THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2018-CP-40-02730

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

v.

Merritt, Webb, Wilson & Caruso, PLLC, Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On May 18, 2018, Zachary M. Merritt, as personal representative of the Estate of James A. Merritt, Jr. ("Respondent"), filed his original Complaint. (R. pp. 12-17). On July 2, 2018, the law firm of Merritt, Webb, Wilson & Caruso, PLLC, ("Appellant") filed its first "Motion to Dismiss, or Alternatively, to Stay and to Compel Arbitration." (R. pp. 18-23). On October 3, 2018, Respondent filed a Memorandum in Opposition to this motion. (R. pp. 63-65). On October 4, 2018, Appellant replied to that Memorandum. (R. pp. 66-70).

Subsequently, on October 8, 2018, Respondent filed an Amended Complaint seeking a declaratory judgment and seeking other relief. (R. pp. 71-77).

On October 18, 2018, Appellant again filed a Motion to Dismiss, or Alternatively, to Stay and to Compel Arbitration, this time in response to Respondent's Amended Complaint. ("Motion to Compel Arbitration.") (R. pp. 78-85). On January 10, 2019, the trial court held a hearing on the Appellant's Motion to Compel Arbitration. (R. pp. 153-170).

On January 25, 2019, the circuit court entered an order denying Appellant's Motion to Compel Arbitration. (R. pp. 3-8). On February 1, 2019, Appellant timely filed a Motion to

Reconsider its Motion to Compel Arbitration. (R. pp. 93-113). The trial court denied this motion, in otherwise identical orders, on February 25, 2019, (R. p. 9), and February 27, 2019. (R. p. 10).

On March 19, 2019, Appellant timely filed and served its notice of appeal.

STANDARD OF REVIEW

The construction of an agreement to arbitrate, like any contract, is a matter of law that the court reviews *de novo*. *McMillan v. Gold Kist, Inc.*, 353 S.C. 353, 358, 577 S.E.2d 482, 484 (Ct. App. 2003) (*citing Watts v. Monarch Builders, Inc.*, 272 S.C. 517, 252 S.E.2d 889 (1979)). "Whether a party has agreed to arbitrate an issue is a matter of contract interpretation." *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 108, 739 S.E.2d 209, 213 (2013).

Parties can refer questions of arbitrability to an arbitrator. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529, 202 L. Ed. 2d 480 (2019); *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). Arbitrability determinations are subject to *de novo* review. *Wilson v. Willis*, __ S.C.__, No. 2016-001512, 2019 WL 1549924, at *3 (S.C. Apr. 10, 2019); *Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007).

The party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration. Nevertheless, a trial court's findings of fact will be reversed if no evidence reasonably supports these findings. *Aiken*, 373 S.C. at 148; *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014).

STATEMENT OF THE FACTS

INTRODUCTION AND GENERAL FACTUAL BACKGROUND

This arbitration dispute arises from a disagreement between Respondent, the personal representative of the Estate of James Merritt, Jr. ("Jim Merritt"), and Appellant, Jim Merritt's former law firm, over the value of Respondent's interest in Appellant. Upon joining Appellant in

2006, Jim Merritt signed an amendment to the firm's operating agreement that, as relevant here, added him as a member and amended a portion of the operating agreement pertaining to valuation of a member's interest if a member decided to leave the firm. The amendment did not change—or even address—the arbitration provision in the firm's Operating Agreement. Moreover, the arbitration provision prevented civil actions against Appellant to determine any "rights, liabilities, obligations, valuations, or payment plans" and required resolution of these disputes through arbitration.

Despite this binding arbitration provision, the trial court denied Appellant's Motion to Compel arbitration after Respondent filed an action in the Richland County Court of Common Pleas asserting various claims based on Respondent's interest in Appellant. The trial court held the buy-out valuation provision in the 2006 Amendment to the operating agreement superseded the arbitration provision and that the arbitration provision would not cover this dispute if it applied. The trial court erred in denying the motion to compel arbitration, and this Court should reverse and direct the entry of an order compelling arbitration and dismissing Respondent's case.

DETAILED FACTUAL BACKGROUND

Prior to his death, James Merritt Jr., ("Jim Merritt") a lawyer, and the decedent in this case, was a member of Appellant. Appellant is a law firm operating as a professional limited liability company organized and existing under the laws of the State of North Carolina. Motion to Compel Arbitration, ¶ 1, (R. p. 19); *Id.* at Exh. A, (R. p. 26). It also has an office in Columbia, South Carolina. Amended Complaint, ¶ 5, (R. p. 72). At the time he joined the firm, Appellant had an operating agreement in place that was originally implemented on June 11, 2002 ("Operating Agreement"). Appellant's October 18, 2018, Motion to Dismiss, or Alternatively, to Stay and to

Compel Arbitration ("Motion to Dismiss"), ¶1. *Id.* at Exh. A. (R. p. 114). The Operating Agreement included the following arbitration provision ("Arbitration Provision"):

> The interests of the Members in the company shall be personal property for all purposes. Legal title to all Company assets shall be held in the name of the Company. Neither any Member nor a successor, representative, or assign of any Member shall have the right, title, or interest in or to any Company property or the right to partition any Property owned by the Company, other than the right to initiate an arbitration proceeding pursuant to the rules of the American Arbitration Association Rules for determination and payment of a partnership assets and payment of a partnership buyout as further provided in this agreement. **It is explicitly agreed by and between the parties that no civil action shall be maintained against an individual or the company as to the determination of any rights, liabilities, obligations, valuations, or payment plans, and that all matters will be resolved by arbitration** and that the arbitration award will be enforced pursuant to the North Carolina Rules of General Statutes as to registration and enforcement of arbitration awards.

