

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

RECEIVED

JUN 14 2017

Appellate Case No. 2016-002317

SC Court of Appeals

Lloyd C. (Chad) Whitmire Respondent,

v.

Johnny C. (Carl) Hawkensen and
The Commons at Fort Mill, LLC, ... Appellants.

RECORD ON APPEAL

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BELSER & BELSER, P.A.
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FORM 4

**STATE OF SOUTH CAROLINA
COUNTY OF YORK
IN THE COURT OF COMMON PLEAS**

**JUDGMENT IN A CIVIL CASE
CASE NUMBER 2016CP4602458**

Loyd C Chad Whitmire		Johnny C Carl Hawkensen	Commons At Fort Mill LLC The
-----------------------------	--	--------------------------------	---

PLAINTIFF(S)

DEFENDANT(S)

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

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

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

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

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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S/S. Jackson Kimball

Master In Equity

3063

Judge Code

09/29/2016

Date

For Clerk of Court Office Use Only

This judgment was entered on **September 30, 2016**, and a copy mailed first class or placed in the appropriate attorney's box on **September 30, 2016**, to attorneys of record or to parties (when appearing pro se) as follows:

Walter Keith Martens 130 E. Main Street Rock Hill, SC
29731

H. Freeman Belser PO Box 96 Columbia, SC 29202

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter

David Hamilton - Clerk of Court

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

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

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Loyd C. (Chad) Whitmire,)
)
Plaintiff,)

Case No. 2016-CP-46-2458

v.)

ORDER ON MOTION TO APPOINT
RECEIVER

Johnny C. (Carl) Hawkensen and)
The Commons at Fort Mill, LLC,)
)
Defendants.)

FILED-RECEIVED
2016 SEP 30 AM 10:34
DAVID HAMILTON
S.C.C.P. & G.S.
YORK COUNTY, SC

This matter came before the court on September 15, 2016, upon motion of Plaintiff to appoint a receiver to take control of the business and accounts of The Commons at Fort Mill, LLC. Plaintiff was represented at the hearing by W. Keith Martens. Defendants were represented by H. Freeman Belser. Both parties submitted affidavits and arguments in support of their respective positions. Based on the record presented and the arguments of counsel, I make the following findings and conclusions.

This lawsuit arises from, among other things, the parties' dispute over their relative membership interests in The Commons at Fort Mill, LLC (the "Company"). The Company owns and operates a 144-unit apartment complex in Fort Mill, South Carolina, which generates recurring monthly revenue, derived primarily from rents charged to tenants of the complex.

Plaintiff alleges that he has been excluded from the Company's accounts and operations for more than a year, and that he has not received any distributions from the Company during that time. After attempting to negotiate a buyout of Plaintiff's interest in the Company, Plaintiff dissociated from the Company in July, 2016, and then filed this action. One of Plaintiff's causes of action seeks an order valuing his interest in the Company, and requiring the Company to purchase Plaintiff's interest pursuant to the provisions of S.C. Code § 33-44-702 (1976, as amended).

When Plaintiff filed his complaint, he also sought appointment of a receiver to take possession of the Company's apartment complex, and to operate that complex during the

pendency of this action. In the alternative, Plaintiff sought an injunction prohibiting Defendants from using the revenues, rents and profits of the Company for any purpose other than paying the Company's ordinary and *bona fide* operating expenses.

"Receivership is a drastic course, allowed only under pressing circumstances and granted with reluctance and caution." *Vasiliades v. Vasiliades*, 231 S.C. 366, 376, 98 S.E.2d 810, 815 (1957). Based upon the affidavits and documents submitted by the parties, I find and conclude that Plaintiff has not met the heavy burden necessary to warrant the "drastic course" of a receiver. Consequently, Plaintiff's motion for appointment of a receiver must be denied at this juncture.

Likewise, Plaintiff's motion for a preliminary injunction must be denied. "For a preliminary injunction to be granted, the plaintiff must establish that (1) [he] would suffer irreparable harm if the injunction is not granted; (2) [he] will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law." *Scratch Golf Co. v. Dunes West Residential Golf Prop., Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 907 (2004). Based upon the affidavits submitted to the court, I find that Plaintiff has not carried the burden of demonstrating that he is likely to succeed on the merits. In particular, I find the affidavit of the Company's outside accountant persuasive on this issue. The Company's accountant testified, through affidavit, that the Company's expenditures appear to be regular and normal in the maintenance and operation of an apartment complex. At this stage of the litigation, the evidence presents a genuine fact issue concerning whether the Company is operating normally at this time.

While appointment of a receiver or granting injunctive relief at this stage of the litigation is not indicated, I find and conclude that Plaintiff is entitled to regular reports concerning the income and expenses of the Company. I also note that Defendants, through their counsel, affirmatively consented to provide regular reports to Plaintiff during the pendency of this action. Specifically, Defendants agreed to provide Plaintiff and Plaintiff's Counsel with copies of the Company's regular monthly profit and loss statements, as prepared by the Company's accountant in the ordinary course of business. Defendants also agreed to provide monthly to Plaintiff and Plaintiff's counsel copies of the Company's monthly bank account statements.

Therefore, based upon the record before the court at this time, it is ordered as follows:

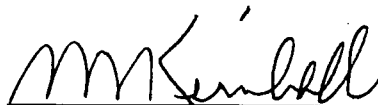
1. Plaintiff's motion for appointment of a receiver and for injunctive relief is denied. The motions are denied without prejudice, and Plaintiff is granted leave to renew the motions

should further discovery reveal that the Company's property, or its rents and profits, are in danger of being lost or materially injured during the pendency of this case.

2. During the pendency of this action, including any appeal, Defendants shall provide the following reports and information to Plaintiff at the same time as such reports are available to Defendants: (a) monthly, quarterly and year-end Profit and Loss statements prepared by or for the Company in the ordinary course of its business; and, (b) monthly bank statements, showing all debits and credits of the Company's accounts.

AND IT IS SO ORDERED.

September 29, 2016



S. Jackson Kimball
Special Circuit Court Judge
York County

43

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2016CP4602458

Loyd C Chad Whitmire

Johnny C Carl Hawkensen

Commons At Fort Mill
LLC The

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: The Court

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

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

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

ORDER INFORMATION

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

INFORMATION FOR THE JUDGMENT INDEX

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S/S. Jackson Kimball
Master In Equity

3063
Judge Code

10/05/2016
Date

For Clerk of Court Office Use Only

This judgment was entered on **October 6, 2016**, and a copy mailed first class or placed in the appropriate attorney's box on **October 6, 2016**, to attorneys of record or to parties (when appearing pro se) as follows:

Walter Keith Martens 130 E. Main Street Rock Hill, SC
29731

H. Freeman Belser PO Box 96 Columbia, SC 29202

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter

David Hamilton - Clerk of Court

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

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

R. 8 #1

company. In October 2014, Whitmire and Hawkensen bought out the membership interests of the other members. Shortly thereafter, Crossroads Commons Phase I, LLC, conveyed its real property to the newly-formed Company.

On October 28, 2014, Whitmire and Hawkensen executed a written Operating Agreement for the Company ("Operating Agreement"). Page one of the Operating Agreement contains, at the top of the page, the following notice in bold-type, underlined and all capital letters:

THE TERMS AND CONDITIONS OF THIS OPERATING AGREEMENT ARE SUBJECT TO BINDING ARBITRATION PURSUANT TO S.C. CODE ANN. 15-48-10 ET. SEQ. (1976 AS MAY BE AMENDED)

Other than this notice, the Operating Agreement contains no mention of arbitration. Nothing in the body of the Operating Agreement outlines procedures for resolution of the parties' disputes, or specifies which disputes will be submitted to arbitration.

Whitmire filed this action in August, 2016, alleging that, since approximately December 2014, he has been wrongly excluded from the business, operations and accounts of the Company. Whitmire also alleges that Hawkensen has refused to recognize Whitmire's proper membership interest in the Company, and that Hawkensen is operating the Company without regard for Whitmire's rights as a member. Whitmire's complaint contains eight causes of action, including claims for breach of Hawkensen's duty of loyalty and care, breach of contract, breach of contract accompanied by fraud, negligence, gross negligence and violation of South Carolina's UTPA. Whitmire also seeks an order under South Carolina's dissociation statute, establishing the value of his interest in the Company, and requiring the Company to purchase his interest.

Before answering the Complaint, Hawkensen moved for an order compelling Whitmire to submit all of his claims to arbitration, pursuant to S.C. Code Ann. § 15-48-20 (1976, as amended). Alternatively, Hawkensen contends that Whitmire's claims are subject to arbitration under the Federal Arbitration Act.

ANALYSIS

I. Federal Arbitration Act ("FAA").

By its express terms, the FAA applies only where the parties' written arbitration agreement is contained in a "... maritime transaction or a contract evidencing a transaction in interstate commerce." 9 U.S.C. § 2. "To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts." *Zabinski v. Bright Acres Assoc.*, 346 S.C. 580, 594, 553 S.E.2d 110, 117

SMK
#2

(2001). The FAA is inapplicable to any transaction involving purely intrastate commerce. *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 730 S.E.2d 312 (2012). “Our courts consistently look to the essential character of the contract when applying the FAA.” *Thornton v. Trident Med. Ctr., LLC.*, 357 S.C. 91, 96, 592 S.E.2d 50, 52 (Ct.App.2003) (finding it was proper to “focus upon what the terms of the contract specifically require for performance in determining whether interstate commerce [was] involved”).

Defendants argue that the Company’s Operating Agreement is a contract evidencing a transaction in interstate commerce because Whitmire, a resident of North Carolina, is a member of the Company. I find and conclude that Whitmire’s residency, standing alone, is insufficient to establish an interstate commerce connection.

Per the terms of the Operating Agreement, the Company is a “single purpose real estate holding entity.” Its only purpose is to own and operate an apartment complex that the parties developed and constructed in Fort Mill, South Carolina. South Carolina has “. . . continued to adhere to the view that the development of real estate is an inherently intrastate transaction.” *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 456, 730 S.E.2d 312, 317 (2012)(no interstate connection related to sale or real property, even though out-of-state construction materials were used, mortgage lender for purchase was located in North Carolina, and home was covered by warranty issued by national warranty company); *see also Zabinski, supra*, 346 S.C. at 595, 553 S.E.2d at 117-18 (“The development of land within South Carolina borders is the quintessential example of a purely intrastate activity.”). The Company’s Operating Agreement is the governing document for a South Carolina limited liability company, and the Company’s business activities are entirely within South Carolina. The Operating Agreement is not a contract “evidencing a transaction in interstate commerce”, and contains nothing to that effect. Thus, the FAA does not apply to this dispute, and I so conclude.

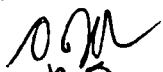
II. South Carolina Uniform Arbitration Act.

I also find and conclude that Defendants have failed to establish that they are entitled to compel arbitration pursuant to the provisions of the South Carolina’s Uniform Arbitration Act (S.C. Code § 15-48-10 *et seq.* (1976, as amended).)

A. Defendants have failed to “show an agreement” to arbitrate.

§ 15-48-10 provides:

(a) *A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration* any controversy thereafter arising between the parties


#3 R. 10

is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. ***Notice that a contract is subject to arbitration*** pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration. (Emphasis added.)

§ 15-48-20(a) provides:

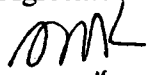
a) On application of a party ***showing an agreement described in § 15-48-10***, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied. (Emphasis added.)

A party seeking to compel arbitration pursuant to § 15-48-20 has the initial burden of “. . . showing an agreement described in § 15-48-10 . . .” has been entered into by the parties. In turn, § 15-48-10 describes that agreement as “[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” § 15-48-10(a). § 15-48-10 further provides that, in order for the parties' arbitration agreement to be enforceable under state law, “notice that a contract is subject to arbitration” must be “typed in underlined capital letters or rubber-stamped prominently on the first page of a contract.”

“[I]t is not the court's place to change the meaning of a clear and unambiguous statute.” *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)(citing *In re Vincent J.*, 333 S.C. 233, 509 S.E.2d 261 (1998) (other citations omitted)). “What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature.” *Id.*

By its express terms, § 15-48-10 requires both an “agreement” to arbitrate and a “notice” that the parties' agreement is subject to arbitration. It is clear that an “agreement” to arbitrate and a “notice” of arbitration are separate and distinct requirements, both of which must exist before arbitration may be compelled. While an agreement to arbitrate is unenforceable unless notice of the agreement is “prominently” placed on the first page of the contract, on the other hand, the mere presence of a notice, without a specific agreement to arbitrate, is insufficient.

While the Company's Operating Agreement contains a notice that the terms and


B 4

conditions of the Operating Agreement are subject to arbitration, it does not contain any provision whereby the parties actually *agreed* to arbitrate any particular "controversy thereafter arising." Defendants have failed to "[show] an agreement as described in §15-48-10", and, therefore, they are not entitled to pursue arbitration under § 15-48-20. There simply is no arbitration agreement for the court to consider or enforce.

B. The notice does not require submission of Plaintiff's claims to arbitration.

As discussed above, the court cannot reconcile Defendants' position with the plain language of § 15-48-10, which requires both an agreement and a notice. Nevertheless, even if the notice is viewed as the parties' agreement to arbitrate, it does not follow that Plaintiff's claims are subject to arbitration.

Whether a party has agreed to arbitrate an issue is a matter of contract interpretation. "[A] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960). In determining whether an arbitration agreement applies to a particular dispute, the court must consider whether the factual allegations underlying the plaintiff's claim are within the scope of the parties' arbitration agreement. *Parsons v. John Wieland Homes, Inc.*, Op. No. 2014-000782, 2016 WL 4411112, at *2 (S.C. Aug. 17, 2016).

The "notice of arbitration" printed on the first page of the Operating Agreement, states only that the "*terms and conditions of this operating agreement* are subject to arbitration." (Emphasis added.) Thus, even if the notice were also an arbitration agreement, that agreement would require the parties to arbitrate disputes concerning the "terms and conditions" of the Operating Agreement. However, Plaintiff's claims do not turn upon the "terms and conditions" of the Operating Agreement. They did not agree to arbitrate claims of the kind asserted in Plaintiff's complaint. Had the parties intended that "any and all disputes" between them be arbitrated, they could have included such a provision in the Operating Agreement. They did not.

Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect. *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009), citing *Schulmeyer v. State Farm Fire and Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). It is a question of law for the court whether the language of a contract is ambiguous. *S.C. Dep't of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001). "If the intention of the parties is clear, the Courts have no authority to change the contract in any particular" *Carroway v. Johnson*, 245 S.C. 200, 203, 139 S.E.2d 908, 910

(1965); *see also*, *S.S. Newell & Company v. American Mutual Liability Insurance Company*, 199 S.C. 325, 332, 19 S.E.2d 473 (1942). I find and conclude that there is no ambiguity in the language of the Operating Agreement.

“Arbitration is a matter of consent, and not coercion.” *Stolt-Nielsen, S.A. v. AnimalFeeds Int’l. Corp.*, 559 U.S. 662, 697 (2010), quoting *Volt Infor. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 479 (1989)). The parties did not agree that “any and all disputes” between them must be arbitrated, and Plaintiff did not agree to arbitrate the claims he has asserted in this action. He cannot now be forced to do so.

CONCLUSION

Based on the findings and conclusions herein, it is ordered that Defendants’ motion to compel arbitration and stay this action be denied.

AND IT IS SO ORDERED.

October 5, 2016


S. Jackson Kimball
Special Circuit Court Judge
York County

#6

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2016CP4602458

Loyd C Chad Whitmire

Johnny C Carl Hawksen

Commons At Fort Mill
LLC The

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

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

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

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

This matter came before me on October 31, 2016 upon Defendants' motion pursuant to Rule 59(e), SCRPC, asking the Court to alter or amend the Court's orders filed September 30 and October 6, 2016. . Representing the parties were: W. Keith Martens for Plaintiff; and, H. Freeman Belser for Defendants.

The purpose of Rule 59(e), SCRPC, to alter or amend the judgment, is to request the trial judge to ". . . reconsider matters properly encompassed in a decision on the merits." *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992) (Citations omitted).

Upon reviewing the record presented, and considering the arguments of counsel, I find no matter presented that was not addressed expressly, or by clear implication, in the prior orders. I further find no basis for reconsideration or amendment of the rulings rendered in the prior orders.

Therefore, it is ordered that Defendants' Motion pursuant to Rule 59(e), SCRPC, be denied.

AND IT IS SO ORDERED.

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

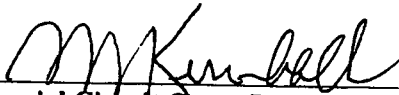
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[Signature]
1 R. 14

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Special Circuit Court Judge

3063

Judge Code

10/31/2016

Date

11/1/16
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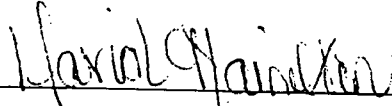
This judgment was entered on *11/1/16*, and a copy mailed first class or placed in the appropriate attorney's box on *11/1/16*, to attorneys of record or to parties (when appearing pro se) as follows:

Walter Keith Martens 130 E. Main Street Rock Hill, SC
29731

H. Freeman Belser PO Box 96 Columbia, SC 29202

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)



Court Reporter: N/A

David Hamilton - Clerk of Court

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

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

11/2

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) SIXTEENTH JUDICIAL CIRCUIT

Loyd C. (Chad) Whitmire,) C/A No. 2016-CP-46-2458

Plaintiff,

v.

SUMMONS

Johnny C. (Carl) Hawkensen and
The Commons at Fort Mill, LLC,

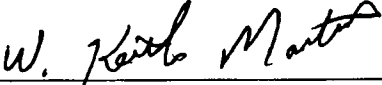
Defendants.

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2016 AUG 19 PM 1:09
DAVID K. HAMILTON
C.C.D. & G.S.
YORK COUNTY, SC

TO THE DEFENDANT:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer upon the undersigned subscriber at HAMILTON MARTENS, LLC, at Post Office Box 10940, Rock Hill, South Carolina 29731, within thirty (30) days after the service hereof, exclusive of the date of such service; and you are hereby notified that should you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for judgment by default for the relief demanded in the Complaint.

August 18, 2016


W. Keith Martens
HAMILTON MARTENS, LLC
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ATTORNEY FOR PLAINTIFF

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) SIXTEENTH JUDICIAL CIRCUIT

Loyd C. (Chad) Whitmire,) C/A No. 2016-CP-46-2458
Plaintiff,)
v.) COMPLAINT
Johnny C. (Carl) Hawkensen and)
The Commons at Fort Mill, LLC,)
Defendants.)

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Plaintiff, complaining of the defendant, would allege and show as follows:

PARTIES, JURISDICTION AND VENUE

1. Plaintiff (hereafter "Plaintiff" or "Whitmire") is a citizen and resident of Mecklenburg County, North Carolina.
2. On information and belief, Defendant Johnny C. Hawkensen (hereafter "Hawkensen") is a citizen and resident of York County, South Carolina.
3. Defendant The Commons at Fort Mill, LLC (hereafter "Company") is a South Carolina limited liability company that owns property and transacts business in York County, South Carolina.
4. The most significant events giving rise to this action occurred within York County, South Carolina.
5. This court has jurisdiction over the parties and the subject matter of this dispute. Venue is proper in York County.

FACTS

6. Whitmire and Hawkensen have a long-standing business relationship.
7. In or about 2007, Whitmire and Hawkensen formed R&D of the Carolinas, LLC ("R&D") for purposes of participating in the purchase and development of a 29.84 +/- acre parcel of real property at the intersection of Highway 21 and Gold Hill Road in Fort Mill, South Carolina (the "Original Tract"). Whitmire and Hawkensen were, at all relevant times, the only members of R&D.
8. In approximately November 2007, R&D was one of several Tenants in Common to acquire the Original Tract.
9. In approximately June 2008, the Tenants in Common subdivided the Original Tract.
10. Approximately 13.76 acres (the "Upper Tract") was conveyed to a newly-formed limited liability company, Crossroads Retail, LLC, in which all of the original Tenants in Common (including R&D) were members. The Upper Tract is not at issue in this litigation.
11. The remainder of the subdivided property (the "Lower Tract") was conveyed to another newly-formed limited liability company, Crossroads Commons, LLC.
12. R&D was admitted as a member of Crossroads Commons, LLC.
13. Whitmire, individually, was admitted as a member of Crossroad Commons, LLC.
14. Hawkensen was not, individually, a member of Crossroad Commons, LLC.
15. Beginning in June 2008, Crossroads Commons, LLC constructed an apartment complex upon the Lower Tract which, upon completion, included 144 rental units, a clubhouse, pool and other amenities.

16. In October 2011, certain other members of Crossroads Commons, LLC relinquished their interests in that company.

17. Contemporaneous with the departure of certain other members from Crossroads Commons, LLC, Crossroads Commons, LLC conveyed the Lower Tract (including the now-complete apartment complex) to a newly-formed entity, Crossroads Commons Phase I, LLC.

18. While R&D was not a member of Crossroads Commons Phase I, LLC, both Hawkensen and Whitmire were admitted as members of Crossroads Commons Phase I, LLC, with each holding an equal 20% interest in that company. Two other individuals, Dean Biasucci and Tom Holderby, held the remaining 60% interest in Crossroad Commons Phase I, LLC, either individually or through an LLC.

19. From approximately October 2011 until October 2014, Crossroads Commons Phase I, LLC owned the Lower Tract and operated the apartment complex that had been constructed upon the Lower Tract. The apartment complex generated considerable recurring revenues for Crossroads Commons Phase I, LLC and for the benefit of its members.

20. Between October 2011 and October 2014, a number of disputes arose between the members of Crossroads Commons Phase I, LLC with regard to expenses, allocations of profits and distributions to members of the Company.

21. In October 2014, the members of Crossroad Commons Phase I, LLC resolved their ongoing dispute with the execution of a "buy-sell" agreement, whereby Hawkensen and Whitmire acquired the ownership interests of Biasucci and Holderby.

22. Following Hawkensen's and Whitmire's buy-out of Biasucci and Holderby, Whitmire and Hawkensen each held equal (50/50) interests Crossroads Commons Phase I, LLC.

23. In October 2014, Hawkensen and Whitmire formed the Company, with the intent that the assets of Crossroads Commons Phase I, LLC would be conveyed to the newly-formed Company and the existing mortgage debt of Crossroads Commons Phase I, LLC would be refinanced and assumed by the Company. While the Company did not immediately prepare an operating agreement, the Company's Articles of Organization (which were signed by Hawkensen, as organizer, and filed with the South Carolina Secretary of State) reflect that Hawkensen and Whitmire were initial "co-managers" of the Company.

24. In or about December 2014, Crossroads Commons Phase I, LLC conveyed the Lower Tract (including the apartment complex) to the Company.

25. The Company did not pay any monetary consideration to Crossroads Commons Phase I, LLC or to the members of Crossroads Commons Phase I, LLC (i.e. – Whitmire and Hawkensen). Rather, Whitmire and Hawkensen understood and agreed that the Company was merely a continuation of their long-standing business relationship, and that the Company would succeed Crossroads Commons Phase I, LLC as the owner and operator of the apartment complex.

26. Because Whitmire and Hawkensen held equal interests in Crossroads Commons Phase I, LLC, their interests in the Company are, or should also be, equal.

27. To appease the Company's mortgage lender, and at the behest of their mortgage broker, Hawkensen and Whitmire agreed that Whitmire's ownership interest in the Company would be shown on an organizational chart as a 13% interest. In actuality, Whitmire has always held a 50% +/- interest in the Company.

28. During a loan closing in December 2014, Whitmire was asked to sign an organizational chart for the Company reflecting his ownership interest at 13 percent, instead of the approximate 50 percent interest that he actually held.

29. Both Whitmire and Hawkensen understood that the organizational chart was a document prepared by, or for, the Company's mortgage lender rather than an operational document of the Company.

30. Whitmire reasonably believed that he was acting in the best interest of the Company and in the best interest of his long-time business associate, Hawkensen, when he signed the organizational chart.

31. Before signing the organizational chart, Whitmire confirmed with Hawkensen that the organizational chart did not affect Whitmire's actual ownership interest in the Company, and that Whitmire and Hawkensen would continue to treat one another equally and fairly, as they had throughout their long-standing business relationship.

32. In reliance upon Hawkensen's representations and assurances, Whitmire signed the organizational chart which reflected that he held a 13% interest in the Company, and that Hawkensen held an 87% interest in the Company.

33. On information and belief, Hawkensen either did not intend to honor his representations to Whitmire at the time he made those representations or he later reneged, when he saw an opportunity to take advantage of Whitmire and seize greater control of the Company.

34. Whitmire relied upon the representations of Hawkensen to his detriment.

35. Shortly after the Company secured its new loan, Hawkensen engaged in a number of transactions that constitute reckless self-dealing, without any regard to the rights of Whitmire or the best interest of the Company. Hawkensen's actions include:

a. Hawkensen fired the existing property manager who had been successfully operating the Company's apartment complex and replaced the manager with Hawkensen's long-time girlfriend and his nephew, neither of whom had any property management experience;

b. Hawkensen allowed his nephew and daughter to occupy apartment units, without charging them rent;

c. Notwithstanding express prohibitions of self-dealing in the Company's loan agreement, Hawkensen caused the Company to hire his own construction company to "repave" the parking lot. Hawkensen later boasted to Whitmire that he subcontracted with another company to simply "top coat" the parking lot, and that Hawkensen's construction company retained the difference;

d. Hawkensen caused the Company to purchase brand-new furniture to replace the nearly-new clubhouse furniture and then moved the "old" furniture to his girlfriend's home;

e. Hawkensen placed other members of his family, including his elderly mother, on the Company's payroll, either as employees or as independent contractors, even though those people provided no beneficial services to the Company;

f. Hawkensen used Company funds to pay attorneys and other professionals for Hawkensen's personal legal matters.

36. On information and belief, and based upon a review of the Company's ledgers, Hawkensen took draws or loans from the Company totaling approximately \$368,500 between December 2014 and October 2015. Hawkensen caused the Company to pay another \$66,188.00 to his own construction company, \$22,537.05 to lawyers and outside professionals, and approximately \$150,000 more to his family members.

37. As Hawkensen was diverting considerable assets from the Company for his personal benefit, and for the benefit of his relatives, he repeatedly denied Whitmire's requests for interim distributions, contending that the Company was "not making money." Since December 2014, Whitmire has received just a fraction of the amounts that have been distributed to Hawkensen from the Company.

38. On information and belief, and based upon a review of the Company's ledgers, the Company generated monthly revenues in excess of \$140,000 per month throughout 2015 and continues to generate substantial recurring monthly revenue. Despite this fact, Whitmire has received no distributions from the Company since December 2014.

39. On information and belief, and based upon a review of the Company's records, the Company's primary asset (the apartment complex) had a gross appraised value of approximately \$16,300,000 and a net appraised value in excess of \$6,000,000 as of December 2014. On information and belief, that asset has appreciated in value since it was last appraised in December 2014.

40. Throughout 2015, Whitmire began to challenge a number of Hawkensen's business decisions for the Company, as well as Company expenditures and its failure to pay equal interim distributions to its members.

41. In response to Whitmire's objections, Hawkensen began to take the position that Whitmire held only a 13% interest in the Company with no management authority for the Company. Hawkensen frequently offered to "buy out" Whitmire for a mere fraction of fair value of Whitmire's interest.

42. Hawkensen knew or reasonably should have known that his contentions were false and unsupportable, and that Whitmire's interest in the Company was much more valuable than the amounts offered by Hawkensen.

43. Since March 2015, Whitmire has been completely excluded from the business and operations of the Company by Hawkensen.

FOR A FIRST CAUSE OF ACTION
(Against Hawkensen - Breach of Duty of Loyalty)

44. Whitmire reiterates the allegations of paragraphs 1-43 and incorporates them by reference.

45. At all relevant times, the Company was a manager-managed company and Hawkensen was an actual or de facto manager of the Company.

