

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

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SC Court of Appeals

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

Respondent,

v.

Merritt, Webb, Wilson & Caruso, PLLC,

Appellant.

RECORD ON APPEAL

Demetri K. Koutrakos, SC Bar No. 11318
Ian T. Duggan, SC Bar No. 80074
Harry A. Dixon, SC Bar No. 103509
Callison Tighe & Robinson, LLC
1812 Lincoln St, Suite 200
PO Box 1390
Columbia, SC 29202-1390
Telephone No. (803) 404-6900
Facsimile No. (803) 404-6901
jimkoutrakos@callisontighe.com
ianduggan@callisontighe.com
harrydixon@callisontighe.com
ATTORNEYS FOR APPELLANT
MERRITT, WEBB, WILSON &
CARUSO, PLLC

Matthew T. Richardson, (SC Bar No. 15647)
Lucy Dinkins, (SC Bar No. 101177)
Wyche, PA
801 Gervais St., Ste. B
PO Box 12247
Columbia, SC 29211-2247
Telephone No. (803) 254-6542
Facsimile No. (803) 254-6544
mrichardson@wyche.com
ldinkins@wyche.com

Eric B. Amstutz (SC Bar No. 0363)
William Wilson, III (SC Bar No. 15808)
Wyche, PA
44 E. Camperdown Way
PO Box 728
Greenville, SC 29602-0728
Telephone No. (864) 242-8200
Facsimile No. (864) 235-8900
eamstutz@wyche.com
bwilson@wyche.com
ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL DISTRICT

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

Plaintiff,

vs.

Merritt, Webb, Wilson & Caruso, PLLC,

Defendant.

Case No: 2018-CP-40-02730

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

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

FACTUAL AND PROCEDURAL BACKGROUND

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

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

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

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

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

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

LEGAL STANDARD

It is the public policy of both North Carolina and South Carolina¹ to favor arbitration and to resolve doubts regarding the scope of arbitrability in favor of arbitration. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596-97, 553 S.E.2d 110, 118 (2001); *Johnston Cnty. v. R.N. Rouse & Co., Inc.*, 414 S.E.2d 30, 32 (N.C. 1992). In considering whether to compel arbitration of a dispute, a court must first determine whether the parties had a valid agreement to arbitrate. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007); *T.M.C.S., Inc. v. Marco Contractors, Inc.*, 780 S.E.2d 588, 593 (N.C. Ct. App. 2015). Although public policy favors the arbitration of disputes, a party cannot be compelled to arbitrate claims unless there is a valid arbitration agreement. *Zabinski*, 346 S.C. at 596, 553 S.E.2d at 118 ("Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not

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

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

DISCUSSION AND ANALYSIS

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

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

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

Id. This section lacks an arbitration provision.

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

Id. ¶ II.

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

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

Law Firm's Mot., Ex. A ¶ 1.7.

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

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

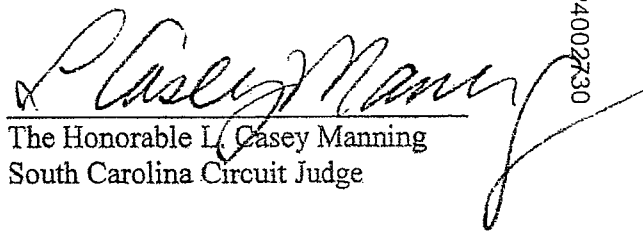
Plaintiff's Complaint asserts causes of action for declaratory judgment, breach of the statutory requirement to purchase shares, payment of wages, and claim and delivery or replevin, which are all statutory claims. The Complaint does not assert a cause of action for breach of either the Original Operating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

CONCLUSION

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

IT IS SO ORDERED.

January 24, 2019
Richland County, South Carolina


The Honorable L. Casey Manning
South Carolina Circuit Judge

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

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

CASE NO: 2018-CP-40-02730

Plaintiff,

**ORDER DENYING DEFENDANT'S
MOTION TO RECONSIDER**

v.

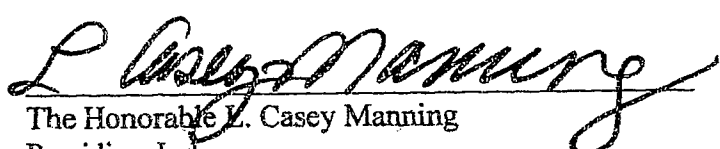
Merritt, Webb, Wilson & Caruso, PLLC

Defendants.

THIS MATTER came before the Court on October 18, 2018 on the Motion to Dismiss, or in the Alternative, to Stay and Compel Arbitration, filed by Defendant, Merritt, Webb, Wilson & Caruso, PLLC. Following the hearing and review of arguments and pleadings submitted by the parties, this Court denied Defendant's Motion by an Order dated, January 24, 2019. Defendant filed a Motion to Reconsider on February 01, 2019, which was timely under Rule 59(e). After a review of the pleadings, the motion and arguments therein, and all the testimony including this Court's previous ruling, this Court denies Defendant's Motion to Reconsider without oral arguments presented.

Therefore, after reviewing Defendant's Motion and the arguments within being duly noted, Defendant's Motion to Reconsider this Court's ruling on Defendant's Motion to Dismiss, or in the Alternative, to Stay and Compel Arbitration is hereby **DENIED**.

IT IS SO ORDERED this 25 day of February, 2019


The Honorable L. Casey Manning
Presiding Judge

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

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

CASE NO: 2018-CP-40-02730

Plaintiff,

**ORDER DENYING DEFENDANT'S
MOTION TO RECONSIDER**

v.

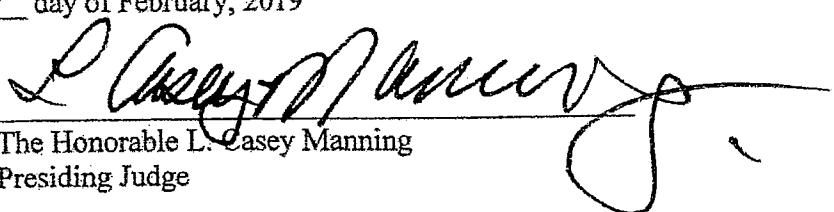
Merritt, Webb, Wilson & Caruso, PLLC

Defendants.

THIS MATTER came before the Court on October 18, 2018 on the Motion to Dismiss, or in the Alternative, to Stay and Compel Arbitration, filed by Defendant, Merritt, Webb, Wilson & Caruso, PLLC. Following the hearing and review of arguments and pleadings submitted by the parties, this Court denied Defendant's Motion by an Order dated, January 24, 2019. Defendant filed a Motion to Reconsider on February 01, 2019, which was timely under Rule 59(e). After a review of the pleadings, the motion and arguments therein, and all the testimony including this Court's previous ruling, this Court denies Defendant's Motion to Reconsider without oral arguments presented.

Therefore, after reviewing Defendant's Motion and the arguments within being duly noted, Defendant's Motion to Reconsider this Court's ruling on Defendant's Motion to Dismiss, or in the Alternative, to Stay and Compel Arbitration is hereby **DENIED**.

IT IS SO ORDERED this 27 day of February, 2019


The Honorable L. Casey Manning
Presiding Judge

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

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

Plaintiffs,

vs.

Merritt, Webb, Wilson & Caruso, PLLC, 7b

Defendants.

IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL DISTRICT

SUMMONS

C.A.: _____

TO THE ABOVE NAMED DEFENDANT:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in the above-entitled action, a copy of which is herewith served upon you, and to serve a copy of your answer upon the undersigned at their offices at 44 East Camperdown Way, Greenville, SC 29601, within thirty (30) days after service hereof upon you, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

/s William M. Wilson III

William M. Wilson III (15808)

WYCHE, P.A.

44 East Camperdown Way

Post Office Box 728

Greenville, South Carolina 29602-0728

Telephone: 864-242-2800

Telefax: 864-235-8900

Attorneys for Plaintiffs

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

May 18, 2018

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

FIFTH JUDICIAL DISTRICT

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

Case No: 2018-CP-40-_____

Plaintiff,

COMPLAINT

vs.

(Declaratory Judgment)

Merritt, Webb, Wilson & Caruso, PLLC,

Defendant.

Comes now the Plaintiff Zachary M. Merritt ("Plaintiff"), as personal representative of the Estate of James A. Merritt, Jr., deceased ("the Estate"), complaining of the Defendant Merritt, Webb, Wilson & Caruso, PLLC ("Law Firm" or "Defendant"), and alleges as follows:

NATURE OF THE ACTION

1. This action is brought in part pursuant to the provisions of the Uniform Declaratory Judgment Act as codified in S.C. Code Ann. § 15-53-10 *et seq.*, and it arises out of the Law Firm's failure to pay or agree pay to the Estate the fair market value of the ownership interest of James A. Merritt, Jr. ("Decedent") in the Law Firm, as required by their agreement and by law.

PARTIES AND JURISDICTION

2. Plaintiff is the son of the Decedent and the duly appointed, qualified, and acting personal representative of the Estate. He brings this action on behalf of the Estate as well as all others entitled to recover under the applicable law.

3. Plaintiff is a South Carolina citizen residing at all relevant times in York County, South Carolina.

4. The Estate is being administered in the Probate Court of Richland County, South Carolina, with Case Number 2017-ES-40-01594.

5. The Law Firm is a limited liability company authorized to do business in South Carolina and that maintains an office and operations in Richland County, South Carolina, at 8910 Two Notch Rd #400, Columbia, South Carolina 29223.

6. The Law Firm may be served through its Registered Agent in South Carolina, CT Corporation System.

7. This Court has personal jurisdiction over the Law Firm because, among other things, the Law Firm maintains an office in Richland County, South Carolina; is authorized to conduct business in South Carolina; maintains a registered agent for service of process in South Carolina; performed the agreement with Decedent at least in part in Richland County, South Carolina; and is obligated to pay the fair market value of Decedent's shares to the Estate being administered in Richland County, South Carolina.

8. This Court has jurisdiction over the subject matter of this action and over the Defendant, and venue is proper.

FACTUAL BACKGROUND

9. Plaintiff incorporates all paragraphs above as if fully stated herein.

10. The Decedent held a 25% ownership interest in the Law Firm at the time of his death on July 12, 2017.

11. By operation of law, the Decedent ceased to be a member of the Law Firm at his death.

12. By operation of law, the Estate is an economic interest owner and is entitled to the economic interest attributable to the Decedent's ownership interest at Decedent's death.

13. The Decedent's ownership interest in the Law Firm (referred to herein as "Shares" or "shares") has been transferred by operation of law to the Estate following Decedent's death and must be acquired for fair market value by the Law Firm or persons qualified to own such shares.

14. There is no agreement with the Law Firm as to the value of the Shares, although there is agreement between the members of the Law Firm that the Law Firm should be valued as a going concern.

15. Defendant has refused all requests by Plaintiff to agree to a methodology and process for an independent third party appraisal and/or to provide financial information necessary for an independent valuation of the Shares (on the basis of valuing the Law Firm as a going concern), and Defendant has further declared its intention to proceed with an appraiser of its choosing without input or consent of Plaintiff, thereby resulting in a valuation that cannot be verified by Plaintiff as reflecting a fair market value of the Shares (on the basis of valuing the Law Firm as a going concern).

16. Defendant also has failed to pay all wages due to Decedent, including but not limited to bonuses for 2017.

FOR A FIRST CAUSE OF ACTION
(Declaratory Judgment)

17. The foregoing allegations are incorporated herein by reference.

18. Pursuant to S.C. Code Ann. §§ 15-53-10, *et seq.*, this Court has the power to declare the rights of the parties under the applicable law and agreements between the Law Firm members requiring the Shares to be purchased for fair market value (on the basis of valuing the Law Firm as a going concern).

19. Accordingly, the Court should hear this matter and declare the Law Firm shall pay the Estate for the fair market value of the Shares and also declare the fair market value of the shares of the Law Firm (on the basis of valuing the Law Firm as a going concern); and declare that the Estate is entitled to unpaid wages of Decedent, including but not limited to bonuses for 2017, and also declare the amount of unpaid wages.

FOR A SECOND CAUSE OF ACTION

(Breach of Contract and Statutory Requirement to Purchase Shares)

20. The foregoing allegations are incorporated herein by reference.

21. Defendant has breached and/or anticipatorily breached the requirement to pay the fair market value of the Shares to the Estate (on the basis of valuing the Law Firm as a going concern).

22. Plaintiff is entitled to an injunction requiring Defendant to pay to the Estate the fair market value of the Shares (on the basis of valuing the Law Firm as a going concern).

23. Plaintiff is entitled to a money judgment in the amount of the fair market valuation of the Shares (on the basis of valuing the Law Firm as a going concern).

24. Plaintiff is entitled to prejudgment interest on the fair market value of the Shares (on the basis of valuing the Law Firm as a going concern) beginning July 12, 2018, to the extent it remains unpaid.

25. Plaintiff reserves the right to pursue payment of the fair market value of the Shares from the remaining individual members of the Law Firm and/or persons qualified to own such Shares.

FOR A THIRD CAUSE OF ACTION

(Payment of Wages)

26. The foregoing allegations are incorporated herein by reference.

27. The Decedent earned wages, including but not limited to bonuses for 2017, prior to his death.

28. The Law Firm failed to pay said wages to the Estate.

29. The Estate is entitled to a money judgment for the amount of unpaid wages, plus interest, statutory liquidated damages in an amount to equal to the amount found to be due, and costs and fees of the action and reasonable attorneys' fees.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

- (1) Declare the Law Firm shall pay the Estate the fair market value of the Shares of the Law Firm (on the basis of valuing the Law Firm as a going concern);
- (2) Declare the fair market value of the Shares (on the basis of valuing the Law Firm as a going concern) to be paid by the Law Firm to the Estate for the Shares;
- (3) Enter an injunction in favor of the Plaintiff requiring Defendant to pay to the Estate the fair market value of the Shares (on the basis of valuing the Law Firm as a going concern);
- (4) Enter a money judgment in favor of the Estate against the Law Firm in the amount of the fair market value of the Shares (on the basis of valuing the Law Firm as a going concern);
- (5) Declare that Plaintiff reserves the right to pursue payment of the fair market value of the Shares from the individual members of the Law Firm, if the Law Firm refuses or otherwise fails to pay;
- (6) Declare that the Estate is entitled to unpaid wages of Decedent, including but not limited to bonuses for 2017, and also declare the amount of unpaid wages;

- (7) Enter a money judgment for the amount of unpaid wages, plus interest, statutory liquidated damages in an amount to equal to the amount found to be due, and costs and fees of the action and reasonable attorneys' fees;
- (8) Award attorneys' fees and the costs of this action; and
- (9) Grant any such other and further relief as this Court shall deem just and proper.

Respectfully submitted,

s/ William M. Wilson III

William M. Wilson III (S.C. Bar No. 15808)

Matthew T. Richardson (S.C. Bar No. 15647)

Eric B. Amstutz (S.C. Bar No. 0363)

WYCHE, P.A.

P.O. Box 12247

Columbia, SC

Telephone: 803-254-6542

Facsimile: 864-235-8900

E-Mail: bwilson@wyche.com;

mrichardson@wyche.com; eamstutz@wyche.com

Attorneys for Plaintiff

Dated: May 18, 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
Zachary M. Merritt, as personal	)	Civil Action No. 2018-CP-40-02730
representative of the Estate	)	
of James A. Merritt, Jr.	)	
Plaintiff,	)	
	)	DEFENDANT'S MOTION TO DISMISS,
vs.	)	OR, ALTERNATIVELY, TO STAY AND
	)	TO COMPEL ARBITRATION
Merritt, Webb, Wilson & Caruso,	)	
PLLC	)	
Defendant.	)	

YOU WILL PLEASE TAKE NOTICE that the undersigned attorneys for Defendant Merritt, Webb, Wilson & Caruso, PLLC, move, pursuant to SCRCP Rules 12(b)(1), 12(b)(3), 12(b)(6) and the North Carolina Revised Arbitration Act (N.C.G.S. §1-569.31 *et seq.*) or, alternatively, the North Carolina Uniform Arbitration Act (§1-567.1 *et seq.*) for an order dismissing with prejudice the claims asserted against it in this action, or alternatively, staying the action, and compelling those claims to arbitration.¹

This Motion is based upon the pleadings, applicable law, and any memorandum of law or other material that may be submitted to the Court prior to or at the hearing on this Motion. Defendant requests a hearing on this motion within ten days after the filing thereof, or as soon thereafter as counsel may be heard. The grounds for this motion are primarily founded on the following:

¹ This Motion is filed in lieu of filing an Answer at this stage. *See e.g.* Rule 12(b), SCRCP ("A motion making any of these defenses shall be made before pleading if a further pleading is permitted.") To the extent an Answer is required, Defendant denies all allegations contained and relief sought against it in Plaintiff's Complaint.

FACTS

1. On June 11, 2002, the Members of the law firm Browne, Flebotte, Wilson & Horn, PLLC, a North Carolina Limited Liability Company, implemented an Operating Agreement, a true copy of which is appended hereto as **Exhibit A**.

2. The Operating Agreement included the following provision at paragraph 1.7 regarding arbitration,

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.

3. Paragraph 10.8 of the 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.”²

4. Subsequently, on August 31, 2006, the Members of Browne, Flebotte, Wilson and

² “Choice of law clauses are generally honored in South Carolina.” *Team IA, Inc. v. Lucas*, 395 S.C. 237, 248–49, 717 S.E.2d 103, 108–09 (Ct. App. 2011) *See also Nucor Corp. v. Bell*, 482 F.Supp.2d 714, 728 (D.S.C.2007) (“Generally, under South Carolina choice of law principles, if the parties to a contract specify the law under which the contract shall be governed, the court will honor this choice of law.”)

Webb, PLLC,³ amended the Operating Agreement in order to effect the election and admission of Attorneys James A. Merritt, Jr., and Heather B. Caruso as full Members of the firm. A true copy of this Amendment is appended hereto as **Exhibit B**. The Amendment did not affect or otherwise modify the above arbitration provision contained within the original Operating Agreement. Contemporaneously, an "Admissions Agreement" adding Mr. Merritt and Ms. Caruso into the firm as Members was signed by all. A true copy of this Admission Agreement is appended hereto as **Exhibit C**. A true copy of the "Minutes of Action" by the firm generally memorializing the above events is appended hereto as **Exhibit D**. Concurrently, and as an effect of these documents, the firm's name was changed from Browne, Flebotte, Wilson and Webb, PLLC to Merritt, Flebotte, Wilson, Webb & Caruso, PLLC.⁴

LAW AND ANALYSIS

5. "[T]he public policy of North Carolina strongly favors the settlement of disputes by arbitration and requires that the courts resolve any doubts concerning the scope of arbitrable issues in favor of arbitration." *Revels v. Miss N. Carolina Pageant Org., Inc.*, 176 N.C. App. 730, 735, 627 S.E.2d 280, 283 (2006) (citing to *Johnston County v. R.N. Rouse & Co.*, 331 N.C. 88, 91, 414 S.E.2d 30, 32 (1992)). See also *Westmoreland v. High Point Healthcare Inc.*, 218 N.C. App. 76, 90, 721 S.E.2d 712, 722 (2012) ("It is the public policy of North Carolina to favor arbitration.")

6. On January 1, 2004, pursuant to S.L. 2003-345, § 2, North Carolina General

³ Browne, Flebotte, Wilson & Horn, PLLC changed its name to Browne, Flebotte, Wilson, Horn and Webb, PLLC on February 26, 2004, following the admission of Joy Rhyne Webb as a Member. Following Martin Horn's withdrawal from the PLLC membership, the law firm name was changed on August 4, 2005 to Browne, Flebotte, Wilson and Webb, PLLC.

⁴ Following Daniel Flebotte's withdrawal from the PLLC membership, the law firm name was changed to Merritt, Webb, Wilson & Caruso, PLLC on August 25, 2011.

Statutes §§ 1-567.1 to 1-567.20, collectively known as “The North Carolina Uniform Arbitration Act” was repealed. In its place, North Carolina implemented the “North Carolina Revised Arbitration Act.” N.C.G.S. 1-569.31 *et seq.* The Revised Act was made applicable to agreements to arbitrate on or after January 1, 2004, or agreements to arbitrate made before January 1, 2004, if “all parties to the agreement or to the arbitration proceeding agree in a record that this Article applies.” *See* N.C. Gen. Stat. Ann. § 1-569.3(a) and (b).

7. Whether the Admission Agreement and Amendment to the Operating Agreement signified an agreement by the Members of the firm to be bound by the Revised Uniform Arbitration Act or the Prior Uniform Arbitration Act is of no import. In this case, the result is the same.⁵ Both § 1-567.2 and § 1-569.6 hold that agreements to arbitrate disputes amongst parties to an agreement are “valid, enforceable, and irrevocable.”

8. The far-reaching arbitration provision in the Operating Agreement in this case is valid. The parties to the Operating Agreement, all licensed attorneys, were sophisticated parties entering into a business relationship. There is no evidence of coercion, duress or any other mechanism to set aside the agreement amongst the law firm’s members on contractual grounds. “The law of contracts governs the issue of whether there exists an agreement to arbitrate.” *King v. Bryant*, 225 N.C. App. 340, 345–46, 737 S.E.2d 802, 807 (2013) (*quoting Routh v. Snap-On Tools Corp.*, 108 N.C.App. 268, 271, 423 S.E.2d 791, 794 (1992)). While the decedent’s interests are the subject of this case, the arbitration provision also plainly applies to

⁵ In addition, both North Carolina General Statutes § 1-567.18(a) and § 1-567.28(a) provide that an appeal may be taken from an order denying a motion to compel arbitration. *See also Gemini Drilling and Found., LLC v. Nat’l Fire Ins. Co. of Hartford*, 665 S.E.2d 505, 508 (N.C. Ct. App. 2008). Similarly, the Federal Arbitration Act (FAA) also provides for an immediate right to appeal a denial of a stay of a proceeding pending arbitration. *See e.g.* 9 U.S.C. § 16(a)(1) *et seq.*

his "successor[s], representative[s], or assign[s]."

9. Similarly, the valid arbitration clause in this case applies to the present controversy between the parties to this suit. The arbitration provision in the Operating Agreement holds that it is "explicitly agreed" between the Members "*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.*" (emphasis added). In this case, Plaintiff admits that its case "arises out of [Merritt, Webb, Wilson & Caruso, PLLC]'s failure to pay or agree [to] pay to the Estate the fair market value of the ownership interest of James A. Merritt, Jr. . . . in [Merritt, Webb, Wilson & Caruso, PLLC]." Complaint, ¶ 1. Any fair reading of the arbitration clause, the Operating Agreement as a whole, and the Plaintiff's Complaint indicates the present dispute falls into the category of the type of issues the Members of Merritt, Webb, Wilson & Caruso, PLLC, including Mr. Merritt, intended to arbitrate.

WHEREFORE, Merritt, Webb, Wilson & Caruso, PLLC, requests that the Court enter an order providing the following:

A. Pursuant to Rule 12(b), SCRCp, dismiss, with prejudice, Plaintiff's Claims, or in the alternative, stay the action and strike it from the active roster;

B. Hold that the Plaintiff's claims are subject to a binding arbitration agreement governed by North Carolina law and that Plaintiff's only recourse for pursuing those claims is to submit them to binding arbitration in accordance with the parties' express agreement; and,

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

[SIGNATURE ON FOLLOWING PAGE]

Respectfully submitted,

CALLISON TIGHE & ROBINSON, LLC

s/ Ian T. Duggan
Ian T. Duggan, SC Bar No. 80074
Callison Tighe & Robinson, LLC
1812 Lincoln St, Suite 200
PO Box 1390
Columbia, SC 29202-1390
Telephone No. (803)404-6900
Facsimile No. (803)404-6900
ianduggan@callisontighe.com

Columbia, South Carolina

July 2, 2018

EXHIBIT A

JUNE 11, 2002

Operating Agreement
Of
BROWNE, FLEBOTTE, WIL SON & HORN, PLLC
(A North Carolina Limited Liability Company)

Effective as of the date the
Company's Articles of Organization were
Filed with the Secretary of State

THE PLLC MEMBERSHIP INTERESTS REPRESENTED BY THIS OPERATING AGREEMENT HAVE NOT BEEN REGISTERED WITH THE SECURITIES AND EXCHANGE COMMISSION UNDER THE SECURITIES ACT OF 1933, AS AMENDED, OR UNDER THE NORTH CAROLINA SECURITIES ACT, OR SIMILAR LAWS OR ACTS OF OTHER STATES IN RELIANCE UPON EXEMPTIONS UNDER THOSE ACTS. THE SALE OR OTHER DISPOSITION OF THE MEMBERSHIP INTERESTS IS RESTRICTED AS STATED IN THIS OPERATING AGREEMENT, AND IN ANY EVENT IS PROHIBITED WITHOUT REGISTRATION UNDER THE SECURITIES ACT OF 1933, AS AMENDED, AND ANY APPLICABLE STATE SECURITIES ACTS AND LAWS OR PURSUANT TO AN EXEMPTION FROM SUCH REGISTRATION. BY ACQUIRING THE MEMBERSHIP INTERESTS REPRESENTED BY THIS OPERATING AGREEMENT, THE MEMBER REPRESENTS THAT IT WILL NOT SELL OR OTHERWISE DISPOSE OF ITS MEMBERSHIP INTERESTS WITHOUT REGISTRATION OR OTHER COMPLIANCE WITH THE AFORESAID ACTS AND THE RULES AND REGULATIONS ISSUED THEREUNDER.

OPERATING AGREEMENT
OF
BROWNE, FLEBOTTE, WILSON & HORN, PLLC

THIS OPERATING AGREEMENT OF BROWNE, FLEBOTTE, WILSON & HORN, PLLC (the "Company"), a professional limited liability company organized pursuant to the North Carolina Limited Liability Company Act, is effective as of the date the Company's Articles of Organization were filed with the Secretary of State, by and among the Company and the persons executing this Agreement as the Members and Managers.

ARTICLE I
FORMATION OF THE COMPANY

1.1 *Formation.* The Company was formed effective July 19, 2001 pursuant to the filing with the Secretary of State of the Articles of Organization of the Company. In consideration of the mutual premises and covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree that the rights and obligations of the parties and the administration and termination of the Company shall be governed by this Agreement, the Articles of Organization and the Act.

1.2 *Name.* The name of the Company is BROWNE, FLEBOTTE, WILSON & HORN, PLLC. The Managers may change the name of the Company from time to time as they deem advisable, provide appropriate amendments to the Agreement and the Articles of Organization and necessary filings under the Act are first obtained.

1.3 *Registered Office and Registered Agent.* The Company's registered office within the State of North Carolina and its registered agent at such address shall be as determined from time to time by the Managers.

1.4 *Principal Place of Business.* The principal place of business of the Company within the State of North Carolina shall be at such place or places as the Managers may from time to time deem necessary or advisable.

1.5 *Purposes and Powers*

(a) The purpose of the Company shall be to engage in the business of a professional practice of law and in any other lawful business for which professional limited liability companies may be organized under the Act.

(b) The Company shall have any and all powers which are necessary or desirable to carry out the purposes and business of the Company, to the extent the same may be legally exercised by professional limited liability companies under the Act

1.6 *Term.* The Company shall continue in existence until it is dissolved and its affairs wound up in accordance with the provisions of this Agreement or the Act.

1.7 *Nature of Members' Interests.* 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 any right, title, or interest in or to any Company property or the right to partition any Property owned by the Company, other than the right to initiate an arbitration proceeding pursuant to the rules of the American Arbitration Association Rules for determination and payment of a partnership assets 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.

1.8 *Classification of the Company.* The Members hereby acknowledge that the Company will not make an election with the Internal Revenue Service to be treated as an association taxed as a corporation and thus will be taxed as a partnership for federal income tax purposes, and that no Member is authorized to make such election unless all of the Members agree to do so.

ARTICLE II DEFINITIONS

2.1 *Definitions.* The following terms used in this Agreement shall have the following meanings (unless otherwise expressly provided herein): any words used in this agreement not otherwise provided with a specific definition shall have the ordinary definition used in the particular discipline that it arises.

"*Acr*" means the North Carolina Limited Liability Company Act, as amended from time to time

"*Adjusted Capital Account Deficit*" means, with respect to any Member, the deficit balance, if any, in such Member's Capital Account as of the end of the relevant fiscal year, after giving effect to the following adjustments:

- (i) Credit to such Capital Account any amounts to which such Member is obligated to restore or is deemed to be obligated to restore pursuant to the penultimate sentences of Treasury Regulations Sections 1.704-2(g)(1) and 1.704-2(i)(5); and
- (ii) Debit to such Capital Account the items described in Sections 1.704-1(b)(2)(ii)(d)(4), 1.704-1(b)(2)(ii)(d)(5), and 1.704-1(b)(2)(ii)(d)(6) of the Treasury Regulations

The foregoing definition of Adjusted Capital Account Deficit is intended to comply with the provisions of Section 1.704-(b)(2)(ii)(d) of the Treasury Regulations and shall be interpreted consistently therewith.

"Adjusted Capital Contributions" means, as of any day, a Member's Capital Contributions adjusted as follows:

(a) Increased by the amount of any Company liabilities which, in connection with Distributions, are assumed by such Member or are secured by any Property distributed to such Member; and

(b) Reduced by the amount of cash and the Gross Asset Value of any Property distributed to such Member and the amount of any liabilities of such Member assumed by the Company or which are secured by any Property contributed by such Member to the Company.