Motion to Dismiss, Exh. A, ¶1.7 (R. p. 117) (emphasis added).

The Operating Agreement also stated that it "shall be governed and construed in accordance with the laws of the State of North Carolina without giving effect to the conflicts of laws provisions therein." *Id.* at ¶10.8 (R. p. 134).

On August 31, 2006, the then-members of Appellant drafted a document electing and admitting Jim Merritt and another attorney as members of the firm. Motion to Dismiss, Exh. B (R. pp. 142-146). Styled the "Members' Agreement for the Election and Admission of New Members to Browne, Flebotte, Wilson & Webb, PLLC[1] and Amendment of the Firm's Operating Agreement" (the "2006 Amendment"), this document stated in relevant part:

> [To] the extent anything in the PLLC's existing Operating Agreement, as previously amended, conflicts with any provision of this Agreement, the terms of this Agreement prevail and control . . . [and] any conflicting terms are deleted from the Operating Agreement and replaced by the terms of this Agreement.

Id. at § II (R. p. 143).

[1] Appellant's former name.

The 2006 Amendment also contained a provision that stated,

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

Id. at § IV.E. (R. p. 145).

On July 12, 2017, while still a member of Appellant, Jim Merritt tragically passed away. Amended Complaint, ¶ 10 (R. p. 72).

On October 8, 2018, Respondent filed an action in the Richland County Court of Common Pleas seeking 1). a declaration that Appellant was required to pay Respondent the fair market value of his share of Appellant and wages accruing as a result of his membership in Appellant (R. pp. 73-74); 2.) relief from Appellant's alleged "breach" of a statutory requirement to purchase Respondent's shares in Appellant (R. p. 74); 3.) payment of the unpaid wages and benefits accruing as a result of Respondent's membership in Appellant (R. pp. 74-75); and 4.) the return of personal property and personal effects within the custody or control of Respondent. (R. p. 75).

Appellant then moved to compel arbitration, primarily arguing that the Arbitration Provision within the Operating Agreement applied to Respondent's claims.

The trial court denied Appellant's motion to compel arbitration on two grounds. First, the court held that the 2006 Amendment, "accomplished in August 2006 when Jim Merritt joined the firm," "omit[ted] any requirement that" disputes related to "valuation of a member's interest and the valuation rights of a departed member . . . be determined in arbitration." Order Denying Motion to Compel Arbitration, p. 5 (R. p. 7). Second, the court held that even assuming the "arbitration provision in the Original Operating Agreement remains in effect, the provision does not compel

arbitration of Plaintiff's claims because the claims are based upon statutory law, not the Original Operating Agreement." *Id.* After the trial court denied Appellant's timely filed Motion to Reconsider (R. p. 9), Appellant filed a timely notice of appeal.[2]

ARGUMENTS

I. A Binding, Valid, and Enforceable Arbitration Agreement Exists.

A. The 2006 Amendment Did Not Contradict or Supersede the Arbitration Provision.

The 2006 Amendment provided for a change in the valuation method to be used for members electing to leave the law firm. It did not contradict or address the Arbitration Provision in the Operating Agreement in any way, and therefore the Arbitration Provision applies between Appellant and Respondent.

Unless the parties have contracted otherwise, the Federal Arbitration Act (FAA) applies in federal or state court to any arbitration agreement involving interstate commerce. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001). Under the FAA and both North Carolina and South Carolina law, ordinary contract principles apply to determine whether the Arbitration Provision is enforceable. *See* 9 U.S.C. § 2 ("A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."); N.C.G.S. Ann. § 1-569.6 ("An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties

[2] An order denying a motion to compel arbitration made is immediately appealable. S.C. Code Ann. § 15-48-200(a)(1); *Towles v. United HealthCare Corp.*, 338 S.C. 29, 35, 524 S.E.2d 839, 842–43 (Ct. App. 1999).

to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for revoking a contract."); S.C. Code Ann. § 15-48-10(a) ("A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.").

Moreover, South Carolina law requires that a court compel arbitration when a party refuses to arbitrate, and if the parties dispute whether an agreement to arbitrate exists, then the court will determine the issue. *See* S.C. Code Ann. § 15-48-20 (a) ("On application of a party showing an [arbitration] agreement . . . and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.").[3] Arbitration agreements enjoy a strong presumption of validity in federal and state courts. *Dean*, 408 S.C. 371. South Carolina has a strong policy favoring resolution of disputes through alternative

[3] Appellant's Operating Agreement states that it "shall be governed and construed in accordance with the laws of the State of North Carolina without giving effect to the conflicts of laws provisions thereof." Motion to Compel Arbitration, Exh. A, ¶ 10.8, (R. p. 44). However, this Court need not decide any choice of law issue in this case because such a determination is not necessary to resolve this appeal. South Carolina and North Carolina law are substantially similar in their treatment of contract interpretation and questions of arbitrability. And these laws are not in conflict with the FAA. *Munoz*, 343 S.C. at 538 ("Unless the parties have contracted to the contrary, the FAA applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction."); *Burke Cty. Pub. Sch. Bd. of Ed. v. Shaver P'ship*, 303 N.C. 408, 422, 279 S.E.2d 816, 825 (1981) (holding that even when there is a "contractual provision calling for application of North Carolina law. The Federal Arbitration Act, by virtue of the Supremacy Clause, is . . . part of North Carolina law.") *See also, King v. Bryant*, 225 N.C. App. 340, 344, 737 S.E.2d 802, 806 (2013) ("If the FAA is applicable, courts must apply it, even in the face of contractual provisions calling for the application of state law.") Taking the lower court's example though, where appropriate, citations are made to both South and North Carolina law in this brief.

dispute resolution, including arbitration. *C-Sculptures, LLC v. Brown*, 403 S.C. 53, 56, 742 S.E.2d 359, 361 (2013).