46. As a manager of the Company, Hawkensen owed a duty of loyalty to the Company and to Whitmire which required Hawkensen to, among other things:

a. account to the Company and hold as trustee any property, profit or benefit derived by Hawkensen in the conduct of the Company's business or derived from a use by Hawkensen of the Company's property; and

b. refrain from dealing with the Company in the conduct of the Company's business as or on behalf of a party having an interest adverse to the Company; and

47. Hawkensen breached the duty of loyalty that he owed to Whitmire and to the Company in one or more of the specifics set forth above, and in other particulars as will be proven by the evidence.

48. Hawkensen's actions have caused Whitmire to suffer damages in such sums as will be proven by the evidence.

49. By reason of his breach(es) of his duty of loyalty, Hawkensen is personally liable for actual, incidental, consequential and exemplary damages.

FOR A SECOND CAUSE OF ACTION
(Against Hawkensen – Breach of Duty of Care)

50. Whitmire reiterates the allegations of paragraphs 1-49 and incorporates them by reference.

51. As a manager of the Company, Hawkensen owed a duty of care to Whitmire and to the Company which required Hawkensen to refrain from engaging in grossly negligent or reckless conduct, intentional misconduct or a knowing violation of the law.

52. As set forth more specifically above, Hawkensen has engaged in a pattern of grossly negligent or reckless conduct and/or intentional misconduct which was detrimental to the Company and to Whitmire.

53. Hawkensen's grossly negligent or reckless conduct and/or his intentional misconduct has caused Whitmire to suffer damages in such sums as will be proven by the evidence.

54. By reason of his breach(es) of his duty of care, Hawkensen is personally liable for actual, incidental, consequential and exemplary damages.

FOR A THIRD CAUSE OF ACTION
(Against Hawkensen – Breach of Contract)

55. Whitmire reiterates the allegations of paragraphs 1-54 and incorporates them by reference to the extent not inconsistent with the following paragraphs.

56. At the time Hawkensen and Whitmire agreed to form the Company, they were both members of Crossroads Commons Phase I, LLC, holding equal interests in that company.

57. Hawkensen and Whitmire mutually contracted and agreed that they would form the Company, and then cause Crossroads Commons Phase I, LLC to transfer its primary assets (the apartment complex and the Lower Tract) to the Company.

58. Hawkensen and Whitmire mutually contracted and agreed that their ownership interests in the Company would be identical to their prior interests in Crossroads Commons Phase I, LLC, with each member holding an equal (50% +/-) interest in the Company.

59. Whitmire fully performed his obligations under the parties' contract, authorizing and permitting the primary assets of Crossroads Commons Phase I, LLC to be transferred to the Company, foregoing immediate compensation for his interest in Crossroads Commons Phase I, LLC and, instead, accepting a 50% interest in the Company.

60. Hawkensen breached the terms of his contract with Whitmire, including the covenant of good faith and fair dealing that is incorporated into every contract, when he failed to honor his agreement with Whitmire and refused to treat Whitmire as an equal and bona fide member of the Company.

61. Hawkensen's breach(es) of the parties' contract have caused Whitmire to suffer substantial actual, incidental and consequential damages, all in such sums as will be proven by the evidence.

FOR A FOURTH CAUSE OF ACTION

(Against Hawkensen –
Breach of Contract Accompanied by Fraudulent Act)

62. Whitmire reiterates the allegations of paragraphs 1-61 and incorporates them by reference to the extent not inconsistent with the following paragraphs.

63. Hawkensen's breaches of contract were accompanied by one or more fraudulent acts, including:

a. Taking interim distributions from the Company for his own benefit, and then denying Whitmire distributions in equal amounts, asserting that the Company was “not profitable;”

b. Authorizing and engaging in self-dealing and fraudulent transactions with the Company in an effort to make the Company appear unprofitable, and avoid making distributions to Whitmire;

c. Falsely asserting that Whitmire possessed a minority (13%) interest in the Company when Hawkensen knew or reasonably should have known such assertions were false; and

d. In such other particulars as will be proven by the evidence.

64. In addition to actual, incidental and consequential damages, Whitmire is entitled to recover additional punitive damages in such sums as will vindicate Whitmire’s rights, punish Hawkensen for his wrong doing and set an example.

FOR A FIFTH CAUSE OF ACTION
(Against Hawkensen - Negligence and Gross Negligence)

65. Whitmire reiterates the allegations of paragraphs 1-64 and incorporates them by reference to the extent not inconsistent with the following paragraphs.

66. By virtue of their long-standing business relationship Hawkensen owed Whitmire a duty of care to refrain from taking actions that were directly detrimental and harmful to Whitmire.

67. The duty owed by Hawkensen arose independently of Hawkensen’s and Whitmire’s membership in the Company.

68. Hawkensen breached his duty of care to Whitmire in one or more of the particulars specified elsewhere in this pleading.

69. Hawkensen's acts and omissions were negligent, grossly negligent and were undertaken with intentional and reckless disregard for the rights of Whitmire, Hawkensen's long-standing business associate.

70. Hawkensen's acts and omissions have caused Whitmire to suffer actual damages in such sums as will be proven by the evidence.

71. In addition to actual damages, Whitmire is entitled to recover punitive damages in a sufficient sum to vindicate Whitmire's rights, punish Hawkensen for his intentional, reckless and/or grossly negligent behavior, and to set an example.

FOR A SIXTH CAUSE OF ACTION
(Against Hawkensen – Unfair Trade Practices)

72. Whitmire reiterates the allegations of paragraphs 1-71 and incorporates them by reference to the extent not inconsistent with the following paragraphs.

73. Hawkensen has engaged in a multitude of unfair and deceptive business practices with regard to Whitmire, including but not limited to:

a. Inducing Whitmire to sign an organizational chart that did not accurately reflect Whitmire's ownership interest in the Company with false promises that Hawkensen would continue to treat Whitmire "fairly" and equitably;

b. When Whitmire attempted to execute his bona fide rights and obligations as a member and manager of the Company, Hawkensen contended that Whitmire held a mere 13% interest in the Company and no authority, when Hawkensen knew or reasonably should have known that his contentions were false and unsupportable;

c. When Whitmire attempted to execute his bona fide rights and obligations as a member and manager of the Company, Hawkensen locked Whitmire out of the Company and denied Whitmire access to the Company's records and accounts;

d. In denying distributions to Whitmire while Hawkensen has continually distributed significant sums of money to himself, his family members, and his construction company; and

e. In such other particulars as will be proven by the evidence.

74. On information and belief, Hawkensen engaged in these acts in a deliberate attempt to deprive Whitmire of the benefits of years of work and sacrifice, and in an effort to gain singular control of the very valuable business asset that Whitmire and Hawkensen had built together.

75. Hawkensen's unfair and deceptive business practices violate the laws and public policies of this state, are contrary to the orderly conduct of business in this state, and therefore affect the public at large.

76. Hawkensen's unfair and deceptive business practices are capable of repetition.

77. Hawkensen's unfair and deceptive business practices have caused Whitmire to suffer an ascertainable loss of money and/or property in such sums as will be proven by the evidence.

78. Hawkensen's unfair and deceptive business practices were knowing or intentional.

79. Whitmire is entitled to recover from Hawkensen an amount equal to three times his actual losses, together with attorney's fees and the costs of this action.

FOR A SEVENTH CAUSE OF ACTION
(Against Both Defendants – Declaratory Judgment)

80. Whitmire reiterates the allegations of paragraphs 1-79 and incorporates them by reference to the extent not inconsistent with the following paragraphs.

81. At the time Hawkensen and Whitmire agreed to form the Company, they were both members of Crossroads Commons Phase I, LLC, holding equal interests in that company.

82. At the time Hawkensen and Whitmire agreed to form the Company, Crossroads Commons Phase I, LLC was the owner of the apartment complex and the Lower Tract.

83. In or about December 2014, Hawkensen and Whitmire, as members and/or managers of Crossroads Commons Phase I, LLC caused Crossroads Commons Phase I, LLC to transfer and convey the apartment complex and the Lower Tract to the Company.

84. The Company did not purchase the apartment complex or the Lower Tract from Crossroads Commons Phase I, LLC, and did not pay financial consideration to Crossroads Commons Phase I, LLC.

85. Neither Hawkensen nor Whitmire received immediate financial remuneration for their interests in Crossroads Commons Phase I, LLC. Instead, they each received interests in the newly-formed Company that were equal to their prior interests in Crossroads Commons Phase I, LLC.

86. Neither Hawkensen nor Whitmire sold, purchased, transferred, relinquished or exchanged any of their ownership interests in the Company or engaged in any transfer of shares through a transaction supported by valuable consideration. There has been no transaction or transfer for value that would have resulted in Hawkensen's ownership interest in the Company being increased or resulted in Whitmire's ownership interest in the Company being decreased.

87. Whitmire is entitled to declaratory judgment that his ownership interest in the Company is equal to the ownership interest of Hawkensen, with each holding an equal 50% +/- interest in the Company.

FOR AN EIGHTH CAUSE OF ACTION

(Against Both Defendants – Reformation of Organizational Chart)

88. Whitmire reiterates the allegations of paragraphs 1-87 and incorporates them by reference to the extent not inconsistent with the following paragraphs.

89. Hawkensen would be unjustly enriched if Whitmire's equal (50% +/-) ownership interest in the Company is not recognized and properly accounted for.

90. To the extent necessary to prevent Hawkensen's unjust enrichment and to ensure that Whitmire receives appropriate and equitable value for his 50% +/- interest in the Company, Whitmire is entitled to have the Organizational Chart reformed to reflect that Hawkensen and Whitmire now have, and always have held, equal ownership interests in the Company.

FOR A NINTH CAUSE OF ACTION
(Against the Company – Dissociation)

91. Whitmire reiterates the allegations of paragraphs 1-90 and incorporates them by reference to the extent not inconsistent with the following paragraphs.

92. Beginning in early 2015 and continuing for more than a year, Whitmire attempted to negotiate with Hawkensen and the Company for a buy-out of Whitmire's interest in the Company at fair value.

93. Neither the Company nor Hawkensen ever offered Whitmire a price approaching fair value for his interest in the Company, and the parties have mutually agreed that it would be futile to continue negotiating.

94. On or about July 31, 2016, Whitmire served Hawkensen and the Company with formal notice of his dissociation from the Company.

95. Whitmire is entitled to have the court determine the fair value of his distributional interest in the Company, valued at 50% +/-, and to an order requiring the Company purchase Whitmire's distributional interest at fair value.

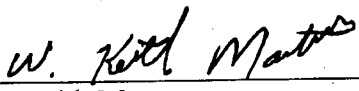
96. Whitmire is also entitled to a judicial determination that the Company has acted arbitrarily, vexatiously or not in good faith with regard to its valuation of Whitmire's distributional interest, such that Whitmire is entitled to recover his reasonable expenses,

including attorney's fees and the expenses of appraisers and other experts incurred in this proceeding.

WHEREFORE, Plaintiff Whitmire prays for the following relief:

1. For judgment against Hawkensen, and for an award actual, incidental, consequential, exemplary and punitive damages in such sums as the fact-finder may find appropriate;
2. For a judicial declaration that Whitmire holds a 50% +/- interest in Defendant Company;
3. For reformation of Defendant Company's organizational chart and/or such other equitable relief as necessary to prevent Hawkensen's unjust enrichment and to ensure that Whitmire is treated equitably and fairly with regard to the Defendant Company;
4. For a judicial determination of the fair value of Plaintiff Whitmire's interest in Defendant Company and for entry of an order requiring Defendant Company to purchase such interest;
5. For the costs of this action, including costs of appraisers, professionals, etc. as authorized by statute;
6. For attorney's fees;
7. For such other and further relief as the court deems just and proper.

August 18, 2016.



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Telephone 803.329.7672
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ATTORNEYS FOR PLAINTIFF
LOYD C. (CHAD) WHITMIRE

STATE OF SOUTH CAROLINA)

COUNTY OF YORK)

Loyd C. (Chad) Whitmire,)

Plaintiff,)

v.)

Johnny C. (Carl) Hawkensen and
The Commons at Fort Mill, LLC,)

Defendants.)

IN THE COURT OF COMMON PLEAS
IN THE 16th JUDICIAL CIRCUIT
Case Number 2016-CP-46-2458

ANSWER AND COUNTERCLAIMS

FILED-RECEIVED
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D. J. HAMILTON
CLERK OF COURT
S.C.
YORK COUNTY, S.C.

Subject to and specifically reserving their right to arbitration pursuant to the October 28, 2014 Operating Agreement of The Commons at Fort Mill, LLC, as well as their right to appeal The Honorable S. Jackson Kimball, III's decision to deny Defendants' Motion to Compel Arbitration, Defendants Johnny C. (Carl) Hawkensen ("Hawkensen") and The Commons at Fort Mill, LLC ("The Commons"), hereby submit their Answer and Counterclaims to the allegations of the Plaintiffs' Complaint. Defendants specifically deny each and every allegation of the Complaint except as specifically admitted herein.

For a First Defense

Specific Response to Numbered Paragraphs

1. Admitted.
2. Admitted.
3. Admitted.
4. Admitted, but the Defendants further allege that this dispute involves real estate in North Carolina.
5. Denied. This matter is subject to arbitration.
6. Admitted.
7. Defendants crave reference to and incorporate herein the legal documents memorializing the referenced transaction. Defendants further allege that Hawkensen owned 85% in R&D of the Carolinas, LLC and Plaintiff owned 15%.

8. Defendants crave reference to and incorporate herein the legal documents memorializing the referenced transaction.
9. Defendants crave reference to and incorporate herein the legal documents memorializing the referenced transaction.
10. Defendants crave reference to and incorporate herein the legal documents memorializing the referenced transaction.
11. Defendants crave reference to and incorporate herein the legal documents memorializing the referenced transaction.
12. Defendants crave reference to and incorporate herein the legal documents memorializing the referenced transaction.
13. Defendants crave reference to and incorporate herein the legal documents memorializing the referenced transaction.
14. Defendants crave reference to and incorporate herein the legal documents memorializing the referenced transaction.
15. Admitted.
16. Defendants crave reference to and incorporate herein the legal documents memorializing the referenced transaction.
17. Defendants crave reference to and incorporate herein the legal documents memorializing the referenced transaction.
18. Defendants crave reference to and incorporate herein the legal documents memorializing the referenced transaction.
19. Admitted.
20. Admitted.
21. Defendants crave reference to and incorporate herein the legal documents memorializing the referenced transaction.
22. Denied.
23. Defendants crave reference to and incorporate herein the legal documents memorializing the referenced transaction.
24. Admitted.