In the event any Member transfers all or any portion of his Membership Interest in accordance with the terms of this Agreement, the Member's transferee shall succeed to the Adjusted Capital Contribution of the transferor to the extent it relates to the transferred Membership Interest or portion thereof.

"*Agreement*" means this Operating Agreement, as it may be amended from time to time.

"*Articles of Organization*" means the Articles of Organization of the Company filed with the Secretary of State, as amended or restated from time to time.

"*Capital Account*" means, with respect to any Member, the capital account maintained for such Member in accordance with Section 5.5 of this Agreement.

"*Capital Contribution*" means all contributions of cash or property (valued for this purpose at initial Gross Asset Value) made by a Member or the Member's predecessor in interest.

"*Code*" means the Internal Revenue Code of 1986, as amended from time to time (and any corresponding provisions of succeeding law).

"*Company Minimum Gain*" means gain as defined in Treasury Regulations Section 1.704-2(d).

"*Depreciation*" means, for each Fiscal Year, an amount equal to the depreciation, amortization, or other cost recovery deduction allowable with respect to an asset for such Fiscal Year, except that if the Gross Asset Value of an asset differs from its adjusted basis for federal income tax purposes at the beginning of such Fiscal Year, Depreciation shall be an amount which bears the same ratio to such beginning Gross Asset Value as the federal income tax depreciation, amortization, or other cost recovery deduction for such Fiscal Year bears to such beginning adjusted tax basis; PROVIDED, HOWEVER, that if the adjusted basis for federal income tax purposes of an asset at the beginning of such Fiscal Year is zero, Depreciation shall be determined with reference to such beginning Gross Asset Value using any reasonable method selected by the Managers.

"*Disinterested Member*" means a Member who is not related (within the meaning of Section 267(b) of the Code or Section 707(b)(1) of the Code) to either the Member whose Membership is to be transferred as provided in Article VIII or the proposed transferee of such Membership Interest.

"*Distributable Cash*" means, with respect to the Company at any time, all funds of the Company on hand or in bank accounts of the Company as, in the discretion of the Managers, is then available for Distribution to the Members after provision has been made for (i) payment of all operating expenses of the Company as of such time; (ii) provision for payment of all outstanding and unpaid current obligations of the Company as of such time; and (iii) provision for such reserves as the Managers deem necessary or appropriate for Company operations as provided by Section 11.2

"*Distribution*" means any money or other property distributed to a Member with respect to the Member's Membership Interest, but shall not include any payment to a Member for materials or services rendered or funds loaned nor any reimbursement to a Member for expenses incurred by such Member in accordance with this Agreement.

"*Fiscal Year*" means an annual accounting period ending December 31 of each year during the term of the Company, unless otherwise specified by the Managers.

"*Gross Asset Value*" means, with respect to any asset, the asset's adjusted basis for federal income tax purposes except as follows:

- (i) The initial Gross Asset Value of any asset contributed by a Member to the Company shall be the gross fair market value of such asset, as determined by the contributing Member and the Managers;
- (ii) The Gross Asset Values of all assets of the Company shall be adjusted to equal their respective gross fair market values, as determined by the Managers, as of the following times: (a) the acquisition of an additional interest in the Company (other than upon the initial formation of the Company) by any new or existing Member in exchange for more than a *de minimis* Capital Contribution; (b) the distribution by the Company to a Member of more than a *de minimis* amount of Company Property as consideration for an interest in the Company; and (c) the liquidation of the Company within the meaning of Treasury Regulations Section 1.704-1(b)(2)(ii)(g); PROVIDED, HOWEVER, that the adjustments pursuant to clauses (a) and (b) above shall be made only if the Managers reasonably determine that such adjustments are necessary or appropriate to reflect the relative economic interests of the Members in the Company;
- (iii) The Gross Asset Value of any asset of the Company distributed to any Member shall be adjusted to equal the gross fair market value of such asset on the date of distribution as determined by the distributee and the Managers; and
- (iv) The Gross Asset Values of Company assets shall be increased (or decreased) to reflect any adjustments to the adjusted basis of such assets pursuant to Code Section 734(b) or Code Section 743(b), but only to the extent that such adjustments are taken into account in determining Capital Accounts pursuant to Treasury Regulations Section 1.704(b)(2)(iv)(m) and clause (vi) to the extent the Managers determine that an adjustment pursuant to clause (ii) hereof is necessary

or appropriate in connection with a transaction that would otherwise result in an adjustment pursuant to this clause (iv).

If the Gross Asset Value of an asset has been determined or adjusted pursuant to clause (i), clause (ii) or clause (iv) hereof, such Gross Asset Value shall thereafter be adjusted by the Depreciation taken into account with respect to such asset for purposes of computing Profits or Losses.

"Majority in Interest" means a combination of any Members who, in the aggregate, own more than fifty percent (50%) of the Membership Interests of all Members

"Manager" means each Member of the Company in its capacity as a manager of the Company. "Managers" refers to such Persons as a group.

"Member" means each Person designated as a member of the Company on Schedule I hereto or any other Person admitted as a member of the Company in accordance with this Agreement or the Act. "Members" refers to such Persons as a group.

"Member Minimum Gain" means an amount, with respect to each Member Nonrecourse Debt, equal to the Company Minimum Gain that would result if such Member Nonrecourse Debt were treated as a Nonrecourse Liability, determined in accordance with Treasury Regulations Section 1.704-2(i)

"Member Nonrecourse Debt" means any nonrecourse debt (for the purposes of Treasury Regulations Section 1.1001-2) of the Company for which any Member bears the "economic risk of loss", within the meaning of Treasury Regulations Section 1.752-2.

"Member Nonrecourse Debt" means any nonrecourse debt (for the purposes of Treasury Regulations Section 1.1001-2) of the Company for which any Member bears the "economic risk of loss", within the meaning of Treasury Regulations Section 1.752-2.

"Member Nonrecourse Deductions" means deductions as described in Treasury Regulations Section 1.704-2(i). The amount of Member Nonrecourse Deductions with respect to Member Nonrecourse Debt for any Fiscal Year equals the excess, if any, of (A) the net increase, if any, in the amount of Member Minimum Gain attributable to such Member Nonrecourse Debt during such Fiscal Year, over (B) the aggregate amount of any Distributions during that Fiscal Year to the Member that bears the economic risk of loss for such Member Nonrecourse Debt to the extent such Distributions are from the proceeds of such Member Nonrecourse Debt and are allocable to an increase in Member Minimum Gain attributable to such Member Nonrecourse Debt, determined in accordance with Treasury Regulations Section 1.704-2(i).

"Membership Interest" means of a Member's rights in the Company, including without limitation, the Member's share of the Profits and Losses, the right to receive distributions of the Company's assets, any right to vote, and any right to participate in the management of the Company as provided in the Act and this Agreement. The Membership Interest of each Member is set forth on Schedule I hereto.

"Nonrecourse Deductions" means deductions as set forth in Treasury Regulations Section 1.704-2(b)(1). The amount of Nonrecourse Deductions for a given Fiscal Year equals the excess, if any, of (A) the net increase, if any, in the amount of Company Minimum Gain during such Fiscal Year, over (B) the aggregate amount of any Distributions during such Fiscal Year of proceeds of a Nonrecourse Liability that are allocable to an increase in Company Minimum Gain, determined according to the provisions of Treasury Regulations Section 1.704-2(h).

"Nonrecourse Liability" means any Company liability (or portion thereof) for which no Member bears the "economic risk of loss", within the meaning of Treasury Regulations Section 1.752-2.

"Percentage Interest" means the percentage which the Capital Contributions of a Member to the Company bears to the Capital Contributions of all Members. The initial Capital Contribution of each Member is set forth opposite such Member's name on Schedule I hereto.

"Person" means an individual, a trust, an estate, a domestic corporation, a foreign corporation, a professional corporation, a partnership, a limited partnership, a limited liability company, a foreign limited liability company, an unincorporated association, or another entity.

"Profits" and *"Losses"* mean, for each Fiscal Year, an amount equal to the Company's taxable income or loss or such year or period, determined in accordance with Code Section 703(a) (for this purpose, all items of income, gain, loss, or deduction required to be stated separately pursuant to Code Section 703(a)(1) shall be included in taxable income or loss), with the following adjustments:

- (i) Any income of the Company that is exempt from federal income tax and not otherwise taken into account in computing Profits or Losses pursuant to this definition shall be added to such taxable income or loss;
- (ii) Any expenditures of the Company described in Code Section 705(a)(2)(B) or treated as Code Section 705(a)(2)(B) expenditures pursuant to Treasury Regulations Section 1.704(b)(2)(iv)(i), and not otherwise taken into account in computing Profits or Losses pursuant to this definition shall be subtracted from such taxable income or loss;
- (iii) In the event the Gross Asset Value of any Company asset is adjusted pursuant to clause (ii) or clause (iii) of the definition of "Gross Asset Value", the amount of such adjustment shall be taken into account as gain or loss from the disposition of such asset for purposes of computing Profits or Losses;
- (iv) Gain or loss resulting from any disposition of Company Property with respect to which gain or loss is recognized for federal income tax purposes shall be computed by reference to the Gross Asset Value of the property disposed of, notwithstanding that the adjusted tax basis of such property differs from its Gross Asset Value;

- (v) In lieu of the depreciation, amortization, and other cost recovery deductions taken into account in computing such taxable income or loss, there shall be taken into account Depreciation for such fiscal year or other period, computed in accordance with the definition of Depreciation set out hereof;
- (vi) To the extent an adjustment to the adjusted tax basis of any Company asset pursuant to Code Section 734(b) or Code Section 743(b) is required pursuant to Treasury Regulations Section 1.704-1(b)(2)(iv)(m)(4) to be taken into account in determining Capital Accounts as a result of a distribution other than in liquidation of a Member's interest in the Company, the amount of such adjustment shall be treated as an item of gain (if the adjustment increases the basis of the asset) or loss (if the adjustment decreases the basis of the asset) from the disposition of the asset and shall be taken into account for purposes of computing Profits or Losses;
- (vii) Notwithstanding any other provision of this definition, any items which are specially allocated pursuant to Sections 6.2, 6.3, 6.6, 6.7, 6.8, 6.9, 6.10, or 6.11 hereof shall be determined by applying the rules analogous to those set forth in Sections (i) through (vi) above.

"Property" means (i) any and all property acquired by the Company, real and/or personal (including, without limitation, intangible property) and (ii) any and all of the improvements constructed on any real property.

"Secretary of State" means the Secretary of State of North Carolina.

"Tax Matters Member" means the Member designed by the Managers as the "tax matters partner", as that term is defined in the Code.

"Transfer" means sell, assign, transfer, lease, or otherwise dispose of property, including without limitation an interest in the Company

"Treasury Regulations" means the Income Tax Regulations and Temporary Regulations promulgated under the Code, as such regulations may be amended from time to time (including corresponding provisions of succeeding regulations).

ARTICLE III MANAGEMENT OF THE COMPANY

3.1 *Management by Members.* Each Member of the Company, by virtue of its status as a Member, shall also be a Manager of the Company for all purposes. Except as otherwise expressly provided in this Agreement, the Articles of Organization or the Act, all decisions with respect to the management of the business and affairs of the Company shall be made by action of a Majority in Interest of the Members taken at a meeting or evidenced by a written consent executed by a Majority in Interest of the Members. Meetings of the Members may be held on such terms and after such notice as the Members may establish. The Members, acting in their

capacity as Managers, shall have full and complete authority, power and discretion to manage and control the business of the Company, to make all decisions regarding those matters and to perform any and all other acts customary or incident to the management of the Company's business. The Members, acting in their capacity as Managers, may delegate responsibility for all or any part of the day-to-day management of the Company to any Person retained by the Managers who shall have and exercise on behalf of the Company all powers and rights necessary or convenient to carry out the management responsibilities so delegated.

3.2 *Compensation and Expenses.* The Members shall not receive any compensation from the Company for serving as Managers, but the Company will reimburse the Members for expenses incurred by the Members in connection with their service to the Company as Managers. Nothing contained in this Section 3.2 is intended to affect the Percentage Interests of the Members or the amounts that may be payable to the Members by reason of their respective Percentage Interest.

3.3 *Indemnification of Members for Management Services.* The Company shall indemnify the Managers to the fullest extent permitted or required by the Act, as amended from time to time, and the Company may advance expenses incurred by the Manager, provided the Manager shall reimburse the Company for such advance in the event it is ultimately determined that the Manager is not entitled to be indemnified by the Company against such expenses. The provisions of this Section 3.4 shall apply also to any Person to whom the Managers have delegated management authority as provided in Section 3.1, whether or not such Person is a Member.

3.4 *Limitation Liability* No Member of the Company shall be liable to the Company for monetary damages for an act or omission in such Person's capacity as Manager, except as provided in the Act for (i) acts or omissions which the Member knew at the time of the acts or omissions were clearly in conflict with the interests of the Company; (ii) any transaction from which the Manager derived an improper personal benefit; or (iii) acts or omissions occurring prior to the date this provision becomes effective. If the Act is amended to authorize further elimination or limited to the fullest extent permitted by the Act as so amended. Any repeal or modification of this Section shall not adversely affect the right or protection of the Managers existing at the time of such repeal or modification. The provisions of this Section 3.5 shall apply also to any Person to whom the Managers have delegated management authority as provided in Section 3.1, whether or not such Person is a Member.

3.5 *Liability for Return of Capital Contribution.* The Members shall not be liable for the return of the Capital Contributions of the Members, and upon dissolution, the Members shall look solely to the assets of the Company.

ARTICLE IV RIGHTS AND OBLIGATIONS OF MEMBERS

4.1 *Names and Addresses of Members.* The names, addresses and Membership Interests of the Members are as reflected in Schedule I attached hereto and made a part hereof, which

Schedule the Company shall amend as necessary to maintain the accuracy of all information disclosed therein.

4.2 *Action by Members.* Any action to be taken by the Members under the Act or this Agreement may be taken (i) at a meeting of Members held on such terms, and after such notice as the Managers may establish; PROVIDED, HOWEVER, that notice of a meeting of Members must be given to all Members entitled to vote at a meeting at least five (5) days before the date of the meeting; or (ii) by written action of a Majority of Interest of the Members; PROVIDED, HOWEVER, that any action requiring the consent of all Members under this Agreement, the Act, or other applicable law taken by written action must be signed by all Members. No notice need be given of action proposed to be taken by written action or an approval given by written action, unless specifically required by this Agreement, the Act, or other applicable law. Such written actions must be kept with the records of the Company.

4.3 *Limited Liability.* The Members shall not be required to make any contribution to the capital of the Company except as set forth in Article V, nor shall the Members in their capacity as such be bound by, or personally liable for, any expense, liability, or obligation of the Company except to the extent of their interests in the Company and the obligation to return Distributions made to them under certain circumstances as required by the Act. The Members shall be under no obligation to restore a deficit capital account upon the dissolution of the Company or the liquidation of any of their Membership Interests.

4.4 *Bankruptcy or Incapacity of a Member.* A Member shall cease to have any power as a Member or a Manager, any voting rights or rights or approval hereunder upon death, bankruptcy, insolvency, dissolution, general assignment for the benefit of creditors, legal incapacity, or the Member's becoming a disqualified person as that term is defined under N.C. Gen.Stat § 55B-2. In no event shall a personal representative or successor become a substitute Member.

4.5 *Withdrawal.* A Member may withdraw from the Company as described in Section 8.2 below. Within a reasonable time after withdrawing from the Company, a withdrawing Member shall be entitled to receive a distribution from the Company equal to the positive balance, if any, in such Member's Capital Account immediately before the Member's withdrawal, after giving effect to all allocations under Article VI and all distributions under Article VII for all prior periods.

ARTICLE I CAPITAL CONTRIBUTIONS AND LOANS

5.1 *Initial Capital Contributions.* Members have contributed to the Company the cash or property set forth as the initial Capital Contributions on Schedule I attached hereto.

5.2 *Additional Funds.* In the event that the Managers determine at any time (or from time to time) that additional funds are required by the Company for or in respect of its business or to pay any of its obligations, expenses, costs, liabilities, or expenditures (including, without limitation, any operating deficits) then the Managers, in their sole discretion, may borrow all or part of such

additional funds on behalf of the Company, with interest payable at then-prevailing rates, from one or more of the Members or from commercial banks, savings and loan associations, or other commercial lending institutions.

5.3 *Additional Capital Contributions.* If the Managers determine that additional funds are required for the purposes set forth in Section 5.2 of this Agreement and that all or any portion of such additional funds should be contributed to the Company as additional Capital Contributions, the Managers may propose to the Members that the Members make additional Capital Contributions. Upon unanimous agreement of the Members to make such additional Capital Contributions, the Members shall make the necessary additional Capital Contributions to the Company in proportions as may be determined by the agreement of the Members.

5.4 *No Interest on Capital Contributions.* No interest shall be paid on any contribution to the capital of the Company.

5.5 *Capital Accounts* A Capital Account shall be established for each Member and shall be credited with each Member's initial and any additional Capital Contributions. All contributions of Property to the Company by a Member shall be valued and credited to the Member's Capital Account at the Gross Asset Value of such Property on the date of its contribution. All distributions of Property to a Member by the Company shall be valued and debited against such Member's Capital Account at the Gross Asset Value of such property on the date of its distribution. Each Member's Capital Account shall at all times be determined and maintained pursuant to the principles of this Section 5.5 and Treasury Regulations Section 1.704(b)(2)(iv). Each Member's Capital Account shall be increased in accordance with such Regulations by:

- (i) The amount of Profits allocated to the Member pursuant to this Agreement; and
- (ii) The amount of any Company liabilities assumed by the Member or which are secured by any Property distributed to such Member.

Each Member's capital account shall be decreased in accordance with such Regulations by:

- (i) The amount of Losses allocated to the Member pursuant to this Agreement;
- (ii) The amount of Distributable Cash distributed to the Member pursuant to this Agreement; and
- (iii) The amount of any liabilities of the Member assumed by the Company or which are secured by any property contributed by such Member to the Company.

In addition, each Member's Capital Account shall be subject to such other adjustments as may be required in order to comply with the capital account maintenance requirements of Section 704(b) of the Code.

If the Managers shall determine that it is prudent to modify the manner in which the Capital Accounts, or any debits or credits thereto (including, without limitation, debits or credits relating to liabilities that are secured or contributed or distributed property or that are assumed by the Company or the Members), are computed in order to comply with such Treasury Regulations, the Managers may make such modification, provided that it is not likely to have a material effect on the amounts Distributable to any Member upon dissolution of the Company. The Managers also shall (i) make any adjustments that are necessary or appropriate to maintain equality between the Capital Accounts of the Members and the amount of Company capital reflected on the Company's balance sheet, as computed for book purposes, in accordance with Treasury Regulations Section 1.704-1(b)(2)(iv)(g) and (ii) make any appropriate modifications in the event unanticipated events might otherwise cause this Agreement not to comply with Treasury Regulations Section 1.704-1(b).

ARTICLE VI ALLOCATIONS, ELECTIONS, AND REPORTS

6.1 *Profits and Losses.*

(a) Except as otherwise provided herein, Profits of the Company shall be allocated among the Members first to the Members who have been allocated losses pursuant to this Section 6.1(a) until the cumulative Profits allocated to such Members pursuant to this Section 6.1(a) equal the cumulative prior allocations of Losses to such Members pursuant to this Section 6.1(a), and next to the Members in accordance with their respective Percentage Interests. Except as otherwise provided herein, Losses of the Company shall be allocated among the Members in accordance with their respective Percentage Interests. In the event the Percentage Interests vary during any Fiscal Year, Profits and Losses and all items of tax credit and tax preference for such Fiscal Year shall be allocated among the Members on a daily basis in accordance with their varying Percentage Interests during the Fiscal Year.

(b) Losses allocated pursuant to this Section 6.1 shall not exceed the maximum amount of Losses that can be so allocated without causing any Member to have an Adjusted Capital Account Deficit at the end of any Fiscal Year. In the event some but not all of the Members would have Adjusted Capital Account Deficits as a consequence of an allocation of Losses pursuant to this Section 6.1, the limitation set forth in this Section 6.1 shall be applied on a Member by Member basis so as to allocate the maximum possible Losses to each member under Section 1.704(b)(2)(ii)(d) of the Treasury Regulations.

6.2 *Nonrecourse Deductions* Nonrecourse Deductions shall be allocated among the Members in accordance with their respective Percentage Interests.

6.3 *Member Nonrecourse Deductions.* Any Member Nonrecourse Deductions shall be specially allocated to the Member who bears the economic risk of loss with respect to the Member Nonrecourse Debt to which such Member Nonrecourse Deductions are attributable in accordance with Treasury Regulations Section 1.704-2(1).

6.4 *Allocations between Transferor and Transferee.* In the event of the transfer of all or any part of a Membership Interest (in accordance with the provisions of this Agreement) at any time other than at the end of a Fiscal Year, or the admission of a new Member (in accordance with the terms of this Agreement), the transferring Member or new Member's share of the Company's income, gain, loss, deductions, and credits, as computed both for accounting purposes and for federal income tax purposes, shall be allocated between the transferor Member and the transferee Member, or the new Member and the other Members, as the case may be, in the same ratio as the number of days in such Fiscal Year before and after the date of the transfer or admission; PROVIDED, HOWEVER, that if there has been a sale or other disposition of the assets of the Company (or any part thereof) during such Fiscal Year, then upon the mutual agreement of all the Members (excluding the new Member and the transferring Member), the Company shall treat the periods before and after the date of the transfer or admission as separate Fiscal Years and allocate the Company's net income, gain, net loss, deductions, and credits for each of such deemed separate Fiscal Years. Notwithstanding the foregoing, the Company's "allocable cash basis items", as that term is used in Section 706(d)(2)(B) of the Code, shall be allocated as required by Section 706(d)(2) of the Code and the Treasury Regulations thereunder.

6.5 *Contributed Property.* In accordance with Code Section 704(c) and the Treasury Regulations thereunder, income, gain, loss, and deduction with respect to any property contributed to the capital of the Company shall, solely for tax purposes, be allocated among the Members so as to take account of any variation between the adjusted basis of such property to the Company for federal income tax purposes and its initial Gross Asset Value at the time of contribution.

If the Gross Asset Value of any asset of the Company is adjusted as provided herein, subsequent allocation of income, gain, loss and deduction with respect to such asset shall take account of any variation between the adjusted basis of such asset for federal income tax purposes and its Gross Asset Value in the same manner as under Code Section 704(c) and the Treasury Regulations thereunder.

Any elections or other decisions relating to such allocations shall be made by the Managers in any manner that reasonably reflects the purpose and intention of this Agreement. Allocations pursuant to this Section 6.5 are solely for purposes of federal, state, and local taxes and shall not affect, or in any way be taken into account in computing, any Member's Capital Account or share of Profits, Losses, other items, or Distributions pursuant to any provision of this Agreement.

6.6 *Minimum Gain Chargeback.* If there is a net decrease in Company Minimum Gain during any Fiscal Year, each Member shall be specially allocated items of Company income and gain for such year (and, if necessary, subsequent years) in an amount equal to such Member's share of the net decrease in Company Minimum Gain, determined in accordance with Treasury Regulations Section 1.704-2(g). Allocations pursuant to the previous sentence shall be made in proportion to the respective amounts required to be allocated to each Member pursuant thereto. The items to be so allocated shall be determined in accordance with Treasury Regulations Sections 1.704-2(f) and 1.704-2(j)(2). This Section 6.6 is intended to comply with the minimum

gain chargeback requirement in Treasury Regulations Section 1.704-2(f) and shall be interpreted consistently therewith.

6.7 *Member Minimum Gain Chargeback.* If there is a net decrease in Member Minimum Gain attributable to a Member Nonrecourse Debt, as defined in Treasury Regulations Section 1.704-2(i)(4), during any Fiscal Year, each Member who has a share of the Member Minimum Gain attributable to such Member Nonrecourse Debt, determined in accordance with Treasury Regulations Section 1.704-2(i)(5), shall be specially allocated items of Company income and gain for such Fiscal Year (and, if necessary, subsequent Fiscal Years) in an amount equal to such Member's share of the net decrease in Member Minimum Gain attributable to such Member Nonrecourse Debt, determined in accordance with Treasury Regulations Section 1.704-2(i)(4) and (5). Allocations pursuant to the previous sentence shall be made in proportion to the respective amounts required to be allocated to each Member pursuant thereto. The items to be so allocated shall be determined in accordance with Treasury Regulations Section 1.704-2(i)(4). This Section 6.7 is intended to comply with the Member Minimum Gain chargeback requirement in Treasury Regulations Section 1.704(i)(4) and shall be interpreted consistently therewith.

6.8 *Qualified Income Offset.* If any Member unexpectedly receives an adjustment, allocation, or distribution as described in Treasury Regulations Section 1.704(b)(2)(ii)(d)(4) through (6) which causes or increases a deficit capital account balance in such Member's Capital Account (as determined in accordance with such Regulations) items of Company income and gain shall be specially allocated to each such Member in an amount and manner sufficient to eliminate, to the extent required by the Treasury Regulations, the Adjusted Capital Account Deficit of such Member as quickly as possible, provided that an allocation pursuant to this Section 6.8 shall be made if any only to the extent that such Member would have an Adjusted Capital Account Deficit after all other allocations provided for in this Article VI have been tentatively made as if this Section 6.8 were not in the Agreement. This provision is intended to be a "qualified income offset" as defined in Treasury Regulations Section 1.704-1(b)(2)(ii)(d), such Regulations being specifically incorporated herein by reference.

6.9 *Gross Income Allocation.* In the event any Member has a deficit Capital Account at the end of any Company Fiscal Year which is in excess of the sum of (i) the amount such Member is obligated to restore and (ii) the amount such Member is deemed to be obligated to restore pursuant to the penultimate sentences of Treasury Regulations Sections 1.704-2(g)(1) and 1.704-2(i)(5), each such Member shall be specially allocated items of Company income and gain in the amount of such excess as quickly as possible, provided that an allocation pursuant to this Section 6.9 shall be made if and only to the extent that such Member would have a deficit Capital Account in excess of such sum after all other allocations provided for in this Article VI have been tentatively made as if this Section 6.9 and Section 6.8 hereof were not in this Agreement.

6.10 *Section 754 Adjustment.* To the extent an adjustment to the adjusted tax basis of any Company asset pursuant to Code Section 734(b) or Code Section 743(b) is required, pursuant to Treasury Regulations Section 1.704-1(b)(2)(iv)(m)(2) or Treasury Regulations Section 1.704-1(b)(2)(iv)(m)(4), to be taken into account in determining Capital Accounts as the result of a distribution to a Member in complete liquidation of such Member's interest in the Company, the amount of such adjustment to the Capital Accounts shall be treated as an item of gain (if the

adjustment increases the basis of the asset) or loss (if the adjustment decreases such basis) and such gain or loss shall be specially allocated to the Members in accordance with their interests in the Company in the event that Treasury Regulations Section 1.704-2(b)(2)(iv)(m)(2) applies, or to the Members to whom such distribution was made in the event that Treasury Regulations Section 1.704-1(b)(2)(iv)(m)(4) applies.

6.11 *Curative Allocations.* The allocations set forth in Sections 6.1(b), 6.2, 6.3, 6.6, 6.7, 6.8, 6.9, and 6.10 hereof (the "Regulatory Allocations") are intended to comply with certain requirements of the Treasury Regulations. It is the intent of the Members that, to the extent possible, all Regulatory Allocations shall be offset either with other Regulatory Allocations or with special allocations of other items of Company income, gain, loss, or deduction pursuant to this Section 6.11. Therefore, notwithstanding any other provision of this Article VI (other than the Regulatory Allocations), the Managers shall make such offsetting special allocations of Company income, gain, loss, or deduction in whatever manner they determine appropriate so that, after such offsetting allocations are made, each Member's Capital Account balance is, to the extent possible, equal to the Capital Account balance such Member would have had if the Regulatory Allocations were not part of the Agreement and all Company items were allocated pursuant to Sections 6.1(a). In exercising his discretion under this Section 6.11, the Managers shall take into account future Regulatory Allocations under Sections 6.6 and 6.7, that although not yet made, are likely to offset other Regulatory Allocations previously made under Sections 6.2 and 6.3.

6.12 *Compliance with Treasury Regulations.* The above provisions of this Article VI notwithstanding, it is specifically understood that the Managers may, without the consent of any Members, make such elections, tax allocations and adjustments, including amendments to this Agreement, as the Managers deem necessary or appropriate to maintain the greatest extent possible the validity of the tax allocations set forth in this Agreement, particularly with regard to Treasury Regulations under Code Section 704(b).

6.13 *Tax Withholding.* The Company shall be authorized to pay, on behalf of any Member, any amounts to any federal, state, or local taxing authority, as may be necessary for the Company to comply with tax withholding provisions of the Code or the north Carolina General Statutes or other income tax or revenue laws of any taxing authority. To the extent the Company pays any such amounts that it may be required to pay on behalf of a Member, such amounts shall be treated as a cash Distribution to such Member and shall reduce the amount otherwise distributable to such Member.

ARTICLE VII DISTRIBUTIONS

7.1 *Distributable Cash.* The Company may distribute Cash at such times as the Managers shall determine in the following order of priority: (i) first to the Members in proportion to and to the extent of their Adjusted Capital Contributions, and (ii) second to the Members in accordance with their Percentage Interests.

7.2 *Distribution in Liquidation.* Upon liquidation of the Company, all of the Company's Property shall be sold as provided in Section 10.2 and Profits and Losses allocated accordingly. Proceeds from the liquidation of the Company shall be distributed in accordance with the provisions of Section 10.2.

