Contract

6. Plaintiff re-alleges the preceding paragraphs as if fully set forth verbatim.

7. Plaintiff was an owner of a durable medical equipment (hereinafter "DME") company named Abacare Home Medical, Inc. (hereinafter "Abacare") based in Charleston, South Carolina.

8. Defendants Smith and Reed owned a DME company named Reliable Medical Equipment of South Carolina, Inc (hereinafter "Reliable").

9. Defendants Smith and Reed purchased Abacare from Plaintiff in November 2008 through the umbrella corporation, A.T.M.E.S., into which Reliable and Abacare merged.

10. After the sale of Abacare to A.T.M.E.S., Plaintiff became a 25% owner of A.T.M.E.S.

11. On June 30, 2009, Defendants A.T.M.E.S., Jeffery Reed, and Murrell G. Smith and Plaintiff Phillip DeClemente executed a Bill of Sale and Promissory Note in favor of Mr. DeClemente in the amount of Two Hundred Sixty-Five Thousand Dollars ($265,000.00), plus interest at a yearly rate of twelve percent (12%). (See Exhibits #1 and #2).

12. The Bill of Sale and Promissory Note were executed in exchange for Plaintiff's transfer of his ownership in A.T.M.E.S. to Defendants Reed, Smith and A.T.M.E.S.

13. At the time the Promissory Note was executed, it was agreed by all parties that the total amount owed to Plaintiff for his share of the company pursuant to the payment amortization schedule was Three Hundred Thirty Thousand Three Hundred Eighty-Two Dollars and Fifty Nine Cents ($330,382.59).

14. At the time the Bill of Sale was executed, it was agreed upon by the parties that:

> "if at the end of the buyout period as set forth hereinabove, Smith and Reed remain as members and have an ownership interest in the Company then DeClemente shall be paid an additional Thirty Thousand Dollars over a six month period as a compliance bonus, interest paid at zero percent at the rate of Five Thousand and 00/100 Dollars per month and subject to

DeClemente not having violated any of the terms of this Buy/Sell Agreement, the Confidentiality Agreement referenced herein and the Covenant Not to Compete referenced hereinabove and has not acted in any manner detrimental to the success of any of the companies referenced herein."
(See Exhibit #2)

15. Valuable consideration was provided by each party.

16. The referenced documents constitute a contract between the parties.

17. The monthly payment due Plaintiff and agreed upon in the contract is in the amount of Seven Thousand Three Hundred Forty-One dollars and Eighty Four cents ($7,341.84) for forty-five (45) months.

18. The first payment was due Mr. DeClemente on July 30, 2009.

19. The maturity date of the Promissory Note is March 1, 2013.

20. As of the date of this filing, A.T.M.E.S. has not made a full payment to Mr. DeClemente since September 2011. Since that date, Defendants have made partial payments on their debt and have, on multiple occasions, acknowledged the debt in writing.

21. Defendants A.T.M.E.S., Smith and Reed are in default on both the Promissory Note and their payment obligation under the non-compete agreement in the Bill of Sale.

22. Mr. DeClemente has given Defendants written notice of their default, in compliance with paragraph 6 of the Promissory Note.

23. Paragraph 6(B) of the Promissory Note provides for the acceleration of the entire amount due in the event of Defendants' default.

24. As of June 11, 2015, A.T.M.E.S. was eighteen payments in arrears, for a total of One Hundred Eighty-Eight Thousand Eight Hundred Eighty-One Dollars and Eighteen Cents ($188,881.18).

25. As of June 11, 2015, late fees on the delinquent payments total Six Thousand Six Hundred Seven Dollars and Sixty-Four Cents ($6,607.64).

26. As of June 11, 2015, the interest on the balance owed was Forty-Six Thousand Four Hundred Ninety-Nine Dollars and Eighty-Seven Cents ($46,499.87).

27. A.T.M.E.S. also owes the Plaintiff an additional payment of Thirty Thousand Dollars ($30,000.00) for Plaintiff's compliance with the non-compete agreement in the Bill of Sale.