25. Denied. Defendants crave reference to and incorporate herein the legal documents memorializing the referenced transaction.
26. Denied.
27. Denied.
28. Denied.
29. Denied.
30. Denied.
31. Denied.
32. Denied.
33. Denied.
34. Denied.
35. Denied.
36. Denied.
37. Denied.
38. Denied.
39. Defendants admit that the appraisal speaks for itself.
40. Denied.
41. Denied.
42. Denied.
43. Denied.
44. Defendants reallege and incorporate herein by reference the allegations of the above paragraphs.
45. Defendants admit that The Commons is manager managed by Blue Wave Management, Inc.
46. This paragraph calls for a legal conclusion.

47. Denied.
48. Denied.
49. Denied.
50. Defendants reallege and incorporate herein by reference the allegations of the above paragraphs.
51. This paragraph calls for a legal conclusion.
52. Denied.
53. Denied.
54. Denied.
55. Defendants reallege and incorporate herein by reference the allegations of the above paragraphs.
56. Defendants crave reference to and incorporate herein the legal documents memorializing the referenced transaction.
57. Defendants crave reference to and incorporate herein the legal documents memorializing the referenced transaction.
58. Denied.
59. Denied.
60. Denied.
61. Denied.
62. Defendants reallege and incorporate herein by reference the allegations of the above paragraphs.
63. Denied.
64. Denied.
65. Defendants reallege and incorporate herein by reference the allegations of the above paragraphs.
66. Denied.

67. This paragraph calls for a legal conclusion.
68. Denied.
69. Denied.
70. Denied.
71. Denied.
72. Defendants reallege and incorporate herein by reference the allegations of the above paragraphs.
73. Denied.
74. Denied.
75. Denied.
76. Denied.
77. Denied.
78. Denied.
79. Denied.
80. Defendants reallege and incorporate herein by reference the allegations of the above paragraphs.
81. Defendants crave reference to and incorporate herein the legal documents memorializing the referenced transaction.
82. Admitted.
83. Defendants crave reference to and incorporate herein the legal documents memorializing the referenced transaction.
84. Defendants crave reference to and incorporate herein the legal documents memorializing the referenced transaction.
85. Denied. Defendants crave reference to and incorporate herein the legal documents memorializing the referenced transaction.

86. For answer to this paragraph, Defendants crave reference to and incorporate herein the legal documents memorializing the transaction.
87. Denied.
88. Defendants reallege and incorporate herein by reference the allegations of the above paragraphs.
89. Denied.
90. Denied.
91. Defendants reallege and incorporate herein by reference the allegations of the above paragraphs.
92. Denied.
93. Denied.
94. The effective date of the Plaintiff's dissociation was August 1, 2016.
95. Denied.
96. Denied.

For a Second Defense
Parol Evidence Rule

97. The organizational chart that the Plaintiff signed in conjunction with the Fall 2014 transactions clearly and unambiguously states that Plaintiff has a 13% interest in The Commons. Under the parol evidence rule, the Plaintiff is barred from presenting any extrinsic evidence that contradicts the organizational chart; therefore, the Plaintiff is bound by the terms of the organizational chart and cannot aver otherwise.

For a Third Defense
Equitable Estoppel

98. Plaintiff signed the organizational chart by his own free will in the absence of any duress. Plaintiff's actions and inactions contemporaneous with the giving of his signature, and thereafter, are inconsistent with the allegations the Complaint. Therefore, the Plaintiff is bound by the terms of the organizational chart and is estopped from pleading or attempting to prove otherwise.

For a Third Defense
Merger

99. The final bargain of the parties was integrated into the documents executed and delivered at the closing of the purchase of the Lower Tract by The Commons on December 9, 2014. Those documents contain representations as to ownership, references to the organizational chart, and an integration clauses, the effect of which is that the Plaintiff is prohibited by the doctrine of merger averring otherwise.

For a Fourth Defense
Unclean Hands

100. The organizational chart that the Plaintiff signed in conjunction with the Fall 2014 transactions was prepared and signed at the request of The Commons' lender, which loaned The Commons \$11,000,000. If one were to believe Plaintiff's allegations, then Plaintiff was a knowing participant in a large scale mortgage fraud involving the Plaintiff and Hawkensen and their mortgage broker and attorney, in which case Plaintiff would have unclean hands and be precluded from pursuing the relief that he seeks.

For a Fourth Defense
Illegality

101. Illegality is a defense to a contract action, and Plaintiff is not permitted to acquire a right of action from his own unlawful act because one who participates in an unlawful act cannot recover damages for the consequence of that act. If one were to believe Plaintiff's allegations, then Plaintiff was a knowing participant in a large scale mortgage fraud involving the Plaintiff and Hawkensen and their mortgage broker and attorney, in which case Plaintiff has no right to pursue the relief that he seeks.

For a Fifth Defense
Duty to Read, to Understand, and to Protect

102. Plaintiff, an experienced businessman who was represented by counsel in conjunction with the Fall 2014 transactions, had a duty to read, to understand, and to protect himself in signing documents, including, but not limited to the organizational chart. The allegations of the Complaint suggest that he failed to do so, but that does not mean that he can attempt to undo them now.

For a Sixth Defense
Offset

103. If the Court orders Defendants to purchase Plaintiff's interest in The Commons, then Defendants are entitled to an offset for all amounts owing by the Plaintiff to The Commons, whether or not currently due, from the Plaintiff, including those

damages from wrongful dissociation, pursuant to S.C. Code Ann. §§ 33-44-602(d) and 33-44-701(f).

For a Seventh Defense

Laches

104. Plaintiff realleges and incorporates herein by referenced the allegations of the above paragraphs.
105. If one assumes that Plaintiff's allegations are true, then doctrine of laches bars him from enforcing a right that he otherwise would have had, for he has unreasonably and unexplainably delayed in bringing his claims long after the December 2014 closing, even though he had an opportunity to be diligent in doing so.

For an Eighth Defense and by way of Counterclaim

Resulting Trust

106. Plaintiff realleges and incorporates herein by referenced the allegations of the above paragraphs.
107. In August 2014, Plaintiff met Michael Heinen, owner of three parcels totaling 14.47 acres in Mooresville, North Carolina ("the Mooresville Property"). Heinen, who is not a developer, was seeking a partner with development experience to maximize the value of the Mooresville Property. The highest and best use of the Mooresville Property was then and is now as an apartment community.
108. Shortly thereafter, Plaintiff informed Hawkensen of the Mooresville Property and the potential for a joint venture with Heinen. Plaintiff and Hawkensen agreed to explore a relationship with Heinen where Heinen would contribute the Mooresville Property to a venture and Plaintiff and Hawkensen would develop it.
109. On September 9, 2014, Plaintiff sent Hawkensen an email with a proposed budget and takedown schedule for the Mooresville Property that valued the property at \$75,000/acre. At that time, Heinen valued the Mooresville Property at approximately \$110,000.
110. Plaintiff, Hawkensen, and Heinen were not able to finalize a deal in the fall of 2014. However, Plaintiff and Hawkensen did agree to make a \$100,000 bridge loan to Heinen to tie up the Mooresville Property while the parties negotiated a loan and purchase agreement. Plaintiff and Hawkensen intended the Mooresville Property venture to be a joint venture.

111. Around the time that Plaintiff brought the Heinen deal to Hawkensen, Plaintiff and Hawkensen were negotiating a buyout with the other members of Crossroads Commons Phase 1, LLC, Thomas S. Holderby and Dean Biasucci.
112. Holderby and Biasucci became members of Crossroads Commons Phase 1, LLC in the fall of 2011 through a separate limited liability company called Carolina Capital Communities, LLC.
113. The subject of a buyout arose because Holderby and Biasucci had significantly overdrawn their distributional interests in Crossroads Commons Phase 1.
114. Plaintiff and Hawkensen became aware of the overdrafts in 2013.
115. Plaintiff and Hawkensen estimated the overdrafts by Holderby and Biasucci at \$1,200,000.
116. After discovering the overdrafts, Plaintiff informed Hawkensen that he intended to "take his share" or words to that effect.
117. On October 10, 2013, Plaintiff took \$37,000 from Crossroads Commons Phase 1. This was supposed to be a loan, but Plaintiff never paid it back.
118. Between August 19, 2013 and November 5, 2014, Plaintiff took \$179,000 from Crossroads Commons Phase 1. Some of the money was taken by Plaintiff without prior authorization by Plaintiff when he went to the bank alone and withdrew funds.
119. A material part of the buyout negotiation was the fact that Holderby and Biasucci had never paid Plaintiff and Hawkensen for the land that R&D of the Carolinas, LLC contributed to Crossroads Commons, Phase 1.
120. Plaintiff owned 15% of R&D of the Carolinas, LLC.
121. Hawkensen owned 85% of R&D of the Carolinas, LLC.
122. On October 7, 2014, Plaintiff, Hawkensen, Holderby, and Biasucci executed a Membership Interest Purchase Agreement (MIPA) setting forth the terms of the buyout.
123. Paragraph 1.01 of the MIPA provides that Holderby and Biasucci would resign as managers of Crossroad Commons Phase 1 at closing at that the membership interests of the remaining members, Plaintiff and Hawkensen, would be owned as they may agree.
124. Holderby and Biasucci did not believe that Plaintiff and Hawkensen would be able to secure financing to fund the transactions outlined in the MIPA.

125. Paragraph 6.07 of the MIPA provided that Holderby and Biasucci could put the property up for sale if Plaintiff and Hawkensen were not able to close by January 15, 2015.
126. Paragraph 6.07 of the MIPA also provided that Holderby and Biasucci could sell the property if they received a purchase offer of at least \$13,600,000.
127. Paragraph 6.09 of the MIPA provided that the net proceeds of a sale of the property pursuant to Paragraph 6.07 would be distributed as follows:
 - a. \$600,000 to Holderby and Biasucci plus 50% of the excess of the sales price over \$13,600,000;
 - b. \$1,333,907 to Hawkensen; and
 - c. The remainder to Plaintiff and Hawkensen in accordance with their percentages of ownership of Crossroads Commons Phase 1.
128. The specific allocations of funds to Holderby, Biasucci, Plaintiff and Hawkensen under Paragraph 6.07 was in recognition of the fact that (a) Holderby and Biasucci had significantly overdrawn their distributional interests in Crossroads Commons Phase 1, (b) Holderby and Biasucci had never paid Plaintiff and Hawkensen for the land that for the land that R&D of the Carolinas, LLC contributed to Crossroads Commons, Phase 1, (c) Hawkensen owned 85% and Plaintiff owned 15% of R&D of the Carolinas, LLC and (d) Plaintiff had taken \$179,000 from Crossroads Commons Phase 1 between August 19, 2013 and November 25, 2014.
129. Plaintiff and Hawkensen organized The Commons on October 14, 2014, at which time they were in negotiations with the lender that was going to finance the buyout of Holderby and Biasucci.
130. The lender required that Plaintiff and Hawkensen have a management company for the Commons. Therefore, Plaintiff and Hawkensen incorporated Blue Wave Management, Inc. on October 21, 2014. Plaintiff owns 13% of Blue Wave, and Hawkensen owns 87%.
131. The lender also required that Plaintiff and Hawkensen provide an organizational chart demonstrating their respective ownership interests in the Commons. Therefore, Plaintiff and Hawkensen signed an organizational chart prepared by their lawyer showing that Plaintiff owned 13%, Hawkensen owned 86%, and Blue Wave owned 1%.
132. On or about December 9, 2014, Plaintiff and Hawkensen closed on the loan and the buyout of Holderby and Biasucci.

133. At closing, the lender agreed to loan approximately \$1,000,000 excess cash to The Commons.
134. Plaintiff did not receive any of the excess cash in light of the fact that Plaintiff had taken \$165,000 from Crossroads Commons Phase 1 between August 19, 2013 and September 30, 2014.
135. Consistent with his ownership interest in R&D of the Carolinas, LLC, Hawkensen was entitled to 85% of the excess cash, or \$850,000. Hawkensen applied \$600,000 of that amount to purchase the interests that Holderby and Biasucci had in Crossroads Commons Phase 1 and loaned the remaining \$250,000 to The Commons.
136. On or about December 15, 2014, Hawkensen completed an Outgoing Wire Transfer Request instructing Wells Fargo to wire \$100,000 to Heinen from the account of Hawkensen Construction, Inc., a South Carolina corporation wholly owned by Hawkensen.
137. On December 16, 2014, The Commons transferred \$100,000 to Hawkensen Construction, Inc.
138. Defendants are informed and believe that the bridge loan identifies Plaintiff as the creditor because Plaintiff was the principal contact with Heinen, not because the parties intended for the interest in the Mooresville Property to be held exclusively by Plaintiff.
139. In January 2015, Plaintiff discovered that the Internal Revenue Service had a lien on the Mooresville Property that restricted Heinen's ability to proceed. Thereafter, Heinen defaulted on the bridge loan.
140. Plaintiff kept Hawkensen informed of the Mooresville Property and Heinen's default throughout 2015.
141. In December 2015, Plaintiff informed Hawkensen of the details of the foreclosure process.
142. In 2016, the relationship between Plaintiff and Hawkensen deteriorated and the parties obtained counsel.
143. At no point in 2016 did Plaintiff ever inform Hawkensen about the Mooresville Property or about the progress of the foreclosure.
144. In July 2016, Defendants discovered that title to the Mooresville Property was in the name of Plaintiff, even though (a) the \$100,000 bridge loan was made by The

Commons through Hawkensen Construction, Inc., and (b) Hawkensen and Plaintiff always intended the Mooresville Property deal to be a joint venture.