7.3 *Limitations Upon Distributions.* No Distribution shall be declared and paid if payment of such Distribution would cause the Company to violate any limitation on distributions provided in the Act.

ARTICLE VIII TRANSFER OF INTERESTS AND ADMISSION OF MEMBERS

8.1 *Admission of New Members.* New members may be admitted only upon approval of an unanimous vote of the then existing Members of the Company. The Company may issue a Membership Interest in the Company only to an individual who is a licensee as that term is defined under N.C. Gen. Stat. § 55B-2.

8.2 *Transfers of Interest.* A Member may transfer such Member's Membership Interest only as described in this Section 8.2. Upon any termination of employment, bankruptcy, insolvency, dissolution, general assignment for the benefit of creditors, legal incapacity, or upon the Member's becoming a disqualified person as that term is defined under N.C. Gen. Stat. § 55B-2, or upon notice with at least 30 days notice in writing to the other members of a partner's intent to withdraw his membership or participation in the limited liability company for retirement or any other reasons not based on termination for fault, the Member or his successor shall be required to withdraw from the Company (if applicable) and to transfer such interest, pursuant to the terms described in this Paragraph. The Purchase Price for the Company's purchase of a Member's Interest shall be as determined pursuant to the valuation methods described further in this agreement.

The Purchase Price shall be paid to the departing Member in twelve (12) equal monthly installments beginning sixty (60) days from the Termination Date. The twelve equal monthly installments will be memorialized by a promissory note executed by the limited liability company and personally guaranteed by each member with a security agreement on the assets of the limited liability company.

8.3 *Members Shall be Licensees.* Notwithstanding any other provision of this Agreement, only licensees as that term is defined in N.C. Gen. Stat. § 55B-2 shall be admitted as Members.

ARTICLE IX DISSOLUTION AND LIQUIDATION OF THE COMPANY

9.1 *Dissolution Events.* The Company will be dissolved upon the happening of any of the following events:

(a) All or substantially all of the assets of the Company are sold, exchanged, or otherwise transferred (unless the Managers notify the Members that they have elected to continue the business of the Company, in which event the Company will continue until the Managers give notice that they elect to dissolve the Company);

(b) All Members sign a document stating their election to dissolve the Company;

(c) The entry of a final judgment, order, or decree of a Court of competent jurisdiction adjudicating the Company to be bankrupt and the expiration without appeal of the period, if any, allowed by applicable law in which to appeal;

(d) The entry of a decree of judicial dissolution or the issuance of a certificate for administrative dissolution under the Act.

9.2 *Liquidation.* Upon the happening of any of the events specified in Section 9.1, the Managers, or any liquidating trustee elected by the Members, will commence as promptly as practicable to wind up the Company's affairs unless the Managers or the liquidating trustee (either, the "Liquidator") determine that an immediate liquidation of Company assets would cause undue loss to the Company, in which event the liquidation may be deferred for a time determined by the Liquidator to be appropriate. Assets of the Company may be deferred for a time determined by the Liquidator to be appropriate. Assets of the Company may be liquidated or distributed in kind, as the Liquidator determines to be appropriate. The Members will continue to share Distributable Cash, Profits, and Losses during the period of liquidation in the manner set forth in Articles VI and VII. The proceeds from liquidation of the Company, including repayment of any debts of Members to the Company, and any Company assets that are not sold in connection with the liquidation will be applied in the following order of priority:

(a) To payment of the debts and satisfaction of the other obligations of the Company, including without limitation, debts and obligations to Members;

(b) To the establishment of any reserves deemed appropriate by the Liquidator for any liabilities or obligations of the Company, which reserves will be held for the purpose of paying liabilities or obligations and, at the expiration of a period the Liquidator deems appropriate, will be distributed in the manner provided in Section 9.2(c); and thereafter;

(c) To the payment to the Members of the positive balances in their respective Capital Accounts, pro rata, in proportion to the positive balances in those Capital Accounts after giving effect to all allocations under Article VI and all distributions under Article VII for all prior periods, including the period during which the process of liquidation occurs.

9.3 *Articles of Dissolution.* Upon the dissolution and commencement of the winding up of the Company, the Managers shall cause Articles of Dissolution to be executed on behalf of the Company and filed with the Secretary of State, and the Managers shall execute, acknowledge and file any and all other instruments or appropriate to reflect the dissolution of the Company.

ARTICLE X MISCELLANEOUS

10.1 *Records.* The records of the Company will be maintained at the Company's principal place of business, or at such other place selected by the Managers, provided that the Company keeps at its principal place of business the records required by the Act to be maintained there. Appropriate records in reasonable detail will be maintained to reflect income tax information for the Members. Each member, at such Member's expense, may inspect and make copies of the records maintained by the Company and may require an audit of the books of account maintained by the Company to be conducted by independent accountants for the Company.

10.2 *Reserves.* The Managers may cause the Company to create reasonable reserve accounts to be used exclusively to fund Company operating deficits and for any other valid Company purpose. The Managers shall in their sole discretion determine the amount of payments to such reserve accounts.

10.3 *Notices.* The Managers will notify the Members of any change in the name, principal, or registered office or registered agent of the Company. Any notice or other communication required by this Agreement must be in writing. Notices and other communications will be deemed to have been given when delivered by hand or dispatched by means of electronic facsimile transmission or nationally recognized air courier, or on the third (3rd) business day after being deposited in the United States mail, postage prepaid. In each case, notice hereunder shall be addressed to the Member to whom the notice is intended to be given at such Member's address set forth on Schedule I to this Agreement, or, in the case of the Company, to its principal place of business. A Member may change its notice address by notice in writing to the Company and to each other Member given in accordance with this Section 10.3.

10.4 *Amendments.* Except as otherwise provided in Section 6.12 with respect to amendments required to comply with the Treasury Regulations and to maintain the validity of the tax allocations, no amendment to this Agreement or to the Articles of Organization will be valid or binding upon the Members or the Company, nor will any waiver of any term of his Agreement be effective, unless in writing and signed by the Members holding at least a Majority in Interest; PROVIDED, HOWEVER, that any provision of this Agreement requiring the consent, approval, or action of more than a Majority in Interest of the Members, or any provision contained in the Articles of Organization affecting such a provision, may only be amended or waived by a written action signed by the Members holding the required percentage of Membership Interests.

10.5 *Additional Documents.* Each party hereto agrees to execute and acknowledge all documents and writings which the Managers may deem necessary or expedient in the creation of the Company and the achievement of its purposes, including but not limited to Articles of Organization and any amendments or cancellation thereof.

10.6 *Representations of Members.* Each Member represents and warrants to the Company and every other Member that such it (i) is fully aware of, and is capable of bearing, the risks relating to an investment in the Company; (ii) understands that its interest in the Company has not been registered under the Securities Act or the securities law of any jurisdiction in reliance upon

exemptions contained in those laws; and (iii) has acquired its interest in the Company for its own account, with the intention of holding the interest for investment and without any intention of participating directly or indirectly in any redistribution or resale of any portion of the interest in violation of the Securities Act or any applicable law.

10.7 *Survival of Rights.* Except as otherwise provided herein, this Agreement shall be binding upon and inure to the benefit of the parties, their successors or assigns.

10.8 *Interpretation and Governing Law.* When the context in which words are used in this Agreement indicates that such is the intent, words in the singular number shall include the plural and vice versa. The masculine gender shall include the feminine and neuter. The Article and Section headings or titles shall not define, limit, extend or interpret the scope of this Agreement or any particular Article or Section. This Agreement 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.

10.9 *Severability.* If any provision, sentence, phrase, or word of this Agreement or the application thereof to any person or circumstance shall be held invalid, the remainder of this Agreement, or the application of such provision, sentence, phrase, or word to persons or circumstances, other than those as to which it is held invalid, shall not be affected thereby.

10.10 *Agreement in Counterparts.* This Agreement may be executed in several counterparts, each of which shall be deemed an original, and all of which shall constitute one and the same instrument. In addition, this Agreement may contain more than one counterpart of the signature pages and this Agreement may be executed by the affixing of the signatures of each of the Members to one of such counterpart signature pages; all of such signature pages shall be read as though one, and they shall have the same force and effect as though all of the signers had signed a single signature page.

10.11 *Tax Matters Member.* For purposes of this Agreement, the Managers may designate one Member as the Tax Matters Member.

10.12 *Creditors Not Benefited.* Nothing in this Agreement is intended to benefit any creditor of the Company or of any Member. No creditor of the Company or of any Member will be entitled to require the Managers to solicit or accept any loan or additional capital contribution for the Company or to enforce any right which the Company or any Member may have against a Member, whether arising under this Agreement or otherwise.

[The remainder of this page is intentionally left blank.]

IN WITNESS WHEREOF, the undersigned, being all of the Members of the Company, have caused this Agreement to be duly adopted by the Company and do hereby assume and agree to be bound by and to perform all of the terms and provisions set forth in this Agreement.

THE COMPANY:

BROWNE, FLEBOTTE, WILSON & HORN, PLLC

By: _____

THE MEMBERS:

By:

X. Marcus Browne

SAF

Opel M

W&H

SCHEDULE I

Name and Addresses of Members	Initial Contribution	Membership Interest
Marc Browne	\$	25%
Daniel Flebotte	\$	25%
Joseph Wilson	\$	25%
Martin Horn	\$	25%

SCHEDULE II

Determination of Purchase Price for Transferring Members

[For Discussion Purposes Only; there are many possible models]

PRICE AND METHOD OF PAYMENT

The purchase price of the Membership Interests for a purchase by the Company, and the method of payment of the purchase price, shall be determined in accordance with this Schedule II.

1. Price. Upon the occurrence of an event giving rise to a purchase of the Membership Interests by the Company pursuant to Section 8.2 of the Operating Agreement, the purchase price for the Membership Interests shall be as follows:

The price of the Membership Interests shall be equal to the book value of such Membership Interests, as determined by an independent appraisal by an appraiser engaged by the Company having at least ten (10) years of experience in valuing legal practices, valued as of the date that a Member's employment is terminated for any reason pursuant to Section 8.2 of the Operating Agreement, in accordance with generally accepted accounting principles with the following adjustments:

- (i) Cash and cash equivalents of the Company shall be included in the valuation;
- (ii) All equipment and personal property owned by the Company shall be included in the valuation. The value of such equipment shall be the fully depreciated net value of such equipment, as shown on the Company's books and records;
- (iii) All accounts payable shall be valued at their face amount;
- (iv) All prepaid items, bonuses, and pension or profit sharing contributions shall not be included in the valuation because such bonuses, pension, and other profit sharing contributions are already vested individually in the member and are not in fact partnership assets.
- (v) All accounts receivable shall be valued by discounting the amount of each receivable by the average collection rate over the two (2) preceding years. All accounts receivable shall be included but not limited to the probabilities of income from current cases pending will be determined on a case by case basis using conventional analysis within the legal industry

- (vi) Unbilled accounts shall be included in the valuation.
- (vii) Life insurance policies, if any, owned by the Company, shall be shown at their cash surrender values net of any amounts owing due to loans on the policies;\
- (viii) Liabilities shall be deducted from the assets referred to above. It should be considered in the valuation of a partnership interest value for goodwill, trade name, and other similar intangible assets including all intangible assets already recorded on the corporate books at the time of the Operating Agreement along with the individual contribution by a member to the formation of a limited liability company prior to the execution of this agreement to be evaluated on an individual basis.
- (ix) Determination of book value as provided herein, when made and determined in accordance with this Paragraph 1, shall be conclusive and binding upon all parties, including the Company, each Member, and the selling Member's heirs and personal representatives.
 - A. The book value shall include but not be limited to insuring an equitable price for any partner. Provide a mechanism for liquidating ownership interest in a equitable and fair manner which includes maximizing mutual tax benefits. The price will include a value for preventing ownership interest from being sold to outsiders. Additionally the valuation shall determine a binding price for estate tax assessment when relevant, and establish a price of liquidation for maximum use in divorce proceedings.
 - B. To be included but not limited to the following additional considerations along with standard factors in book valuation there shall be adjustments or accounting peculiarities or one time losses; considerations made for cash or property distributions to owners in excess of normal salaries; adjustments made to reflect future tax liabilities resulting from the buyout such as recapture provisions or buyouts of negative capital account interest; and that yearly revisions to the capitalization rate must be recognized as an uncertainty of future benefit changes.
 - C. Acknowledge that good will is the cornerstone upon which the partnerships interest shall be valued this being a professional practice. That the valuation method for good will will be traditional accounting practices for professional business. The evaluation for good will will include but will not be limited to valuation derived from the business itself such as that generated because of location, advertising, and market reputation of the firm's name along with the personal good will which is derived from the expertise and reputation of the business partner terminating his employment.

- D. The book value shall include a broad base evaluation method to obtain the goal of fair evaluation including but not limited to evaluation of billings, cash receipts, and receivables along with valuation for inventory, a valuation for customer current file base and future client base, hard and soft assets including soft assets such as libraries and hard assets such as equipment and will use both capitalization of earnings methods, excessive earning methods, a leverage buyout method and multiple earnings revenue along with any other traditional accounting method for evaluation of a professional corporation.
- E. It is further acknowledged that the amount paid to a terminated partner is only an amount paid based on contribution of the partner and therefore there will be no capital gain to the partner upon payment of any funds pursuant to the termination provision of this agreement.
- F. That if the withdrawing or terminating partner also executes a covenant not to compete then the value of that will be included in the traditional valuation method.
- G. That whatever method is used by an independent appraiser, the independent appraiser will also use the specific techniques under the methodology of the following:
 - 1. Comparative values of similar growing concerns
 - 2. Reproduction or replacement value
 - 3. Present value of cash flow
 - 4. Liquidation approach
 - 5. Book value approach
 - 6. Or any combination of the above formulas that reach an equitable value for a terminating or withdrawing partner.
- H. The above valuation techniques and methodology are stated only to be thumbnails of what would be available as tools to any independent appraiser acknowledging that traditional professional business valuation includes analysis cash flow earning based methodology, asset based methodology, revenue based methodology, and market based methodology based on comparable sales with available markets.

2. Method of Payment. The Company shall pay for the Membership Interests purchased within fifteen (15) days after the date that the purchase price of the Membership Interests is determined pursuant to Paragraph 1, as follows:

- (a) In cash, or;

- (b) The Company may prepay all or any part of any note or notes at any time following the close of the calendar year in which the closing occurs. All prepayments shall be applied first to accrued interest and then to the principal of the installments in the inverse order of their maturity. The promissory note(s) shall contain a standard acceleration clause in the event of default and a provision for attorneys' fees in the event of suit.

3. Closing Procedure. At the closing, the Member selling Membership Interests to the Company, or such Member's executor or personal administrator, as the case may be, shall concurrently, with tender and receipt of the Purchase Price as provided in Paragraph 1, deliver the certificate or certificates representing the Membership Interests being purchased, endorsed in property form for transfer in blank, together with such assignments, certificates of authority, tax releases, consents to transfer and other instruments as may be reasonably requested by the Company. The Member selling Membership Interests to the Company, or such Member's Executor or personal representative, as the case may be, shall represent and warrant to the Company that such Member or his or her representative is conveying to the Company the Membership Interests being sold, with full warranties of title, free and clear of any claims, options, charges, encumbrances or rights of others, except as may be created by Operating Agreement

EXHIBIT B

**Members' Agreement for the Election and Admission of New Members to
Browne, Flebotte, Wilson & Webb, PLLC and Amendment of the Firm's
Operating Agreement**

This Members' Agreement for the Election and Admission of New Members to Browne, Flebotte, Wilson & Webb, PLLC and Amendment of the Firm's Operating Agreement (hereinafter referred to as "the Agreement"), which is a duly authorized and unanimously agreed upon amendment to the Operating Agreement of Browne, Flebotte, Wilson & Webb, PLLC (registered with the Secretary of State under this and similar names) hereinafter referred to at various times as "the PLLC," provides for the following:

I. Intent of the Members and Waiver

It is the unanimous intent of the Members to alter, amend and change the PLLC's current Operating Agreement as previously amended so as to elect new members, change and redefine PLLC governance and other changes in the PLLC. The Members agree that any and all objections to the validity or enforceability of this Agreement and/or of this Agreement as an Amendment to the PLLC's Operating Agreement as previously amended on any basis, including, but not limited to form, notice or procedure, is hereby waived. It is also the unanimous intent of the Members that any change to the PLLC's Operating Agreement that is necessary to accomplish this intent and to put into effect the specific provisions noted below is and will be done even if not specifically noted below. Such changes will be considered to have been done as of the date of this Agreement.

II. General Amendment of PLLC's Operating Agreement

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 it is presumed that, by this Agreement, the three current Members of the PLLC have unanimously and in an appropriate fashion, knowingly and with adherence to all requirements of notice and other corporate formalities required by the Operating Agreement, state statute or law, voted to amend the Operating Agreement so that any conflicting terms are deleted from the Operating Agreement and replaced by the terms of this Agreement.

III. Election and Admission of New Members

A. Previously, the equity owners/members of the PLLC unanimously extended an invitation to James A. Merritt, Jr. ("Merritt") and Heather B. Caruso ("Caruso") (referred to jointly as "the Elected Members") to become equity owners/members of the PLLC with their individual ownership interest in the PLLC being equal to that of the present

equity owners/members. Merritt and Caruso previously accepted that offer with their acceptance being effective as of 5:30pm August 31, 2006. Their acceptance of this offer was made upon the assurance from the existing Members that the only existing equity owners/members of the PLLC were, prior to the Elected Members' admission, Daniel Flebotte, Joseph Wilson and Joy Rhyne Webb.

B. The consideration exchanged for the purchase this 40% ownership interest by Merritt and Caruso (20% each) is considered to be sufficient for the interest granted and consists of, among other things, contract rights, assets and the assumption of PLLC's pre-existing liabilities.

C. It is agreed that Merritt and Caruso have immediate and equal ownership and voting rights and owe the PLLC nothing further for their ownership interest granted hereby. Nor are there any pre-conditions for their ownership and use of their heretofore described interest in the PLLC.

D. It is further agreed that by their signatures to the contemporaneously signed document referred to as the "Admission Agreement" attached hereto as Exhibit "A," Merritt and Caruso are both Members of the PLLC and parties to this Agreement.

E. By their signatures to this Agreement it is presumed that Flebotte, Wilson, Webb and the PLLC have signed the Admission Agreement as well.

F. Herein below and henceforth Merritt, Flebotte, Wilson, Webb and Caruso will be referred to variously as "the Members" or as "the Five Equity Members."

IV. General Provisions and Amendments

A. None of the Members owe anything further for their ownership interest in the PLLC and each Member has full rights under the Operating Agreement as amended herein.

B. As of 12:01am 1 September 2006, the name of the PLLC will become Merritt, Flebotte, Wilson, Webb & Caruso, PLLC (referred to herein below as "the Firm") and this new name will be appropriately filed with the North Carolina Secretary of State's office.

C. The Members have voted unanimously to name Merritt Managing Member of the Firm. Until his duties, rights and obligations are more specifically set out in a subsequent Resolution he will exercise those rights and bear those obligations usually and customarily granted and required of a Managing Member. He will be indemnified for any efforts to the full extent allowed by law and statute.

D. All decisions made by the Firm including changes to the Operating Agreement, except for those that the Managing Member may within his own authority and discretion take, must be made by a simple majority of the ownership interest of the Firm. Members may not divide their vote. Except that votes for the Admission of new members must be unanimous.

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

F. No Member has any Allocated Losses or any Adjusted Capital Account that would give him/her any greater claim to the assets or profits of the Firm than any other. Until otherwise determined and voted upon by the Members each Member has an equal share and claim on any income, profits and assets of the Firm.

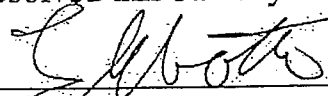
G. No Member's interest or portion in the Firm may be sold, assigned or otherwise transferred without the unanimous consent of the remaining Members.

H. Heretofore, Merritt was a Shareholder in another law firm, Berry, Quackenbush & Stuart, PA ("BQS"). Merritt negotiated his departure from that firm and entered into a specific agreement, known herein as the Merritt Departure Agreement and attached hereto as Attachment "B." In doing so he agreed to assume certain obligations and liabilities in order to facilitate his departure. This Merritt Departure Agreement and the terms thereof were entered into by Merritt into with BQS with the full knowledge, approval and encouragement of all Members of the Firm. The Merritt Departure Agreement was entered into to facilitate the creation of a regional law firm for the Firm and has inured to the benefit of all Members of the Firm. The Firm therefore recognizes, accepts and assumes all of Merritt's liabilities and obligations as set forth in the Merritt Departure Agreement from his previous firm – Berry, Quackenbush & Stuart, PA. It further agrees to indemnify him and hold him harmless from all such obligations incurred there under since it has and will continue to enjoy the benefits of that Departure Agreement.

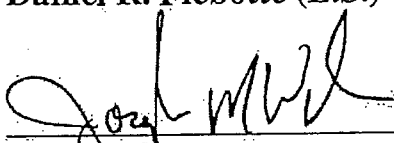
I. Article VIII of the existing Operating Agreement is hereby amended so as to specifically allow Merritt and Caruso, as attorneys duly licensed by the State of South Carolina, to own equity interests as Members of the Firm pursuant to N.C. Gen. Statute 55B-6.

J. Further changes in the Operating Agreement as Amended may be made by majority vote of the Five Equity Members of the Firm if necessary or advisable.

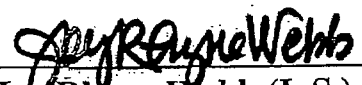
By their signatures and seals affixed herein below the Members on behalf of themselves individually and on behalf of the PLLC corporately have indicated and warranted their agreement with and unanimous consent to the each and every of the terms of this four page Agreement. It is so agreed and resolved this 31st day of August 2006.



Daniel R. Flebotte (L.S.)



Joseph M. Wilson (L.S.)



Joy Rhyne Webb (L.S.)

EXHIBIT C

ADMISSION AGREEMENT OF BROWNE, FLEBOTTE, WILSON & WEBB, PLLC WITH JAMES A. MERRITT, JR. AND HEATHER B. CARUSO AS NEW MEMBERS OF THE FIRM

THIS ADMISSION AGREEMENT is made and entered into this 31st day of August, 2006 between Browne, Flebotte, Wilson & Webb, PLLC, ("the PLLC") a North Carolina Professional Limited Liability Corporation and each of its present Members ("the Present Members") with James A. Merritt, Jr. ("Merritt") and Heather B. Caruso ("Caruso") (referred to jointly as "the Elected Members"), whose signatures appear below.

This Admission Agreement incorporates by specific reference and is incorporated into the "**Members' Agreement for the Election and Admission of New Members to Browne, Flebotte, Wilson & Webb, PLLC and Amendment of the Firm's Operating Agreement**" ("the Election Agreement") of this same date and for all purposes is part of that Agreement as Exhibit "A".

This Admission Agreement is made in consideration of the admission of the Elected Members as Members of the PLLC, the mutual promises and covenants contained herein and in the Election Agreement, and for other good, valuable and adequate consideration.

1. **Agreement to be bound by the Amended Operating Agreement:** The Elected Members acknowledge receipt of a copy of the Operating Agreement as currently amended by the Election Agreement ("the Operating Agreement"). The Elected Members hereby agree to be bound by all the terms and conditions of the Operating Agreement as modified by the Election Agreement and as will henceforth be modified.

2. **Representations and Warranties:** The Elected Members represent and warrant to the PLLC and all other Members of the PLLC that

- a. they have complied with all known requirements for becoming a Member in the PLLC as set forth in the Amended Operating Agreement as further modified by the Election Agreement and under applicable law, and
- b. that the addresses and social security numbers set forth below are true and correct as of the date hereof.

3. **Securities Laws:** The Elected Members understand and agree that Membership Shares in the PLLC have not been registered under any federal or state securities law as more fully set forth in the Amended Operating Agreement.

4. **Counterparts:** This Admission Agreement may be executed in multiple counterparts.

5. **Terms:** All capitalized terms not otherwise defined herein shall have the meanings given them in the Operating Agreement as amended by the Election Agreement.

This Admission Agreement is executed as of the date first above written and the witnesses hereto warrant the signatures of the Present Members at the foot of the Election Agreement as well.

Witnesses:

Joseph R. Webb

Browne, Flebotte, Wilson & Webb, PLLC

By: [Signature]
Member, Individually and Corporately

James Daniels

By: Joseph M. Webb
Member, Individually and Corporately

Kathy Davis

By: Joseph R. Webb
Member, Individually and Corporately

William M. West

By: Harlan B. Cause
Elected Member

SSN: _____

Address: _____

6 Linnet Court

Columbia, SC 29229

[Signature]

By: [Signature]
Elected Member

SSN: _____

Address: _____

2200 Brandon Hills Dr

Columbia, SC 29273

EXHIBIT D

**Minutes of Action Taken by Unanimous Written Consent of the
Members of Browne, Flebotte, Wilson & Webb, PLLC**

The following Resolutions are adopted by the unanimous written consent of the shareholders of Browne, Flebotte, Wilson & Webb, PLLC (the "PLLC") pursuant to the authority granted by any and all the applicable state laws, regulations and the existing Operated Agreement as Amended.

I. Resolution Affirming Agreement of August 31, 2006

An Agreement entitled *Members' Agreement for the Election and Admission of New Members to Browne, Flebotte, Wilson & Webb, PLLC and Amendment of the Firm's Operating Agreement* ("the Election Agreement") has been negotiated and presented to all Members of the PLLC. A copy of the Election Agreement is attached hereto as Attachment "A."

Upon a unanimous vote of the three existing Members of the PLLC (Daniel R. Flebotte, Joseph M. Wilson and Joy Rhyne Webb) it is Resolved that:

~the Election Agreement is hereby affirmed and approved as an Agreement of the Corporation;

~that James A. Merritt, Jr. and Heather B. Caruso are hereby elected Members of the PLLC with ownership interests equal to the existing Members;

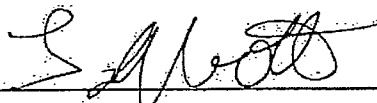
~that the Operating Agreement of the PLLC is amended as noted in the Election Agreement and to effectuate the above and the intent of the Members;

~that all other provisions of the Election Agreement are hereby approved; and

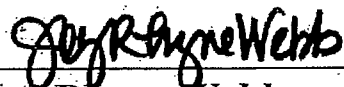
~that no further action is required to effectuate the Election Agreement.

The above Resolutions were taken by the unanimous written consent of the Members of the PLLC, and each of the Members of the PLLC hereby approves of the action contained in these resolutions and hereby waives any requirement of any notice of a meeting or notice of taking of the action contained in these resolutions or any other corporate formality by signing his/her name below.

These Resolutions are effective and binding as of 5:30pm August 31, 2006.


Daniel R. Flebotte


Joseph M. Wilson


Joy Rhyne Webb

31 August 2006

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

FIFTH JUDICIAL DISTRICT

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

Plaintiff,

vs.

Merritt, Webb, Wilson & Caruso, PLLC,

Defendant.

Case No: 2018-CP-40-02730

**PLAINTIFF'S MEMORANDUM IN
OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS, OR,
ALTERNATIVELY, TO STAY AND
COMPEL ARBITRATION**

Plaintiff, Zachary M. Merritt, as personal representative of the Estate of James A. Merritt, Jr., deceased ("Decedent"), opposes the Defendant Merritt, Webb, Wilson & Caruso, PLLC's ("Law Firm") Motion to Dismiss, or, Alternatively, to Stay and Compel Arbitration. The Law Firm's motion is based upon the existence of an arbitration clause in the Law Firm's Operating Agreement. As discussed further below, the Estate was not a party to the Operating Agreement and therefore is not bound by the arbitration clause.

Background

The instant action was brought by Plaintiff against the Law Firm in which the Decedent was a member and seeks recovery of the fair market value of the Decedent's ownership interest in the Law Firm. The Estate is being administered in the Probate Court of Richland County, South Carolina, with Case Number 2017 ES40 01594. The Law Firm is a professional limited liability company ("PLLC") formed under the laws of the State of North Carolina and maintains an office in Columbia, South Carolina. The Decedent was the "Merritt" within the law firm's name of "Merritt, Webb, Wilson & Caruso," and he held a 25% ownership interest at the time of his death on July 12, 2017.

The lawsuit seeks the fair market value of the Decedent's share in the Law Firm, which is required to be paid by the Law Firm within one year of a member's death. By statute, the Decedent's Estate may hold the shares for up to one year, but "[w]ithin one year of the date of such death, all of the shares owned by such deceased shareholder **shall** be transferred to and acquired by the professional corporation or [licensed] persons qualified to own such shares." N.C. Gen. Stat. § 55B-7(b) (emphasis added). The statute further provides that if the parties are unable to agree upon a value for these shares, then "**the price for such shares shall be the fair market value of the stock.**" *Id.* (emphasis added). Mr. Merritt passed away on July 12, 2017, and so the statute required payment to the Estate of the fair market value of those shares no later than July 12, 2018.

Argument

The sole basis of the Law Firm's motion is that the firm's Operating Agreement requires arbitration. **But the Estate is not a member of the Law Firm and was not a signatory to the Operating Agreement.** As such, the arbitration clause cannot be enforced against it. *See Sloan Fin. Grp., Inc. v. Beckett*, 583 S.E.2d 325, 330 (N.C. Ct. App. 2003), *aff'd*, 593 S.E.2d 583 (N.C. 2004) ("[A] party cannot be forced to submit to arbitration of any dispute unless he has agreed to do so." (internal quotations omitted)).