28. Under paragraph 11 of the Bill of Sale, Plaintiff was entitled to purchase the business real property located at 2353 Highway 17 North, Mt. Pleasant, South Carolina.

29. Plaintiff reached an agreement with the property owners to sell his purchase-option rights for Twenty Five Thousand Dollars ($25,000.00).

30. Defendants prevented Plaintiff from receiving the full benefit of his purchase-option rights to sale of the business property by seizing half of the sale proceeds, totaling Twelve Thousand Five Hundred Dollars ($12,500.00).

31. Paragraph 4 of the Bill of Sale between A.T.M.E.S. and Mr. DeClemente requires A.T.M.E.S. to provide Mr. DeClemente with use of a truck.

32. The referenced truck is a 2008 Chevrolet Silverado 2500HD.

33. Plaintiff's money was used to make all payments on the truck.

34. In March 2011 A.T.M.E.S. disposed of the referenced truck in violation of its contract with Mr. DeClemente.

35. At the time of the truck's disposition, there was at least Fifteen Thousand Dollars ($15,000.00) equity in the vehicle, to which Mr. DeClemente is entitled.

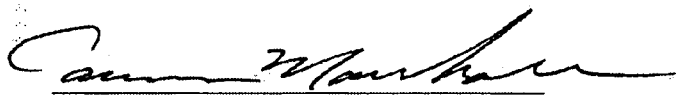
36. Defendants' conduct constitutes breaches of contract.

37. Plaintiff has been damaged as a proximate result of Defendants' contractual breaches and seeks recovery of all damages allowed by law.

38. As of June 11, 2015, and subject to recalculation with the passage of time, Mr. DeClemente is entitled to recover One Hundred Eighty-Eight Thousand Eight Hundred Eighty-One Dollars and Eighteen Cents ($188,881.18) in arrearage, Six Thousand Six Hundred Seven Dollars and Sixty-Four Cents ($6,607.64) in late fees, Forty-Six Thousand Four Hundred Ninety-Nine Dollars and Eighty-Seven Cents ($46,499.87) in interest, Thirty Thousand Dollars for the balance due under the Non-Compete Clause of the Bill of Sale, Fifteen Thousand Dollars ($15,000.00) for lost equity in the referenced truck, Twelve Thousand Five Hundred Dollars ($12,500.00) to which he is entitled for sale of his business real property rights, and all attorney's fees and costs associated with collection as provided in paragraph 6(D) of the Promissory Note.

WHEREFORE, Plaintiff seeks judgment and the award of actual and punitive damages sufficient to compensate him for his losses and in amounts which a jury deems just and proper, for the costs of this action, and such other relief as the Court may find just and proper.

Respectfully submitted,



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cameron@attorneymarshall.com
Attorney for Plaintiff

March 19, 2016

Charleston, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)))	IN THE COURT OF COMMON PLEAS IN THE NINTH JUDICIAL CIRCUIT
PHILLIP DECLEMENTE A/K/A ALEC ROCHFORD, PLAINTIFF, vs. ASSISTIVE TECHNOLOGY MEDICAL EQUIPMENT SERVICES, LLC; JEFFERY REED; MURRELL G. SMITH, DEFENDANTS.	)	Civil Action No. 2015-CP-10-3325 **DEFENDANTS' NOTICE OF MOTION AND MOTION TO TRANSFER VENUE AND MOTION TO DISMISS**

FILED
2016 JUL 21 PM 2:19
JULIE J. ARMSTRONG
CLERK OF COURT

TO: CAMERON L. MARSHALL, ATTORNEY FOR THE PLAINTIFF

YOU WILL PLEASE TAKE NOTICE that Defendants, Assistive Technology Medical Equipment Services, LLC, Jeffery Reed and Murrell G. Smith, by and through their undersigned counsel, pursuant to Rules 12(b)(1), (2), (3), (4), (5) (6) and (7), Rule 12(f) and Rule 12(h) of the South Carolina Rules of Civil Procedure, will move before the Presiding Judge on the tenth (10th) day after service hereof at 10:00 a.m. or as soon thereafter as counsel may be heard, for immediate dismissal of the Plaintiff's Amended Complaint filed in this case.