145. In August 2016, after Defendants brought this discovery to the attention of Plaintiff, Plaintiff asserted complete ownership over the Mooresville Property, which, based on Plaintiff's own valuation of \$75,000/acre, is worth \$1,085,250.00.
146. Defendants are informed and believe that the Mooresville Property is an asset of The Commons because:
 - a. The \$100,000 bridge loan was made by The Commons through Hawkensen Construction, Inc., a South Carolina corporation wholly owned by Hawkensen;
 - b. At the time the \$100,000 bridge loan was made, Plaintiff and Hawkensen intended that the deal with Heinen be a joint venture; and
 - c. For at least twelve months after the \$100,000 bridge loan was made, Plaintiff actions relative to the Mooresville Property were consistent with the parties' intent that the deal be a joint venture.
147. Defendants are informed and believe that they are entitled to an order imposing a resulting trust on the Mooresville Property that names Plaintiff as the trustee and The Commons as the beneficiary, or, in the alternative, to an order requiring the Plaintiff to convey title to the Mooresville Property to The Commons.

For a Ninth Defense and by way of Counterclaim
Wrongful Dissociation

148. Plaintiff realleges and incorporates herein by referenced the allegations of the above paragraphs.
149. Plaintiff dissociated from The Commons, effective Aug 1, 2016.
150. The Operating Agreement for The Commons does not eliminate a member's right to dissociate; however, the Operating Agreement does prohibit The Commons from amending its organizational documents without the consent of the lender.
151. Plaintiff knew or should have known about this requirement prior to dissociating, but Defendants are informed that Plaintiff made no effort to comply with this requirement.
152. Plaintiff's dissociation from the Commons is wrongfully pursuant to S.C. Code Ann. § 33-44-602(b)(1).

153. Defendants have been damaged by Plaintiff's wrongful dissociation.
154. Plaintiff is liable to Defendants for the damages caused by Plaintiff's dissociation, in addition to Plaintiff's other obligations, pursuant to S.C. Code Ann. § 33-44-602(c).

WHEREFORE, Defendants pray that this Court:

1. Dismiss Plaintiff's Complaint with Prejudice;
2. Impose a Constructive Trust on the Mooresville Property;
3. Enter judgment against Plaintiff on account of his wrongful dissociation;
4. Award Defendants their attorney's fees and costs in defending this action; and
5. Grant Defendants such further relief as the Court deems appropriate.

BELSER & BELSER, P. A.



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(803) 929-0096
Attorneys for Defendants

Columbia, South Carolina

September 29, 2016.

1 STATE OF SOUTH CAROLINA) IN COMMON PLEAS
 2 COUNTY OF RICHLAND) COURT
 3)
 4 LOYD C. WHITMIRE,)
 5) TRANSCRIPT
 6 -V-) OF
 7) RECORD
 8 JOHNNY C. HAWKENSEN ET AL.,) 2016-CP-46-2458
 9 DEFENDANTS.)

10

11 SEPTEMBER 15, 2016

12 RICHLAND, SOUTH CAROLINA

13

14 B-E-F-O-R-E:

15 HONORABLE S. JACKSON KIMBALL, JUDGE;

16

17 A-P-P-E-A-R-A-N-C-E-S:

18 FOR THE PLAINTIFF:

19 WALTER KEITH MARTENS, ESQ.

20

21 FOR THE DEFENDANT:

22 H. FREEMAN BELSER, ESQ.

23

24

25

I-N-D-E-X

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1 (The following proceedings were held on
2 September 15, 2016.)

3 THE COURT: This is case number 2016-2458, Loyd C:
4 "Chad" Whitmire vs. Johnny C. "Carl" Hawkenesen. Present
5 representing the Plaintiff is Mr. Keith Martens. Present
6 representing the Defendant is Mr. Freeman Belser.

7 I've got two motions. Now, I think I received
8 something today to do with something else.

9 MR. BELSER: Well, Your Honor, two motions, one is
10 the Defendant's motion for arbitration -- to compel
11 arbitration --

12 THE COURT: That's right.

13 MR. BELSER: -- and the second one is Plaintiff's
14 motion to appoint a receiver. The thing that I sent today
15 was a memorandum in support of my motion for arbitration. I
16 sent that by e-mail this morning. I have a hard copy if
17 Your Honor would like another copy. I'm not sure if you've
18 printed it out or not.

19 THE COURT: No, I've got it right here. Maryann
20 printed it out for me.

21 Let me -- and I don't recall which was filed
22 first. I think -- which was filed first?

23 MR. BELSER: The motion to appoint a receiver was
24 filed first.

25 THE COURT: All right. Let me hear that.

1 MR. MARTENS: May it please the Court. I'm Keith
2 Martens here on behalf of the Plaintiff, Chad Whitmire.

3 Your Honor, seated in the courtroom is Mr. Kevin
4 Jones. He's the general manager of Rhinehart Property
5 Management. We asked him to be here in the event that the
6 Court grants this motion. I wanted to have -- we would
7 propose that Rhinehart Property Management be appointed as
8 the receiver. I wanted Mr. Jones to be here just in case
9 the Court had any questions regarding receiver's
10 qualification roles, et cetera.

11 THE COURT: I -- let's hear the motion. Let's
12 just hear the motion for right now.

13 MR. MARTENS: Yes, sir. A motion to appoint a
14 receiver is an extraordinary remedy. And the Defendants
15 have argued that in opposition to this motion. That fact is
16 not lost on me. In 21 years of practice, I think this is
17 the second time I've come before a Court asking for this
18 extraordinary relief.

19 The fact that a receivership is rarely granted
20 doesn't mean it should never be granted. And we believe
21 that this is a case in which receivership is an appropriate
22 remedy, particularly, in light of the arbitration issue,
23 which the Court will hear shortly, because we believe if --
24 we don't believe the Defendants can prevail on their motion
25 to compel arbitration. As Your Honor is well aware, an

1 order denying a motion to compel arbitration is immediately
2 appealable.

3 Our concern as established by the affidavit that
4 we filed in support of this motion --

5 THE COURT: Well, let me back up a second and stop
6 you. Maybe I'm doing this in the wrong order. A question I
7 had as I read through all of this yesterday was whether if I
8 granted a motion to compel arbitration, the arbitrator -- an
9 arbitrator has the authority by statute to appoint the
10 receiver? You see what I mean? In other words, is it
11 possible that I could compel arbitration and still appoint a
12 receiver because the receivership statute says the Court
13 shall appoint.

14 MR. MARTENS: I believe --

15 THE COURT: Is that sort of an ancillary remedy
16 that has nothing to do with the merits of what's heard in
17 arbitration?

18 MR. MARTENS: That's exactly right. I believe the
19 answer to that question is yes. I have not been able to
20 find a specific state law case on point. I have found, and
21 I would like to hand up to the Court, a case from the Fourth
22 Circuit that deals not with a receivership, but with a
23 preliminary injunction.

24 THE COURT: Uh-huh.

25 MR. MARTENS: And the issue in that case was

1 whether when a Court compels arbitration -- and again, keep
2 in mind, this is under the federal act, not the state act,
3 but I think, as the Court is well aware, our state courts
4 have regularly followed federal court interpretations of a
5 FAA as guidance for what to do with arbitration --

6 THE COURT: Yes, sir.

7 MR. MARTENS: This case was a case where a party
8 sought to compel arbitration. There was a question about
9 injunctive relief, preliminary injunctive relief and did the
10 Court have the authority to grant preliminary injunctive
11 relief and compel arbitration in the same action. And the
12 Court said -- after reviewing it, said yes, the Court does
13 after that authority. And, in fact, what they say is that
14 we hold that where a dispute is subject to mandatory
15 arbitration under the federal act --

16 THE COURT: Where are you, please?

17 MR. MARTENS: This is on Page 5 of the order, Your
18 Honor.

19 THE COURT: Of the opinion?

20 MR. MARTENS: Of the opinion, I'm sorry, yes, sir.
21 Beginning in the left-hand column at the bottom of Page 5.

22 THE COURT: Yes, sir.

23 MR. MARTENS: See that paragraph number one?

24 THE COURT: Yes, sir.

25 MR. MARTENS: About the fourth line down,

1 Accordingly, we hold that where a dispute is subject to
2 mandatory arbitration under the federal act, a district
3 court has the discretion to grant a preliminary injunction
4 to preserve the status quo pending the arbitration of the
5 parties' dispute if the enjoined conduct would render that
6 process a hollow formality.

7 And, essentially, that's our argument here. As we
8 have established, I believe we've established through the
9 affidavit of Mr. Whitmire, the company's own records show
10 significant cash leaving this company. The Defendants have
11 offered some affidavits in opposition to that.

12 THE COURT: Uh-huh.

13 MR. MARTENS: But we certainly think there's a
14 serious and significant question as to what is being done
15 with the rents and profits of this company.

16 So to answer your question, I believe this issue,
17 whether the Court can consider a receiver, is a separate and
18 distinct issue from whether they're entitled to compel
19 arbitration of the primary suit.

20 THE COURT: Well, let me --

21 Mr. Belser, what about that? Let's get that out
22 of the way.

23 MR. BELSER: Yes, Your Honor. Not surprisingly, I
24 think the answer is no. I think that this -- as stated in
25 my memorandum, this relates directly to the management and

1 operations of the limited liability company. The operating
2 agreement says on the first page that everything is -- the
3 terms and conditions are subject to the arbitration --
4 arbitration pursuant to the South Carolina act. I think
5 that there's -- there's no -- I'm not aware of any case law
6 in South Carolina that says that a judge can -- a circuit
7 court judge can retain jurisdiction over a receiver while
8 arbitration is ongoing.

9 THE COURT: Well, I guess that's the point. If
10 you don't know of one, then I've got to figure it out.

11 I did not print out the receivership statute. Do
12 you have a copy of that, please?

13 MR. MARTENS: I do, Your Honor.

14 THE COURT: I looked at it, but I didn't print it
15 out. But my recollection is it says the Court may.

16 MR. MARTENS: And I apologize to Mr. Belser and to
17 myself because I printed it off at home, so that's the only
18 copy I have, but I'm happy to hand that up.

19 MR. BELSER: I've got enough paperwork over here.

20 THE COURT: Yeah, the statute says -- this is
21 what -- go ahead. You can continue, but the statute says a
22 receiver may be appointed by a judge of the circuit court
23 either in or out of court.

24 MR. MARTENS: Uh-huh.

25 THE COURT: I question whether an arbitrator has

1 the authority to do that, and in the interim, all could be
2 lost. Now, I'm not saying that I'm going authorize the
3 appointment of a receiver, but I want to get over the hurdle
4 of --

5 MR. BELSER: Yes, sir.

6 THE COURT: -- whether -- if I grant your motion
7 to compel arbitration, I can still -- it still lays with me
8 to either appoint or refuse to appoint a receiver.

9 MR. BELSER: Well, Your Honor, I think that even
10 though the statute itself, which is an old statute -- it
11 doesn't matter, the receivership has been around a lot
12 longer than arbitration has been around.

13 THE COURT: Sure.

14 MR. BELSER: Even though the statute does not
15 expressly say that the Court with jurisdiction or the
16 arbitrator with authority has the right to appoint a
17 receiver, I think the clear purpose of the arbitration act,
18 both the state act and the federal act, is to allow the --
19 is to get disputes out of the court judicial system,
20 traditional judicial system and to put them in front of an
21 arbitrator.

22 In this particular matter, there's a dispute,
23 clearly, and the parties agree that any disputes would be
24 decided by an arbitrator. So I think that there's a whole
25 boat load of case law in support of, you know, granting

1 arbitration, it's to be rigorously enforced, both in state
2 courts and federal courts.

3 THE COURT: Well, my question, though, is this,
4 let's assume what you say is true, does anybody other than
5 -- you just can't appoint a receiver willy nilly. Does
6 anybody other than by statute have the -- given by
7 statute -- authority given by statute have the power to
8 appoint a receiver to take over somebody's business?

9 MR. BELSER: Well, I think that an arbitrator who
10 is sitting as a judge in the dispute as decider of the
11 issues is the one who has -- would have the authority to
12 appoint a receiver in the first place. And it doesn't --
13 the statute doesn't say that and I can't make it say that.

14 THE COURT: No.

15 MR. BELSER: As much as I would like to be able to
16 do that, I can't.

17 THE COURT: Yeah.

18 MR. BELSER: But I think the fact of the matter is
19 that the whole purpose of the arbitration act is to allow
20 for third party arbitrators to sit in the place of a judge
21 and a jury and the arbitrators have the same powers the
22 circuit court has to enforce a judgment.

23 THE COURT: I don't think so because the circuit
24 court, for example, has to enter the judgment that the
25 arbitrator renders.

1 MR. BELSER: Uh-huh.

2 THE COURT: That's just one example.

3 MR. BELSER: I think that the -- the arbitrator
4 does not take the place of the clerk of court. I mean, I
5 will agree that if an arbitrator issues an award, then that
6 has to then be entered into the record under the same case
7 by the clerk of court, but that decision is not something
8 that's reviewable by the circuit court. I think that the
9 circuit court's role -- that the judge's role is --

10 THE COURT: We don't have any disagreement about
11 that.

12 MR. BELSER: Yes, sir.

13 THE COURT: The issue to me is assume for the
14 moment that there's a paragraph in the agreement that says
15 all disputes of any kind whatsoever will be -- the parties
16 agree that all disputes of any kind whatsoever will be
17 submitted to arbitration period. The arbitration resolves
18 the dispute. A receivership doesn't resolve a dispute. It
19 preserves the --

20 MR. BELSER: The status --

21 THE COURT: The corpus of the dispute --

22 MR. BELSER: Yes, sir.

23 THE COURT: -- if you will. I don't see that as
24 inconsistent.

25 MR. BELSER: Well, I think that an arbitrator has

1 the authority to control -- to preserve the status quo just
2 like the arbitrator has the ability under the act to set a
3 discovery schedule and require both parties to do this, that
4 and the other. I do not have the arbitration act itself in
5 front of me, but I believe that the whole purpose of the
6 arbitration act is to get disputes out of the judicial
7 system and to put them in the hands of some third party
8 arbitrator. And there's a procedure under the act in order
9 to get an arbitrator appointed.