The Law Firm also argues that the arbitration provision includes a reference to "successor[s], representative[s], or assign[s]," but this reference does not change the fact that the Estate is not a party to the agreement and therefore cannot be bound by it. Moreover, the Law Firm is not a successor, representative, or assign with respect to membership in the Law Firm, which by law can only occur with respect to a licensed member of the legal profession. *See* N.C. Gen. Stat. §§ 55B-6(a), 57D-2-02(a) (providing that the ownership share of an owner of a

professional limited liability company may only be held by or transferred to a licensed member of the profession).

In addition, the Law Firm's reliance upon a policy favoring arbitration is misplaced where the Estate never was a party to the agreement. In North Carolina, "[w]hether a dispute is subject to arbitration involves a two pronged analysis; the court must ascertain both (1) whether the parties had a valid agreement to arbitrate, and also (2) whether the specific dispute falls within the substantive scope of that agreement." *Id.* (internal quotations omitted). The law is clear that it is only "in this second step of [the] analysis where the presumption in favor of arbitration exists." *Id.* at 331. Here, the issue is resolved at step one given that there was no agreement to arbitrate. As a result, the presumption does not apply.

For these reasons, the motion must be denied.

Respectfully submitted,

s/ William M. Wilson III

William M. Wilson III (S.C. Bar No. 15808)
 Matthew T. Richardson (S.C. Bar No. 15647)
 Eric B. Amstutz (S.C. Bar No. 0363)
 WYCHE, P.A.
 P.O. Box 12247
 Columbia, SC
 Telephone: 803-254-6542
 Facsimile: 864-235-8900
 E-Mail: bwilson@wyche.com
mrichardson@wyche.com
eamstutz@wyche.com

Dated: October 3, 2018

Attorneys for Plaintiff

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
Zachary M. Merritt, as personal representative of the Estate of James A. Merritt, Jr.	)	Civil Action No. 2018-CP-40-02730
Plaintiff,	)	
	)	DEFENDANT'S REPLY TO PLAINTIFF'S
	)	MEMORANDUM IN OPPOSITION TO
vs.	)	DEFENDANT'S MOTION TO DISMISS,
	)	OR, ALTERNATIVELY, TO STAY AND
	)	COMPEL ARBITRATION
Merritt, Webb, Wilson & Caruso, PLLC	)	
Defendant.	)	

Defendant, Merritt, Webb, Wilson & Caruso, PLLC, submits this Memorandum in Reply to Plaintiff, Zachary M. Merritt, as personal representative of the Estate of James A. Merritt, Jr.'s Memorandum in Opposition to Defendant's Motion to Dismiss, or, Alternatively, to Stay and Compel Arbitration.

Plaintiff's contention that the Estate is not bound to the arbitration agreement the decedent signed is incorrect as a matter of law.

FACTS

1. As described in Defendant's original Motion to Dismiss, or Alternatively, to Stay and Compel Arbitration, on August 31, 2006, the Decedent became a Member of Defendant, Merritt, Webb, Wilson & Caruso, PLLC, with all of the appurtenant rights and responsibilities under the law firm's Operating Agreement.

2. The Operating Agreement included the following provision at paragraph 1.7 regarding the mandatory resolution of disputes via arbitration,

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.

(emphasis added).

3. On May 18, 2018, Plaintiff filed suit on the decedent's estate's behalf seeking to enforce the terms of the Operating Agreement in granting the decedent "a 25% interest in [Merritt, Webb, Wilson & Caruso, PLLC] at the time of his death on July 12, 2017." Complaint, ¶ 10.¹

LAW AND ANALYSIS

4. Plaintiff does not assert that the arbitration provision found within the Operating Agreement is invalid. Rather, he asserts that because the estate of the decedent was not a signatory to the Operating Agreement, the estate is not bound by the agreement to arbitrate contained within the Operating Agreement.

5. This argument fails on three grounds.

6. First, while still alive, the decedent signed the Operating Agreement and its wide-ranging arbitration clause. In doing so, under North Carolina law, the decedent inherently bound not just himself, but his estate to the agreement giving him an ownership interest and the appurtenant responsibility to resolve disputes via arbitration.

¹ Plaintiff's Complaint was filed after repeated efforts by Defendant to establish the fair market value of the estate proceeds in a mutually agreeable manner between the parties.

7. On this point, North Carolina statutory law is clear,

Upon the death of any person, all demands whatsoever and rights to prosecute or defend any action or special proceeding, existing in favor of or against such person [with limited exceptions inapplicable here] . . . shall survive to and against the personal representative . . . of the person's estate.

N.C. Gen. Stat. Ann. § 28A-18-1.

All actions and proceedings brought by or against personal representatives or collectors upon any cause of action or right to which the estate of the decedent is the real party in interest, must be brought by or against them in their representative capacity.

N.C. Gen. Stat. Ann. § 28A-18-3.²

8. Despite Plaintiff's novel argument in opposition to these elementary tenets, he cites no authority, mandatory, persuasive, from North Carolina or any other jurisdiction, as support.

9. Second, the Operating Agreement plainly bound the decedent's successors, representatives and assigns. There can be no truer successor than a "personal *representative*" of an estate.³

10. Third, even if this suit on behalf of the decedent was not brought in a derivative

² A personal representative is also vested with *inter alia* the following authorities in administering a decedent's estate pursuant to N.C. Gen. Stat. Ann. § 28A-13-3,

(4) To complete performance of contracts entered into by the decedent that continue as obligations of the decedent's estate, or to refuse to complete such contracts, as the personal representative may determine to be in the best interests of the estate, but such refusal **shall not limit any cause of action which might have been maintained against decedent if the decedent had refused to complete such contract.**

(emphasis added).

³ Contrary to what Plaintiff suggests, Defendant has not argued that the estate or personal representative is Member of Merritt, Webb, Wilson & Caruso, PLLC. As a point in fact, §4.4 of the Operating Agreement provides that "in no event shall a personal representative or successor become a substitute Member."

capacity on behalf of the decedent, under North Carolina law, the obligation and entitlement to arbitrate “does not attach only to one who has personally signed the written arbitration provision.” Rather, “well-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties.” *Ellen v. A.C. Schultes of Md., Inc.*, 172 N.C.App. 317, 320, 615 S.E.2d 729, 732 (2005) (quoting *Wash. Square Sec., Inc. v. Aune*, 385 F.3d 432, 435 (4th Cir.2004)).

11. 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) *see also Ellen*, 172 N.C.App. at 320–23, 615 S.E.2d at 731–33.

12. As Plaintiff’s own pleadings recognize, without the Operating Agreement and related organizational documents, Defendant would not, as a matter of law, exist. And, Plaintiff would have no claim whatsoever.⁴

13. In evaluating whether a party seeks to avoid an arbitration claim within an agreement, “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.*” *Smith Jamison Constr. v. APAC-Atl., Inc.*, 811 S.E.2d 635, 638 (N.C. Ct.

⁴ See Plaintiff’s Motion in Opposition, pg. 1, (“the Decedent was the “Merritt” within the law firm’s name of ‘Merritt, Webb, Wilson & Caruso,’ and he held a 25% ownership interest at the time of his death on July 12, 2017”); Complaint, ¶ 14, (“there is *agreement* between the members of [Merritt, Webb, Wilson & Caruso, PLLC] that [it] should be valued as a going concern.” (emphasis added) *Id.* at ¶ 18 (“this Court has the power to declare the rights of the parties under the applicable *and agreements between the Law Firm member*”) (emphasis added); *Id.* at Second Cause of Action, (“**Breach of Contract** and Statutory Requirement to Purchase Shares”) (emphasis added).

App. 2018) (quoting *Carter*, 218 N.C. App. 222, 231, 721 S.E.2d 256, 263) (emphasis in *Smith*). If so, then a plaintiff is equitably estopped from denying the application of the arbitration agreement to his claims.

14. On one hand, the Plaintiff seeks to enforce the decedent's property interest laid out in the Operating Agreement. On the other hand, Plaintiff seeks to bypass the terms calling for mandatory resolution of disputes via arbitration. Plaintiff cannot have it both ways. One must follow the other.

15. The parties are rightly directed to arbitration, pursuant to the terms of the Operating Agreement the decedent, a talented attorney and respected member of the community, signed.

Respectfully submitted,

CALLISON TIGHE & ROBINSON, LLC

s/ Ian T. Duggan

Ian T. Duggan, SC Bar No. 80074
Callison Tighe & Robinson, LLC
1812 Lincoln St, Suite 200
PO Box 1390
Columbia, SC 29202-1390
Telephone No. (803)404-6900
Facsimile No. (803)404-6900
ilanduggan@callisontighe.com

Columbia, South Carolina

October 4, 2018

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL DISTRICT

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

Case No: 2018-CP-40-02730

Plaintiff,

AMENDED COMPLAINT

vs.

(Declaratory Judgment)

Merritt, Webb, Wilson & Caruso, PLLC,

Defendant.

Comes now the Plaintiff Zachary M. Merritt ("Plaintiff"), as personal representative of the Estate of James A. Merritt, Jr., deceased ("the Estate"), complaining of the Defendant Merritt, Webb, Wilson & Caruso, PLLC ("Law Firm" or "Defendant"), and alleges as follows:

NATURE OF THE ACTION

1. This action is brought in part pursuant to the provisions of the Uniform Declaratory Judgment Act as codified in S.C. Code Ann. § 15-53-10 *et seq.*, and it arises out of the Law Firm's failure to pay or agree pay to the Estate the fair market value of the ownership interest of James A. Merritt, Jr. ("Decedent") in the Law Firm, as required by statute.

PARTIES AND JURISDICTION

2. Plaintiff is the son of the Decedent and the duly appointed, qualified, and acting personal representative of the Estate. He brings this action on behalf of the Estate as well as all others entitled to recover under the applicable law.

3. Plaintiff is a South Carolina citizen residing at all relevant times in York County, South Carolina.

4. The Estate is being administered in the Probate Court of Richland County, South Carolina, with Case Number 2017-ES-40-01594.

5. The Law Firm is a limited liability company authorized to do business in South Carolina and that maintains an office and operations in Richland County, South Carolina, at 8910 Two Notch Rd #400, Columbia, South Carolina 29223.

6. The Law Firm may be served through its Registered Agent in South Carolina, CT Corporation System.

7. This Court has personal jurisdiction over the Law Firm because, among other things, the Law Firm maintains an office in Richland County, South Carolina; is authorized to conduct business in South Carolina; maintains a registered agent for service of process in South Carolina; and is obligated to pay the fair market value of Decedent's shares to the Estate being administered in Richland County, South Carolina.

8. This Court has jurisdiction over the subject matter of this action and over the Defendant, and venue is proper.

FACTUAL BACKGROUND

9. Plaintiff incorporates all paragraphs above as if fully stated herein.

10. The Decedent held a 25% ownership interest in the Law Firm at the time of his death on July 12, 2017.

11. By operation of statute, the Decedent ceased to be a member of the Law Firm at his death.

12. By operation of statute, the Decedent's ownership interest in the Law Firm (referred to herein as "Shares" or "shares") was transferred to the Estate following Decedent's death and must be transferred to and acquired by the Law Firm or persons qualified to own such

shares for fair market value within one year of Decedent's death (*i.e.*, no later than July 12, 2018).

13. There is no agreement with the Law Firm as to the value of the Shares.

14. Pursuant to the statute, the Law Firm is obligated to the Estate for the fair market value of the Shares.

15. Defendant has refused all requests by Plaintiff to agree to a methodology and process for an independent third party appraisal and/or to provide financial information necessary for an independent valuation of the fair market value of the Shares, and Defendant has further declared its intention to proceed with an appraiser of its choosing without input or consent of Plaintiff, thereby resulting in a valuation that cannot be verified by Plaintiff as reflecting a fair market value of the Shares.

16. Defendant also has failed to pay all wages due to Decedent, including but not limited to bonuses for 2017.

17. Defendant also has wrongfully refused to return to the Estate certain personal property and personal effects within the possession, custody, and control of the Law Firm, as well as electronic files, pictures, photographs, emails, texts, and documents located on computers, storage devices, and/or phones (collectively, "Personal Effects and Files").

FOR A FIRST CAUSE OF ACTION
(Declaratory Judgment)

18. The foregoing allegations are incorporated herein by reference.

19. Pursuant to S.C. Code Ann. §§ 15-53-10, *et seq.*, this Court has the power to declare the rights of the parties under the applicable statute requiring the Shares to be purchased for fair market value.

20. Accordingly, the Court should hear this matter and declare pursuant to the statute that the Law Firm shall pay the Estate for the fair market value of the Shares and also declare the fair market value of the shares of the Law Firm; and declare that the Estate is entitled to unpaid wages of Decedent, including but not limited to bonuses for 2017; declare the amount of unpaid wages; and declare that the Estate is entitled to the return of the Personal Effects and Files of Decedent in the possession, custody, or control of Defendant.

FOR A SECOND CAUSE OF ACTION
(Breach of Statutory Requirement to Purchase Shares)

21. The foregoing allegations are incorporated herein by reference.

22. Defendant has breached the statutory requirement to pay the fair market value of the Shares to the Estate.

23. Plaintiff is entitled to an injunction requiring Defendant to pay to the Estate the fair market value of the Shares.

24. Plaintiff is entitled to a money judgment in the amount of the fair market value of the Shares.

25. Plaintiff is entitled to prejudgment interest on the fair market value of the Shares beginning July 12, 2018, to the extent it remains unpaid.

26. Plaintiff reserves the right to pursue payment of the fair market value of the Shares from the remaining individual members of the Law Firm and/or persons qualified to own such Shares.

FOR A THIRD CAUSE OF ACTION
(Payment of Wages)

27. The foregoing allegations are incorporated herein by reference.

28. The Decedent earned wages, including but not limited to bonuses for 2017, prior to his death.

29. The Law Firm failed to pay said wages to the Estate.

30. The Estate is entitled to a money judgment for the amount of unpaid wages, plus interest, statutory liquidated damages in an amount to equal to the amount found to be due, and costs and fees of the action and reasonable attorneys' fees.

FOR A FOURTH CAUSE OF ACTION
(Trover/Claim and Delivery/Replevin)

31. The foregoing allegations are incorporated herein by reference.

32. At the time of his death, Decedent was the rightful owner of the Personal Effects and Files.

33. The Estate is entitled to the possession of the Personal Effects and Files and has demanded their return, but the Law Firm has unreasonably refused all demands and has retained possession, custody, and/or control over the Personal Effects and Files.

34. The Personal Effects and Files are wrongfully detained by the Law Firm without cause.

35. The Personal Effects and Files have not been taken for a tax, assessment, or fine pursuant to a statute or seized under an execution or attachment against the property of the Plaintiff.

36. The Estate is entitled to a Judgment for the possession of the Personal Effects and Files or, alternatively, for the value of the Personal Effects and Files in case a delivery cannot be had; and the Estate also is entitled to a Judgment for damages, both punitive and actual, for the detention.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

- (1) Declare the Law Firm shall pay the Estate the fair market value of the Shares of the Law Firm in accordance with the requirement of the statute;
- (2) Declare the fair market value of the Shares to be paid by the Law Firm to the Estate for the Shares;
- (3) Enter an injunction in favor of the Plaintiff requiring Defendant to pay to the Estate the fair market value of the Shares;
- (4) Enter a money judgment in favor of the Estate against the Law Firm in the amount of the fair market value of the Shares;
- (5) Declare that Plaintiff reserves the right to pursue payment of the fair market value of the Shares from the individual members of the Law Firm, if the Law Firm refuses or otherwise fails to pay;
- (6) Declare that the Estate is entitled to unpaid wages of Decedent, including but not limited to bonuses for 2017, and also declare the amount of unpaid wages;
- (7) Enter a money judgment for the amount of unpaid wages, plus interest, statutory liquidated damages in an amount to equal to the amount found to be due, and costs and fees of the action and reasonable attorneys' fees;
- (8) Declare that the Estate is entitled to the return of the Personal Effects and Files of Decedent in the possession, custody, or control of Defendant;
- (9) Enter a judgment for possession of the Personal Effects and Files or, alternatively, for the value of the Personal Effects and Files in case a delivery cannot be had;
- (10) Enter an injunction requiring Defendant to give possession to Plaintiff of the

- Personal Effects and Files in the possession, custody, or control of Defendant;
- (11) Enter a judgment for damages, both punitive and actual, for the detention of the Personal Effects and Files;
- (12) Award attorneys' fees and the costs of this action; and
- (13) Grant any such other and further relief as this Court shall deem just and proper.

Respectfully submitted,

s/ William M. Wilson III

William M. Wilson III (S.C. Bar No. 15808)

Matthew T. Richardson (S.C. Bar No. 15647)

Eric B. Amstutz (S.C. Bar No. 0363)

WYCHE, P.A.

P.O. Box 12247

Columbia, SC

Telephone: 803-254-6542

Facsimile: 864-235-8900

E-Mail: bwilson@wyche.com;

mrichardson@wyche.com; eamstutz@wyche.com

Attorneys for Plaintiff

Dated: October 8, 2018

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) FOR THE FIFTH JUDICIAL CIRCUIT

Zachary M. Merritt, as personal) Civil Action No. 2018-CP-40-02730
representative of the Estate)
of James A. Merritt, Jr.)
Plaintiff,)

vs.) **DEFENDANT'S MOTION TO DISMISS,
OR, ALTERNATIVELY, TO STAY AND
TO COMPEL ARBITRATION**

Merritt, Webb, Wilson & Caruso,)
PLLC)
Defendant.)

TO: MESSRS. MATTHEW M. WILSON, III, MATTHEW T. RICHARDSON, ERIC B. AMSTUTZ, ESQUIRES, COUNSEL FOR PLAINTIFF, ZACHARY M. MERRITT, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JAMES A. MERRITT, JR.

YOU WILL PLEASE TAKE NOTICE that the undersigned attorneys for Defendant Merritt, Webb, Wilson & Caruso, PLLC, move, pursuant to SCRPC Rules 12(b)(1), 12(b)(3), 12(b)(6) and the North Carolina Revised Arbitration Act (N.C.G.S. §1-569.31 *et seq.*) or, alternatively, the North Carolina Uniform Arbitration Act (§1-567.1 *et seq.*), for an order dismissing with prejudice the claims asserted against it in this action, or alternatively, staying the action, and compelling those claims to arbitration.¹

This Motion is based upon the pleadings, applicable law, and any memorandum or other material that may be submitted to the Court prior to or at the hearing on this Motion. Defendant requests a hearing on this motion within ten days after the filing thereof, or as soon thereafter as counsel may be heard. The grounds for this motion are primarily founded on the following:

¹ This Motion is filed in lieu of filing an Answer at this stage. *See e.g.* Rule 12(b), SCRPC ("A motion making any of these defenses shall be made before pleading if a further pleading is permitted.").

FACTS

1. On June 11, 2002, the Members of the law firm Browne, Flebotte, Wilson & Horn, PLLC, a North Carolina Limited Liability Company, implemented an Operating Agreement, a true copy of which is appended hereto as **Exhibit A**.

2. The Operating Agreement included the following provision at paragraph 1.7 regarding arbitration,

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.

3. Paragraph 10.8 of the 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.”²

4. Subsequently, on August 31, 2006, the Members of Browne, Flebotte, Wilson and

² “Choice of law clauses are generally honored in South Carolina.” *Team LA, Inc. v. Lucas*, 395 S.C. 237, 248–49, 717 S.E.2d 103, 108–09 (Ct. App. 2011) *See also Nucor Corp. v. Bell*, 482 F.Supp.2d 714, 728 (D.S.C.2007) (“Generally, under South Carolina choice of law principles, if the parties to a contract specify the law under which the contract shall be governed, the court will honor this choice of law.”)

Webb, PLLC,³ amended the Operating Agreement in order to effect the election and admission of Attorneys James A. Merritt, Jr., and Heather B. Caruso as full Members of the Firm. A true copy of this Amendment is appended hereto as **Exhibit B**. The Amendment did not affect or otherwise modify the above arbitration provision contained within the original Operating Agreement. Contemporaneously, an “Admissions Agreement” adding Mr. Merritt and Ms. Caruso into the Firm as Members was signed by all. A true copy of this Admission Agreement is appended hereto as **Exhibit C**. A true copy of the “Minutes of Action” by the firm generally memorializing the above events is appended hereto as **Exhibit D**. Concurrently, and as an effect of these documents, the firm’s name was changed from Browne, Flebotte, Wilson and Webb, PLLC to Merritt, Flebotte, Wilson, Webb & Caruso, PLLC.⁴

5. After the decedent passed away in July 2017, Merritt, Webb, Wilson & Caruso, PLLC, endeavored to remit payment for the decedent’s share of the Firm to the decedent’s estate on mutually agreeable terms. When these efforts were unsuccessful, the Firm hired an independent appraiser to calculate the fair market value of the decedent’s 25% interest in the Firm as of June 30, 2017. Merritt, Webb, Wilson & Caruso, PLLC, has tendered an offer to Plaintiff to immediately pay this value to Plaintiff, but has not yet received a substantive response to this offer.

LAW AND ANALYSIS

6. “[T]he public policy of North Carolina strongly favors the settlement of disputes

³ Browne, Flebotte, Wilson & Horn, PLLC changed its name to Browne, Flebotte, Wilson, Horn and Webb, PLLC on February 26, 2004, following the admission of Joy Rhyne Webb as a Member. Following Martin Horn’s withdrawal from the PLLC membership, the law firm name was changed on August 4, 2005 to Browne, Flebotte, Wilson and Webb, PLLC.

⁴ Following Daniel Flebotte’s withdrawal from the PLLC membership, the law firm name was changed to Merritt, Webb, Wilson & Caruso, PLLC on August 25, 2011.

by arbitration and requires that the courts resolve any doubts concerning the scope of arbitrable issues in favor of arbitration.” *Revels v. Miss N. Carolina Pageant Org., Inc.*, 176 N.C. App. 730, 735, 627 S.E.2d 280, 283 (2006) (citing to *Johnston County v. R.N. Rouse & Co.*, 331 N.C. 88, 91, 414 S.E.2d 30, 32 (1992)). See also *Westmoreland v. High Point Healthcare Inc.*, 218 N.C. App. 76, 90, 721 S.E.2d 712, 722 (2012) (“It is the public policy of North Carolina to favor arbitration.”)

7. On January 1, 2004, pursuant to S.L. 2003-345, § 2, North Carolina General Statutes §§ 1-567.1 to 1-567.20, collectively known as “The North Carolina Uniform Arbitration Act” was repealed. In its place, North Carolina implemented the “North Carolina Revised Arbitration Act.” N.C.G.S. 1-569.31 *et seq.* The Revised Act was made applicable to agreements to arbitrate on or after January 1, 2004, or agreements to arbitrate made before January 1, 2004, if “all parties to the agreement or to the arbitration proceeding agree in a record that this Article applies.” See N.C. Gen. Stat. Ann. § 1-569.3(a) and (b).

8. Whether the Admission Agreement and Amendment to the Operating Agreement signified an agreement by the Members of the Firm to be bound by the Revised Uniform Arbitration Act or the Prior Uniform Arbitration Act is of no import. In this case, the result is the same.⁵ Both § 1-567.2 and § 1-569.6 hold that agreements to arbitrate disputes amongst parties to an agreement are “valid, enforceable, and irrevocable.”

9. The far-reaching arbitration provision in the Operating Agreement in this case is valid. The parties to the Operating Agreement, all licensed attorneys, were sophisticated parties

⁵ In addition, both North Carolina General Statutes § 1-567.18(a) and § 1-567.28(a) provide that an appeal may be taken from an order denying a motion to compel arbitration. See also *Gemini Drilling and Found., LLC v. Nat’l Fire Ins. Co. of Hartford*, 665 S.E.2d 505, 508 (N.C. Ct. App. 2008). Similarly, the Federal Arbitration Act (FAA) also provides for an immediate right to appeal a denial of a stay of a proceeding pending arbitration. See *e.g.* 9 U.S.C. § 16(a)(1) *et seq.*

entering into a business relationship. There is no evidence of coercion, duress or any other mechanism to set aside the agreement amongst the law firm's members on contractual grounds. "The law of contracts governs the issue of whether there exists an agreement to arbitrate." *King v. Bryant*, 225 N.C. App. 340, 345–46, 737 S.E.2d 802, 807 (2013) (quoting *Routh v. Snap-On Tools Corp.*, 108 N.C.App. 268, 271, 423 S.E.2d 791, 794 (1992)).

10. While the decedent's interests are the subject of this case, the above-quoted arbitration provision also plainly applies to his "successor[s], representative[s], or assign[s]."

11. Similarly, the valid arbitration clause in this case applies to the present controversies between the parties to this suit. The arbitration provision in the Operating Agreement holds that it is "explicitly agreed" between the Members "***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.***" (emphasis added). In sum, all of the causes of action contained with the Plaintiff's Amended Complaint are captured by the far-reaching arbitration provision contained within the Firm's Operating Agreement.

12. Plainly though, the gravamen of the dispute amongst the parties "arises out of [Merritt, Webb, Wilson & Caruso, PLLC]'s failure to pay or agree [to] pay to the Estate the fair market value of the ownership interest of James A. Merritt, Jr. . . . in [Merritt, Webb, Wilson & Caruso, PLLC]." Amended Complaint, ¶ 1.

13. Although, the decedent has passed on, when he signed the Operating Agreement and its wide-ranging arbitration clause, under North Carolina law, he inherently bound not just himself, but his estate to the agreement that gave him an ownership interest in the Firm and the

appurtenant responsibility to resolve disputes via arbitration.

14. On this point, North Carolina statutory law is clear,

Upon the death of any person, all demands whatsoever and rights to prosecute or defend any action or special proceeding, existing in favor of or against such person [with limited exceptions inapplicable here] . . . shall survive to and against the personal representative . . . of the person's estate.

N.C. Gen. Stat. Ann. § 28A-18-1.

All actions and proceedings brought by or against personal representatives or collectors upon any cause of action or right to which the estate of the decedent is the real party in interest, must be brought by or against them in their representative capacity.

N.C. Gen. Stat. Ann. § 28A-18-3.⁶

15. Even if this suit on behalf of the decedent was not brought in a derivative capacity on behalf of the decedent, under North Carolina law, the obligation and entitlement to arbitrate “does not attach only to one who has personally signed the written arbitration provision.” Rather, “well-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties.” *Ellen v. A.C. Schultes of Md., Inc.*, 172 N.C.App. 317, 320, 615 S.E.2d 729, 732 (2005) (quoting *Wash. Square Sec., Inc. v. Aune*, 385 F.3d 432, 435 (4th Cir.2004)).

⁶ A personal representative is also vested with *inter alia* the following authorities in administering a decedent's estate pursuant to N.C. Gen. Stat. Ann. § 28A-13-3,

(4) To complete performance of contracts entered into by the decedent that continue as obligations of the decedent's estate, or to refuse to complete such contracts, as the personal representative may determine to be in the best interests of the estate, but such refusal **shall not limit any cause of action which might have been maintained against decedent if the decedent had refused to complete such contract.**

(emphasis added).

16. 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) *see also Ellen*, 172 N.C.App. at 320–23, 615 S.E.2d at 731–33.

17. While Plaintiff take pains in his *Amended* Complaint to gloss over the existence of any Agreement between the decedent and the present Members of Defendant, without the aforementioned Operating Agreement and related organizational documents, Defendant would not, as a matter of law, exist. And, Plaintiff would have no claim whatsoever.

18. In evaluating whether a party seeks to avoid an arbitration claim within an agreement, “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.*” *Smith Jamison Constr. v. APAC-Atl., Inc.*, 811 S.E.2d 635, 638 (N.C. Ct. App. 2018) (quoting *Carter*, 218 N.C. App. 222, 231, 721 S.E.2d 256, 263) (emphasis in *Smith*). If so, then a plaintiff is equitably estopped from denying the application of the arbitration agreement to his claims.

19. Finally, the Operating Agreement and its arbitration provision plainly bound the decedent’s “successor[s], representative[s], and assign[s].” There can be no truer successor than a “personal *representative*” of an estate.

20. Any fair reading of the arbitration clause, the Operating Agreement as a whole, and the Plaintiff’s Complaint indicates [a.] the decedent’s estate is bound by the arbitration agreement; [b.] the present dispute falls into the category of the type of issues the Members of Merritt, Webb, Wilson & Caruso, PLLC, including Mr. Merritt, intended to arbitrate.

WHEREFORE, Merritt, Webb, Wilson & Caruso, PLLC, requests that the Court enter an order providing the following:

- A. Pursuant to Rule 12(b), SCRCP, dismiss, with prejudice, Plaintiff's Claims, or in the alternative, stay the action and strike it from the active roster;
- B. Hold that the Plaintiff's claims are subject to a binding arbitration agreement governed by North Carolina law and that Plaintiff's only recourse for pursuing those claims is to submit them to binding arbitration in accordance with the parties' express agreement; and,
- C. Such other and further relief as the Court deems just and proper.

Respectfully submitted,

CALLISON TIGHE & ROBINSON, LLC

s/ Ian T. Duggan

Ian T. Duggan, SC Bar No. 80074

Callison Tighe & Robinson, LLC

1812 Lincoln St, Suite 200

PO Box 1390

Columbia, SC 29202-1390

Telephone No. (803)404-6900

Facsimile No. (803)404-6900

ianduggan@callisontighe.com

Columbia, South Carolina

October 18, 2018

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

FIFTH JUDICIAL DISTRICT

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

Case No: 2018-CP-40-02730

Plaintiff,

vs.