"Whether a party has agreed to arbitrate an issue is a matter of contract interpretation." *Landers*, 402 S.C. at 108. "'When deciding whether the parties agreed to arbitrate a certain matter . . . courts generally . . . should apply ordinary state-law principles that govern the formation of contracts.'" *Id.* (*quoting First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995)).

Neither party disputes the existence of the Operating Agreement or the 2006 Amendment – rather, what is in dispute is the interpretation of these documents. Under either North Carolina or South Carolina law, this Court should consider Section IV.E of the 2006 Amendment, not in isolation, but in conjunction with the other written instruments in this case—principally, the Operating Agreement. *Koon v. Fares*, 379 S.C. 150, 155, 666 S.E.2d 230, 233 (2008) (*citing Litchfield Co. of S.C. v. Kiriakides*, 290 S.C. 220, 223, 349 S.E.2d 344, 346 (Ct. App. 1986) ("The purpose of the rules of contract construction is to ascertain the intention of the parties as gathered from the contents of the entire document and not from any particular provision within the contract.").

In construing the 2006 Amendment to the Operating Agreement (Motion to Compel Arbitration, Exh. B (R. pp. 52-56), the lower court found:

> Section IV.E of the Amended Operating Agreement omits any requirement that . . . valuations and rights [of members to the Appellant] be determined in arbitration. Therefore, the Amended Operating agreement does not require arbitration of disputes relating to the valuation of a former member's interest. Pursuant to Section II of the Amended Operating Agreement, the superseding terms of the Amended Operating Agreement control.

Order Denying Motion to Compel Arbitration, p. 5 (R. p. 7). As such, the court held "Plaintiff's claims are not subject to an arbitration agreement, and the Court cannot compel Plaintiff to arbitrate his claims." *Id.* This conclusion was error.

Like any contract, the construction of an agreement to arbitrate is a matter of law. *McMillan*, 353 S.C. at 358 (citing *Watts*, 272 S.C. 517). In *Plaza Dev. Servs. v. Joe Harden Builder, Inc.*, 294 S.C. 430, 434, 365 S.E.2d 231, 233 (Ct. App. 1988), this Court examined the impact of an amendment to two parties' original agreement calling for arbitration. In that case, this Court affirmed a trial court's grant of a motion to compel arbitration filed by Joe Harden Builder, Inc. (referred to as "JHB"), over the objection of appellant Plaza, a real estate developer. This Court found that the language of a second agreement between the parties, while perhaps modifying some parts of the original contract, left "the [original] contract intact" and was "silent as to arbitration." *Plaza Development Services*, 294 S.C. at 433–34. Therefore, the Court held that the "arbitration clause of the [original] contract applied" and that "the trial judge was correct in granting the motion to compel arbitration." *Id.*

Moreover, *Plaza Development Services* addressed a similar fact pattern: a dispute arose between JHB and Plaza, and JHB filed a demand for arbitration with the American Arbitration Association ("AAA") pursuant to an existing contractual agreement between JHB and Plaza. *Id.* 294 S.C. at 431–32. "Before the disputes could reach the arbitration stage, they were resolved by a settlement agreement between Plaza and JHB." *Id.* That settlement agreement contained the following language:

> The parties agree that their performance under this agreement is a final and complete settlement of the final amount due under the contract and neither party shall make any additional claims thereof. Except as provided for herein, the Contract shall remain in full force, virtue and effect.
>
> Provided that JHB is not in default of the Contract on this agreement . . .

> The parties hereto agree that this escrow agreement in no way limits or diminishes JHB's warranty or responsibility to perform under the Contract.

Plaza Development Services, 294 S.C. at 433. Subsequently, a subcontractor of JHB, Baker Masonry, Inc., initiated an arbitration proceeding against JHB. JHB then demanded arbitration against Plaza and asked the arbitration panel to consolidate the cases. *Plaza Development Services*, 294 S.C. at 431–32. Plaza then initiated an action in circuit court, seeking *inter alia* an injunction to enjoin JHB from proceeding with the arbitration against Plaza. *Id.* That motion was denied, and Plaza appealed. *Id.*

Plaza asserted on appeal that the settlement agreement entered into between JHB and Plaza (an agreement that omitted any mention of arbitration) made the original agreement to arbitrate inapplicable between JHB and Plaza. In reaching its decision, this Court relied on a familiar rule of contract interpretation:

> Where instruments are entered into by the same parties at different times but relate to the same subject matter, the instruments will be construed together to determine the entire agreement between the parties.