Plaintiff has failed to provide sufficient service and process to grant personal and subject matter jurisdiction of all Defendants. Plaintiff failed to file within applicable statute of limitations. Plaintiff has failed to file this action in the proper venue. Plaintiff has failed to plead facts sufficient to grant the relief requested. Further, none of the parties, witnesses, facts and events giving rise to action reside or have any connection

with Charleston County. Charleston County is not the proper venue for this action and in the interest of the parties and witnesses, venue should be transferred to Sumter County.

This motion is based upon South Carolina statutory and case law, the pleadings filed in this action and such other further affidavits, depositions, pleadings and memoranda as the Defendants may file prior to the hearing of this matter.

JAMES E. SMITH JR., P.A.

BY: _____

James E. Smith Jr.
Dylan W. Goff
1422 Laurel Street
Columbia, South Carolina 29201
(803) 933-9800

ATTORNEY FOR DEFENDANTS

Columbia, South Carolina
June 1, 2016

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)))	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CIVIL ACTION NO.: 2015-CP-10-3325
PHILLIP DECLEMENTE, a/k/a ALEC ROCHFORD, Plaintiff, v. ASSISTIVE TECHNOLOGY MEDICAL EQUIPMENT SERVICES, LLC; JEFFERY REED; MURRELL G. SMITH; ART BRADHAM, CPA, PC; and ART BRADHAM, Defendants.	)))))))))))))))	**PLAINTIFF'S MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT MOTION**

FILED
2016 JUL 21 PM 1:32
JULIE J. ARMSTRONG
CLERK OF COURT
BY

FACTUAL AND PROCEDURAL BACKGROUND

This lawsuit results from a business dispute among former partners Phillip DeClemente, Murrell G. Smith and Jeffery Reed. Plaintiff is the former manager and partial owner of Abacare Home Medical ("Abacare"), a durable medical equipment ("DME") company located in Charleston, SC. Defendants Jeffery Reed and Murrell G. Smith are the current owners of Abacare and Reliable Medical Equipment Co., Inc. ("Reliable"), and their parent company, Assistive Technology Medical Equipment Services ("ATMES"), a DME company located in Sumter, SC. Abacare and Reliable joined forces and merged into ATMES in November 2008 when ATMES purchased Abacare from its owners, the Estate of Dorothy Connelly and Phillip DeClemente. As part of the sale, Mr. DeClemente assigned all of his interest in Abacare, in the form of stock purchase options, to ATMES. Plaintiff, Mr. Reed, Mr. Smith, and a fourth partner, Kimberly Cuce, then each became twenty-five percent owners of ATMES, the parent company of Abacare and Reliable.

Plaintiff and Defendants Smith and Reed had disagreements over management of ATMES and its subsidiaries, Abacare and Reliable. On June 30, 2009 Plaintiff sold his 25% ownership in ATMES to Defendants Smith and Reed for $265,000.00. The Bill of Sale (Exhibit #1) and Promissory Note (Exhibit #2) require Defendants to pay Plaintiff $7,341.84 per month beginning July 2009, with the final payment due in March of 2013. Smith and Reed also each gave a Personal Guaranty for the first twelve payments (Exhibit #3 and #4). The contract contains a mutual Full and Final Release, in which Plaintiff and Defendants agree to never sue one another (Exhibit #5). The contract requires that should Defendants miss any payments, Plaintiff must inform them of the missed payments by certified mail. Defendants first missed a payment to Plaintiff in September 2011, but subsequently made additional payment and assured Plaintiff of their intent to honor their payment obligations.