Merritt, Webb, Wilson & Caruso, PLLC,

**PLAINTIFF'S MEMORANDUM IN
OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS, OR,
ALTERNATIVELY, TO STAY AND TO
COMPEL ARBITRATION**

Defendant.

Plaintiff Zachary M. Merritt ("Zack Merritt"), as personal representative of the Estate of James A. Merritt, Jr. ("Jim Merritt"), respectfully submits this memorandum in opposition to Defendant Merritt, Webb, Wilson & Caruso, PLLC's (the "Law Firm") Motion to Dismiss, Or, Alternatively, to Stay and To Compel Arbitration ("Law Firm's Motion").

BACKGROUND

This action arises out of the Law Firm's refusal to pay Jim Merritt's estate the fair market value of his ownership interest in the Law Firm as required by statutory law. The Law Firm is a limited liability company organized under North Carolina law and maintains an office in Columbia, South Carolina. Am. Compl. ¶ 5.

Jim Merritt was a Columbia attorney until he moved to Raleigh, North Carolina to put together and manage the successful Law Firm that has more than one hundred thousand clients in three states through pre-paid legal services. He was the managing member of the Law Firm and held a 25% ownership interest in the Firm at the time of his death on July 12, 2017. *Id.* ¶ 10. Under North Carolina statutory law, Jim Merritt ceased being a member of the Law Firm upon his death, and the Law Firm was required to purchase Jim Merritt's interest in the Firm from his estate within one year of his death. *Id.* ¶¶ 11, 12. The Law Firm has failed to do so and continues to

refuse to provide even a minimum amount of financial information to Jim Merritt's estate for the purpose of determining the value of his ownership interest in the Law Firm.

Zack Merritt is a South Carolina attorney, Jim Merritt's son, and the personal representative of Jim Merritt's estate. *Id.* ¶ 2. Jim Merritt and the Law Firm had no agreement regarding the value of his interest in the Firm. *Id.* ¶ 13. The Law Firm has refused Zack Merritt's requests to agree to a process for obtaining an independent third-party appraisal of the value of Jim Merritt's ownership interest in the Firm and to provide Zack Merritt with the financial information necessary for an independent valuation. *Id.* ¶ 15. Furthermore, the Law Firm has failed to pay wages owed to Jim Merritt under statutory law and also has wrongfully retained certain personal property and effects belonging to Jim Merritt. *Id.* ¶¶ 16, 17.

In summary, the Law Firm has treated Jim Merritt's estate in a grossly unfair manner and has failed to fulfill its statutory obligations to the estate. Consequently, Zack Merritt had to bring this action to enforce the statutory rights of Jim Merritt's estate to recover the fair value of Jim Merritt's interest in the Law Firm, to recover the wages owed to Jim Merritt by the Law Firm, and to obtain possession of Jim Merritt's personal property and effects. These statutory claims are not subject to arbitration.

DISCUSSION

The Law Firm argues in its Motion that Zack Merritt's claims should be dismissed or stayed because they are subject to the arbitration provision in the Law Firm's operating agreement ("Operating Agreement") from June 2002. Plaintiff's claims, however, are not covered by the arbitration agreement in the original Operating Agreement, which was entered into before Jim Merritt became part of the Law Firm, and the Law Firm's Motion should be denied.

I. The Arbitration Provision in the Operating Agreement is Inapplicable Because Zach Merritt's Claims are Based upon Statutory Law, Not the Original Operating Agreement.

The arbitration provision in the Law Firm's original Operating Agreement does not compel arbitration of Plaintiff's claims in the Amended Complaint because these claims are in no way based upon the original Operating Agreement. Instead, the claims are based upon statutory law.

The Amended Complaint ("Complaint") asserts causes of action for declaratory judgment, breach of the statutory requirement to purchase shares, payment of wages, and delivery/replevin. Am. Compl. ¶¶ 18-36. These causes of action are based upon S.C. Code Ann. § 15-53-10, *et seq.*, N.C.G.S. § 55B-7(b), N.C.G.S. § 95-25.22, and N.C.G.S. § 1-472, respectively. The Complaint does not assert a cause of action for breach of the Operating Agreement and does not seek enforcement of any provision of the Operating Agreement. *See* Am. Compl. In fact, the Complaint does not even mention or reference the Operating Agreement. *See id.* Thus, Zack Merritt's claims are entirely separate and independent from the Operating Agreement, and Zack Merritt is entitled to recover on his claims regardless of the terms of the Operating Agreement and regardless of whether the Law Firm even had an operating agreement.

The arbitration provision in the original Operating Agreement is, therefore, inapplicable to this action and fails to provide a basis for compelling Zack Merritt to submit his claims to arbitration. *See, e.g., Thompson v. Norfolk S. Ry. Co.*, 140 N.C. 115, 120, 535 S.E.2d 397, 400 (N.C. Ct. App. 2000) ("[P]arties may not be compelled to arbitrate their claims unless there exists a valid agreement to arbitrate." (citation omitted)).

Moreover, the Operating Agreement cannot properly even be considered at the motion to dismiss stage because it is not attached to the Complaint or even referenced in it. *See, e.g., Charleston Cnty. Sch. Dist. v. Harrell*, 393 S.C. 552, 557, 713 S.E.2d 604, 607 (2011) ("In

considering a motion to dismiss pursuant to Rule 12(b)(6), SCRCP, the circuit court must base its ruling solely upon the allegations set forth on the face of the complaint.” (citation omitted)). Accordingly, the Law Firm’s Motion must be denied.

The Law Firm introduces and relies upon three other exhibits in addition to the Operating Agreement in support of its motion to dismiss. *See* Law Firm’s Mot. to Dismiss. None of these exhibits is referenced or relied upon in the Complaint. If the exhibits introduced by the Law Firm are considered by the Court, then the Law Firm’s Motion must be converted into a motion for summary judgment and only after notice and an opportunity to submit evidence on the issues after discovery. *See* Rule 12(b)(6), SCRCP; *see also, e.g., Martin v. Companion Healthcare Corp.*, 357 S.C. 570, 574, 593 S.E.2d 624, 627 (Ct. App. 2004) (“When a court is considering a motion to dismiss and matters outside the pleadings are presented to and not excluded by the court, ‘the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56.’” (quoting Rule 12(b)(6))). If the Court were to convert this Motion into a motion for summary judgment by considering the exhibits offered by the Law Firm outside of the pleadings, then the Motion should be denied as premature because no discovery has been conducted yet. *See, e.g., Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) (“[S]ummary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery.” (citations omitted)); *see also infra* Part II and note 1.

II. The Amended Operating Agreement Does Not Require Arbitration of Disputes Relating to Valuation of a Former Member’s Interest.

The Law Firm’s Motion should also be denied because the Law Firm’s amended operating agreement (“Amended Agreement”), which was adopted in August 2006 when Jim Merritt joined the Law Firm, does not require arbitration of disputes such as this one relating to the valuation of a member’s interest in the Firm. *See* Law Firm’s Mot., Ex. B.

Section IV.E of the Amended Agreement governs the valuation of a leaving or disassociated member's interest in the Law Firm. *Id.* ¶ IV.E. This section states, in full:

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

Id. Notably, this section contains no arbitration provision.¹

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

The arbitration provision in the original operating agreement references arbitration for the determination and payment of a partnership buyout and related valuations. *See* Law Firm's Mot., Ex. A ¶ 1.7. Section IV.E of the Amended Agreement, however, supersedes that section in the original operating agreement with respect to valuation of a member's interest and the valuation rights of a departed member, and it omits any requirement that such valuations and rights be determined in arbitration. Therefore, the Amended Agreement does not require arbitration of disputes relating to the valuation of a former member's interest, and pursuant to Section II of the Amended Agreement, the terms of the Amended Agreement control. Accordingly, Zack Merritt's claims are not subject to a valid arbitration agreement, and Zack Merritt cannot be compelled to arbitrate. *See, e.g., Thompson*, 140 N.C. at 120, 535 S.E.2d at 400 ("[P]arties may not be

¹ Plaintiff is not aware of any further amendment relating to departing members' rights of valuation and is uncertain whether any further such amendment exists.

compelled to arbitrate their claims unless there exists a valid agreement to arbitrate.” (citation omitted)).

III. The Law Firm Has Failed to Provide Any Basis for Dismissing Zack Merritt’s Claims.

The Law Firm asks the Court to dismiss Zack Merritt’s claims with prejudice, but the Law Firm has failed to articulate any proper basis for dismissal. The Law Firm’s Motion contains no substantive discussion whatsoever of any grounds for dismissal under Rule 12(b) of the South Carolina Rules of Civil Procedure. Rather, the discussion in the Law Firm’s Motion relates entirely to the arbitration provision in the Operating Agreement and its enforceability and applicability under North Carolina Law.

N.C.G.S. § 1-569.7(g) mandates 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. If a claim subject to the arbitration is severable, the court may limit the stay to that claim.” Likewise, S.C. Code Ann § 15-48-20(d) provides in relevant part that “[a]ny action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made.” Thus, a court should stay, not dismiss, a judicial proceeding involving claims subject to arbitration.

Because the arguments in the Law Firm’s Motion relate solely to the arbitrability of Zack Merritt’s claims, and claims subject to arbitration should be stayed rather than dismissed, the Law Firm has not provided any basis for dismissing any of Zack Merritt’s claims that the Law Firm argues are subject to arbitration or any of Zach Merritt’s other claims. Therefore, the Law Firm has failed to satisfy its burden of demonstrating that Zack Merritt’s claims should be dismissed, and the Motion should be denied.

CONCLUSION

For the reasons set forth herein, the Law Firm's Motion should be denied, and the Law Firm should be directed to answer Zack Merritt's Amended Complaint.

Respectfully submitted,

Wyche, P.A.

s/ Matthew T. Richardson
Matthew Richardson (S.C. Bar 15647)
Eric B. Amstutz (S.C. Bar No. 0363)
William M. Wilson III (S.C. Bar No. 15808)
Mary Lucille ("Lucy") Dinkins (S.C. Bar 101177)
801 Gervais Street, Suite B
Columbia, South Carolina 29211
Telephone: 803-254-6542
Facsimile: 803-254-6544
Email: mrichardson@wyche.com
eamstutz@wyche.com
bwilson@wyche.com
ldinkins@wyche.com

January 8, 2019

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
Zachary M. Merritt, as personal representative of the Estate of James A. Merritt, Jr.	)	Civil Action No. 2018-CP-40-02730
Plaintiff,	)	
	)	DEFENDANT'S NOTICE OF MOTION AND
	)	MOTION FOR RECONSIDERATION OF
vs.	)	THE COURT'S DENIAL OF DEFENDANT'S
	)	MOTION TO DISMISS, OR IN THE
Merritt, Webb, Wilson & Caruso, PLLC	)	ALTERNATIVE, TO STAY, AND COMPEL
Defendant.	)	ARBITRATION

TO: COUNSEL FOR PLAINTIFF, ZACHARY M. MERRITT, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JAMES A. MERRITT, JR.

YOU WILL PLEASE TAKE NOTICE that the Defendant, Merritt, Webb, Wilson & Caruso, PLLC, by and through their undersigned counsel, hereby move the Court, pursuant to Rules 52(b) and 59(e), SCRCP, for an order reconsidering or altering and amending the Court's Order, dated January 24, 2019, and received by counsel for the Defendant on January 25, 2019.

This Motion to Reconsider is based upon the pleadings filed herein, the arguments of counsel, the evidence presented in conjunction with the Court's hearing on the Defendant's motion, and the following:

1. Respectfully, the Court erred in denying the Defendant's October 18, 2018, Motion to Dismiss, or in the Alternative, to Stay and Compel Arbitration ("Defendant's Motion"). The Court did not construe together all of the written instruments evidencing the parties' agreement. *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 594 S.E.2d 485 (Ct. App. 2004).¹

¹ The June 11, 2002, operating agreement of Defendant ("operating agreement"), a true copy of which is hereby appended and incorporated by reference as *Exhibit A*, was amended on August 31, 2006, pursuant to the "Members' Agreement for the Election and Admission of New Members to

2. Contrary to the Court's Order, because the subsequent 2006 amendment to the operating agreement did not modify or even address the original arbitration agreement, the arbitration provision in the unamended operating agreement remains in effect. *Plaza Dev. Servs. v. Joe Harden Builder, Inc.*, 294 S.C. 430, 434, 365 S.E.2d 231, 233 (Ct. App. 1988).

3. The Court also erred when it concluded Section IV.E of the 2006 amendment is applicable in this case. The plain language of that Section applies only when a member "decides" to leave the firm. Jim Merritt's departure was no such election.

4. The Court incorrectly concluded that the Plaintiff's claims are not arbitrable. The arbitration agreement in this case, by incorporating the American Arbitration Association rules for arbitration, delegated questions of arbitrability to the arbitrator for decision. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. ___, 139 S. Ct. 524, 530 (January 8, 2019). Under North Carolina law, which governs the operating agreement, such an inclusion is "clear and unmistakable" evidence of the parties' intent to submit questions of arbitrability to an arbitrator. *Bailey v. Ford Motor Co.*, 244 N.C. App. 346, 355, 780 S.E.2d 920, 927 (2015).

5. Even if the parties had not clearly and unmistakably elected an arbitrator to decide the question of arbitrability, the plain language of the broad arbitration clause in the operating agreement compels arbitration. Furthermore, the Court failed to construe any doubts regarding the

Browne, Flebotte, Wilson & Webb, PLLC¹ and Amendment of the Firm's Operating Agreement" ("2006 amendment"). A true copy of this document is appended as *Exhibit B* and incorporated by reference. Concurrently executed were the "Admission Agreement of Browne, Flebotte, Wilson & Webb, PLLC, with James A. Merritt, Jr., and Heather B. Caruso as New Members of the Firm," a true copy of which is appended as *Exhibit C* and incorporated by reference; and, the "Minutes of Action Taken by Unanimous Written Consent of the Members of Browne, Flebotte, Wilson & Webb, PLLC" a true copy of which is appended as *Exhibit D* and incorporated by reference.

applicability of arbitration, in favor of arbitration. *Zabinski v. Bright Acres Associates*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001).

6. The Court also errantly created a “statutory claims” exception to arbitration where none exists. This finding is in contravention of well-established public policy concerns.

7. For the reasons stated below, Defendant is entitled to a dismissal of this suit, or in the alternative, a stay and the compelling to arbitration of all of the Plaintiff’s claims.

ANALYSIS

8. The Federal Arbitration Act (“FAA”) at 9 U.S.C. § 2 provides that,

A written provision in any maritime transaction or 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, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9. The North Carolina Revised Uniform Arbitration Act at N.C.G.S. Ann. § 1-569.6 provides that,

An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for revoking a contract.

10. The South Carolina Arbitration Act at SC Code Ann. § 15-48-10(a) provides that,

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.

11. Whether assessed under the Federal Arbitration Act or the North or South Carolina State parallels, the arbitration agreement between the parties to this case is valid and enforceable.

12. “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).

13. “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.C. 1920 (1990)).

A. Under South Carolina or North Carolina state contract law, the terms found at Section IV.E of the 2006 amendment do not override the arbitration provision in the unamended operating agreement.

14. When, as in this case, “the existence of a membership agreement is not in question, the construction of the agreement is a matter of law.” *McMillan v. Gold Kist, Inc.*, 353 S.C. 353, 358, 577 S.E.2d 482, 484 (Ct. App. 2003). All of Plaintiff’s claims in this case are subject to arbitration, whether based upon ordinary principles of North Carolina or South Carolina law.

15. In this case, on August 31, 2006, when he became Managing member of Defendant, Jim Merritt agreed to bind himself to the terms of the operating agreement, as amended by the 2006 amendment. Paragraph 1 of the signed “Admission Agreement of Browne, Flebotte, Wilson & Webb, PLLC with James A. Merritt, Jr., and Heather B. Caruso as New Members of the Firm” [Exhibit C] recites that Jim Merritt “acknowledge[s] receipt of a copy of the Operating Agreement as currently amended . . .”

16. In executing the documents appended to this motion for reconsideration, the members of the Defendant law firm made the original operating agreement wholly applicable – except to those narrow portions of the contract specifically superseded by the 2006 amendment. Exhibit B, Section II. By the plain language of the 2006 amendment, only “conflicting terms” are replaced; otherwise, the entirety of the original operating agreement remains applicable. *Id.* Only

by carefully examining all of the written instruments memorializing the agreement as a whole can this Court give full effect to its terms.

17. Under either North Carolina or South Carolina law, this Court must consider Section IV.E of the 2006 amendment, not in isolation, but in conjunction with the other written instruments in this case – principally, the original operating agreement.

18. In *Plaza Dev. Servs. v. Joe Harden Builder, Inc.*, 294 S.C. 430, 434, 365 S.E.2d 231, 233 (Ct. App. 1988), like the situation before this Court, the South Carolina Court of Appeals examined the impact of an amendment to two parties' original agreement calling for arbitration. In that case, the Court of Appeals affirmed a trial court's grant of a motion to compel arbitration filed by Joe Harden Builder, Inc. (referred to by the Court of Appeals as "JHB"), over the objection of appellant Plaza, a real estate developer.

19. As procedural background, after a dispute arose between JHB and Plaza, 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 431-432, 365 S.E. at 232. (Ct. App. 1998). "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 Dev. Servs., 294 S.C. at 433, 365 S.E. at 232-233

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20. Subsequently, a subcontractor of JHB, Baker Masonry, Inc., initiated an arbitration proceeding against JHB. JHB demanded arbitration against Plaza and asked the arbitration panel to consolidate the cases. *Id.* 294 S.C. at 431-432, 365 S.E. at 232. (Ct. App. 1998). 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. Plaza subsequently appealed the denial. *Id.*

21. At issue before the Court of Appeals was whether, as Plaza asserted, the settlement agreement entered into between JHB and Plaza (an agreement that omitted any mention of arbitration) made inapplicable the original agreement to arbitrate between JHB and Plaza. The Court of Appeals held that,

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.

Id. 294 S.C. at 433-34, 365 S.E.2d at 233 (Ct. App. 1988) (citing to *Bishop Realty and Rentals v. Perk, Inc.*, 292 S.C. 182, 355 S.E.2d 298 (Ct.App.1987).

22. With this precedent in mind, the court proceeded to “constru[e] the two instruments together.” *Id.* The court found that the language of the settlement agreement, while perhaps modifying some parts of the original contract, left “the [original] contract intact” and was “silent as to arbitration.” *Id.* Therefore, the Court of Appeals 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.*

23. The Court correctly concluded that Section IV.E “omits any requirement that . . . valuations and rights be determined in arbitration.” The Court’s ultimate holding though, that arbitration is no longer applicable in this case, is contrary to the Court of Appeals’ ruling in *Plaza*.

24. Likewise, in *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 594 S.E.2d 485 (Ct. App. 2004), the South Carolina Court of Appeals confirmed and expounded upon its prior ruling in *Plaza*. In *Ellie*, the Court of Appeals held that a trial court correctly analyzed documents memorializing “one transaction with a series of amendments” by “constru[ing] all the various writings of the parties as one contract.” *Ellie*, 358 S.C. at 94, 594 S.E.2d at 494 (Ct. App. 2004).

25. In reaching this conclusion, the Court stated the following,

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 *Kluttz 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 (1991).

Ellie, 358 S.C. at 92–93, 594 S.E.2d at 492–93 (Ct. App. 2004) (emphasis added).

26. North Carolina law is in accord with these tenets of South Carolina law. *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 to *In re Foreclosure of 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, 640,

170 S.E.2d 477, 482 (1969) (citing *Combs v. Combs*, 273 N.C. 462, 160 S.E.2d 308 (1968)); *Smith v. Smith*, 249 N.C. 669, 107 S.E.2d 530 (1959)) (“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.”)

27. In addition to being contrary to North Carolina and South Carolina law, the logical foundation of the Court’s Order is that “omission equals replacement.” Extending this reasoning is not only in contravention of the aforementioned North Carolina and South Carolina law, it leads to absurd results. Under a similar analysis, since Section IV of the 2006 amendment is styled “General Provisions and Amendments,” any aspects of the original operating agreement that govern “general provisions” are no longer applicable.

28. If Section IV.E of the 2006 amendment were to amend by way of replacement any terms of the original operating agreement, Section 8.2 of the operating agreement would be the place. Section 8.2 of the operating agreement states,

Upon any termination of employment, bankruptcy, insolvency, dissolution, general assignment for the benefit of creditors, legal incapacity, or upon the Member’s becoming a disqualified person as that term is defined under N.C. Gen. Stat § 55B-2, or upon notice with at least 30 days notice in writing to the other member’s of a partner’s intent to withdraw his membership or participation in the limited liability company for retirement or any other reasons not based on termination for fault, the Member or his successor shall be required to withdraw from the Company (if applicable) and to transfer such interest, pursuant to the terms described in this Paragraph. The Purchase Price for the Company’s purchase of a Member’s Interest shall be determined pursuant to the valuation methods described further in this agreement.

29. Schedule II, appended to the operating agreement, further sets out the method for determining valuation, to wit,

Price. Upon the occurrence of an event giving rise to a purchase of the Membership Interests by the Company pursuant to Section 8.2 of the Operating Agreement, the purchase price for Membership Interests shall be as follows:

The price of the Membership Interests shall be equal to the book value of such Membership Interests, as determined by an independent appraisal by an appraiser engaged by the Company having at least ten (10) years of experience in valuing legal practices, valued as of the date that a Member's employment is terminated for any reason pursuant to Section 8.2 of the Operating Agreement, in accordance with generally accepted accounting principles with the following adjustments . . .

30. Conversely, Section 1.7 of the operating agreement states as follows,

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.**

(emphasis added)

31. Furthermore, the Court incorrectly analyzed the broad nature of Section 1.7's arbitration clause. The arbitration agreement is not limited to the "determination and payment of a partnership buyout and related valuations." Rather, it is global in scope. The plain language of the provision provides for the resolution of dispute over "**any** property owned by the Company" and provides for the resolution of "**all matters**" by arbitration.

32. In *Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 8, 791 S.E.2d 128, 132 (2016), the South Carolina Supreme Court overruled a Court of

Appeals affirmance of a trial court's finding. In that case, the trial court and Court of Appeals concluded that because an arbitration clause was located within a warranty provision, the scope of the arbitration agreement was limited to claims covered by the warranty. The Supreme Court found that such a reading was unsupported by the plain language of the arbitration clause itself – the “plain and unambiguous language of the arbitration clause provide[d] that all claims . . . be subject to arbitration” and thus arbitration in that case was appropriate. *Id.*

33. On that note though, the location of the arbitration agreement within the text of the operating agreement in this case also exemplifies the intent of the parties to the agreement. The arbitration agreement comes near the beginning of the operating agreement. Other nearby sections discuss similarly all-encompassing functions: the purposes and powers of the Defendant firm (Section 1.5); the term of the of the firm (Section 1.6); and the classification of the firm for tax purposes (Section 1.8). Section 1.7 is far removed in the operating agreement from the provisions discussing valuation. Reading the arbitration agreement in context supports an interpretation of its overarching and general applicability.

34. While Section 1.7 is styled as “Nature of Members’ Interests,” Section 10.8 of the operating agreement states that “[t]he Article and Section headings or titles shall not define, limit, extend or interpret the scope of this Agreement or any particular Article or Section” and thus the title “Nature of Members’ Interests” captioning Section 1.7 does not offer any interpretative relevance.

35. Had the members of Defendant, all sophisticated attorneys, concluded that they wanted to rid themselves of the arbitration provision in their operating agreement, they could have said so. They did not. The Court mistakenly concluded Section IV.E of the 2006 amendment

supersedes the arbitration agreement in this case. Section 1.7 of the operating agreement remains in effect and compels arbitration of all of Plaintiff's claims.

B. Section IV.E is not applicable in the event of an involuntary departure of a member of the Defendant law firm.

36. The Court's conclusion on Section IV.E's applicability to Jim Merritt's departure from the Defendant firm is in error at an even more base level. Section IV.E of the 2006 amendment begins with the following clause,

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.

(emphasis added)

37. Jim Merritt's death was not a voluntary "deci[sion] to leave or dissociate" himself from the firm. It was, in fact, an unfortunate, untimely, and regrettable loss to his family, friends, law firm, and the Bar and community as a whole.

38. "If its language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect." *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 46, 747 S.E.2d 178, 184 (2013) (citing to *Ellie*, 358 S.C. at 93, 594 S.E.2d at 493 (Ct. App. 2004)). *See also*, *Superior Auto. Ins. Co. v. Maners*, 261 S.C. 257, 263, 199 S.E.2d 719, 722 (1973) (holding that to discover the intention of a contract, the court must first look to its language—if the language is perfectly plain and capable of legal construction, it alone determines the documents force and effect). *See also*, *Self-Help Ventures Fund v. Custom Finish, LLC*, 199 N.C. App. 743, 747, 682 S.E.2d 746, 749 (2009), *appeal dismissed*, 363 N.C. 856, 694 S.E.2d 392 (2010) ("When the language of a contract is clear and unambiguous, construction of the contract is a matter for the

court.”) (quotation omitted).

39. Reading all of the written instruments in this case provides additional support for a narrow reading of Section IV.E as only applicable to voluntary departures from the firm. The “Transfers of Interest” section of the operating agreement at Section 8.2 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 Defendant, all lawyers, agreed to the narrowly tailored provisions of Section IV.E. Under traditional and binding tenets of contract interpretation, this Court is obliged to respect the plain language of their agreement.

40. Given the involuntary nature of Jim Merritt’s departure from the firm, i.e. his tragic death, the Court wrongly concluded Section IV.E of the 2006 amendment applies to the facts of this case.

C. Under North Carolina law, Jim Merritt “clearly and unmistakably” agreed to have an arbitrator decide all questions of arbitrability.

41. The Court, in reaching its decision in this case, also failed to take into account that the parties agreed to have questions of arbitrability decided by an arbitrator.

42. “The question whether the parties have submitted a particular dispute to arbitration, i.e. the *question of arbitrability*, is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise.” *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S.Ct. 588 (2002) (emphasis in original) (internal quotations and citations omitted).

43. Section 10.8 of the operating agreement memorializes the parties’ intent to be bound by North Carolina law. North Carolina recognizes the “majority rule” amongst federal circuits 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).

44. Under North Carolina law, "the parties' adoption of an arbitral body's rules [is also] clear and unmistakable evidence that the parties intended for an arbitrator to decide a question of *procedural* arbitrability." *Bailey v. Ford Motor Co.*, 244 N.C. App. at 355, 780 S.E.2d at 927 (2015).

45. In this case, the members of Defendant expressly incorporated into their arbitration agreement at Section 1.7 the American Arbitration Association ("AAA") Rules. 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). *See also, Schein*, 139 S. Ct. at 528 (January 8, 2019) ("The rules of the American Arbitration Association provide that arbitrators have the power to resolve arbitrability questions"); *Epic Games, Inc. v. Murphy-Johnson*, 247 N.C. App. 54, 63–64, 785 S.E.2d 137, 144 (2016) (holding that incorporation of AAA rules in an arbitration agreement demonstrates that the parties agreed the arbitrator should decide issues of substantive arbitrability).

46. Under North Carolina law, the inclusion of the AAA Rules in the parties' arbitration agreement in this case presents "clear and unmistakable" evidence that Plaintiff is bound to pursue any questions regarding the arbitrability of his present claims, including the scope of disputes that may be arbitrated, before an arbitrator – *not* this Court.

47. In addition to misapplying North Carolina law, the Court's Order is in contravention to a very recently decided and binding unanimous United States Supreme Court decision. 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. v. Archer & White Sales, Inc.*, 586 U.S. ___, 139 S. Ct. 524, 530 (January 8, 2019). "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.*" *Id.* 139 S. Ct. at 529 (January 8, 2019) (emphasis added).

48. Even if the parties' language were not so clear, with respect to the question of arbitrability, like South Carolina and the federal government, "[North Carolina's] strong public policy requires that the courts resolve any doubts concerning the scope of arbitrable issues in favor of arbitration." *Johnston Cty. v. R.N. Rouse & Co.*, 331 N.C. 88, 91, 414 S.E.2d 30, 32 (1992); *See also, Cyclone Roofing Co. v. LaFave Co.*, 312 N.C. 224, 229, 321 S.E.2d 872, 876 (1984) ("[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.") (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25, 103 S.Ct. 927 (1983)).

D. The language of the arbitration agreement and the facts of this case further support the arbitrability of Plaintiff's claims.

49. In reaching its decision, the Court failed to follow the great weight of authority compelling arbitration in a case such as this. Under South Carolina law,

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 v. Bright Acres Associates, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001) (citations omitted).

50. Like North Carolina courts, South Carolina courts have also concluded that “[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 to *Towles v. United Healthcare Corp.*, 338 S.C. 29, 524 S.E.2d 839 (Ct.App.1999) (emphasis added). This “heavy presumption of arbitrability” is “strengthened when an arbitration clause is broadly written.” *Landers v. Fed Deposit Ins. Corp.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013) (citing *AT & T Tech., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650, 106 S.Ct. 1415 (1986)).

51. In reaching its ruling, the Court did not give appropriate consideration to the language of Section 1.7 of the operating agreement containing broadly-scoped arbitration language:

a. “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 . . .” (emphasis added)

b. Section 1.7 further states that “[i]t 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.*” (emphasis added)

52. Even under a narrow and restricted reading of Section 1.7, Plaintiff's claims are subject to arbitration. All of the causes of action relate to the determination of rights or turnover of funds or property the Defendant claims as its own – whether strictly monetary, or, in the case of the Plaintiff's Fourth Cause of Action, “personal” property. As the Amended Complaint confesses, Defendant maintains possession of all of the property claimed by Defendant and rightly asserts it has legal right and title to it under the agreement between the parties.