10 THE COURT: Uh-huh.

11 MR. BELSER: Which is kind of step two of this
12 process if arbitration is compelled. Then that person --
13 you know, fortunately, the circuit court gets to -- the
14 circuit court judge get to wipe his hands clean of it
15 because that's the -- the arbitrator's there and the
16 arbitrator can do all things that a judge can do. He can
17 hold people in contempt.

18 THE COURT: Within the confines of the agreement
19 in resolving the dispute.

20 MR. BELSER: Yes, sir.

21 THE COURT: Okay. I just wanted to get -- my
22 thought is -- and I'm glad to have this Fourth Circuit case.
23 In looking at it yesterday, I thought to myself, but it
24 looks to me like if I order arbitration, I've still got to
25 deal with this matter of a receiver. In other words, I --

1 my view of it is, right or wrong, and not knowing any South
2 Carolina case, is that the business of preserving assets is
3 a creature of statute. And the statute says a receiver may
4 be appointed by a judge of the circuit court, of which I'm a
5 hybrid. Otherwise, we'll just have to hear the motion to
6 compel arbitration first and the end of that would determine
7 whether I even hear about the receiver. That's why I asked
8 the question.

9 MR. MARTENS: Your Honor, may I expound on that
10 just a little bit?

11 THE COURT: Do you need to, I sort of just ruled
12 in your favor with that?

13 MR. MARTENS: I just -- I just wanted -- I think
14 that's right. The other thing I wanted to highlight is
15 there's a case from South Carolina that talks about the
16 receiver's role and it says the receiver is an adjunct of
17 the court.

18 THE COURT: Right. I'm aware of that, yeah.

19 Okay. So let's go ahead. I can hear this -- at
20 least, for me, I'm satisfied if I can hear this business
21 about the appointment of a receiver, regardless of the
22 arbitration.

23 MR. MARTENS: So, Your Honor, continuing with my
24 motion, again, the fact that a receiver is rarely granted
25 doesn't mean it should never be granted.

1 THE COURT: Right.

2 MR. MARTENS: Under the statute, and I handed a
3 copy up to the Court, a party can obtain a receiver in the
4 discretion of the Court if we establish one, an apparent
5 right to the property that is the subject of the action. I
6 don't think that's in dispute. We've got disputes about
7 relative ownership interest in this LLC, but I don't think
8 anybody disputes that my client is a member of this LLC.

9 THE COURT: Now, I thought I -- I thought I saw
10 something in all this paperwork where he had just
11 voluntarily disassociated himself?

12 MR. MARTENS: He has disassociated himself.

13 THE COURT: And I know that means he's entitled to
14 the value of his interest at that time.

15 MR. MARTENS: That doesn't mean he's not a member,
16 it means he doesn't have the right to control the company.
17 He steps into the position of an --

18 THE COURT: Yeah, but all he'd be entitled to,
19 though, by the statute, if I read it right, is the value of
20 his interest at the time of his voluntary disassociation.

21 MR. MARTENS: That's correct, but keep in mind, we
22 also -- and that's the other issue and we'll talk about this
23 in the arbitration issue. We also have claims that go back
24 to the time he was an active participating member related to
25 the manner in which he was treated as an active

1 participating member. Those are claims for damages.

2 THE COURT: You do.

3 MR. MARTENS: And our claim, Your Honor, and the
4 reason we move for a receiver is because Mr. Hawkensen has
5 control of everything right now. And when Mr. Hawkensen
6 provided to my client as a member of the LLC pursuant to my
7 letter saying my guy's a member, we want to know what's
8 going on, send us all of the records, they did that. And
9 what those records showed was about \$225,000 that went out
10 in 2015 in the form of either cash or checks to
11 Mr. Hawkensen's construction company or checks to Mr.
12 Hawkensen.

13 THE COURT: Right.

14 MR. MARTENS: We believe that those records create
15 an issue, create a question and they show that the assets or
16 the rents and profits of this company are in danger of being
17 lost or materially impaired, which I believe is what the
18 statutory language requirement is. I don't think we have to
19 prove our case on the merits. We have to establish that the
20 rents and profits are in danger of being lost or materially
21 impaired. We have about \$225,000 that we know has gone out.
22 We have affidavits that have been submitted in opposition to
23 this motion that have accounted for about 18,500 of that.

24 THE COURT: I thought it was more than that.

25 MR. MARTENS: No, sir, if I did my math correctly.

1 THE COURT: Okay. Go ahead.

2 MR. MARTENS: We have an affidavit --

3 THE COURT: Now, are those -- those would
4 represent claims in the past that the Plaintiff may have
5 against Mr. Hawkensen or the LLC?

6 MR. MARTENS: Or the LLC.

7 THE COURT: Yes.

8 MR. MARTENS: He was a member --

9 THE COURT: In the past.

10 MR. MARTENS: He was a -- he still is a member.
11 He's a disassociated member. He disassociated in July to
12 force this issue. But from December of 2014, I believe it
13 was December, late 2014 when this company was formed --

14 THE COURT: Right.

15 MR. MARTENS: -- when my guy's a member --

16 THE COURT: I understand.

17 MR. MARTENS: -- through July of 2016, he received
18 a grand total of \$5,400 as an owner of this business. And
19 in the meantime, the other owner has received in excess of
20 \$225,000.

21 THE COURT: Here's my concern -- and I've read all
22 of that. Here's my concern, how am I to deal with -- in
23 processing this, I have some difficulty, let me say it that
24 way, in discounting the affidavit of the CPA, who offers, at
25 least, explanation for both the health of the business and

1 the disbursements from the business. In appointing an
2 receiver, what is the standard of proof -- what must I -- I
3 must find that the business is in danger of being depleted;
4 is that right?

5 MR. MARTENS: Well, I think the statute says that
6 either the assets or rents and profits are in danger of
7 being lost or materially impaired.

8 THE COURT: Yes, sir. The property or its rents
9 and profits are in danger of being lost or materially
10 injured or impaired. How would I find that? I mean, I've
11 got your allegations and I know what those are. And I've
12 got the affidavit of the CPA, who certainly has a different
13 professional standard to adhere to than the lady who works
14 there who made an affidavit. How am I --

15 MR. MARTENS: I --

16 THE COURT: Weighing that with Mr. Whitmire's
17 allegations and his affidavit, balancing that, how am I to
18 find that the assets, rents, profits and the property itself
19 are in danger of being lost or materially injured or
20 impaired? That's what I'm dealing with in my mind.

21 MR. MARTENS: And I actually think that the
22 accountant's affidavit helps our argument as opposed to
23 hurts it.

24 THE COURT: Let me find it.

25 MR. MARTENS: Or, at least, in part, I think it

1 helps us.

2 THE COURT: Douglas Gentile, right?

3 MR. MARTENS: Yes, sir.

4 THE COURT: Okay.

5 MR. MARTENS: And one of the issues that the Court
6 is concerned about is are we dealing with a company that's
7 on the brink of financial ruin so that by the time my client
8 gets his remedy we're -- it's a hollow remedy, right?

9 THE COURT: Well, no, not necessarily because he
10 has Mr. Hawkensen to go after.

11 MR. MARTENS: I believe the obligation to purchase
12 his interest is the obligation of the LLC.

13 THE COURT: That may be true. Well, the reason --
14 if it couldn't purchase his interest, the reason it couldn't
15 would be that Mr. Hawkensen has done what you said he did,
16 what your client claims he did.

17 MR. MARTENS: That's right.

18 THE COURT: I don't think he's deprived of a
19 remedy. At the end of the day, all remedies in these
20 situations might not be worth anything. We all know that.

21 MR. MARTENS: Well, again, going back to the
22 affidavit of the accountant.

23 THE COURT: Yes, sir.

24 MR. MARTENS: And the reason I think it's more
25 helpful to Mr. Whitmire's position than it is harmful,

1 paragraph seven, Mr. Gentile says --

2 THE COURT: Right.

3 MR. MARTENS: -- the company wasn't profitable in
4 2015. So we've got a company that by the accountant's own
5 reckoning was not profitable, yet, we have \$225,000 of cash
6 that gets pulled out for unexplained reasons. He says it's
7 marginally profitable now. That's exactly what we are
8 concerned about. We've got what they contend is a
9 marginally profitable entity solely under the control of the
10 guy we're fighting with and he's pulled out a quarter of a
11 million dollars when the company's not profitable.

12 THE COURT: Does a disassociated member retain the
13 right to demand reports?

14 MR. MARTENS: We would not be -- I don't believe
15 we would be entitled to regular reports moving forward. I
16 think since the point of disassociation, he is
17 disassociated, but I certainly believe we're entitled to
18 information in discovery that's relative to the claims we
19 have against the company.

20 THE COURT: Certainly.

21 MR. MARTENS: So I don't think I can write a
22 letter and say I represent a member of this LLC, please send
23 us that documentation, but I certainly can serve in
24 discovery requests information that will get me to the same
25 point. And again, our concern --

1 THE COURT: Well, the question is what can I order
2 really?

3 MR. MARTENS: Well -- and Mr. Belser and I have
4 had this conversation because I realize -- I'm asking for a
5 pretty draconian remedy here, I get that. And I don't take
6 that lightly. And Mr. Belser and I have talked about is
7 there some other way we can keep my client pacified without
8 putting a receiver in place. And Mr. Belser's client
9 response to that was not interested, don't want to do that,
10 not willing to do that, not willing to do anything. So
11 that's why we're here.

12 THE COURT: Doesn't the Court have the ability
13 to -- the authority to define the scope of the activities of
14 the receiver?

15 MR. MARTENS: You do, and if you'll look at the
16 last paragraph of our motion, we said as an alternative to
17 receivership, we would also be willing for the Court to
18 entertain some sort of injunction relief that limits the way
19 the assets of this company are spent. We're not trying to
20 put this company out of business, Your Honor. We're not
21 trying to liquidate this company. We're trying to make sure
22 that the company that my client spent 10 years of his life
23 helping build isn't robbed blind while we're fighting about
24 the value of his interest.

25 THE COURT: At the end of the day, what you want

1 is for whatever his -- the value of his interest as a
2 disassociated member is as of the date he disassociated to
3 be protected, A, and B, that the property and assets of the
4 LLC are not -- are not squandered.

5 MR. MARTENS: That's exactly right. That's
6 exactly right. And if there's a less obtrusive way to do it
7 other than have a receiver come in and take over the
8 operation of this business, we're --

9 THE COURT: Well, that's my concern, is taking
10 over the operation.

11 MR. MARTENS: And I fully appreciate that, Your
12 Honor, and I thought long and hard before I filed this
13 motion. And I think counsel will tell you, I suggested to
14 him let's figure out a way that you and I can come to an
15 agreement about what to do without what I may have to do
16 otherwise. And -- and Mr. Hawkensen, for whatever reason,
17 has rejected any overtures short of being here today.

18 THE COURT: Well, I understand.

19 MR. MARTENS: And we believe that we have -- we
20 believe that we have established the elements required under
21 the statute for this Court to appoint a receiver. We've
22 established an apparent right to property that is the
23 subject of the action.

24 THE COURT: Yep.

25 MR. MARTENS: We have established that the

1 property is in possession of the adverse party. We believe
2 we have established that the property or its rents and
3 profits are in danger of being lost or materially destroyed.
4 And so we think we have met everything that is required
5 under the statute.

6 And again, if the Court thinks that's a step too
7 far, then give us the injunctive relief like the Fourth
8 Circuit did in this case and say okay, go litigate, go
9 arbitrate, whatever, but I'm going to put some injunctive
10 relief in place to make sure that what my client is
11 concerned has happened doesn't continue to happen with this
12 single asset of this entity while we're fighting.

13 THE COURT: All right. Mr. Belser.

14 MR. BELSER: Your Honor, may it please the Court.
15 I'm not sure if the relevancy of any discussions that
16 counsel and I have had --

17 THE COURT: They're not.

18 MR. BELSER: -- but just for the -- to protect the
19 dignity of my client, we offered to mediate and Mr. Whitmire
20 rejected that. So, anyway, there has to be -- in order for
21 either a receiver to be appointed or for an injunction to be
22 ordered, the standard is no different. It's a drastic
23 remedy and the moving party has to show that there's not an
24 adequate remedy of law.

25 THE COURT: Let me just say this off the top, I

1 think that -- I think that the Plaintiff could not meet the
2 three-prong test for temporary injunctive relief. He has no
3 adequate remedy of law that he'll suffer irreparable harm or
4 the likelihood of success on the merits. Irreparable harm
5 may be there, but I think the other two are not. The
6 affidavits of -- the affidavits of Gentile and the rest, in
7 my mind, create issues that would have to be hashed out as a
8 matter of fact and proved. In other words, what Mr.
9 Hawkensen -- what the money went for would have to be
10 proved.

11 So I don't think you meet the standard for
12 likelihood of success on the merits. And I think there may
13 be an adequate remedy of law, namely Mr. Hawkensen as well
14 because as Mr. Martens point outs, if this business fails,
15 we don't know what Hawkensen situation would be, but,
16 nevertheless, I don't think there's a basis for injunctive
17 relief. So go ahead from there.

18 MR. BELSER: Okay.

19 THE COURT: Let's talk about a receiver.

20 MR. BELSER: Well, a receiver, I think that the
21 test is similar in that in order for a receiver to be
22 appointed, there has to be an adequate -- there has to be an
23 inadequate remedy of law in order for a receiver to be
24 appointed.

25 THE COURT: Not necessarily.

1 MR. BELSER: Well, the --

2 THE COURT: I don't agree with that. That's not
3 what the statute says either.

4 MR. BELSER: Well; Your Honor, then we have -- in
5 our memorandum in opposition to the motion have -- there's
6 one --

7 THE COURT: Receiver is just a matter of
8 preserving assets, in effect, has nothing -- I don't want to
9 say nothing to do, but the issue of adequate remedy of law
10 is not central to simply preserving assets.

11 MR. BELSER: Well, Your Honor, by -- I believe
12 that in my reading of the cases and also of the test and the
13 statute, the portion of the statute that says -- the third
14 prong --

15 THE COURT: Yes, sir.

16 MR. BELSER: -- that says that the property or its
17 rents are in danger of being lost or materially injured or
18 impaired.