On October 31, 2011, Defendants Reed and Smith violated the Full and Final Release when they filed case number 2011-CP-10-8011 in Charleston County Court of Common Pleas. The case caption is Assistive Technology Medical Equipment Services v. Hood & Selander, CPAs, LLC, Donna C. Cash, as Representative of the Estate of Dorothy Connelly, W.E. Applegate, III, as Personal Representative of the Estate of James B. Connelly, Kimberly Cuce, and Phillip DeClemente. In their lawsuit, Smith and Reed claim Mr. DeClemente and the other Defendants acted fraudulently and misled them about the value of Abacare by failing to disclose to them the company's true sales tax liability owed to the South Carolina Department of Revenue.

Mr. DeClemente failed to answer, within thirty days, the illegal complaint Smith and Reed filed against him. Mr. DeClemente answered the complaint and filed counter-claims on August 10, 2012. The counter-claims seek judgment against ATMES, Smith and Reed for the

funds which are still owed Mr. DeClemente pursuant to the $265,000.00 sales contract in which Mr. DeClemente sold his 25% ownership in ATMES to Smith and Reed. Prior to filing the counterclaims, Mr. DeClemente mailed Defendant Smith a certified letter informing him of the missed payments, as required by the contract conveying Mr. Declemente's ownership in ATMES to Defendants Reed and Smith (Exhibit #6). By letter dated June 12, 2012 and received June 15, 2012, Mr. Smith responded by saying the Defendants had no intention of immediately paying the money owed to Plaintiff, and that ATMES would address the issue of their indebtedness at the conclusion of a damages hearing, as Mr. DeClemente had failed to timely answer the frivolous suit filed against him (Exhibit #7).

On April 24, 2014, Judge J.C. Nicholson found Mr. DeClemente's answer to Defendants' lawsuit untimely, held him in default and disallowed his counter-claims. That ruling has been appealed, but the Court of Appeals has found the appeal premature until it is determined whether any damages are ever ordered against Mr. DeClemente.

Mr. DeClemente filed this action on June 11, 2015, re-alleging the causes of action asserted in his initial counter-claims and adding some which have arisen since the initial counter-claims were filed. Mr. DeClemente was notified of Defendants' intent to dishonor their payment obligation to him by letter from Defendant Smith dated June 12, 2012 and received June 15, 2012. Plaintiff therefore filed this action within the applicable three year statute of limitations, which expired on June 16, 2015. If Defendants claim there is any evidence unknown to Plaintiff which might support an argument for an earlier statute of limitations, then that issue is to be decided by the jury. *Manios v. Nelson, Mullins, Riley and Scarborough, LLP*, 389 S.C. 126, 697 S.E. 2d 644 (2010).

On July 17, 2015 Defendants filed a motion to dismiss Plaintiff's complaint and on August 24, 2015 Defendants filed a Motion to Change Venue and Objections to Plaintiff's Request for Assignment to the Business Court Pilot Program. On January 7, 2016 Judge Markley Dennis denied Defendants' Motion to Change Venue and granted their Motion to Dismiss, only as to causes of action 1-5, based on statute of limitations.

Plaintiff filed a motion to amend Judge Dennis's dismissal of Counts 1-5 and a motion to amend his pleadings. On February 19, 2016 Judge Dennis amended his judgment in part, reinstating Count 1 of the Complaint, which is breach of contract due to Defendants' failure to honor the promissory note they executed in exchange for Plaintiff's twenty-five percent ownership of ATMES. Judge Dennis correctly ruled that Count 1 of the Complaint was timely filed within three years of the note's maturity date, which is March 1, 2013. Plaintiff's motion to amend his Complaint was also granted. Judge Dennis ordered defense attorney James Smith to prepare a formal order supplementing the Court's Form 4, but that has not been done. Plaintiff's Amended Complaint and Motion for Summary Judgment were filed March 22, 2016. Attorney Smith has accepted service of the Amended Complaint on his clients' behalf.

LEGAL ANALYSIS AND ARGUMENT

It is undisputed and admitted by the Defendants that they have breached their contract with Plaintiff and owe him the balance of the note. There is no genuine issue of material fact in this case and Plaintiff is entitled to judgment as a matter of law. SCRCP 56. See, e.g. *Clary v. Borrell*, 398 S.C. 287, 727 S.E.2d 773 (Ct. App. 2012).