Plaza Development Services, 294 S.C. at 433–34 (citing to *Bishop Realty & Rentals, Inc. v. Perk, Inc.*, 292 S.C. 182, 355 S.E.2d 298 (Ct. App. 1987)). With this precedent in mind, this Court proceeded to "construe the two instruments together," held the arbitration provision survived the subsequent agreement, and affirmed the trial court's decision in favor of the party seeking arbitration. *Id.*

This Court reached the same conclusion in *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 594 S.E.2d 485 (Ct. App. 2004), and held that a trial court correctly analyzed documents memorializing "one transaction with a series of amendments" by "construing all the various writings of the parties as one contract." *Ellie, Inc.*, 358 S.C. at 94. In reaching this conclusion, the Court stated:

> In South Carolina, two contracts executed at different times relating to the same subject matter, entered into by the same parties, are to be construed as one contract

> and considered as a whole. *Café Assocs., Ltd. v. Gerngross,* 305 S.C. 6, 10, 406 S.E.2d 162, 164 (1991); *Moshtaghi v. Citadel,* 314 S.C. 316, 321, 443 S.E.2d 915, 918 (Ct.App.1994) (*citing Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.,* 268 S.C. 80, 88, 232 S.E.2d 20, 25 (1977)). Moreover, where one of the contracts explains, amplifies, or limits the other, those provisions will be given effect between the parties so that the whole agreement, as actually contracted by the parties, may be effectuated. *Moshtaghi*, 314 S.C. at 321, 443 S.E.2d at 918; *Edward Pinckney Assocs., Ltd. v. Carver,* 294 S.C. 351, 354, 364 S.E.2d 473, 474 (Ct.App.1987) . . . **This rule applies even where the parties are not the same, if the several instruments were known to all the parties and were delivered the same time to accomplish an agreed purpose.** 17A Am. Jur. 2d Contracts § 388.

Ellie, Inc., 358 S.C. at 92–93 (emphasis added).

Moreover, North Carolina law is in accord. *See, e.g., Beau Rivage Plantation, Inc. v. Melex USA, Inc.*, 112 N.C. App. 446, 451, 436 S.E.2d 152, 154 (1993) (*citing In re Fortescue*, 75 N.C. App. 127, 330 S.E.2d 219 (1985) ("When a second contract involves the same subject matter as the first contract, and no rescission has occurred, the contracts must be construed together."); *see also*, *Yates v. Brown*, 275 N.C. 634, 170 S.E.2d 477, 482 (1969) ("All contemporaneously executed written instruments between the parties, relating to the subject matter of the contract, are to be construed together in determining what was undertaken.") (*citing Combs v. Combs*, 273 N.C. 462, 160 S.E.2d 308 (1968) *and Smith v. Smith*, 249 N.C. 669, 107 S.E.2d 530 (1959)). *See also* 17A Am. Jur. 2d Contracts § 370 ("Writings executed at different times must be considered together if they pertain to the same transaction.")

In this case, the portion of the 2006 Amendment relied on by the circuit court only changes the buy-out valuation method in the Operating Agreement from book value to going concern. An attachment to the Operating Agreement labeled "Schedule II" provides for the price and method of payment for a company buy-out of membership interest and sets a price at book value. Motion to Compel Arbitration, Exh. A, Schedule II (R. pp. 47-50). The relevant 2006 Amendment section provides: "Should any Member decide to leave or disassociate themselves from the Firm their

interest in the Firm will be determined by valuation of the Firm as an on-going concern." Motion to Compel Arbitration, Exh. B, §IV.E (R. p. 55). The 2006 Amendment does not address arbitration, and the language relied on by the trial court does not change the Arbitration Provision in the Operating Agreement. As *Plaza Development Services*; *Ellie, Inc.*; and the various North Carolina cases state, the 2006 Amendment cannot be read as removing the otherwise binding arbitration provision in the Operating Agreement.

Furthermore, the trial court's interpretation would lead to absurd results previously rejected by North Carolina and South Carolina courts. The logical foundation of the lower court's errant order is that "omission equals replacement." If the trial court's analysis were applied to the remainder of the Operating Agreement, then many aspects of the Operating Agreement governing "general provisions" would no longer be applicable because Section IV of the 2006 Amendment is styled "General Provisions and Amendments." *See* Motion to Compel Arbitration, Exh. B (R. pp. 54-56).

Had the members of Defendant, all sophisticated parties, concluded that they wanted to rid themselves of the arbitration provision in their Operating Agreement at the time the 2006 Amendment was implemented, they could have said so. They did not. Accordingly, the 2006 Amendment did not alter, amend, or supersede the Arbitration Provision, and the Arbitration Provision is part of the contract between the parties.

B. The Lower Court's Conclusion that the 2006 Amendment Applies to this Suit was Error.

The trial court's conclusions in its Order Denying the Motion to Compel Arbitration (R. pp. 3-8) lacked factual support. That Order rested on a presumption that Section IV.E. of the 2006 Amendment (R. p. 55) was applicable to the facts in this case. Section IV.E of the 2006 Amendment begins with the following clause: "Should any Member ***decide*** to leave or dissociate

themselves from the Firm . . ." and then goes on to explain the updated valuation method under such circumstances. (R. p. 55).

"'[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration.'" *Dean*, 408 S.C. at 379 (*quoting Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 91, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000)). But, the record is devoid of *any* evidence indicating that Jim Merritt "decide[d] to leave or dissociate" himself from Appellant—a factual prerequisite to the applicability of this provision of the 2006 Amendment.