19 THE COURT: Uh-huh.

20 MR. BELSER: I believe that that gets to the issue
21 of inadequate versus adequate remedy of law. And there's a
22 case that we've cited, which is the Wildon vs. Chapman case,
23 which is on Page 6 of my memorandum, which it was -- it was
24 a dispute between partners -- it was a partnership in 1908.
25 It's a 1908 case, so there was no LLCs at that point. It's,

1 essentially, the same thing. What the Court held in that
2 case is that in order for a partner who wants a receiver --
3 to have a receiver appointed, he has to show that he lacks
4 an adequate remedy of law against not only the partnership,
5 but also against the individual partners.

6 The allegations that Mr. Whitmire has made are not
7 that -- in his affidavit, the allegations are not that Mr.
8 Hawkensen is taking all the money out of the LLC to the
9 detriment of the LLC because Mr. Whitmire doesn't know.
10 What he does allege in his affidavit, which is very, very
11 important, is that the asset is worth a substantial amount
12 of money, that there's approximately five million dollars of
13 equity in the business. So based on his own allegations, he
14 clearly has an adequate remedy of law to have the company
15 buy back his interest.

16 Now, the obstacle there is trying to figure out
17 how much does he own. There's a document that he signed
18 that says he owns 13 percent. A year later, he said 26 and
19 now he's saying 50.

20 THE COURT: I understand.

21 MR. BELSER: That's the main obstacle here.

22 THE COURT: Well, that's a -- I understand that,
23 that's a question of fact. That doesn't have anything to do
24 with this receiver thing I don't think.

25 MR. BELSER: Well, that's just -- the point is

1 there's a big piece of pie and Mr. Whitmire gets some, but
2 it's just a question of how much. The pie is there. The
3 pie hasn't gone bad, just continuing with the pie metaphor.

4 THE COURT: I would -- you raise an interesting
5 question, the remedy under the statute is -- for a
6 disassociated member is to pay that member, disassociated
7 member the value of his interest at the time of his
8 disassociation.

9 MR. BELSER: Uh-huh.

10 THE COURT: That would be what the Court would
11 order. I've had a similar case like that.

12 MR. BELSER: It may have even been these
13 litigants.

14 THE COURT: It was. Well, at least -- I don't
15 remember the name of Mr. Whitmire --

16 MR. MARTENS: R & D.

17 THE COURT: Yeah, the R & D case. That's in the
18 nature of an equitable remedy, ordering the LLC to pay the
19 disassociated member X dollars determined by the Court. In
20 other words, it doesn't have anything to do with an adequate
21 remedy of law. For example, I've appointed receivers in
22 commercial foreclosures many times and the adequate remedy
23 is the value of the property in a foreclosure, which is an
24 equitable remedy. And I think the LLC -- the statutory
25 remedy in connection with an LLC is similar. Mr. Whitmire

1 has a vested interest, if you will -- I will use that term
2 generically -- in the value -- in his share, whatever that
3 may be, in the value of the LLC at the time he
4 disassociated.

5 So even if the -- you're correct, the statute
6 would require a finding that there's no adequate remedy of
7 law. I think it's a different remedy. It's a different
8 type of remedy. That's my view of it.

9 MR. BELSER: Uh-huh.

10 THE COURT: I don't know of a case deciding that.

11 MR. BELSER: Well, the only case that I could find
12 is this Wildon case, which said that -- and this is cited in
13 my brief, we think the -- arrives at the position that a
14 creditor of a co-partnership in order to maintain an action
15 for the appointment of a receiver for the partnership,
16 assets much show he has no adequate remedy of law.

17 THE COURT: This is the creditor.

18 MR. BELSER: Well, Mr. -- Mr. Whitmire by virtue
19 of --

20 THE COURT: Well, compare him to a partner.

21 MR. BELSER: Well, here's what important, though,
22 by the fact that he voluntarily disassociated --

23 THE COURT: Uh-huh.

24 MR. BELSER: -- his status visa vie the LLC makes
25 him a -- kind of in the position of a creditor because we

1 owe him money, the LLC owes him money. And the statute says
2 that --

3 THE COURT: Well, let me just say this, I'm not
4 going to deny the relief based on -- I mean, grant -- deny
5 the relief based on the presence or absence of an adequate
6 remedy of law.

7 MR. BELSER: Okay.

8 THE COURT: So go ahead from there.

9 MR. BELSER: Okay. Well, Your Honor, I think
10 that's kind of getting past that issue and kind of getting
11 to the merits of it, we, in support -- not in support, but
12 in opposition to this motion have filed a number of
13 affidavits. There was one affidavit from Mr. Whitmire,
14 which essentially says that Mr. Hawkensen is --

15 THE COURT: Taking all the money for himself.

16 MR. BELSER: Taking all of this money. He's using
17 company assets, company money for personal purposes --

18 THE COURT: Investing oil and gas.

19 MR. BELSER: Investing oil and gas, paying for
20 other litigation, using company funds. So in response to
21 those very serious allegations, we have affidavits from
22 Matthew Cox, who's a member of the bar in South Carolina,
23 who went through and highlighted the work that he was doing
24 for the benefit of the --

25 THE COURT: He explained the payment of fees to

1 him.

2 MR. BELSER: He explained the payment of fees to
3 him. We -- of the \$225,000, which is on Mr. Hawkensen's --
4 I'm sorry, Mr. Whitmire's affidavit, it's -- these are
5 transactions that he says he had no knowledge of and that he
6 didn't approve. Well, two of those were payments to him, so
7 I'm not quite sure why they're on the list. And all the
8 other ones, we had Ms. Correll, who filed the most lengthy
9 affidavit --

10 THE COURT: Yes.

11 MR. BELSER: -- go through each one and attach
12 exhibits. I disagree with the -- there may be \$18,000 which
13 is unaccounted for, but there's everything else is accounted
14 for with invoices.

15 Now, the course of conduct that Mr. Hawkensen and
16 Mr. Whitmire have been in business together for a long time.
17 This is about a decade. And for about half of that, they've
18 been in litigation first with former partners and now with
19 each other.

20 What Mr. Hawkensen does for the benefit of the LLC
21 is he has a construction company, which performs substantial
22 work for the benefit of the -- that's it -- according to the
23 affidavit, it's market rates. This is not something that
24 Mr. Hawkensen is doing differently than he's done since they
25 first met. He's always had his company do that.

1 THE COURT: Well, all of those -- I read all of
2 the affidavits.

3 MR. BELSER: Yes, sir.

4 THE COURT: All of those are fact questions. And
5 I think I've already intimated that I have a concern about
6 the conflict in those affidavits.

7 Let me ask you this, what do you think, if
8 anything, Mr. Whitmire is entitled to, to monitor the
9 management of the company pending this litigation?

10 MR. BELSER: Well, I think he --

11 THE COURT: Or arbitration, as the case may be.

12 MR. BELSER: Yeah. I think that he has
13 disassociated -- he voluntarily disassociated.

14 THE COURT: We know that.

15 MR. BELSER: And as a result of that voluntary
16 choice, he's forfeited his right to participate in the
17 management and the conduct of the company's business.

18 THE COURT: I agree.

19 MR. BELSER: And he's also forfeited his right to
20 access the company's records.

21 THE COURT: That's true.

22 MR. BELSER: He has not given Mr. Hawkensen a
23 license to steal from the company, of course. I mean, he's
24 still protected by that. But if to -- if Mr. Whitmire is
25 able to prevail, then he has -- on his allegations, which we

1 deny strenuously, et cetera, et cetera, but if he were to
2 prevail, then if he's entitled to any kind of intermediate
3 relief or any final relief at the end of the arbitration,
4 then that's a matter for the arbitrator. The arbitrator can
5 decide that.

6 But right now, based on the allegations that we
7 have, the typical -- this case, the Fourth Circuit case, is
8 kind of the -- the facts of this case are kind of
9 prototypical case where a receiver and injunction is
10 appropriate. This is, just in a quick glance, a broker
11 who's leaving Merrill Lynch and he's taking clients with
12 him. So that's a case where there is, you know, somebody --
13 you know, that's the traditional case where somebody's
14 taking something with them and the irreparable harm aspect
15 is happening.

16 THE COURT: Yep.

17 MR. BELSER: In this particular matter, the asset
18 has, you know, paper equity under an ordinary marketing
19 circumstance of about five million dollars. It is now cash
20 flow positive, marginally cash flow positive. It was not
21 cash flow positive next year, so, if anything, if from
22 Mr. Gentile's affidavit, it shows you that things are moving
23 in the right direction. It was not profitable and now it's
24 marginally profitable. So based on how Mr. Hawkenen is
25 running the business, the business is okay. It's not on

1 life support. It's not threatened to being --

2 THE COURT: What would be wrong with me simply
3 ordering that Mr. Gentile produce and present to the
4 Plaintiff a monthly statement of -- monthly P & L statement?

5 MR. BELSER: Your Honor, I don't have any
6 particular objection to that at all because he does it
7 anyway.

8 THE COURT: Well, that's what I'm getting at.

9 MR. BELSER: Yeah, he does it anyway and it's
10 something that Mr. Whitmire would be entitled to in
11 discovery, no question, so.

12 THE COURT: All right. Here's what I think about
13 the receiver. I don't think that what is before me presents
14 a sufficient showing to appoint a receiver. However, what
15 is before me does present some concern to me about the
16 status of the asset, which is the apartment complex, going
17 forward.

18 Now, you -- I don't know where that goes, but
19 seeing as how the Defendant doesn't have an objection to the
20 Plaintiff receiving these monthly reports, I'm going to
21 order that.

22 MR. BELSER: Your Honor, just for my
23 clarification, these reports are the things that he dose
24 anyway?

25 THE COURT: That's right.

1 MR. BELSER: All right. I don't want Mr. Gentile
2 to have to do anything extra that he's not already doing,
3 but just the monthly reconciliation of as he described in
4 his affidavit.

5 THE COURT: Well, I'm not sure how he described
6 it. How did he describe it?

7 MR. BELSER: Well, what he says is --

8 THE COURT: Mr. Martens, what did he --

9 MR. MARTENS: I think he talks about there's a P &
10 L statement, Your Honor.

11 THE COURT: P & L statement and his P & L
12 statement is attached as an exhibit. It's printed too small
13 for me to read.

14 MR. BELSER: I didn't do that intentionally, Your
15 Honor.

16 THE COURT: I know.

17 MR. BELSER: Paragraph two, he says each month we
18 log into the Commons computer and reconcile the bank account
19 with the Commons journal entries.

20 THE COURT: Does this small print P & L statement
21 give -- show to whom people are paid -- to whom money is
22 paid, I'm sorry?

23 MR. BELSER: No --

24 MR. MARTENS: It does not.

25 MR. BELSER: -- it just has general categories.

1 THE COURT: Okay. Does Mr. Gentile reconcile the
2 checkbook?

3 MR. BELSER: Yes -- well, he does it on the bank
4 account, Your Honor.

5 THE COURT: Well, let's just have Mr. Gentile
6 present to Mr. Martens the monthly P & L statement and the
7 bank reconciliation checks.

8 MR. BELSER: Okay.

9 THE COURT: What he does anyway.

10 MR. BELSER: I just want to be clear. I don't
11 object to him providing to both me and to Mr. Martens what
12 he already does anyway, but to the extent -- I don't want
13 him to have to go to a bunch of -- I'm not an accountant, so
14 I'm not sure exactly what happens.

15 THE COURT: Well, what I'm ordering is that he
16 provide a monthly P & L statement like the one attached as
17 Exhibit A every month to Mr. Martens, and that he also
18 present the bank -- his bank reconciliation -- checkbook
19 reconciliation work. Now, that would ordinarily have him,
20 as it does the rest of us, checking off a check to Duke
21 Power Company, a check to the City of Fort Mill or York
22 County for water services, that kind of thing.

23 MR. BELSER: So like a general-ledger-type thing.

24 THE COURT: Well, I am not an accountant.

25 MR. BELSER: Well, unfortunately, I'm not either,

1 so.

2 THE COURT: I don't --

3 MR. MARTENS: Your Honor, two comments or
4 questions that I have. One is certainly I appreciate that
5 relief and I think that is a step in the right direction.

6 THE COURT: That would, obviously, give the
7 Plaintiff the ability to come back before the Court and cry
8 foul and say oh, he really is dissipating the assets and
9 that kind of thing.

10 MR. MARTENS: And the one comment I had is, Your
11 Honor, I think the order would need to direct the Defendant
12 to do that rather than Mr. Gentile.

13 THE COURT: Yes.

14 MR. MARTENS: Because I don't think we have
15 jurisdiction over Mr. Gentile --

16 THE COURT: Order the commons to produce that
17 information given by Mr. Gentile, yes.

18 MR. MARTENS: And the other --

19 THE COURT: I'm not trying to appoint him as the
20 receiver.

21 MR. MARTENS: The other comment, they have already
22 produced to us monthly Wells Fargo checking account
23 statements. I mean, I would find that acceptable.

24 THE COURT: All right. Those two things. I just
25 don't think at this stage the appointment of a receiver is

1 appropriate and, certainly, not the expense of a receiver to
2 run the business.

3 MR. BELSER: Yeah. And just for the record, I
4 still think this is something for an arbitrator to --

5 THE COURT: We've got to -- well --

6 MR. BELSER: But we're good on that. We're not
7 good, but you know what I'm saying.

8 THE COURT: You do me an order as far as that's
9 concerned.

10 MR. MARTENS: Yes, sir.

11 THE COURT: Deny the receiver, but provide what I
12 said.

13 MR. MARTENS: Yes, sir.

14 THE COURT: All right. Now --

15 MR. MARTENS: And, Your Honor, may we excuse Mr.
16 Jones?

17 THE COURT: Certainly. You didn't have to listen
18 to all this anyway.

19 MR. JONES: That's okay. My pleasure.

20 THE COURT: Thank you, sir. You're free to go.
21 Always were.

22 All right. Let's deal with the motion to compel
23 arbitration. I have one question before we start that and
24 maybe I missed it, but I see, obviously, the heading of the
25 agreement, the requisite bold caps, underlined that's

1 required in the statute, but I did not find in the operating
2 agreement any arbitration conditions. Did I miss that?