Respectfully submitted,

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cameron@attorneymarshall.com
Attorney for Plaintiff

Charleston, South Carolina

July 19, 2016.

Bill of Sale & Transfer

Dated June 30, 2009, appears in this Record on Appeal at pages 112-116

Promissory Note

Dated June 30, 2009, appears in this Record on Appeal at pages 107-109

Personal Guaranty

Of Jeffrey J. Reed, appears in this Record on Appeal at page 110

Personal Guaranty

Of G. Murrell Smith, Jr., appears in this Record on Appeal at page 111

Full and Final Release of DeClemente

Dated July 10, 2009, appears in this Record on Appeal at pages 122-124

Letter from Attorney Marshall

Dated June 8, 2012, appears in this Record on Appeal at page 152

Letter from Respondent Smith

Dated June 12, 2012, appears in this Record on Appeal at page 154

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)))	IN THE COURT OF COMMON PLEAS IN THE NINTH JUDICIAL CIRCUIT

PHILLIP DECLEMENTE, a/k/a ALEC ROCHFORD, Plaintiff, vs. ASSISTIVE TECHNOLOGY MEDICAL EQUIPMENT SERVICES, LLC; JEFFERY REED; and MURRELL G. SMITH, Defendants.	)))))))))))))	Civil Action No. 2015-CP-10-~~03307~~ 3325 **ANSWER TO AMENDED COMPLAINT**

FILED
2016 NOV -1 PM 1:22
JULIE J. ARMSTRONG
CLERK OF COURT

The Defendants ASSISTIVE TECHNOLOGY MEDICAL EQUIPMENT SERVICES, LLC, JEFFERY REED and MURRELL G. SMITH respectfully submit this Answer to the Amended Complaint of Plaintiff, allege as follows:

FOR A FIRST DEFENSE TO ALL CAUSES OF ACTION

1. Each and every allegation of the Complaint not specifically admitted, qualified or otherwise explained, is denied.

2. The Plaintiff's Complaint should further be dismissed pursuant to South Carolina Rules of Civil Procedure Rules 12(b)(3) for improper venue.

FOR A SECOND DEFENSE TO ALL CAUSES OF ACTION

3. As to paragraph one (1) through four (4) of Plaintiff's Complaint are admitted.

4. Paragraph five (5) of Plaintiff's Complaint is denied.

5. As to paragraph six (6) Defendants incorporate by referenced their preceding paragraphs and defenses to the allegations in the Complaint.

6. Plaintiff upon information and believe

7. Defendant admits the allegations of paragraph eight (8).

8. Defendants deny the characterization of a merger as alleged in paragraph nine (9) and only admit that Defendants purchased ABACARE.

9. Defendants deny the allegations of paragraph ten (10) inasmuch as the doctrine of law of the case has established that the Plaintiff committed fraud and deceit among other negligent conduct as established in Civil Action No 2011-CP-10-8011 and has been found not to have any ownership rights in ATMES.

10. As to paragraphs eleven (11), twelve (12), thirteen (13) and fourteen (14), Defendants admit only that a note was prepared but strictly deny that it is enforceable and that the Defendants have any liability under the note because it has been conclusively established that the Plaintiff committed fraud and deceit in the procurement and execution of the referenced promissory note and bill of sale.

11. As to paragraph fifteen (15), Defendants deny that Plaintiff provided valuable consideration.

12. Defendants deny paragraphs sixteen (16), seventeen (17) eighteen (18) and nineteen (19).

13. As to paragraph twenty (20), Defendants deny that any full payment was due to the Plaintiff and further than any acknowledgment of the debt has every occurred that would give rise to liability as a result of the fraud and deceit committed by Plaintiff.

14. Defendants deny the allegations of paragraphs twenty-one (21), twenty-two (22), twenty-three (23), twenty-four (24), twenty-five (25), twenty-six (26) and twenty-seven (27).