Appellant and counsel's purpose in raising this issue is not morbidity or disrespect to a fallen colleague. It is Appellant's firmly-held belief that Jim Merritt's death was not a voluntary "deci[sion] to leave or dissociate" himself from the firm. It was, Appellant posits, an unfortunate, untimely, and regrettable loss to his family, friends, law firm, the Bar, and the community. However, in any law firm, planning for both voluntary and involuntary transitions of firm members is an unfortunate necessity. *Barnacle Broad., Inc. v. Baker Broad., Inc.*, 343 S.C. 140, 147, 538 S.E.2d 672, 675 (Ct. App. 2000) ("The primary test as to the character of a contract is the intention of the parties, such intention to be gathered from the whole scope and effect of the language used.")

Reading all the written instruments in this case provides ample support for a narrow reading of Section IV.E of the 2006 Amendment as *only* applicable to voluntary departures from the firm—a fact not present in this case. Given what Appellant believes was the involuntary nature of Jim Merritt's departure from the firm, i.e. his tragic death (to which there is no contradictory evidence in the record), the Court wrongly concluded Section IV.E of the 2006 Amendment applies to the facts of this case.

In contrast to the 2006 Amendment, the "Transfers of Interest" section at Section 8.2 of the Operating Agreement (Motion to Compel Arbitration, Exh. A (R. p. 41)) contemplates both

voluntary departures of members from the firm and situations where a member involuntarily can no longer serve as a member of the firm. The members of Appellant, all lawyers in an arms-length negotiation that bound them for years to come, agreed to the narrowly tailored provisions of Section IV.E of the 2006 Amendment. Under traditional and binding tenets of contract interpretation, this Court is obliged to respect the plain language of their agreement. *Reyhani v. Stone Creek Cove Condo. II Horizontal Prop. Regime*, 329 S.C. 206, 212, 494 S.E.2d 465, 468 (Ct. App. 1997) (citing 17A Am. Jur. 2d Contracts § 385) ("Documents will be interpreted so as to give effect to all of their provisions, if practical.")

The lower court did not make any specific finding of fact that Jim Merritt's death, was in fact, voluntary. It is Appellant's position that such a finding would be impossible because it did not happen—and certainly despite it being the Respondent's factual burden, they presented no evidence to demonstrate that Jim Merritt's departure from the firm was a voluntary decision. Accordingly, this Court need not remand.

However, if the Court is not inclined to grant Appellant relief outright, remanding this case back to the trial court for an appropriate determination of fact would be warranted. This Court is unable to review a trial court's decision when such a decision lacks "factual findings . . . because 'the reasons underlying the decision [are] left to speculation.'" *In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 133, 568 S.E.2d 338, 343 (2002) (quoting *Kiawah Prop. Owners Grp. v. Pub. Serv. Comm'n of S.C.*, 338 S.C. 92, 96, 525 S.E.2d 863, 866 (1999)). SCRCP 52(a) provides that, in cases tried without a jury, the trial court "shall find the facts specially and state separately its conclusions of law thereon." Moreover, "findings must be sufficient to allow this [c]ourt, sitting in its appellate capacity, to ensure the law is faithfully executed below." *In re Treatment and Care of Luckabaugh*, 351 S.C. at 133.

II. Respondent's Claims Were Within the Scope of the Valid Arbitration Agreement.

A. Respondent's Claims Fell Within the Scope of the Arbitration Provision.

The trial court's distinction between claims based on statutes and claims based on the Operating Agreement was error. The lower court concluded that even if it assumed the "arbitration provision in the Original Operating Agreement remains in effect, the provision does not compel arbitration of Plaintiff's claims because the claims are based upon statutory law, not the Original Operating Agreement." Order Denying Motion to Compel Arbitration, p. 5 (R. p. 7).

The trial court did not cite any law to support this distinction because there is no law to support it. As Respondent confesses, his claims "arise[] out of [Appellant]'s failure to pay or agree [to] pay [Respondent] the fair market value of the ownership interest of James A. Merritt, Jr. . . . in [Appellant]." Amended Complaint at ¶ 1 (R. p. 71). There is no "statute" in this case that provides an exception to the far-reaching Federal, South Carolina, and North Carolina public policies in favor of broadly interpreting arbitration agreements.[4] But for Jim Merritt's many years as a member of the firm, the property in dispute and the claims asserted by Plaintiff would not exist.

In other words, it was not some unidentified statute that established Jim Merritt as the "managing member" of the Appellant, (*see* Transcript of Record, 6:14-15 (R. p. 153)), but the Operating Agreement as amended.[5] Regardless of the label the plaintiff uses, when deciding

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[4] The only statute specifically cited in Respondent's Amended Complaint is S.C. Code Ann. § 15-53-10 *et seq.*, "The Uniform Declaratory Judgment Act." Amended Complaint, ¶¶ 1, 19 (R. pp. 71, 73). Respondent's Second Cause of Action states that Appellant has breached a statutory requirement to purchase shares – but omits which statute he relies upon for relief. *Id.* at ¶ 21 *et seq.* (R. p. 74).