53. This Court need not limit itself to the plain language of the agreement though. When a broadly worded arbitration agreement exists, a court must also consider whether a “‘significant relationship’ exists between the asserted claims and the contract in which the arbitration clause is contained.” *Zabinski v. Bright Acres Assocs.*, 346 S.C. at 598, 553 S.E.2d at 119 (2001) (citing to *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, 739 S.E.2d 209 at 214 (2013) (internal citations and quotations omitted). “Regardless of the label the plaintiff uses, when deciding 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). 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.

54. Plaintiff’s assertions wrongly discount the fact that under North Carolina law, “default” provisions of law governing professional limited liability companies can be modified by way of an operating agreement between the members of a PLLC. *See, e.g.*, North Carolina Limited

Liability Company Act, N.C.G.S. §57D-2-30(a) (“subject to [certain] limitations, the provisions of this Chapter and common law will apply only to the extent contrary or inconsistent provisions are not made in, or are not otherwise supplanted, varied, disclaimed, or nullified by, the operating agreement [of a PLLC]. The provisions of the operating agreement are severable and each will apply to the extent it is valid and enforceable.”) It was not some unidentified statute that established Jim Merritt as a member of the Defendant, it was the operating agreement as amended. Without it, he would have no interest in the firm, much less a discrete 25% interest as ¶10 of the Amended Complaint alleges.

55. Furthermore, the Plaintiff in his Memo in Opposition and the Court in its Order fail to cite to any authority that provides for a “statutory cause of action exception” to the great weight of public policy compelling arbitration in even questionable circumstances. What is demanded of this Court before it can avoid the arbitration clause in this case, is positive assurance that the arbitration clause is not susceptible to any interpretation that the Plaintiff’s claims are covered by it. If not, then the Plaintiff must direct his claims to arbitration. *Tritech.*, 343 S.C. at 399, 540 S.E.2d at 865 (Ct. App. 2000); *Johnston Cty.*, 331 N.C. at 91, 414 S.E.2d at 32 (1992). “[W]hen the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration.” *Parsons*, 418 S.C. at 7, 791 S.E.2d at 131 (2016).

56. The Court, in its Order, placed the arbitration agreement in this case on unequal footing to other contracts when applying the Plaintiff’s unsupportable “statutory claims exception” to arbitration. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443, 126 S.Ct. 1204, (2006) (concluding that courts must ensure arbitration agreements are interpreted “on equal footing with all other contracts.”)

57. The Court's Order allowing the Estate of Jim Merritt to bypass the agreement containing an arbitration clause that Jim Merritt willingly acceded to (and benefited from for many years) goes against the overwhelming weight of authority.

E. Dismissal is the appropriate remedy in this case.

58. The Supreme Court of North Carolina has held that North Carolina courts must apply the Federal Arbitration Act, 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." *Burke Cty. Pub. Sch. Bd. of Ed. v. Shaver P'ship*, 303 N.C. 408, 422, 279 S.E.2d 816, 825 (1981). *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.")²

59. Section 10.8 of the operating agreement memorializes the parties' intent to be bound by North Carolina law. N.C.G.S. § 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." N.C.G.S. §1-569.7 should not be read to limit dismissal of a case in a proper circumstance, such as here, *when all of the Plaintiff's claims are subject to arbitration*.

60. Practically, 9 U.S.C. §3 of the Federal Arbitration Act ("FAA") is substantially identical to N.C.G.S. § 1-569.7. 9 U.S.C. §3 of the FAA provides that,

² *See also, DIRECTV, Inc.*, 136 S.Ct. 463, 468, 193 L.Ed.2d 365 (2015) ("No one denies that lower courts must follow this Court's holding in [*AT & T Mobility LLC v. Concepcion*] [563 U.S. 333, 131 S.Ct. 1740 (2011)] . . . Lower court judges are certainly free to note their disagreement with a decision of this Court... But the Supremacy Clause forbids state courts to dissociate themselves from federal law . . . The [FAA] is a law of the United States, and *Concepcion* is an authoritative interpretation of that Act. Consequently, the judges of every State must follow it.")

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.

61. Case law interpreting this statute provides, if not controlling, than highly important interpretative guidance in this case – a matter directly implicating interstate commerce.³ 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.*, DKC-15-0442, 2015 WL 5178018, at *7 (D. Md. Sept 3, 2015).⁴

³ Plaintiff’s and Defendant’s pleadings in this case demonstrate Defendant’s operations in both North and South Carolina, hence, this case involves interstate commerce. Pursuant to Section 2 of the FAA, a “written provision in any. . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2 (2013). Because “involving commerce” means the “functional equivalent of ‘affecting commerce,’” the FAA’s reach includes the “full breadth of the Commerce Clause.” *Zabinski*, 346 S.C. at 590–91, 553 S.E.2d at 115 (quoting *Allied–Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 274, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995)).

⁴ 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) (Judge Timothy M. Cain presiding); *Marchant v. Maxim Healthcare Servs., Inc.*, No. 2:18-CV-2757-RMG, 2018 WL 5793595, at *2 (D.S.C. Nov. 5, 2018) (Judge Richard M. Gergel presiding); *Smith v. Gen. Info. Sols., LLC*, No. CV 3:18-2354-MGL, 2018 WL 6528155 (D.S.C. Dec. 11, 2018) (Judge Mary Geiger Lewis presiding); *Ray v. Austin Indus., Inc.*, No. 3:18-CV-

62. In similar, and (given the locus of this litigation) if not controlling, then very persuasive holdings, the South Carolina Court of Appeals has held that when “every dispute [is] within the scope of at least one valid arbitration agreement” dismissal is an appropriate remedy. *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 96, 749 S.E.2d 139, 154 (Ct. App. 2013). *See also, Trittech Elec. V. Frank M. Hall & Co.*, 343 S.C. 396, 540 S.E.2d 864, (Ct. App. 2000) (holding it was reversible error for the trial court to refuse to dismiss the state contract action and compel arbitration when confronted with a valid arbitration clause).

63. 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).

64. Prudential aspects of maintaining any claim on this Court’s docket also weigh in support of dismissing all of the claims. Plaintiff is a resident of York County, South Carolina, and himself an active member of the bar. Defendant is a law firm based out of North Carolina. From a practical standpoint, if the parties are to arbitrate their dispute, maintaining this case on this court’s docket in *Richland County*, when all of the claims are subject to arbitration in accordance with North Carolina law, serves little purpose, and, may in fact only increase the expense and administrative burdens on the Court and the parties. In this case, such potential difficulties are neither necessary nor desired.

00392-JMC, 2018 WL 4701375 (D.S.C. Sept. 29, 2018) (Judge J. Michelle Childs presiding).

65. Finally, even if this Court were inclined to dismiss or stay only a segment of all of the claims, pursuit of other claims before this 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). Like here, staying all litigation in these situations, supports “considerations of judicial economy and avoidance of confusion and possible inconsistent results.” *Id.*

CONCLUSION

Wherefore, Defendant Merritt, Webb, Wilson & Caruso, requests that the Court reconsider, alter, or amend its prior Order and enter a new order providing for the following:

- A. Dismiss, with prejudice, Plaintiff’s Claims, or in the alternative, stay the action and strike it from the active roster;
- B. Order the parties to proceed with arbitration; and,
- C. Such other and further relief as the Court deems just and proper.

Respectfully submitted,

CALLISON TIGHE & ROBINSON, LLC

s/ Ian T. Duggan

Ian T. Duggan, SC Bar No. 80074
Callison Tighe & Robinson, LLC
1812 Lincoln St, Suite 200
PO Box 1390
Columbia, SC 29202-1390
Telephone No. (803)404-6900
Facsimile No. (803)404-6900
ianduggan@callisontighe.com

Columbia, South Carolina

February 1, 2019

EXHIBIT A

JUNE 11, 2002

Operating Agreement
Of
BROWNE, FLEBOTTE, WIL SON & HORN, PLLC
(A North Carolina Limited Liability Company)

Effective as of the date the
Company's Articles of Organization were
Filed with the Secretary of State

THE PLLC MEMBERSHIP INTERESTS REPRESENTED BY THIS OPERATING AGREEMENT HAVE NOT BEEN REGISTERED WITH THE SECURITIES AND EXCHANGE COMMISSION UNDER THE SECURITIES ACT OF 1933, AS AMENDED, OR UNDER THE NORTH CAROLINA SECURITIES ACT, OR SIMILAR LAWS OR ACTS OF OTHER STATES IN RELIANCE UPON EXEMPTIONS UNDER THOSE ACTS. THE SALE OR OTHER DISPOSITION OF THE MEMBERSHIP INTERESTS IS RESTRICTED AS STATED IN THIS OPERATING AGREEMENT, AND IN ANY EVENT IS PROHIBITED WITHOUT REGISTRATION UNDER THE SECURITIES ACT OF 1933, AS AMENDED, AND ANY APPLICABLE STATE SECURITIES ACTS AND LAWS OR PURSUANT TO AN EXEMPTION FROM SUCH REGISTRATION. BY ACQUIRING THE MEMBERSHIP INTERESTS REPRESENTED BY THIS OPERATING AGREEMENT, THE MEMBER REPRESENTS THAT IT WILL NOT SELL OR OTHERWISE DISPOSE OF ITS MEMBERSHIP INTERESTS WITHOUT REGISTRATION OR OTHER COMPLIANCE WITH THE AFORESAID ACTS AND THE RULES AND REGULATIONS ISSUED THEREUNDER.

OPERATING AGREEMENT
OF
BROWNE, FLEBOTTE, WILSON & HORN, PLLC

THIS OPERATING AGREEMENT OF BROWNE, FLEBOTTE, WILSON & HORN, PLLC (the "Company"), a professional limited liability company organized pursuant to the North Carolina Limited Liability Company Act, is effective as of the date the Company's Articles of Organization were filed with the Secretary of State, by and among the Company and the persons executing this Agreement as the Members and Managers.

ARTICLE I
FORMATION OF THE COMPANY

1.1 *Formation.* The Company was formed effective July 19, 2001 pursuant to the filing with the Secretary of State of the Articles of Organization of the Company. In consideration of the mutual premises and covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree that the rights and obligations of the parties and the administration and termination of the Company shall be governed by this Agreement, the Articles of Organization and the Act.

1.2 *Name.* The name of the Company is BROWNE, FLEBOTTE, WILSON & HORN, PLLC. The Managers may change the name of the Company from time to time as they deem advisable, provide appropriate amendments to the Agreement and the Articles of Organization and necessary filings under the Act are first obtained.

1.3 *Registered Office and Registered Agent.* The Company's registered office within the State of North Carolina and its registered agent at such address shall be as determined from time to time by the Managers.

1.4 *Principal Place of Business.* The principal place of business of the Company within the State of North Carolina shall be at such place or places as the Managers may from time to time deem necessary or advisable.

1.5 *Purposes and Powers*

(a) The purpose of the Company shall be to engage in the business of a professional practice of law and in any other lawful business for which professional limited liability companies may be organized under the Act.

(b) The Company shall have any and all powers which are necessary or desirable to carry out the purposes and business of the Company, to the extent the same may be legally exercised by professional limited liability companies under the Act.

1.6 *Term.* The Company shall continue in existence until it is dissolved and its affairs wound up in accordance with the provisions of this Agreement or the Act.

1.7 *Nature of Members' Interests.* 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 any right, title, or interest in or to any Company property or the right to partition any Property owned by the Company, other than the right to initiate an arbitration proceeding pursuant to the rules of the American Arbitration Association Rules for determination and payment of a partnership assets 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.

1.8 *Classification of the Company.* The Members hereby acknowledge that the Company will not make an election with the Internal Revenue Service to be treated as an association taxed as a corporation and thus will be taxed as a partnership for federal income tax purposes, and that no Member is authorized to make such election unless all of the Members agree to do so.

ARTICLE II DEFINITIONS

2.1 *Definitions.* The following terms used in this Agreement shall have the following meanings (unless otherwise expressly provided herein): any words used in this agreement not otherwise provided with a specific definition shall have the ordinary definition used in the particular discipline that it arises.

"*Act*" means the North Carolina Limited Liability Company Act, as amended from time to time

"*Adjusted Capital Account Deficit*" means, with respect to any Member, the deficit balance, if any, in such Member's Capital Account as of the end of the relevant fiscal year, after giving effect to the following adjustments:

- (i) Credit to such Capital Account any amounts to which such Member is obligated to restore or is deemed to be obligated to restore pursuant to the penultimate sentences of Treasury Regulations Sections 1.704-2(g)(1) and 1.704-2(i)(5); and
- (ii) Debit to such Capital Account the items described in Sections 1.704-1(b)(2)(ii)(d)(4), 1.704-1(b)(2)(ii)(d)(5), and 1.704-1(b)(2)(ii)(d)(6) of the Treasury Regulations

The foregoing definition of Adjusted Capital Account Deficit is intended to comply with the provisions of Section 1.704-(b)(2)(ii)(d) of the Treasury Regulations and shall be interpreted consistently therewith.

"Adjusted Capital Contributions" means, as of any day, a Member's Capital Contributions adjusted as follows:

(a) Increased by the amount of any Company liabilities which, in connection with Distributions, are assumed by such Member or are secured by any Property distributed to such Member; and

(b) Reduced by the amount of cash and the Gross Asset Value of any Property distributed to such Member and the amount of any liabilities of such Member assumed by the Company or which are secured by any Property contributed by such Member to the Company.

In the event any Member transfers all or any portion of his Membership Interest in accordance with the terms of this Agreement, the Member's transferee shall succeed to the Adjusted Capital Contribution of the transferor to the extent it relates to the transferred Membership Interest or portion thereof.

"*Agreement*" means this Operating Agreement, as it may be amended from time to time.

"*Articles of Organization*" means the Articles of Organization of the Company filed with the Secretary of State, as amended or restated from time to time.

"*Capital Account*" means, with respect to any Member, the capital account maintained for such Member in accordance with Section 5.5 of this Agreement.

"*Capital Contribution*" means all contributions of cash or property (valued for this purpose at initial Gross Asset Value) made by a Member or the Member's predecessor in interest.

"*Code*" means the Internal Revenue Code of 1986, as amended from time to time (and any corresponding provisions of succeeding law).

"*Company Minimum Gain*" means gain as defined in Treasury Regulations Section 1.704-2(d).

"*Depreciation*" means, for each Fiscal Year, an amount equal to the depreciation, amortization, or other cost recovery deduction allowable with respect to an asset for such Fiscal Year, except that if the Gross Asset Value of an asset differs from its adjusted basis for federal income tax purposes at the beginning of such Fiscal Year, Depreciation shall be an amount which bears the same ratio to such beginning Gross Asset Value as the federal income tax depreciation, amortization, or other cost recovery deduction for such Fiscal Year bears to such beginning adjusted tax basis; PROVIDED, HOWEVER, that if the adjusted basis for federal income tax purposes of an asset at the beginning of such Fiscal Year is zero, Depreciation shall be determined with reference to such beginning Gross Asset Value using any reasonable method selected by the Managers.

"*Disinterested Member*" means a Member who is not related (within the meaning of Section 267(b) of the Code or Section 707(b)(1) of the Code) to either the Member whose Membership is to be transferred as provided in Article VIII or the proposed transferee of such Membership Interest.

"*Distributable Cash*" means, with respect to the Company at any time, all funds of the Company on hand or in bank accounts of the Company as, in the discretion of the Managers, is then available for Distribution to the Members after provision has been made for (i) payment of all operating expenses of the Company as of such time; (ii) provision for payment of all outstanding and unpaid current obligations of the Company as of such time; and (iii) provision for such reserves as the Managers deem necessary or appropriate for Company operations as provided by Section 11.2

"*Distribution*" means any money or other property distributed to a Member with respect to the Member's Membership Interest, but shall not include any payment to a Member for materials or services rendered or funds loaned nor any reimbursement to a Member for expenses incurred by such Member in accordance with this Agreement.

"*Fiscal Year*" means an annual accounting period ending December 31 of each year during the term of the Company, unless otherwise specified by the Managers.

"*Gross Asset Value*" means, with respect to any asset, the asset's adjusted basis for federal income tax purposes except as follows:

- (i) The initial Gross Asset Value of any asset contributed by a Member to the Company shall be the gross fair market value of such asset, as determined by the contributing Member and the Managers;
- (ii) The Gross Asset Values of all assets of the Company shall be adjusted to equal their respective gross fair market values, as determined by the Managers, as of the following times: (a) the acquisition of an additional interest in the Company (other than upon the initial formation of the Company) by any new or existing Member in exchange for more than a *de minimis* Capital Contribution; (b) the distribution by the Company to a Member of more than a *de minimis* amount of Company Property as consideration for an interest in the Company; and (c) the liquidation of the Company within the meaning of Treasury Regulations Section 1.704-1(b)(2)(ii)(g); PROVIDED, HOWEVER, that the adjustments pursuant to clauses (a) and (b) above shall be made only if the Managers reasonably determine that such adjustments are necessary or appropriate to reflect the relative economic interests of the Members in the Company;
- (iii) The Gross Asset Value of any asset of the Company distributed to any Member shall be adjusted to equal the gross fair market value of such asset on the date of distribution as determined by the distributee and the Managers; and
- (iv) The Gross Asset Values of Company assets shall be increased (or decreased) to reflect any adjustments to the adjusted basis of such assets pursuant to Code Section 734(b) or Code Section 743(b), but only to the extent that such adjustments are taken into account in determining Capital Accounts pursuant to Treasury Regulations Section 1.704(b)(2)(iv)(m) and clause (vi) to the extent the Managers determine that an adjustment pursuant to clause (ii) hereof is necessary

or appropriate in connection with a transaction that would otherwise result in an adjustment pursuant to this clause (iv).

If the Gross Asset Value of an asset has been determined or adjusted pursuant to clause (i), clause (ii) or clause (iv) hereof, such Gross Asset Value shall thereafter be adjusted by the Depreciation taken into account with respect to such asset for purposes of computing Profits or Losses.

"*Majority in Interest*" means a combination of any Members who, in the aggregate, own more than fifty percent (50%) of the Membership Interests of all Members

"*Manager*" means each Member of the Company in its capacity as a manager of the Company. "Managers" refers to such Persons as a group.

"*Member*" means each Person designated as a member of the Company on Schedule I hereto or any other Person admitted as a member of the Company in accordance with this Agreement or the Act. "Members" refers to such Persons as a group.

"*Member Minimum Gain*" means an amount, with respect to each Member Nonrecourse Debt, equal to the Company Minimum Gain that would result if such Member Nonrecourse Debt were treated as a Nonrecourse Liability, determined in accordance with Treasury Regulations Section 1.704-2(i)

"*Member Nonrecourse Debt*" means any nonrecourse debt (for the purposes of Treasury Regulations Section 1.1001-2) of the Company for which any Member bears the "economic risk of loss", within the meaning of Treasury Regulations Section 1.752-2.

"*Member Nonrecourse Debt*" means any nonrecourse debt (for the purposes of Treasury Regulations Section 1.1001-2) of the Company for which any Member bears the "economic risk of loss", within the meaning of Treasury Regulations Section 1.752-2.

"*Member Nonrecourse Deductions*" means deductions as described in Treasury Regulations Section 1.704-2(i). The amount of Member Nonrecourse Deductions with respect to Member Nonrecourse Debt for any Fiscal Year equals the excess, if any, of (A) the net increase, if any, in the amount of Member Minimum Gain attributable to such Member Nonrecourse Debt during such Fiscal Year, over (B) the aggregate amount of any Distributions during that Fiscal Year to the Member that bears the economic risk of loss for such Member Nonrecourse Debt to the extent such Distributions are from the proceeds of such Member Nonrecourse Debt and are allocable to an increase in Member Minimum Gain attributable to such Member Nonrecourse Debt, determined in accordance with Treasury Regulations Section 1.704-2(i).

"*Membership Interest*" means of a Member's rights in the Company, including without limitation, the Member's share of the Profits and Losses, the right to receive distributions of the Company's assets, any right to vote, and any right to participate in the management of the Company as provided in the Act and this Agreement. The Membership Interest of each Member is set forth on Schedule I hereto.

"*Nonrecourse Deductions*" means deductions as set forth in Treasury Regulations Section 1.704-2(b)(1). The amount of Nonrecourse Deductions for a given Fiscal Year equals the excess, if any, of (A) the net increase, if any, in the amount of Company Minimum Gain during such Fiscal Year, over (B) the aggregate amount of any Distributions during such Fiscal Year of proceeds of a Nonrecourse Liability that are allocable to an increase in Company Minimum Gain, determined according to the provisions of Treasury Regulations Section 1.704-2(h).

"*Nonrecourse Liability*" means any Company liability (or portion thereof) for which no Member bears the "economic risk of loss", within the meaning of Treasury Regulations Section 1.752-2.

"*Percentage Interest*" means the percentage which the Capital Contributions of a Member to the Company bears to the Capital Contributions of all Members. The initial Capital Contribution of each Member is set forth opposite such Member's name on Schedule I hereto.

"*Person*" means an individual, a trust, an estate, a domestic corporation, a foreign corporation, a professional corporation, a partnership, a limited partnership, a limited liability company, a foreign limited liability company, an unincorporated association, or another entity.

"*Profits*" and "*Losses*" mean, for each Fiscal Year, an amount equal to the Company's taxable income or loss or such year or period, determined in accordance with Code Section 703(a) (for this purpose, all items of income, gain, loss, or deduction required to be stated separately pursuant to Code Section 703(a)(1) shall be included in taxable income or loss), with the following adjustments:

- (i) Any income of the Company that is exempt from federal income tax and not otherwise taken into account in computing Profits or Losses pursuant to this definition shall be added to such taxable income or loss;
- (ii) Any expenditures of the Company described in Code Section 705(a)(2)(B) or treated as Code Section 705(a)(2)(B) expenditures pursuant to Treasury Regulations Section 1.704(b)(2)(iv)(i), and not otherwise taken into account in computing Profits or Losses pursuant to this definition shall be subtracted from such taxable income or loss;
- (iii) In the event the Gross Asset Value of any Company asset is adjusted pursuant to clause (ii) or clause (iii) of the definition of "Gross Asset Value", the amount of such adjustment shall be taken into account as gain or loss from the disposition of such asset for purposes of computing Profits or Losses;
- (iv) Gain or loss resulting from any disposition of Company Property with respect to which gain or loss is recognized for federal income tax purposes shall be computed by reference to the Gross Asset Value of the property disposed of, notwithstanding that the adjusted tax basis of such property differs from its Gross Asset Value;

- (v) In lieu of the depreciation, amortization, and other cost recovery deductions taken into account in computing such taxable income or loss, there shall be taken into account Depreciation for such fiscal year or other period, computed in accordance with the definition of Depreciation set out hereof;
- (vi) To the extent an adjustment to the adjusted tax basis of any Company asset pursuant to Code Section 734(b) or Code Section 743(b) is required pursuant to Treasury Regulations Section 1.704-1(b)(2)(iv)(m)(4) to be taken into account in determining Capital Accounts as a result of a distribution other than in liquidation of a Member's interest in the Company, the amount of such adjustment shall be treated as an item of gain (if the adjustment increases the basis of the asset) or loss (if the adjustment decreases the basis of the asset) from the disposition of the asset and shall be taken into account for purposes of computing Profits or Losses;
- (vii) Notwithstanding any other provision of this definition, any items which are specially allocated pursuant to Sections 6.2, 6.3, 6.6, 6.7, 6.8, 6.9, 6.10, or 6.11 hereof shall be determined by applying the rules analogous to those set forth in Sections (i) through (vi) above.

"*Property*" means (i) any and all property acquired by the Company, real and/or personal (including, without limitation, intangible property) and (ii) any and all of the improvements constructed on any real property.

"*Secretary of State*" means the Secretary of State of North Carolina.

"*Tax Matters Member*" means the Member designed by the Managers as the "tax matters partner", as that term is defined in the Code.

"*Transfer*" means sell, assign, transfer, lease, or otherwise dispose of property, including without limitation an interest in the Company

"*Treasury Regulations*" means the Income Tax Regulations and Temporary Regulations promulgated under the Code, as such regulations may be amended from time to time (including corresponding provisions of succeeding regulations).

ARTICLE III MANAGEMENT OF THE COMPANY

3.1 *Management by Members.* Each Member of the Company, by virtue of its status as a Member, shall also be a Manager of the Company for all purposes. Except as otherwise expressly provided in this Agreement, the Articles of Organization or the Act, all decisions with respect to the management of the business and affairs of the Company shall be made by action of a Majority in Interest of the Members taken at a meeting or evidenced by a written consent executed by a Majority in Interest of the Members. Meetings of the Members may be held on such terms and after such notice as the Members may establish. The Members, acting in their

capacity as Managers, shall have full and complete authority, power and discretion to manage and control the business of the Company, to make all decisions regarding those matters and to perform any and all other acts customary or incident to the management of the Company's business. The Members, acting in their capacity as Managers, may delegate responsibility for all or any part of the day-to-day management of the Company to any Person retained by the Managers who shall have and exercise on behalf of the Company all powers and rights necessary or convenient to carry out the management responsibilities so delegated.

3.2 *Compensation and Expenses.* The Members shall not receive any compensation from the Company for serving as Managers, but the Company will reimburse the Members for expenses incurred by the Members in connection with their service to the Company as Managers. Nothing contained in this Section 3.2 is intended to affect the Percentage Interests of the Members or the amounts that may be payable to the Members by reason of their respective Percentage Interest.

3.3 *Indemnification of Members for Management Services.* The Company shall indemnify the Managers to the fullest extent permitted or required by the Act, as amended from time to time, and the Company may advance expenses incurred by the Manager, provided the Manager shall reimburse the Company for such advance in the event it is ultimately determined that the Manager is not entitled to be indemnified by the Company against such expenses. The provisions of this Section 3.4 shall apply also to any Person to whom the Managers have delegated management authority as provided in Section 3.1, whether or not such Person is a Member.

3.4 *Limitation Liability* No Member of the Company shall be liable to the Company for monetary damages for an act or omission in such Person's capacity as Manager, except as provided in the Act for (i) acts or omissions which the Member knew at the time of the acts or omissions were clearly in conflict with the interests of the Company; (ii) any transaction from which the Manager derived an improper personal benefit; or (iii) acts or omissions occurring prior to the date this provision becomes effective. If the Act is amended to authorize further elimination or limited to the fullest extent permitted by the Act as so amended. Any repeal or modification of this Section shall not adversely affect the right or protection of the Managers existing at the time of such repeal or modification. The provisions of this Section 3.5 shall apply also to any Person to whom the Managers have delegated management authority as provided in Section 3.1, whether or not such Person is a Member.

3.5 *Liability for Return of Capital Contribution.* The Members shall not be liable for the return of the Capital Contributions of the Members, and upon dissolution, the Members shall look solely to the assets of the Company.

ARTICLE IV RIGHTS AND OBLIGATIONS OF MEMBERS

4.1 *Names and Addresses of Members.* The names, addresses and Membership Interests of the Members are as reflected in Schedule I attached hereto and made a part hereof, which

Schedule the Company shall amend as necessary to maintain the accuracy of all information disclosed therein.

4.2 *Action by Members.* Any action to be taken by the Members under the Act or this Agreement may be taken (i) at a meeting of Members held on such terms, and after such notice as the Managers may establish; PROVIDED, HOWEVER, that notice of a meeting of Members must be given to all Members entitled to vote at a meeting at least five (5) days before the date of the meeting; or (ii) by written action of a Majority of Interest of the Members; PROVIDED, HOWEVER, that any action requiring the consent of all Members under this Agreement, the Act, or other applicable law taken by written action must be signed by all Members. No notice need be given of action proposed to be taken by written action or an approval given by written action, unless specifically required by this Agreement, the Act, or other applicable law. Such written actions must be kept with the records of the Company.

4.3 *Limited Liability.* The Members shall not be required to make any contribution to the capital of the Company except as set forth in Article V, nor shall the Members in their capacity as such be bound by, or personally liable for, any expense, liability, or obligation of the Company except to the extent of their interests in the Company and the obligation to return Distributions made to them under certain circumstances as required by the Act. The Members shall be under no obligation to restore a deficit capital account upon the dissolution of the Company or the liquidation of any of their Membership Interests.

4.4 *Bankruptcy or Incapacity of a Member.* A Member shall cease to have any power as a Member or a Manager, any voting rights or rights or approval hereunder upon death, bankruptcy, insolvency, dissolution, general assignment for the benefit of creditors, legal incapacity, or the Member's becoming a disqualified person as that term is defined under N.C. Gen.Stat § 55B-2. In no event shall a personal representative or successor become a substitute Member.

4.5 *Withdrawal.* A Member may withdraw from the Company as described in Section 8.2 below. Within a reasonable time after withdrawing from the Company, a withdrawing Member shall be entitled to receive a distribution from the Company equal to the positive balance, if any, in such Member's Capital Account immediately before the Member's withdrawal, after giving effect to all allocations under Article VI and all distributions under Article VII for all prior periods.

ARTICLE I CAPITAL CONTRIBUTIONS AND LOANS

5.1 *Initial Capital Contributions.* Members have contributed to the Company the cash or property set forth as the initial Capital Contributions on Schedule I attached hereto.