15. Defendants deny the allegations of paragraphs twenty-eight (28), twenty-nine (29), thirty (30), thirty-one (31), thirty-two (32), thirty-three (33), thirty-four (34), thirty-five (35) and thirty-

six (36) because Plaintiff's negligence, fraud and deceit as well as the multiple affirmative defenses asserted herein.

16. Defendants deny paragraphs thirty-seven (37) and thirty-eight (38).

FOR A THIRD DEFENSE TO ALL CAUSES OF ACTION

17. Defendants will show that Plaintiff, upon information and belief, initiated this action after an unreasonable delay and that Plaintiff's claims are barred by the doctrine of laches.

FOR A FOURTH DEFENSE TO ALL CAUSES OF ACTION

18. Defendants would show that this action is barred by the applicable statute of limitations, statute of repose, waiver or estoppel.

FOR A FIFTH DEFENSE TO ALL CAUSES OF ACTION

19. Plaintiff's damages, if any, must be reduced by the proportionate value of the beneficial use received by Plaintiff, or by any monies belonging to Defendants retained by Plaintiff, or by any monies received by Plaintiff from the Defendants, to which Plaintiff is not entitled.

FOR A SIXTH DEFENSE TO ALL CAUSES OF ACTION

20. Plaintiff's claims for damages are barred to the extent that Plaintiff has failed to mitigate their damages.

FOR A SEVENTH DEFENSE TO ALL CAUSES OF ACTION

21. Plaintiff's claims for damages are barred by the doctrine of set-off.

FOR AN EIGHTH DEFENSE TO ALL CAUSES OF ACTION

22. Plaintiff's claims for damages are barred by the doctrine of law of the case in that this identical action was brought in Civil Action No. 2011-CP-40-8011 and Plaintiff has been held to conclusively be liable to the Defendants for committing fraud, deceit and negligence among other causes of action and is conclusively held to be liable to the Defendants.

FOR A NINETH DEFENSE TO ALL CAUSES OF ACTION

23. Defendants deny that Plaintiff is entitled to the relief requested in the Prayer for Relief contained in Plaintiff's "Wherefore" paragraph.

WHEREFORE, Defendants pray for the following relief:

1) An Order of this Court dismissing Plaintiff's Complaint with prejudice;

2) An award of attorneys' fees and costs of this action as provided by law or contract;

3) For such other and further relief as this Honorable Court may deem equitable and just.

RESPECTFULLY SUBMITTED,
JAMES E. SMITH, JR., P.A.

By: _____

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(803) 933-9800

Attorneys for Defendants

Columbia, South Carolina
Oct 28, 2016

STATE OF SOUTH CAROLINA	)	IN THE COMMON PLEAS COURT
	)	IN THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	

PHILLIP DECLEMENTE a/k/a ALEC ROCHFORD,	)	Civil Action No. 2015-CP-10-3325
Plaintiff,	)	**NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT**
vs.	)	
ASSISTIVE TECHNOLOGY MEDICAL EQUIPMENT SERVICES, LLC; JEFFERY REED; MURRELL G. SMITH,	)	
Defendants.	)	

FILED
2017 SEP 20 PM 12: 10
JULIE J. ARMSTRONG
CLERK OF COURT
BY

TO: CAMERON MARSHALL, ESQ., ATTORNEY FOR PLAINTIFF

PLEASE TAKE NOTICE that the Defendants will move before the Presiding Circuit Judge, within ten (10) days after service of this Motion, at the Charleston County Courthouse, Charleston, South Carolina, for an Order granting Defendants Summary Judgment in the above-captioned matter. Defendants make this Motion pursuant to Rule 56(a) of the South Carolina Rules of Civil Procedure.

Defendants assert that there is no genuine issue of material fact and Defendants are entitled to judgment as a matter of law. This Motion is supported by the pleadings, discovery on file in this matter, deposition testimony, supplemental documents and any memorandum of law that may be submitted in support of this Motion.

RESPECTFULLY SUBMITTED,

JAMES E. SMITH, JR., P.A.

By: _____

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Attorney for Defendants

September 18, 2017

Columbia, South Carolina