[5] It is telling that Respondent's original Complaint implicitly referred to the Operating Agreement and 2006 Amendment. Complaint, ¶ 14 (R. p. 14)("there is **agreement** between the members of [Appellant] that [it] should be valued as a going concern.") (emphasis added) *Id.* at ¶ 18 ("this

whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of" an arbitration clause. *Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 491, 689 S.E.2d 602, 604 (2010). Without the firm's Operating Agreement, Respondent would have no right to claim an interest in the firm, much less be owed a discrete 25% interest as paragraph 10 of the Amended Complaint alleges. *Id.* Put simply, "[i]t is not the legal label assigned to a claim but the substance of the underlying allegations that determine whether claims are arbitrable." *Hinson v. Jusco Co.*, 868 F. Supp. 145, 149 (D.S.C. 1994).[6]

In reaching its decision, the lower court failed to follow the great weight of authority compelling arbitration in this case. "A motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to ***any*** interpretation which would cover the asserted dispute." *Tritech Elec., Inc. v. Frank M. Hall & Co.*, 343 S.C. 396, 399, 540 S.E.2d 864, 865 (Ct. App. 2000) (*citing Towles*, 338 S.C. 29) (emphasis

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Court has the power to declare the rights of the parties under the applicable law **and agreements between the Law Firm members** requiring the Share to be purchased for fair market value (on the basis of valuing the Law Firm as a going concern") (emphasis added); *Id.* at Second Cause of Action, ¶ 20, *et seq.* (R. p. 15)("**Breach of Contract** and Statutory Requirement to Purchase Shares") (emphasis added).The fact that these references were removed in the Amended Complaint (R. pp. 71-77) is a distinction that makes no difference.

[6] Even if there were some dispute (which there is not) that Respondent, in his capacity as personal representative of Jim Merritt's estate, were not bound by the terms of the Operating Agreement, "[a] nonsignatory is estopped from refusing to comply with an arbitration clause when it receives a direct benefit from a contract containing an arbitration clause." *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 290, 733 S.E.2d 597, 601 (Ct. App. 2012). Stated otherwise, a party is not allowed simultaneously to claim the benefit of the contract while denying the arbitration agreement contained in that contract. *Carter v. TD Ameritrade Holding Corp.*, 218 N.C. App. 222, 231, 721 S.E.2d 256, 263 (2012); *Smith Jamison Constr. v. APAC-Atl., Inc.*, 811 S.E.2d 635, 638 (N.C. Ct. App. 2018)("a court should examine whether the plaintiff has asserted claims in the underlying suit that, either literally or obliquely, *assert a breach of a duty created by the contract containing the arbitration clause.*")(emphasis in original, internal quotations omitted); *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000)("A nonsignatory is estopped from refusing to comply with an arbitration clause when it receives a direct benefit from a contract containing an arbitration clause.")(internal citations omitted).

added).

And,

> Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. Furthermore, unless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered.

Zabinski, 346 S.C. at 597 (citations omitted).

Reading the plain language of the Arbitration Provision shows Respondent's claims are subject to arbitration. All Respondent's causes of action relate to the determination of rights or turnover of funds or property Respondent claims as its own—whether strictly monetary interests, or, in the case of the Respondent's Fourth Cause of Action, "personal" property. Amended Complaint (R. p. 71-77).

Even if the plain language did not clearly cover this dispute, South Carolina courts will compel arbitration when a broadly worded arbitration agreement exists if a "'significant relationship' exists between the asserted claims and the contract in which the arbitration clause is contained." *Zabinski*, 346 S.C. at 598 (*citing Long v. Silver*, 248 F.3d 309 (4th Cir. 2001)). "[T]he scope of [an arbitration] clause does not limit arbitration to the literal interpretation or performance of the contract," but rather, "embraces every dispute between the parties having a significant relationship to the contract." *Landers*, 402 S.C. at 109–10 (internal citations and quotations omitted).

This "heavy presumption of arbitrability" is "strengthened when an arbitration clause is broadly written." *Landers*, 402 S.C. at 109 (citing *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986)). In reaching its ruling, the lower court did not appropriately consider the broad language of the Arbitration Provision:

> Neither any member [or his successors] has ***any*** right, title, or interest in or to any Company property or the right to partition any property ***other than the right*** to

> initiate an arbitration proceeding pursuant to the rules of the American Arbitration Association Rules . . .

Motion to Compel Arbitration, Exh. A, ¶ 1.7 (R. p. 27)(emphasis added). The Arbitration Provision further states:

> It is explicitly agreed by and between the parties that ***no civil action*** shall be maintained against any individual or the company as to the determination of any rights, liabilities, obligations, valuations, or payment plans, and that ***all matters will be resolved by arbitration***.

Id. (emphasis added)

There is no dispute in this case that Jim Merritt, a sophisticated and talented attorney, agreed to the terms of the Operating Agreement as amended. The lower court erred by not respecting the agreement to arbitrate disputes.

B. Pursuant to the Arbitration Provision, Questions of Arbitrability Were For An Arbitrator to Decide.

Parties may agree to have an arbitrator decide not only the merits of a particular dispute but also gateway questions of arbitrability, such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529, 202 L. Ed. 2d 480 (2019); *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 130 S. Ct. 2772, 2774, 177 L. Ed. 2d 403 (2010).

When an agreement "clearly and unmistakably" contemplates that questions of arbitrability be referred to an arbitrator, reviewing courts should respect the parties' contractual decision. *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 629, 667 S.E.2d 1, 5 (Ct. App. 2008)(citing *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452, 123 S. Ct. 2402, 156 L. Ed. 2d 414 (2003)). To the extent that there are any questions of arbitrability that are unanswered by the plain language of the parties' arbitration agreement, those questions are properly referred to the arbitrator for resolution of arbitrability in this case.