5.2 *Additional Funds.* In the event that the Managers determine at any time (or from time to time) that additional funds are required by the Company for or in respect of its business or to pay any of its obligations, expenses, costs, liabilities, or expenditures (including, without limitation, any operating deficits) then the Managers, in their sole discretion, may borrow all or part of such

additional funds on behalf of the Company, with interest payable at then-prevailing rates, from one or more of the Members or from commercial banks, savings and loan associations, or other commercial lending institutions.

5.3 *Additional Capital Contributions.* If the Managers determine that additional funds are required for the purposes set forth in Section 5.2 of this Agreement and that all or any portion of such additional funds should be contributed to the Company as additional Capital Contributions, the Managers may propose to the Members that the Members make additional Capital Contributions. Upon unanimous agreement of the Members to make such additional Capital Contributions, the Members shall make the necessary additional Capital Contributions to the Company in proportions as may be determined by the agreement of the Members.

5.4 *No Interest on Capital Contributions.* No interest shall be paid on any contribution to the capital of the Company.

5.5 *Capital Accounts.* A Capital Account shall be established for each Member and shall be credited with each Member's initial and any additional Capital Contributions. All contributions of Property to the Company by a Member shall be valued and credited to the Member's Capital Account at the Gross Asset Value of such Property on the date of its contribution. All distributions of Property to a Member by the Company shall be valued and debited against such Member's Capital Account at the Gross Asset Value of such property on the date of its distribution. Each Member's Capital Account shall at all times be determined and maintained pursuant to the principles of this Section 5.5 and Treasury Regulations Section 1.704(b)(2)(iv). Each Member's Capital Account shall be increased in accordance with such Regulations by:

- (i) The amount of Profits allocated to the Member pursuant to this Agreement; and
- (ii) The amount of any Company liabilities assumed by the Member or which are secured by any Property distributed to such Member.

Each Member's capital account shall be decreased in accordance with such Regulations by:

- (i) The amount of Losses allocated to the Member pursuant to this Agreement;
- (ii) The amount of Distributable Cash distributed to the Member pursuant to this Agreement; and
- (iii) The amount of any liabilities of the Member assumed by the Company or which are secured by any property contributed by such Member to the Company.

In addition, each Member's Capital Account shall be subject to such other adjustments as may be required in order to comply with the capital account maintenance requirements of Section 704(b) of the Code.

If the Managers shall determine that it is prudent to modify the manner in which the Capital Accounts, or any debits or credits thereto (including, without limitation, debits or credits relating to liabilities that are secured or contributed or distributed property or that are assumed by the Company or the Members), are computed in order to comply with such Treasury Regulations, the Managers may make such modification, provided that it is not likely to have a material effect on the amounts Distributable to any Member upon dissolution of the Company. The Managers also shall (i) make any adjustments that are necessary or appropriate to maintain equality between the Capital Accounts of the Members and the amount of Company capital reflected on the Company's balance sheet, as computed for book purposes, in accordance with Treasury Regulations Section 1.704-1(b)(2)(iv)(g) and (ii) make any appropriate modifications in the event unanticipated events might otherwise cause this Agreement not to comply with Treasury Regulations Section 1.704-1(b).

ARTICLE VI ALLOCATIONS, ELECTIONS, AND REPORTS

6.1 *Profits and Losses.*

(a) Except as otherwise provided herein, Profits of the Company shall be allocated among the Members first to the Members who have been allocated losses pursuant to this Section 6.1(a) until the cumulative Profits allocated to such Members pursuant to this Section 6.1(a) equal the cumulative prior allocations of Losses to such Members pursuant to this Section 6.1(a), and next to the Members in accordance with their respective Percentage Interests. Except as otherwise provided herein, Losses of the Company shall be allocated among the Members in accordance with their respective Percentage Interests. In the event the Percentage Interests vary during any Fiscal Year, Profits and Losses and all items of tax credit and tax preference for such Fiscal Year shall be allocated among the Members on a daily basis in accordance with their varying Percentage Interests during the Fiscal Year.

(b) Losses allocated pursuant to this Section 6.1 shall not exceed the maximum amount of Losses that can be so allocated without causing any Member to have an Adjusted Capital Account Deficit at the end of any Fiscal Year. In the event some but not all of the Members would have Adjusted Capital Account Deficits as a consequence of an allocation of Losses pursuant to this Section 6.1, the limitation set forth in this Section 6.1 shall be applied on a Member by Member basis so as to allocate the maximum possible Losses to each member under Section 1.704(b)(2)(ii)(d) of the Treasury Regulations.

6.2 *Nonrecourse Deductions* Nonrecourse Deductions shall be allocated among the Members in accordance with their respective Percentage Interests.

6.3 *Member Nonrecourse Deductions.* Any Member Nonrecourse Deductions shall be specially allocated to the Member who bears the economic risk of loss with respect to the Member Nonrecourse Debt to which such Member Nonrecourse Deductions are attributable in accordance with Treasury Regulations Section 1.704-2(1).

6.4 *Allocations between Transferor and Transferee.* In the event of the transfer of all or any part of a Membership Interest (in accordance with the provisions of this Agreement) at any time other than at the end of a Fiscal Year, or the admission of a new Member (in accordance with the terms of this Agreement), the transferring Member or new Member's share of the Company's income, gain, loss, deductions, and credits, as computed both for accounting purposes and for federal income tax purposes, shall be allocated between the transferor Member and the transferee Member, or the new Member and the other Members, as the case may be, in the same ratio as the number of days in such Fiscal Year before and after the date of the transfer or admission; PROVIDED, HOWEVER, that if there has been a sale or other disposition of the assets of the Company (or any part thereof) during such Fiscal Year, then upon the mutual agreement of all the Members (excluding the new Member and the transferring Member), the Company shall treat the periods before and after the date of the transfer or admission as separate Fiscal Years and allocate the Company's net income, gain, net loss, deductions, and credits for each of such deemed separate Fiscal Years. Notwithstanding the foregoing, the Company's "allocable cash basis items", as that term is used in Section 706(d)(2)(B) of the Code, shall be allocated as required by Section 706(d)(2) of the Code and the Treasury Regulations thereunder.

6.5 *Contributed Property.* In accordance with Code Section 704(c) and the Treasury Regulations thereunder, income, gain, loss, and deduction with respect to any property contributed to the capital of the Company shall, solely for tax purposes, be allocated among the Members so as to take account of any variation between the adjusted basis of such property to the Company for federal income tax purposes and its initial Gross Asset Value at the time of contribution.

If the Gross Asset Value of any asset of the Company is adjusted as provided herein, subsequent allocation of income, gain, loss and deduction with respect to such asset shall take account of any variation between the adjusted basis of such asset for federal income tax purposes and its Gross Asset Value in the same manner as under Code Section 704(c) and the Treasury Regulations thereunder.

Any elections or other decisions relating to such allocations shall be made by the Managers in any manner that reasonably reflects the purpose and intention of this Agreement. Allocations pursuant to this Section 6.5 are solely for purposes of federal, state, and local taxes and shall not affect, or in any way be taken into account in computing, any Member's Capital Account or share of Profits, Losses, other items, or Distributions pursuant to any provision of this Agreement.

6.6 *Minimum Gain Chargeback.* If there is a net decrease in Company Minimum Gain during any Fiscal Year, each Member shall be specially allocated items of Company income and gain for such year (and, if necessary, subsequent years) in an amount equal to such Member's share of the net decrease in Company Minimum Gain, determined in accordance with Treasury Regulations Section 1.704-2(g). Allocations pursuant to the previous sentence shall be made in proportion to the respective amounts required to be allocated to each Member pursuant thereto. The items to be so allocated shall be determined in accordance with Treasury Regulations Sections 1.704-2(f) and 1.704-2(j)(2). This Section 6.6 is intended to comply with the minimum

gain chargeback requirement in Treasury Regulations Section 1.704-2(f) and shall be interpreted consistently therewith.

6.7 *Member Minimum Gain Chargeback.* If there is a net decrease in Member Minimum Gain attributable to a Member Nonrecourse Debt, as defined in Treasury Regulations Section 1.704-2(i)(4), during any Fiscal Year, each Member who has a share of the Member Minimum Gain attributable to such Member Nonrecourse Debt, determined in accordance with Treasury Regulations Section 1.704-2(i)(5), shall be specially allocated items of Company income and gain for such Fiscal Year (and, if necessary, subsequent Fiscal Years) in an amount equal to such Member's share of the net decrease in Member Minimum Gain attributable to such Member Nonrecourse Debt, determined in accordance with Treasury Regulations Section 1.704-2(i)(4) and (5). Allocations pursuant to the previous sentence shall be made in proportion to the respective amounts required to be allocated to each Member pursuant thereto. The items to be so allocated shall be determined in accordance with Treasury Regulations Section 1.704-2(i)(4). This Section 6.7 is intended to comply with the Member Minimum Gain chargeback requirement in Treasury Regulations Section 1.704(i)(4) and shall be interpreted consistently therewith.

6.8 *Qualified Income Offset.* If any Member unexpectedly receives an adjustment, allocation, or distribution as described in Treasury Regulations Section 1.704(b)(2)(ii)(d)(4) through (6) which causes or increases a deficit capital account balance in such Member's Capital Account (as determined in accordance with such Regulations) items of Company income and gain shall be specially allocated to each such Member in an amount and manner sufficient to eliminate, to the extent required by the Treasury Regulations, the Adjusted Capital Account Deficit of such Member as quickly as possible, provided that an allocation pursuant to this Section 6.8 shall be made if any only to the extent that such Member would have an Adjusted Capital Account Deficit after all other allocations provided for in this Article VI have been tentatively made as if this Section 6.8 were not in the Agreement. This provision is intended to be a "qualified income offset" as defined in Treasury Regulations Section 1.704-1(b)(2)(ii)(d), such Regulations being specifically incorporated herein by reference.

6.9 *Gross Income Allocation.* In the event any Member has a deficit Capital Account at the end of any Company Fiscal Year which is in excess of the sum of (i) the amount such Member is obligated to restore and (ii) the amount such Member is deemed to be obligated to restore pursuant to the penultimate sentences of Treasury Regulations Sections 1.704-2(g)(1) and 1.704-2(i)(5), each such Member shall be specially allocated items of Company income and gain in the amount of such excess as quickly as possible, provided that an allocation pursuant to this Section 6.9 shall be made if and only to the extent that such Member would have a deficit Capital Account in excess of such sum after all other allocations provided for in this Article VI have been tentatively made as if this Section 6.9 and Section 6.8 hereof were not in this Agreement.

6.10 *Section 754 Adjustment.* To the extent an adjustment to the adjusted tax basis of any Company asset pursuant to Code Section 734(b) or Code Section 743(b) is required, pursuant to Treasury Regulations Section 1.704-1(b)(2)(iv)(m)(2) or Treasury Regulations Section 1.704-1(b)(2)(iv)(m)(4), to be taken into account in determining Capital Accounts as the result of a distribution to a Member in complete liquidation of such Member's interest in the Company, the amount of such adjustment to the Capital Accounts shall be treated as an item of gain (if the

adjustment increases the basis of the asset) or loss (if the adjustment decreases such basis) and such gain or loss shall be specially allocated to the Members in accordance with their interests in the Company in the event that Treasury Regulations Section 1.704-2(b)(2)(iv)(m)(2) applies, or to the Members to whom such distribution was made in the event that Treasury Regulations Section 1.704-1(b)(2)(iv)(m)(4) applies.

6.11 *Curative Allocations.* The allocations set forth in Sections 6.1(b), 6.2, 6.3, 6.6, 6.7, 6.8, 6.9, and 6.10 hereof (the "Regulatory Allocations") are intended to comply with certain requirements of the Treasury Regulations. It is the intent of the Members that, to the extent possible, all Regulatory Allocations shall be offset either with other Regulatory Allocations or with special allocations of other items of Company income, gain, loss, or deduction pursuant to this Section 6.11. Therefore, notwithstanding any other provision of this Article VI (other than the Regulatory Allocations), the Managers shall make such offsetting special allocations of Company income, gain, loss, or deduction in whatever manner they determine appropriate so that, after such offsetting allocations are made, each Member's Capital Account balance is, to the extent possible, equal to the Capital Account balance such Member would have had if the Regulatory Allocations were not part of the Agreement and all Company items were allocated pursuant to Sections 6.1(a). In exercising his discretion under this Section 6.11, the Managers shall take into account future Regulatory Allocations under Sections 6.6 and 6.7, that although not yet made, are likely to offset other Regulatory Allocations previously made under Sections 6.2 and 6.3.

6.12 *Compliance with Treasury Regulations.* The above provisions of this Article VI notwithstanding, it is specifically understood that the Managers may, without the consent of any Members, make such elections, tax allocations and adjustments, including amendments to this Agreement, as the Managers deem necessary or appropriate to maintain the greatest extent possible the validity of the tax allocations set forth in this Agreement, particularly with regard to Treasury Regulations under Code Section 704(b).

6.13 *Tax Withholding.* The Company shall be authorized to pay, on behalf of any Member, any amounts to any federal, state, or local taxing authority, as may be necessary for the Company to comply with tax withholding provisions of the Code or the north Carolina General Statutes or other income tax or revenue laws of any taxing authority. To the extent the Company pays any such amounts that it may be required to pay on behalf of a Member, such amounts shall be treated as a cash Distribution to such Member and shall reduce the amount otherwise distributable to such Member.

ARTICLE VII DISTRIBUTIONS

7.1 *Distributable Cash.* The Company may distribute Cash at such times as the Managers shall determine in the following order of priority: (i) first to the Members in proportion to and to the extent of their Adjusted Capital Contributions, and (ii) second to the Members in accordance with their Percentage Interests.

7.2 *Distribution in Liquidation.* Upon liquidation of the Company, all of the Company's Property shall be sold as provided in Section 10.2 and Profits and Losses allocated accordingly. Proceeds from the liquidation of the Company shall be distributed in accordance with the provisions of Section 10.2.

7.3 *Limitations Upon Distributions.* No Distribution shall be declared and paid if payment of such Distribution would cause the Company to violate any limitation on distributions provided in the Act.

ARTICLE VIII TRANSFER OF INTERESTS AND ADMISSION OF MEMBERS

8.1 *Admission of New Members.* New members may be admitted only upon approval of an unanimous vote of the then existing Members of the Company. The Company may issue a Membership Interest in the Company only to an individual who is a licensee as that term is defined under N.C. Gen. Stat. § 55B-2.

8.2 *Transfers of Interest.* A Member may transfer such Member's Membership Interest only as described in this Section 8.2. Upon any termination of employment, bankruptcy, insolvency, dissolution, general assignment for the benefit of creditors, legal incapacity, or upon the Member's becoming a disqualified person as that term is defined under N.C. Gen. Stat. § 55B-2, or upon notice with at least 30 days notice in writing to the other members of a partner's intent to withdraw his membership or participation in the limited liability company for retirement or any other reasons not based on termination for fault, the Member or his successor shall be required to withdraw from the Company (if applicable) and to transfer such interest, pursuant to the terms described in this Paragraph. The Purchase Price for the Company's purchase of a Member's Interest shall be as determined pursuant to the valuation methods described further in this agreement.

The Purchase Price shall be paid to the departing Member in twelve (12) equal monthly installments beginning sixty (60) days from the Termination Date. The twelve equal monthly installments will be memorialized by a promissory note executed by the limited liability company and personally guaranteed by each member with a security agreement on the assets of the limited liability company.

8.3 Members Shall be Licensees. Notwithstanding any other provision of this Agreement, only licensees as that term is defined in N.C. Gen. Stat. § 55B-2 shall be admitted as Members.

ARTICLE IX DISSOLUTION AND LIQUIDATION OF THE COMPANY

9.1 *Dissolution Events.* The Company will be dissolved upon the happening of any of the following events:

(a) All or substantially all of the assets of the Company are sold, exchanged, or otherwise transferred (unless the Managers notify the Members that they have elected to continue the business of the Company, in which event the Company will continue until the Managers give notice that they elect to dissolve the Company);

(b) All Members sign a document stating their election to dissolve the Company;

(c) The entry of a final judgment, order, or decree of a Court of competent jurisdiction adjudicating the Company to be bankrupt and the expiration without appeal of the period, if any, allowed by applicable law in which to appeal;

(d) The entry of a decree of judicial dissolution or the issuance of a certificate for administrative dissolution under the Act.

9.2 *Liquidation.* Upon the happening of any of the events specified in Section 9.1, the Managers, or any liquidating trustee elected by the Members, will commence as promptly as practicable to wind up the Company's affairs unless the Managers or the liquidating trustee (either, the "Liquidator") determine that an immediate liquidation of Company assets would cause undue loss to the Company, in which event the liquidation may be deferred for a time determined by the Liquidator to be appropriate. Assets of the Company may be deferred for a time determined by the Liquidator to be appropriate. Assets of the Company may be liquidated or distributed in kind, as the Liquidator determines to be appropriate. The Members will continue to share Distributable Cash, Profits, and Losses during the period of liquidation in the manner set forth in Articles VI and VII. The proceeds from liquidation of the Company, including repayment of any debts of Members to the Company, and any Company assets that are not sold in connection with the liquidation will be applied in the following order of priority:

(a) To payment of the debts and satisfaction of the other obligations of the Company, including without limitation, debts and obligations to Members;

(b) To the establishment of any reserves deemed appropriate by the Liquidator for any liabilities or obligations of the Company, which reserves will be held for the purpose of paying liabilities or obligations and, at the expiration of a period the Liquidator deems appropriate, will be distributed in the manner provided in Section 9.2(c) ; and thereafter;

(c) To the payment to the Members of the positive balances in their respective Capital Accounts, pro rata, in proportion to the positive balances in those Capital Accounts after giving effect to all allocations under Article VI and all distributions under Article VII for all prior periods, including the period during which the process of liquidation occurs.

9.3 *Articles of Dissolution.* Upon the dissolution and commencement of the winding up of the Company, the Managers shall cause Articles of Dissolution to be executed on behalf of the Company and filed with the Secretary of State, and the Managers shall execute, acknowledge and file any and all other instruments or appropriate to reflect the dissolution of the Company.

ARTICLE X MISCELLANEOUS

10.1 *Records.* The records of the Company will be maintained at the Company's principal place of business, or at such other place selected by the Managers, provided that the Company keeps at its principal place of business the records required by the Act to be maintained there. Appropriate records in reasonable detail will be maintained to reflect income tax information for the Members. Each member, at such Member's expense, may inspect and make copies of the records maintained by the Company and may require an audit of the books of account maintained by the Company to be conducted by independent accountants for the Company.

10.2 *Reserves.* The Managers may cause the Company to create reasonable reserve accounts to be used exclusively to fund Company operating deficits and for any other valid Company purpose. The Managers shall in their sole discretion determine the amount of payments to such reserve accounts.

10.3 *Notices.* The Managers will notify the Members of any change in the name, principal, or registered office or registered agent of the Company. Any notice or other communication required by this Agreement must be in writing. Notices and other communications will be deemed to have been given when delivered by hand or dispatched by means of electronic facsimile transmission or nationally recognized air courier, or on the third (3rd) business day after being deposited in the United States mail, postage prepaid. In each case, notice hereunder shall be addressed to the Member to whom the notice is intended to be given at such Member's address set forth on Schedule I to this Agreement, or, in the case of the Company, to its principal place of business. A Member may change its notice address by notice in writing to the Company and to each other Member given in accordance with this Section 10.3.

10.4 *Amendments.* Except as otherwise provided in Section 6.12 with respect to amendments required to comply with the Treasury Regulations and to maintain the validity of the tax allocations, no amendment to this Agreement or to the Articles of Organization will be valid or binding upon the Members or the Company, nor will any waiver of any term of his Agreement be effective, unless in writing and signed by the Members holding at least a Majority in Interest; PROVIDED, HOWEVER, that any provision of this Agreement requiring the consent, approval, or action of more than a Majority in Interest of the Members, or any provision contained in the Articles of Organization affecting such a provision, may only be amended or waived by a written action signed by the Members holding the required percentage of Membership Interests.

10.5 *Additional Documents.* Each party hereto agrees to execute and acknowledge all documents and writings which the Managers may deem necessary or expedient in the creation of the Company and the achievement of its purposes, including but not limited to Articles of Organization and any amendments or cancellation thereof.

10.6 *Representations of Members.* Each Member represents and warrants to the Company and every other Member that such it (i) is fully aware of, and is capable of bearing, the risks relating to an investment in the Company; (ii) understands that its interest in the Company has not been registered under the Securities Act or the securities law of any jurisdiction in reliance upon

exemptions contained in those laws; and (iii) has acquired its interest in the Company for its own account, with the intention of holding the interest for investment and without any intention of participating directly or indirectly in any redistribution or resale of any portion of the interest in violation of the Securities Act or any applicable law.

10.7 *Survival of Rights.* Except as otherwise provided herein, this Agreement shall be binding upon and inure to the benefit of the parties, their successors or assigns.

10.8 *Interpretation and Governing Law.* When the context in which words are used in this Agreement indicates that such is the intent, words in the singular number shall include the plural and vice versa. The masculine gender shall include the feminine and neuter. The Article and Section headings or titles shall not define, limit, extend or interpret the scope of this Agreement or any particular Article or Section. This Agreement 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.

10.9 *Severability.* If any provision, sentence, phrase, or word of this Agreement or the application thereof to any person or circumstance shall be held invalid, the remainder of this Agreement, or the application of such provision, sentence, phrase, or word to persons or circumstances, other than those as to which it is held invalid, shall not be affected thereby.

10.10 *Agreement in Counterparts.* This Agreement may be executed in several counterparts, each of which shall be deemed an original, and all of which shall constitute one and the same instrument. In addition, this Agreement may contain more than one counterpart of the signature pages and this Agreement may be executed by the affixing of the signatures of each of the Members to one of such counterpart signature pages; all of such signature pages shall be read as though one, and they shall have the same force and effect as though all of the signers had signed a single signature page.

10.11 *Tax Matters Member.* For purposes of this Agreement, the Managers may designate one Member as the Tax Matters Member.

10.12 *Creditors Not Benefited.* Nothing in this Agreement is intended to benefit any creditor of the Company or of any Member. No creditor of the Company or of any Member will be entitled to require the Managers to solicit or accept any loan or additional capital contribution for the Company or to enforce any right which the Company or any Member may have against a Member, whether arising under this Agreement or otherwise.

[The remainder of this page is intentionally left blank.]

IN WITNESS WHEREOF, the undersigned, being all of the Members of the Company, have caused this Agreement to be duly adopted by the Company and do hereby assume and agree to be bound by and to perform all of the terms and provisions set forth in this Agreement.

THE COMPANY:

BROWNE, FLEBOTTE, WILSON & HORN, PLLC

By: _____

THE MEMBERS:

By: A. Marcus Browne

E. Flebotte
A. Wilson
M. Horn

SCHEDULE I

Name and Addresses of Members	Initial Contribution	Membership Interest
Marc Browne	\$	25%
Daniel Flebotte	\$	25%
Joseph Wilson	\$	25%
Martin Horn	\$	25%

SCHEDULE II

Determination of Purchase Price for Transferring Members

[For Discussion Purposes Only; there are many possible models]

PRICE AND METHOD OF PAYMENT

The purchase price of the Membership Interests for a purchase by the Company, and the method of payment of the purchase price, shall be determined in accordance with this Schedule II.

1. Price. Upon the occurrence of an event giving rise to a purchase of the Membership Interests by the Company pursuant to Section 8.2 of the Operating Agreement, the purchase price for the Membership Interests shall be as follows:

The price of the Membership Interests shall be equal to the book value of such Membership Interests, as determined by an independent appraisal by an appraiser engaged by the Company having at least ten (10) years of experience in valuing legal practices, valued as of the date that a Member's employment is terminated for any reason pursuant to Section 8.2 of the Operating Agreement, in accordance with generally accepted accounting principles with the following adjustments:

- (i) Cash and cash equivalents of the Company shall be included in the valuation;
- (ii) All equipment and personal property owned by the Company shall be included in the valuation. The value of such equipment shall be the fully depreciated net value of such equipment, as shown on the Company's books and records;
- (iii) All accounts payable shall be valued at their face amount;
- (iv) All prepaid items, bonuses, and pension or profit sharing contributions shall not be included in the valuation because such bonuses, pension, and other profit sharing contributions are already vested individually in the member and are not in fact partnership assets.
- (v) All accounts receivable shall be valued by discounting the amount of each receivable by the average collection rate over the two (2) preceding years. All accounts receivable shall be included but not limited to the probabilities of income from current cases pending will be determined on a case by case basis using conventional analysis within the legal industry

- (vi) Unbilled accounts shall be included in the valuation.
- (vii) Life insurance policies, if any, owned by the Company, shall be shown at their cash surrender values net of any amounts owing due to loans on the policies;\
- (viii) Liabilities shall be deducted from the assets referred to above. It should be considered in the valuation of a partnership interest value for goodwill, trade name, and other similar intangible assets including all intangible assets already recorded on the corporate books at the time of the Operating Agreement along with the individual contribution by a member to the formation of a limited liability company prior to the execution of this agreement to be evaluated on an individual basis.
- (ix) Determination of book value as provided herein, when made and determined in accordance with this Paragraph 1, shall be conclusive and binding upon all parties, including the Company, each Member, and the selling Member's heirs and personal representatives.
 - A. The book value shall include but not be limited to insuring an equitable price for any partner. Provide a mechanism for liquidating ownership interest in a equitable and fair manner which includes maximizing mutual tax benefits. The price will include a value for preventing ownership interest from being sold to outsiders. Additionally the valuation shall determine a binding price for estate tax assessment when relevant, and establish a price of liquidation for maximum use in divorce proceedings.
 - B. To be included but not limited to the following additional considerations along with standard factors in book valuation there shall be adjustments or accounting peculiarities or one time losses; considerations made for cash or property distributions to owners in excess of normal salaries; adjustments made to reflect future tax liabilities resulting from the buyout such as recapture provisions or buyouts of negative capital account interest; and that yearly revisions to the capitalization rate must be recognized as an uncertainty of future benefit changes.
 - C. Acknowledge that good will is the cornerstone upon which the partnerships interest shall be valued this being a professional practice. That the valuation method for good will will be traditional accounting practices for professional business. The evaluation for good will will include but will not be limited to valuation derived from the business itself such as that generated because of location, advertising, and market reputation of the firm's name along with the personal good will which is derived from the expertise and reputation of the business partner terminating his employment.

- D. The book value shall include a broad base evaluation method to obtain the goal of fair evaluation including but not limited to evaluation of billings, cash receipts, and receivables along with valuation for inventory, a valuation for customer current file base and future client base, hard and soft assets including soft assets such as libraries and hard assets such as equipment and will use both capitalization of earnings methods, excessive earning methods, a leverage buyout method and multiple earnings revenue along with any other traditional accounting method for evaluation of a professional corporation.
- E. It is further acknowledged that the amount paid to a terminated partner is only an amount paid based on contribution of the partner and therefore there will be no capital gain to the partner upon payment of any funds pursuant to the termination provision of this agreement.
- F. That if the withdrawing or terminating partner also executes a covenant not to compete then the value of that will be included in the traditional valuation method.
- G. That whatever method is used by an independent appraiser, the independent appraiser will also use the specific techniques under the methodology of the following:
 - 1. Comparative values of similar growing concerns
 - 2. Reproduction or replacement value
 - 3. Present value of cash flow
 - 4. Liquidation approach
 - 5. Book value approach
 - 6. Or any combination of the above formulas that reach an equitable value for a terminating or withdrawing partner.
- H. The above valuation techniques and methodology are stated only to be thumbnails of what would be available as tools to any independent appraiser acknowledging that traditional professional business valuation includes analysis cash flow earning based methodology, asset based methodology, revenue based methodology, and market based methodology based on comparable sales with available markets.

2. Method of Payment. The Company shall pay for the Membership Interests purchased within fifteen (15) days after the date that the purchase price of the Membership Interests is determined pursuant to Paragraph 1, as follows:

- (a) In cash, or;

- (b) The Company may prepay all or any part of any note or notes at any time following the close of the calendar year in which the closing occurs. All prepayments shall be applied first to accrued interest and then to the principal of the installments in the inverse order of their maturity. The promissory note(s) shall contain a standard acceleration clause in the event of default and a provision for attorneys' fees in the event of suit.

3. Closing Procedure. At the closing, the Member selling Membership Interests to the Company, or such Member's executor or personal administrator, as the case may be, shall concurrently, with tender and receipt of the Purchase Price as provided in Paragraph 1, deliver the certificate or certificates representing the Membership Interests being purchased, endorsed in property form for transfer in blank, together with such assignments, certificates of authority, tax releases, consents to transfer and other instruments as may be reasonably requested by the Company. The Member selling Membership Interests to the Company, or such Member's Executor or personal representative, as the case may be, shall represent and warrant to the Company that such Member or his or her representative is conveying to the Company the Membership Interests being sold, with full warranties of title, free and clear of any claims, options, charges, encumbrances or rights of others, except as may be created by Operating Agreement

EXHIBIT B

Members' Agreement for the Election and Admission of New Members to Browne, Flebotte, Wilson & Webb, PLLC and Amendment of the Firm's Operating Agreement

This Members' Agreement for the Election and Admission of New Members to Browne, Flebotte, Wilson & Webb, PLLC and Amendment of the Firm's Operating Agreement (hereinafter referred to as "the Agreement"), which is a duly authorized and unanimously agreed upon amendment to the Operating Agreement of Browne, Flebotte, Wilson & Webb, PLLC (registered with the Secretary of State under this and similar names) hereinafter referred to at various times as "the PLLC," provides for the following:

I. Intent of the Members and Waiver

It is the unanimous intent of the Members to alter, amend and change the PLLC's current Operating Agreement as previously amended so as to elect new members, change and redefine PLLC governance and other changes in the PLLC. The Members agree that any and all objections to the validity or enforceability of this Agreement and/or of this Agreement as an Amendment to the PLLC's Operating Agreement as previously amended on any basis, including, but not limited to form, notice or procedure, is hereby waived. It is also the unanimous intent of the Members that any change to the PLLC's Operating Agreement that is necessary to accomplish this intent and to put into effect the specific provisions noted below is and will be done even if not specifically noted below. Such changes will be considered to have been done as of the date of this Agreement.