In this case, the members of Appellant (including the decedent, Jim Merritt) expressly incorporated into the Arbitration Provision the American Arbitration Association ("AAA") Rules,

> Neither any Member nor a successor, representative, or assign of any Member shall have the right, title, or interest in or to any Company property or the right to partition any Property owned by the Company, ***other than the right to initiate an arbitration proceeding pursuant to the rules of the American Arbitration Association Rules*** for determination and payment of a partnership assets and payment of a partnership buyout as further provided in this agreement.

Motion to Compel Arbitration, Exh. A, ¶ 1.7 (R. p. 27)(emphasis added). These rules state that "[t]he arbitrator ***shall*** have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, ***scope*** or validity of the arbitration agreement." AAA Commercial Rule 7(a); AAA Employment Rule 6(a); AAA Accounting and Related Services Rule 10(a) (emphasis added). "Any disputes regarding which AAA rules shall apply shall be decided by the AAA." AAA Commercial Rules, Rule 1(a) *See also*, *Henry Schein, Inc.*, 139 S. Ct. at 528 ("The rules of the American Arbitration Association provide that arbitrators have the power to resolve arbitrability questions").

While no published South Carolina case has examined whether the parties' election to adopt an arbitrable body's rules demonstrates clear and unmistakable evidence that the parties intended for an arbitrator to decide questions of arbitrability, "[i]t is the policy of [South Carolina] and federal law to favor arbitration and any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Landers*, 402 S.C. at 109 (internal quotations and citations omitted).

Moreover, North Carolina recognizes the "majority rule" that the "express adoption of an arbitral body's rules, which delegate questions of substantive arbitrability to the arbitrator, constitutes clear and unmistakable evidence that the parties intended to arbitrate questions of substantive arbitrability." *Bailey v. Ford Motor Co.*, 244 N.C. App. 346, 355, 780 S.E.2d 920, 927

(2015) (internal quotations omitted); *Epic Games, Inc. v. Murphy-Johnson*, 247 N.C. App. 54, 63–64, 785 S.E.2d 137, 144 (2016) ("incorporation of the AAA rules demonstrate that the parties agreed the arbitrator should decide issues of substantive arbitrability"); *See also Smith Barney, Inc. v. Bardolph*, 131 N.C. App. 810, 817, 509 S.E.2d 255, 259–60 (1998) (holding that the parties' adoption of an arbitral body's rules was clear and unmistakable evidence that the parties intended for an arbitrator to decide questions of *procedural* arbitrability).

Recent federal cases from the Fourth Circuit support this sound principle. *See, e.g.*, *Simply Wireless, Inc v. T-Mobile US, Inc*, 877 F.3d 522, 528 (4th Cir. 2017), *abrogated on other grounds by Henry Schein, Inc.*, 139 S. Ct. 524, 202 L. Ed. 2d 480 (2019) ("We agree with our sister circuits and therefore hold that, in the context of a commercial contract between sophisticated parties, the explicit incorporation of JAMS Rules serves as 'clear and unmistakable' evidence of the parties' intent to arbitrate arbitrability"); *Berkeley Cty. Sch. Dist. v. HUB Int'l Ltd.*, 363 F. Supp. 3d 632, 646 (D.S.C. 2019) ("Courts are frequently and consistently finding that when an arbitration clause incorporates arbitration rules, whether they be JAMS or AAA rules, there is clear and unmistakable evidence that the parties intended to arbitrate arbitrability.") *See also* 92 Am. Jur. Proof of Facts 3d 1 (Originally published in 2006) ("A clear and unmistakable intent for the arbitrator to decide issues of arbitrability is demonstrated when parties incorporate by reference AAA Commercial Arbitration Rules.").

The United States Supreme Court has also recently weighed in on this issue and stated in a unanimous decision, that where "a valid agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a court may ***not*** decide the arbitrability issue." *Henry Schein, Inc.*, 139 S. Ct. at 530. "In those circumstances, ***a court possesses no power*** to decide the arbitrability issue. That is true ***even if the court thinks that the argument that the arbitration***

agreement applies to a particular dispute is wholly groundless." *Henry Schein, Inc.*, 139 S. Ct. at 529 (emphasis added).

Thus, because the parties demonstrated their intent to be bound by AAA rules in settling any disputes, the Arbitration Provision contains clear and unmistakable evidence of their intent to refer questions of arbitrability to an arbitrator.

III. The Lower Court Should Have Dismissed Outright or Alternatively Stayed All Claims Pending Arbitration.

A. Dismissal is the Appropriate Remedy When All Claims are Subject to Arbitration.

Each of Respondent's claims is covered by the binding Arbitration Provision and dismissal of the case is the appropriate remedy where a court compels arbitration of all pending claims.

S.C. Code Ann. § 15-48-20(d) states:

> Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this section or, if the issue is severable, the stay may be with respect thereto only. When the application is made in such action or proceeding, the order for arbitration shall include such stay.

However, this Court has previously held that when "every dispute [is] within the scope of at least one valid arbitration agreement," a trial court did not err in compelling arbitration and dismissing a suit completely. *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 96, 749 S.E.2d 139, 154 (Ct. App. 2013). *See also, Tritech Elec., Inc.*, 343 S.C. 396 (holding it was reversable error for the trial court to refuse to dismiss the state contract action and compel arbitration when confronted with a valid arbitration clause).

Likewise, N.C. Gen. Stat. Ann. § 1-569.7 provides that "[i]f the court orders arbitration, the court on just terms shall stay any judicial proceeding that involves a claim subject to the

arbitration." Practically, 9 U.S.C. § 3 of the Federal Arbitration Act ("FAA") is substantially identical to the parallel South Carolina and North Carolina statutes,

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Case law interpreting this statute provides highly important, if not controlling, interpretative guidance in this case—a matter directly implicating interstate commerce. Federal courts interpreting 9 U.S.C. § 3 have held that "[n]otwithstanding the terms of § 3 [regarding staying proceedings], dismissal is a proper remedy when all of the issues presented in a lawsuit are arbitrable." *Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc.*, 252 F.3d 707, 709–10 (4th Cir. 2001). There appears to be some subsequent disagreement within the Fourth Circuit as to if dismissal is appropriate in such a circumstance. *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 376 n. 18 (4th Cir. 2012)). But, despite this, "district courts within the Fourth Circuit have continued to find dismissal appropriate." *Taylor v. Santander Consumer USA, Inc.*, No. CIV.A. DKC 15-0442, 2015 WL 5178018, at *7 (D. Md. Sept. 3, 2015).[7]

[7] This is particularly true in recent holdings of the courts of the District of South Carolina. *See e.g.*, *Smith v. Gen. Info. Sols., LLC*, No. CV 3:18-2354-MGL, 2018 WL 6528155 (D.S.C. Dec. 11, 2018); *Marchant v. Maxim Healthcare Servs., Inc.*, No. 2:18-CV-2757-RMG, 2018 WL 5793595, at *2 (D.S.C. Nov. 5, 2018); *Smith v. Gen. Info. Sols., LLC*, No. CV 3:18-2354-MGL, 2018 WL 6528155 (D.S.C. Dec. 11, 2018); *Ray v. Austin Indus., Inc.*, No. 3:18-CV-00392-JMC, 2018 WL 4701375 (D.S.C. Sept. 29, 2018); *Weddington v. Brinker Int'l, Inc.*, No. 8:18-CV-1630-TMC-JDA, 2019 WL 1322609, at *2 (D.S.C. Mar. 7, 2019), *report and recommendation adopted,* No. CV 8:18-1630-TMC, 2019 WL 1320412 (D.S.C. Mar. 22, 2019) (D.S.C. Mar. 22, 2019; *Oyekan v. Educ. Corp. of Am.*, No. 4:18-CV-01785-RBH, 2019 WL 978865, at *6 (D.S.C. Feb. 28, 2019).

Likewise, the Fifth Circuit Court of Appeals has noted that §3 of the FAA "was not intended to limit dismissal of a case in the proper circumstances. The weight of authority clearly supports dismissal of the case when *all* the issues raised in the district court must be submitted to arbitration." *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992) (emphasis in original) (citations omitted).

B. Alternatively, All Claims Should be Stayed Pending Arbitration.

Finally, even if this Court were inclined to come to a decision that would have the effect of dismissing or staying only a segment of all the claims at issue in this case, pursuit of other claims before a court should be stayed pending the result of arbitration. When "questions of fact common to all actions pending" in a matter are "likely to be settled during . . . arbitration, we find that all litigation should be stayed pending the arbitration proceedings." *Am. Home Assur. Co. v. Vecco Concrete Const. Co. of Virginia*, 629 F.2d 961, 964 (4th Cir. 1980); *Nat'l Material Trading v. M/V Kaptan Cebi*, No. C.A. 2:95-3673-23, 1997 WL 915000, at *9 (D.S.C. Mar. 13, 1997) ("When arbitration is likely to settle questions of fact pertinent to nonarbitral claims, consideration of judicial economy and avoidance of confusion and possible inconsistent results militate in favor of staying the entire action.")

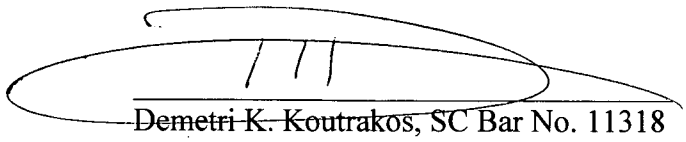
Staying all litigation in situations like those here supports considerations of judicial economy and avoidance of confusion and possible inconsistent results.

CONCLUSION

For the reasons set forth herein and based on the applicable principles of law, Appellant respectfully requests the Court overturn the trial court's ruling on Appellant's Motion to Dismiss, or Alternatively, to Stay and Compel Arbitration and enter an order dismissing this case and directing the parties to arbitration.

Respectfully submitted,

CALLISON TIGHE & ROBINSON, LLC



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Columbia, South Carolina
September 16, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
L. Casey Manning, Circuit Court Judge

Appellate Case No. 2019-000456

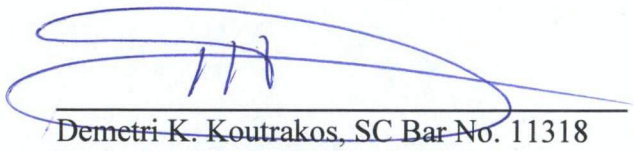
Zachary M. Merritt, as personal representative of the Estate of James A. Merritt, Jr., Respondent,

v.

Merritt, Webb, Wilson & Caruso, PLLC, Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Appellant complies with Rule 211(b), SCACR.



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