II. General Amendment of PLLC's Operating Agreement

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 it is presumed that, by this Agreement, the three current Members of the PLLC have unanimously and in an appropriate fashion, knowingly and with adherence to all requirements of notice and other corporate formalities required by the Operating Agreement, state statute or law, voted to amend the Operating Agreement so that any conflicting terms are deleted from the Operating Agreement and replaced by the terms of this Agreement.

III. Election and Admission of New Members

A. Previously, the equity owners/members of the PLLC unanimously extended an invitation to James A. Merritt, Jr. ("Merritt") and Heather B. Caruso ("Caruso") (referred to jointly as "the Elected Members") to become equity owners/members of the PLLC with their individual ownership interest in the PLLC being equal to that of the present

equity owners/members. Merritt and Caruso previously accepted that offer with their acceptance being effective as of 5:30pm August 31, 2006. Their acceptance of this offer was made upon the assurance from the existing Members that the only existing equity owners/members of the PLLC were, prior to the Elected Members' admission, Daniel Flebotte, Joseph Wilson and Joy Rhyne Webb.

B. The consideration exchanged for the purchase this 40% ownership interest by Merritt and Caruso (20% each) is considered to be sufficient for the interest granted and consists of, among other things, contract rights, assets and the assumption of PLLC's pre-existing liabilities.

C. It is agreed that Merritt and Caruso have immediate and equal ownership and voting rights and owe the PLLC nothing further for their ownership interest granted hereby. Nor are there any pre-conditions for their ownership and use of their heretofore described interest in the PLLC.

D. It is further agreed that by their signatures to the contemporaneously signed document referred to as the "Admission Agreement" attached hereto as Exhibit "A," Merritt and Caruso are both Members of the PLLC and parties to this Agreement.

E. By their signatures to this Agreement it is presumed that Flebotte, Wilson, Webb and the PLLC have signed the Admission Agreement as well.

F. Herein below and henceforth Merritt, Flebotte, Wilson, Webb and Caruso will be referred to variously as "the Members" or as "the Five Equity Members."

IV. General Provisions and Amendments

A. None of the Members owe anything further for their ownership interest in the PLLC and each Member has full rights under the Operating Agreement as amended herein.

B. As of 12:01am 1 September 2006, the name of the PLLC will become Merritt, Flebotte, Wilson, Webb & Caruso, PLLC (referred to herein below as "the Firm") and this new name will be appropriately filed with the North Carolina Secretary of State's office.

C. The Members have voted unanimously to name Merritt Managing Member of the Firm. Until his duties, rights and obligations are more specifically set out in a subsequent Resolution he will exercise those rights and bear those obligations usually and customarily granted and required of a Managing Member. He will be indemnified for any efforts to the full extent allowed by law and statute.

D. All decisions made by the Firm including changes to the Operating Agreement, except for those that the Managing Member may within his own authority and discretion take, must be made by a simple majority of the ownership interest of the Firm. Members may not divide their vote. Except that votes for the Admission of new members must be unanimous.

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

F. No Member has any Allocated Losses or any Adjusted Capital Account that would give him/her any greater claim to the assets or profits of the Firm than any other. Until otherwise determined and voted upon by the Members each Member has an equal share and claim on any income, profits and assets of the Firm.

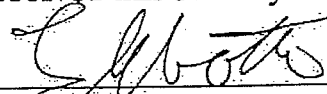
G. No Member's interest or portion in the Firm may be sold, assigned or otherwise transferred without the unanimous consent of the remaining Members.

H. Heretofore, Merritt was a Shareholder in another law firm, Berry, Quackenbush & Stuart, PA ("BQS"). Merritt negotiated his departure from that firm and entered into a specific agreement, known herein as the Merritt Departure Agreement and attached hereto as Attachment "B." In doing so he agreed to assume certain obligations and liabilities in order to facilitate his departure. This Merritt Departure Agreement and the terms thereof were entered into by Merritt into with BQS with the full knowledge, approval and encouragement of all Members of the Firm. The Merritt Departure Agreement was entered into to facilitate the creation of a regional law firm for the Firm and has inured to the benefit of all Members of the Firm. The Firm therefore recognizes, accepts and assumes all of Merritt's liabilities and obligations as set forth in the Merritt Departure Agreement from his previous firm – Berry, Quackenbush & Stuart, PA. It further agrees to indemnify him and hold him harmless from all such obligations incurred there under since it has and will continue to enjoy the benefits of that Departure Agreement.

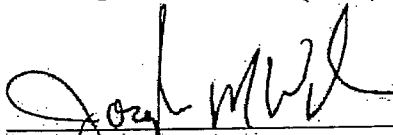
I. Article VIII of the existing Operating Agreement is hereby amended so as to specifically allow Merritt and Caruso, as attorneys duly licensed by the State of South Carolina, to own equity interests as Members of the Firm pursuant to N.C. Gen. Statute 55B-6.

J. Further changes in the Operating Agreement as Amended may be made by majority vote of the Five Equity Members of the Firm if necessary or advisable.

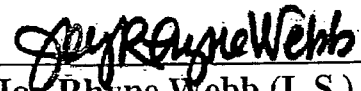
By their signatures and seals affixed herein below the Members on behalf of themselves individually and on behalf of the PLLC corporately have indicated and warranted their agreement with and unanimous consent to the each and every of the terms of this four page Agreement. It is so agreed and resolved this 31st day of August 2006.



Daniel R. Flebotte (L.S.)



Joseph M. Wilson (L.S.)



Joy Rhyne Webb (L.S.)

EXHIBIT C

ADMISSION AGREEMENT OF BROWNE, FLEBOTTE, WILSON & WEBB, PLLC WITH JAMES A. MERRITT, JR. AND HEATHER B. CARUSO AS NEW MEMBERS OF THE FIRM

THIS ADMISSION AGREEMENT is made and entered into this 31st day of August, 2006 between Browne, Flebotte, Wilson & Webb, PLLC, ("the PLLC") a North Carolina Professional Limited Liability Corporation and each of its present Members ("the Present Members") with James A. Merritt, Jr. ("Merritt") and Heather B. Caruso ("Caruso") (referred to jointly as "the Elected Members"), whose signatures appear below.

This Admission Agreement incorporates by specific reference and is incorporated into the "**Members' Agreement for the Election and Admission of New Members to Browne, Flebotte, Wilson & Webb, PLLC and Amendment of the Firm's Operating Agreement**" ("the Election Agreement") of this same date and for all purposes is part of that Agreement as Exhibit "A".

This Admission Agreement is made in consideration of the admission of the Elected Members as Members of the PLLC, the mutual promises and covenants contained herein and in the Election Agreement, and for other good, valuable and adequate consideration.

1. **Agreement to be bound by the Amended Operating Agreement:** The Elected Members acknowledge receipt of a copy of the Operating Agreement as currently amended by the Election Agreement ("the Operating Agreement"). The Elected Members hereby agree to be bound by all the terms and conditions of the Operating Agreement as modified by the Election Agreement and as will henceforth be modified.

2. **Representations and Warranties:** The Elected Members represent and warrant to the PLLC and all other Members of the PLLC that

- a. they have complied with all known requirements for becoming a Member in the PLLC as set forth in the Amended Operating Agreement as further modified by the Election Agreement and under applicable law, and
- b. that the addresses and social security numbers set forth below are true and correct as of the date hereof.

3. **Securities Laws:** The Elected Members understand and agree that Membership Shares in the PLLC have not been registered under any federal or state securities law as more fully set forth in the Amended Operating Agreement.

4. **Counterparts:** This Admission Agreement may be executed in multiple counterparts.

5. **Terms:** All capitalized terms not otherwise defined herein shall have the meanings given them in the Operating Agreement as amended by the Election Agreement.

This Admission Agreement is executed as of the date first above written and the witnesses hereto warrant the signatures of the Present Members at the foot of the Election Agreement as well.

Witnesses:

Jay R. Webb

Browne, Flebotte, Wilson & Webb, PLLC

By: [Signature]
Member, Individually and Corporately

Jenny Daniels

By: Joseph M. Webb
Member, Individually and Corporately

Kathy Davis

By: Jay R. Webb
Member, Individually and Corporately

Chadwick

By: Harlan B. Cause
Elected Member

SSN: _____

Address: _____

6 Linnet Court

Columbia, SC 29229

[Signature]

By: [Signature]
Elected Member

SSN: _____

Address: _____

2200 Barnwell Hills Rd

Columbia, SC 29223

EXHIBIT D

**Minutes of Action Taken by Unanimous Written Consent of the
Members of Browne, Flebotte, Wilson & Webb, PLLC**

The following Resolutions are adopted by the unanimous written consent of the shareholders of Browne, Flebotte, Wilson & Webb, PLLC (the "PLLC") pursuant to the authority granted by any and all the applicable state laws, regulations and the existing Operated Agreement as Amended.

I. Resolution Affirming Agreement of August 31, 2006

An Agreement entitled *Members' Agreement for the Election and Admission of New Members to Browne, Flebotte, Wilson & Webb, PLLC and Amendment of the Firm's Operating Agreement* ("the Election Agreement") has been negotiated and presented to all Members of the PLLC. A copy of the Election Agreement is attached hereto as Attachment "A."

Upon a unanimous vote of the three existing Members of the PLLC (Daniel R. Flebotte, Joseph M. Wilson and Joy Rhyne Webb) it is Resolved that:

~the Election Agreement is hereby affirmed and approved as an Agreement of the Corporation;

~that James A. Merritt, Jr. and Heather B. Caruso are hereby elected Members of the PLLC with ownership interests equal to the existing Members;

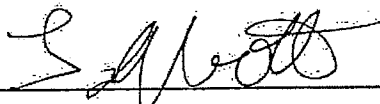
~that the Operating Agreement of the PLLC is amended as noted in the Election Agreement and to effectuate the above and the intent of the Members;

~that all other provisions of the Election Agreement are hereby approved; and

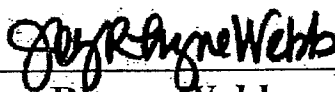
~that no further action is required to effectuate the Election Agreement.

The above Resolutions were taken by the unanimous written consent of the Members of the PLLC, and each of the Members of the PLLC hereby approves of the action contained in these resolutions and hereby waives any requirement of any notice of a meeting or notice of taking of the action contained in these resolutions or any other corporate formality by signing his/her name below.

These Resolutions are effective and binding as of 5:30pm August 31, 2006.


Daniel R. Flebotte


Joseph M. Wilson


Joy Rhyne Webb

31 August 2006

In The Court of Common Pleas
Fifth Judicial Circuit
2018-CP-40-02730

Transcript of Record

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I N D E X

<u>Witness/Description</u>	<u>Page No.</u>
Certificate Page.	18

E X H I B I T S

<u>No.</u>	<u>Description</u>	<u>Ev.</u>
	No exhibits introduced.	

1 THE COURT: Next I have, it appears, number 10.
2 That's *Merritt vs. Merritt* really. Who is Junior?

3 MR. RICHARDSON: This is Mr. Zack Merritt; he's a
4 lawyer in Rock Hill.

5 THE COURT: Yes, and Jim was your father?

6 MR. RICHARDSON: Yes, sir.

7 MR. MERRITT: He was, yeah.

8 THE COURT: I remember him very well a long time ago.
9 We tried a couple of medical malpractice cases.

10 MR. MERRITT: That's right.

11 THE COURT: Now, this is a motion to dismiss, or in
12 the alternative it says a motion to stay and to compel
13 arbitration. It's your motion?

14 MR. DUGGAN: Yes, Your Honor.

15 THE COURT: Is everybody ready?

16 MR. RICHARDSON: Yes, sir.

17 MS. DINKINS: Yes, sir.

18 THE COURT: You may proceed.

19 MR. DUGGAN: Thank you, Your Honor. I am Ian Duggan
20 with Callison Tighe. Your Honor, it's my first time here
21 before you.

22 THE COURT: Congratulations on your debut.

23 MR. DUGGAN: Thank you, Your Honor.

24 This is a case of Mr. Merritt. Zachary's father, as
25 Your Honor is aware, was a partner with the law firm of

1 Merritt, Webb, Wilson, and Caruso. Since his unfortunate
2 passing has occurred, there's disagreement about how to
3 value the interest ---

4 THE COURT: His interest, I guess, is how you say it?

5 MR. DUGGAN: That's, that's absolutely right, Your
6 Honor, and I can attest to Mr. Zack Merritt's character and
7 talents as an attorney and don't -- my client doesn't
8 begrudge ---

9 THE COURT: There's nothing personal. It's a business
10 -- this is ---

11 MR. DUGGAN: That ---

12 THE COURT: --- a legal matter. Okay. I understand.

13 MR. DUGGAN: That's correct, Your Honor, and the
14 question before us today is, is where does it get decided.
15 The law firm's operating agreement contained an arbitration
16 provision.

17 THE COURT: I understand from reading the file that
18 that agreement came before he -- or after he was in the
19 firm. It was some time after. I won't get ahead of
20 myself. There's some question about the timing of that
21 agreement, I do believe, in terms of the arbitration
22 clause.

23 MR. DUGGAN: Yes, Your Honor. I think that's a fair
24 assessment. When Mr. Merritt, Sr., joined the firm, there
25 was an addendum made to the operating agreement. Changed

1 the name of the law firm, made a couple of other
2 modifications, but it's our position that that arbitration
3 provision was unaffected. What was added was
4 complementary.

5 THE COURT: You say the arbitration agreement was
6 already in effect when he joined the firm?

7 MR. DUGGAN: That's correct, Your Honor.

8 THE COURT: Okay.

9 MR. DUGGAN: Yes, Your Honor, and that, that
10 provision, it's clear that it states that:

11 No civil action shall be maintained against an
12 individual or the company as to the termination
13 of any rights, liabilities, obligations, et
14 cetera, and that all matters will be resolved by
15 arbitration.

16 THE COURT: Yes, sir.

17 MR. DUGGAN: It's our position that it's a very plain
18 arbitration agreement. I understand there's disagreement.
19 We've tried to settle that, to negotiate it out. We're at
20 loggerheads, and we'd like to move forward with arbitration
21 and, and see if we can't get this resolved as quickly as
22 possible, sir.

23 THE COURT: All right. Thank you, sir.

24 Mr. -- I'm sorry. Your name, please, ma'am.

25 MS. DINKINS: Thank you, Your Honor. My name is Lucy

1 Dinkins, and I'm here with Matthew Richardson. We
2 represent the plaintiff, Zack Merritt.

3 THE COURT: You work with Mr. Richardson?

4 MS. DINKINS: I do, who is , who is also -- Mr.
5 Merritt is also here with us today.

6 THE COURT: I understand. Yes, ma'am.

7 MS. DINKINS: Mr. Zack Merritt is also a South
8 Carolina attorney, and he is the personal representative of
9 the estate of his father, which I believe Your Honor knows.
10 His father was a Columbia attorney until he moved to
11 Raleigh in 2006 in order to join and manage the defendant's
12 law firm.

13 The defendant law firm is a very successful law firm.
14 They have over 100,000 clients in three states, and Mr. Jim
15 Merritt was the managing member of the defendant, and he
16 held a 25 percent ownership interest in the firm at the
17 time of his death in July 2017. And under North Carolina
18 statutory law, Jim Merritt ceased being a member of the
19 defendant's professional limited liability corporation upon
20 his death, and the defendant was required to purchase his
21 ownership interest in the firm from his estate within one
22 year of his death.

23 That has not happened, and the defendant has even
24 refused to provide Mr. Merritt with minimum financial
25 information so that Mr. Merritt can determine the value of

1 his father's interest in the firm. And in addition to
2 that, the defendant has also failed to pay wages that were
3 owed to Jim Merritt for 2017, and they have refused -- they
4 wrongfully retained some of his personal property and
5 effects such as his cell phone and records on it.

6 So, because of the defendant's unfair treatment of Jim
7 Merritt's estate and its failure to fulfill its statutory
8 obligations to the estate, Zack Merritt has been forced to
9 bring this action. And contrary to what the defendant
10 claims, none of his statutory claims are subject to
11 arbitration.

12 So, the defendant's motion should be denied because
13 the amended operating agreement which was adopted in 2006
14 when Jim Merritt joined the firm doesn't contain an
15 arbitration provision. Section 6E of the amended agreement
16 -- which I have a copy if Your Honor would like to see it.

17 THE COURT: You might as well show it to me.

18 MS. DINKINS: Okay.

19 THE COURT: I don't have my computer up here, if y'all
20 don't mind.

21 MS. DINKINS: It was attached to the defendant's
22 motion.

23 THE COURT: All right.

24 MR. DUGGAN: Your Honor, I have a hard copy.

25 THE COURT: All right. That's fine. Either, either.

1 Y'all are going to show me the same thing, so.

2 MS. DINKINS: And I have highlighted just the relevant
3 provisions on page 3.

4 THE COURT: Okay.

5 MR. DUGGAN: Yes, Your Honor.

6 THE COURT: You said you've highlighted them?

7 MS. DINKINS: Just on page 3. It is Section 6E to
8 which I'm referring.

9 THE COURT: I don't have it. This is what you just
10 handed me.

11 MS. DINKINS: Yeah.

12 THE COURT: Take another look at it. You might have
13 given me the wrong copy.

14 MS. DINKINS: It's right here.

15 THE COURT: I can read. I just can't see very well,
16 Section E.

17 MS. DINKINS: No problem.

18 THE COURT: Go ahead.

19 MS. DINKINS: So, Section E, and that Section ---

20 THE COURT: Section E, yes.

21 MS. DINKINS: Section 6E, it governs the departure of
22 members and the payment of their interest, and it has no
23 arbitration provision. Section 2 of that same amendment,
24 which I believe is on the first page, provides that any new
25 provision in this amended operating agreement of course

1 prevails and control over the terms of the original
2 agreement which was adopted before Jim Merritt joined the
3 firm.

4 The arbitration provision that's in the original
5 agreement and which the defendant is relying on references
6 arbitration for the determination and payment of a
7 partnership buyout among the original members, but this
8 Section 6E supersedes that section in the original
9 agreement and omits any requirement that valuation of the
10 departed member's interest be determined in arbitration.
11 So, because the terms of the amended agreement control and
12 the amended agreement doesn't require arbitration, Zack
13 Merritt's claims aren't subject to a valid arbitration
14 agreement.

15 But even if the -- even if it were determined that the
16 arbitration provision in that original agreement, which
17 again was enacted before Mr. Jim Merritt joined the firm,
18 even if it were determined that that still remains in
19 effect, that provision is not applicable to Zack Merritt's
20 claims because Zack Merritt's claims arise entirely under
21 statutory law. They are not based in any way on that
22 original operating agreement.

23 The amended complaint asserts four claims. It asserts
24 claims for declaratory judgment of statutory rights, breach
25 of the statutory requirement to purchase shares, payment of

1 wages, and delivery of personal effects belonging to Jim
2 Merritt. The complaint does not assert a claim for breach
3 of the original operating agreement, and it doesn't seek to
4 enforce any provision of that agreement.

5 So, Zack Merritt would be entitled to prevail on his
6 statutory claims, and the defendant would be entitled to,
7 among other things, pay for the fair value of Jim Merritt's
8 interest in the firm regardless of the terms of that
9 original operating agreement, even regardless of whether
10 the defendant had an operating agreement. So, Zack
11 Merritt's claims are simply not subject to a valid
12 arbitration agreement, and the defendant's motion should be
13 dismissed.

14 THE COURT: All right. Thank you, ma'am.

15 Yes, sir.

16 MR. DUGGAN: Your Honor, I'll take that last point
17 first.

18 THE COURT: All right.

19 MR. DUGGAN: The defendant in this case is a law firm
20 that would not exist without that operating agreement being
21 in place. I understand the original complaint incorporated
22 elements of the operating agreement into it. The amended
23 complaint strikes any reference from it. The fact remains,
24 though, that Mr. Merritt, Sr.'s, 25 percent interest and
25 the simple existence of that law firm inherently means you

1 go with the operating agreement.

2 On top of that, there's some argument in the
3 plaintiff's motion that you should not consider anything
4 outside of the complaint. This is a jurisdictional
5 question, though, and as the court is aware, in considering
6 motions to dismiss on jurisdiction, you can certainly
7 consider affidavits and documents outside of the four
8 corners of the complaint.

9 With respect to plaintiff's motion -- respect to the
10 component of the plaintiff's motion regarding the -- what
11 they see as a conflict, I must quibble and disagree
12 strongly, in fact. The original operating agreement, as
13 Your Honor can see, is several dozen, dozen pages. The
14 supplement is really a straightforward, much smaller
15 agreement. This is a simple contractual interpretation
16 matter. There is no discussion of any way to settle
17 disputes from that supplemental agreement. Therefore, the
18 original mechanism and manner by which the partners would
19 settle disputes, arbitration, remained wholly in effect.

20 Certainly if there's some questions as far as
21 arbitrability of any of these things, that can be settled
22 by an arbitrator, and that's clearly established law, I
23 believe. The Supreme Court just recently this week came
24 out with an opinion that reaffirmed that, that questions of
25 arbitration are one for the arbitrator.

1 We want to get this resolved, sir. My client is ---

2 THE COURT: For the record, you need to tell me what
3 case that is that recently came out, sir.

4 MR. DUGGAN: Yes, sir.

5 THE COURT: Do you mind citing it?

6 MR. DUGGAN: I would be happy to send that to the
7 clerk's office. It was Justice Cavanaugh's first drafted
8 opinion. It was unanimous.

9 THE COURT: So, that helps. You're talking about
10 United States Supreme Court and not the South Carolina ---

11 MR. DUGGAN: Yes, Your Honor.

12 THE COURT: --- Supreme Court.

13 MR. DUGGAN: That's correct.

14 THE COURT: Or not the North Carolina Supreme Court
15 either, I guess.

16 MR. DUGGAN: Yes, Your Honor.

17 THE COURT: All right.

18 MR. DUGGAN: And that, in fairness, that interpreted
19 the Federal Arbitration Act, how well ---

20 THE COURT: Well, you know, the people of South
21 Carolina have never thought very much of the federal
22 government, you know.

23 MR. DUGGAN: Pardon?

24 THE COURT: But continue. I've used that many times.
25 It has nothing to do with you. Some lawyers in the back,

1 they know me. They're laughing at that, but go ahead, sir.

2 MR. DUGGAN: There's also -- and I, and I did not
3 touch on this, but it is contained within the plaintiff's
4 written motion, dismissal versus stay.

5 THE COURT: Yes.

6 MR. DUGGAN: I think that gets us to the same point at
7 the end of the day, and I could not find any, with respect
8 to the court's prior comment, could not find any South
9 Carolina case law directly ---

10 THE COURT: Did you find a Fourth Circuit case?

11 MR. DUGGAN: --- on point. Yes, Your Honor.

12 THE COURT: Mr. Richardson might be able to help you
13 with that a little bit. Go ahead.

14 MR. DUGGAN: I'm sure he can, Your Honor, but what
15 that case law -- and this is actually from the Fifth
16 Circuit, but it's cited by the Fourth -- is that when all
17 the matters within a complaint are subject to arbitration.

18 THE COURT: Fifth Circuit, is that Louisiana? That's
19 west of the Mississippi.

20 MR. DUGGAN: That, that -- well, Georgia as well, Your
21 Honor.

22 THE COURT: Oh. Georgia, too. I'm sorry. Go ahead.

23 MR. DUGGAN: This is the matter of *Alfred vs. Dean*
24 *Witter Reynolds*, and this is subsequently cited by the
25 Fourth Circuit. But its substantial premise, that when

1 everything in a complaint is subject to arbitration, the
2 only jurisdiction that the court could have would be to
3 review the subsequent arbitration action. Therefore, it's
4 proper for dismissal.

5 I think it gets us to the end of the day, and this is
6 my smallest part of this motion, but I think dismissal is
7 appropriate. If we have to stay it, I think we arrive at
8 the same point, though, sir, and that's resolving this
9 matter as quickly we can.

10 THE COURT: All right. Thank you, sir.

11 Yes, ma'am.

12 MS. DINKINS: Yes. Just briefly, Your Honor. I'll
13 try to address the points that counsel made in the order he
14 did.

15 First of all, the defendant is a professional limited
16 liability company, so it has an operating agreement, but
17 that, that, of course, doesn't mean that every claim
18 against the defendant arises under the operating agreement.
19 So, the fact that it has one, that's really irrelevant to,
20 to this dispute. It does -- of course, of course not every
21 claim against it is going arise out of the agreement, and
22 Zack Merritt's statutory claims don't.

23 Second of all, just to briefly address the U.S.
24 Supreme Court case that came out, that case dealt with an
25 exception that some federal courts were recognizing to win

1 the issue of arbitrability is supposed to be decided by an
2 arbitrator. But it didn't affect and, in fact, reiterated
3 the fact that a court is supposed to decide whether a valid
4 arbitration agreement exists prior to sending claims to
5 arbitration, and that's what we're arguing. We're arguing
6 that no valid arbitration agreement exists here.

7 And then lastly about whether this case should be
8 dismissed or stayed, we certainly maintain that dismissal
9 of these claims would be improper. Under both North
10 Carolina and South Carolina law, when a case is subject to
11 arbitration, it should be at most stayed. It shouldn't be
12 dismissed, and so the defendant has failed to demonstrate a
13 basis for dismissing these claims.

14 And the Fourth Circuit law that's been, that's been
15 referred to is interpreting ---

16 THE COURT: I think he said Fifth Circuit.

17 MR. DUGGAN: I did, Your Honor. That case has been
18 subsequently cited in accord by the, by the District of
19 South Carolina, the Fourth Circuit.

20 THE COURT: Okay. I'm sorry. Go ahead.

21 MS. DINKINS: And that's dealing, first of all, with
22 the Federal Arbitration Act, which doesn't apply here. And
23 that is not, to my knowledge, a pattern of resolution that
24 has been adopted in all of the -- even in all of the
25 federal courts. And really it's contrary to the expressed

1 terms of the Federal Arbitration Act. So, that really does
2 not -- that doesn't, that doesn't give a basis for
3 dismissing the claims here.

4 THE COURT: All right.

5 Anything further?

6 MR. DUGGAN: No, Your Honor. Thanks.

7 THE COURT: All right. Look, I'm not going to make a
8 decision from the bench obviously, but I'm going to give
9 you an opportunity to supplement your arguments with a
10 proposed argument of memoranda. Let's say proposed orders.
11 How long do y'all like? Would y'all want ten days? It
12 doesn't matter to me. Ten days, twenty? I don't care.

13 This is -- look, this is an important issue as far as
14 I can determine, and I remember Mr. Merritt very fondly.
15 We're about the same age, as I recall, and we started
16 practicing law about the same time. So, I'm not going to
17 take this lightly. I'm going to take my time and be as
18 thorough and as fair as I can to both sides.

19 So, my question is you want ten days? You'd like
20 longer? Is ten days long enough?

21 MR. RICHARDSON: Ten days. Ten days.

22 THE COURT: Let's say ten days. If there's any issue
23 about longer than that, just let me know, and I'll be happy
24 to reconsider the ten days and expand it if anybody wants
25 to, okay?

1 MR. DUGGAN: Thank you.

2 THE COURT: And, of course, exchange them with each
3 other at the same time you send them to me. Thank you all
4 so very much.

5 MS. DINKINS: Thank you.

6 --- END OF TRANSCRIPT OF RECORD ---

CERTIFICATE

I, THE UNDERSIGNED ELIZABETH B. HARRIS, CERTIFIED
VERBATIM OFFICIAL COURT REPORTER FOR THE FIFTH
JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO
HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE
AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE
PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING
OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE
CIRCUIT COURT FOR RICHLAND COUNTY, SOUTH CAROLINA, ON
THE 10TH DAY OF JANUARY, 2019.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
COUNSEL, NOR INTEREST IN ANY PARTY HERETO.

/s/Elizabeth B. Harris, CVR-M-CM

COLUMBIA, SOUTH CAROLINA

MAY 1ST, 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

RECEIVED
SEP 17 2019
SC Court of Appeals

Appellate Case No. 2019-000456

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

Respondent,

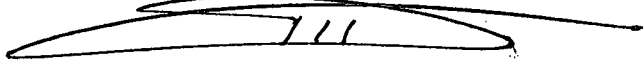
v.

Merritt, Webb, Wilson & Caruso, PLLC,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Record on Appeal complies with Rule 211(b), SCACR,
by containing all material proposed to be included by any of the parties.



Demetri K. Koutrakos, SC Bar No. 11318
Ian T. Duggan, SC Bar No. 80074
Harry A. Dixon, SC Bar No. 103509
Callison Tighe & Robinson, LLC
1812 Lincoln St, Suite 200
PO Box 1390
Columbia, SC 29202-1390
Telephone No. (803)404-6900
Facsimile No. (803)404-6900
jimkoutrakos@callisontighe.com
ianduggan@callisontighe.com
harrydixon@callisontighe.com
ATTORNEYS FOR APPELLANT
MERRITT, WEBB, WILSON & CARUSO, PLLC

Columbia, South Carolina
August 27, 2019