3 MR. BELSER: I hope you didn't look too hard
4 because it wasn't there. But here's the thing, there's
5 no -- and I've dealt with this issue before. There's no
6 separate -- typically, the problem with an arbitration
7 clause is the clause is buried in the agreement and there's
8 no notice on the front. Here, the arbitration clause
9 itself, which is also the notice, is right on the front of
10 the agreement that says --

11 THE COURT: Well, I saw it. I agree with you.

12 MR. BELSER: Yeah.

13 THE COURT: It's there.

14 MR. BELSER: But to answer your question, there is
15 no separate provision inside the agreement.

16 THE COURT: Okay.

17 MR. BELSER: But our position is this is not only
18 the notice, but it's also the provision right there.

19 THE COURT: Okay. Now, does the statute provide a
20 mechanism whereby, in essence, that notice triggers a
21 process by which you do the arbitration? In other words,
22 take an AIA contract, Triple A appointment, how you appoint
23 the arbitrator, the venue, all of that, you know.

24 MR. BELSER: Yes, sir.

25 THE COURT: Arbitration agreements are -- the meat

1 of the arbitration agreement is ordinarily pretty detailed.
2 I've never seen -- I've never seen a contract where the -- as
3 you point out, the notice provision was proper, but there
4 was no arbitration, quote, agreement.

5 MR. BELSER: Well, I think --

6 THE COURT: How would we carry it out?

7 MR. BELSER: Well, the statute is very clear, it's
8 like the LLC statute on buying out a member, it says you've
9 this time period to do this, that and the other. Here's
10 what the Court --

11 THE COURT: I didn't have a chance to read that,
12 that's why I'm asking you the question. What does it say?

13 MR. BELSER: The statute has a procedure which
14 it's similar to a first party insurance dispute where both
15 sides appoint an appraiser and they have to agree to an
16 umpire.

17 THE COURT: Yeah.

18 MR. BELSER: I think that, essentially, Mr.
19 Martens and I would have to -- and our clients would have to
20 agree to an arbitrator. And then if we can't --

21 THE COURT: How would I compel that?

22 MR. BELSER: Well, to comply -- but then the
23 statute says that if you can't agree, then you can come to
24 the Court and ask for a Court-appointed arbitrator.

25 THE COURT: What about the form?

1 MR. BELSER: Well --

2 THE COURT: There's some cases that say that, you
3 know -- that has to deal with the fact that an -- the form
4 specifying is no good now or is out of business or whatever.
5 So the agreement is either broad enough or not broad enough
6 to substitute a form. The case is about that. But they all
7 were founded on a real agreement to arbitrate, the terms of
8 an agreement to arbitrate.

9 MR. BELSER: Uh-huh.

10 THE COURT: How many arbitrators? What rules?
11 You, the Triple has its own rules. My point is, do you have
12 the book with the statute? I should have it.

13 MR. BELSER: I printed out the statute, Your
14 Honor.

15 THE COURT: The whole thing?

16 MR. BELSER: No, sir, the Title 15-48-10. I did
17 not print out the entire statute. And I'm happy to hand
18 this up.

19 THE COURT: I haven't used these books in years.
20 I usually do it back there on my computer.

21 MR. BELSER: And I don't want to step on counsel's
22 argument, but that's -- our contention is there is no
23 agreement. It would be as if you had a notice that says
24 there's an attorney's fee provision in this contract, but
25 there's no provision to tell you how to word it.

1 THE COURT: Okay, hang on a second.

2 (Pause.)

3 THE COURT: I'm looking at 15-48-30, it says if
4 the arbitration agreement provides a method of appointment,
5 it should be followed, in the absence thereof, there shall
6 be three arbitrators and so on. And 50 -- 48-50 says the
7 arbitrator shall appoint a time and place. 15-48-80 says
8 the arbitrators may issue or cause to be issued subpoenas,
9 arbitrators may permit depositions. Let me get to the
10 award. Here it is. Here it is. Okay. At the top of the
11 agreement, it says -- the operating agreement, the terms and
12 conditions of this operating agreement are subject to
13 binding arbitration pursuant to S.C. Code and so on.

14 MR. BELSER: And --

15 THE COURT: Now, I do think that covers my
16 position about the receiver because that's nothing to do
17 with the terms and conditions of this operating agreement.

18 MR. BELSER: Well, I --

19 THE COURT: Well, let's don't even talk about
20 that. Let's don't get off on that. And anything else you
21 want to tell me about whether this heading is sufficient to
22 be an operating agreement -- an arbitration agreement.

23 MR. BELSER: Well, Your Honor, the only thing is
24 I've seen contacts before that say notice, this contract
25 contains an arbitration clause. And then there's an

1 arbitration clause embedded. I think the only common sense
2 way to look at this is that this is the arbitration clause
3 itself and it is right on the front. And so it constitutes
4 both the notice and the provision and it incorporates by
5 reference the statute that highlights -- that outlines the
6 procedure of arbitration process. And that combined with
7 the fact that arbitration clauses and arbitration provisions
8 are rigorously enforced and strongly encouraged and all the
9 common law that supports that they are enforceable is there.

10 And one other point I've not raised yet is this --
11 even though this provision does not reference the federal
12 act, this matter does involve interstate commerce.

13 THE COURT: Only because he's a residence of North
14 Carolina.

15 MR. BELSER: Well, because he's a resident of
16 North Carolina, but there's also a piece of property in
17 Morrisville, North Carolina, which is the subject matter of
18 some of this litigation.

19 THE COURT: Well, the litigation or this
20 agreement?

21 MR. BELSER: Well, there's a piece of property --

22 THE COURT: Who's it owned by?

23 MR. BELSER: Well, it's titled in the name of
24 Mr. Whitmire, but it was purchased -- it was intended to be
25 a joint endeavor between the two people.

1 THE COURT: Well, that's not the subject of any of
2 this.

3 MR. BELSER: Well, the question is whether or not
4 that's an asset of the company or an asset of Mr. Whitmire.
5 It's our position there should be a resulting trust imposed
6 upon that asset.

7 THE COURT: Is that in any pleading?

8 MR. MARTENS: No, sir.

9 MR. BELSER: No, sir, we have not filed our
10 counterclaim yet.

11 THE COURT: I didn't think so.

12 Okay. I find that the matters contained in this
13 agreement are not -- do not concern interstate commerce.
14 They concern the operation of an apartment complex located
15 entirely in York County, South Carolina. Do not involve the
16 procurement of financing or materials for construction or
17 repair pertaining to that project, rather the project itself
18 in an LLC, which is a South Carolina limited liability
19 company. So I find that there is not a sufficient issue of
20 interstate commerce to invoke the FAA.

21 That's where you're headed?

22 MR. BELSER: Yes.

23 THE COURT: Does either of you know of a case --
24 and I tried to find one and couldn't, addressing the
25 situation where an agreement has this heading, but has no

1 defined -- no stated arbitration provision?

2 MR. MARTENS: I'm not aware of any, Your Honor. I
3 have several arguments that I'd like to make --

4 THE COURT: Go ahead.

5 MR. MARTENS: -- in opposition to this motion.
6 The first is one the Court raised, we've got the notice --
7 if you look at the statute 15-48-10, there's two parts to
8 that section A. And the first part says a written agreement
9 to submit any existing controversy to arbitration or a
10 provision and written contract to submit to arbitration and
11 controversy thereafter arising between the parties is valid,
12 enforceable and irrevocable save on such grounds as exist at
13 law or in equity for the revocation of any contract.

14 THE COURT: Right.

15 MR. MARTENS: Now, that language is virtually
16 identical to the federal arbitration act. And I want to --
17 despite the fact that counsel has questioned my common sense
18 and my interpretation of this --

19 THE COURT: Well, he questioned mine, too, but
20 that's all right.

21 MR. BELSER: I apologize..

22 THE COURT: I say that in jest.

23 MR. MARTENS: And I do, too. I take no offense to
24 the comment.

25 With due respect to counsel's argument, the

1 purpose of the federal act and the state act is not to make
2 arbitration some hallowed -- it's to place arbitration
3 agreements on similar footing with other contractual
4 provisions. There was a bias in the courts against
5 arbitration, so congress said we're going to pass a law that
6 says Court, you have to read an arbitration agreement just
7 like you would read any other contract. And as Your Honor
8 is well aware and I've been litigating this issue the entire
9 time I've been in practice from Lackey and Bazzle vs.
10 Greentree on up. The whole purpose of that is to enforce
11 the parties' agreement as it was written. And so the first
12 part of the statute says that if there's an agreement, the
13 Court's bound to enforce it. And then under the state act,
14 it says that you also have to have notice on the front.

15 THE COURT: Yeah.

16 MR. MARTENS: So our first argument is they have
17 the notice, but they omitted the agreement. And applying
18 the ordinary contract interpretation principles, how can we
19 sit here and pass judgment as to whether or not the parties
20 got to the closing table and said you know what, we don't
21 want an arbitrator, let's take that out. And somebody
22 forgot to take the notice off the top of the contract.
23 There's a notice requirement and there's an agreement
24 requirement. There's no agreement in this contract. And we
25 believe that as a matter of contract law, there's no

1 agreement for the Court to enforce.

2 If we assume, as counsel has argued, that this
3 notice is both the notice and the agreement, what it says
4 literally is the terms and conditions of the operating
5 agreement are subject to arbitration. Again, we go back to
6 traditional contract principles. We enforce the agreement
7 as the parties wrote it, regardless of its wisdom or folly,
8 regardless of a party's efforts to carefully safeguard its
9 position. This agreement doesn't say any dispute we have is
10 going to be arbitrated. It says the terms and conditions of
11 this agreement are subject to arbitration.

12 Our complaint, we have a breach of contract
13 action. It has nothing to do with the terms and conditions
14 of this operating agreement. It -- the allegations of that
15 complaint are these guys were members of a former LLC. They
16 agreed to form this new one and to transfer their interest
17 from one to the other and when that happened, my guy got
18 short changed in the process. And that was a breach of the
19 parties' agreement. Not of this operating agreement, but of
20 a separate contract between --

21 THE COURT: In other words, the dispute is not
22 over the operating agreement?

23 MR. MARTENS: That's right. Our claim -- and,
24 Your Honor, as you well know, even as recently as the Parson
25 vs. John Willing Holmes case, the Court has said --

1 THE COURT: My batting average is not very good
2 with arbitration. That might favor you.

3 MR. MARTENS: The Court has said what we've got to
4 do is look at the factual allegations of the complaint and
5 determine did the parties intend that this dispute be
6 submitted to arbitration. Our claims are a breach of a duty
7 of loyalty. That's a statutory cause of action, that's not
8 a claim under the operating agreement. Breach of a duty of
9 care, again, that's a statutory cause of action under the
10 LLC act. Breach of contract, that's the agreement I just
11 spoke of. Breach of contract accompanied by fraudulent act.
12 That's not this operating agreement. It's a separate
13 agreement between the parties. Negligence and gross
14 negligence based upon, as counsel mentioned, this
15 longstanding course of dealing between these gentlemen and
16 the way my client has ended up at the end of that 10-year
17 course of dealing. This LLC didn't even exist until
18 December of 2014.

19 Unfair trade practices, declaratory judgment and a
20 disassociation claim. Now, in that respect, Your Honor, I
21 want to point out that the disassociation statute, which is
22 33-44-701, says that the jurisdiction of the Court in which
23 the proceeding is commenced is plenary and exclusive. I
24 didn't know what plenary jurisdiction was. I looked it up
25 and it is full and complete jurisdiction or power of the

1 Court over the subject matter as well as the parties to the
2 controversy. That's the definition. That's what the
3 legislature has said. Where this action gets filed, that
4 Court has plenary and exclusive jurisdiction.

5 THE COURT: Would you say that, therefore, an
6 operating agreement cannot be subject to arbitration?

7 MR. MARTENS: No, I don't believe that because
8 arbitration is a matter of contract, not coercion. If the
9 parties agreed they would submit that dispute to
10 arbitration, then that's where they would be required to
11 submit the dispute.

12 THE COURT: Okay. All right.

13 MR. MARTENS: There was no such agreement here.
14 And you can't bootstrap yourself into an agreement that
15 these parties never negotiated because for whatever reason
16 somebody left a statutory notice at the top of an agreement
17 that has no arbitration clause in it. And even if you're
18 going to enforce the arbitration agreement as they executed
19 it, it's only enforceable as to the terms and conditions of
20 the operating agreement.

21 THE COURT: Okay.

22 MR. MARTENS: And there are lots of claims in this
23 case -- and Your Honor, there's lots of cases that have
24 held, you know, the Supreme Court has said look, we don't
25 care if this makes it less efficient. We don't care if

1 you've got to litigate in one place and arbitrate in
2 another. If that's what the parties agreed to, that's what
3 the courts are going to enforce. And that's what the U. S.
4 Supreme Court has consistently done in these cases.

5 THE COURT: I -- I -- reviewing it again
6 yesterday, I was -- I went through it -- I went back and
7 forth through the agreement trying to find an arbitration
8 agreement. I share Mr. Martens's view that subparagraph A
9 of the 15-48-10 really requires an agreement and that this
10 is, as specified in the same subsection, a notice provision.
11 So I deny the motion to compel arbitration.

12 And so Mr. Martens, you need to add that to your
13 order.

14 MR. MARTENS: Yes, sir.

15 THE COURT: Anything else?

16 MR. BELSER: Your Honor, just for the record.

17 THE COURT: Yes, sir.

18 MR. BELSER: Just to address a few points that
19 were raised, the agreement on the front page, the terms and
20 conditions of this agreement are subject to arbitration
21 could not be more clear to me. Now, I'm younger and haven't
22 been around as long as y'all have, but it seems pretty clear
23 to me. And with reference to --

24 THE COURT: The terms and conditions of the
25 arbitration agreement?

1 MR. BELSER: Well --

2 THE COURT: By virtue of the notice?

3 MR. BELSER: Well, it's our position that that
4 notice is also a provision itself and --

5 THE COURT: I disagree with that.

6 MR. BELSER: Yeah, but I'm saying it's our
7 position that that's crystal clear. And also --

8 THE COURT: Here's crystal clear right here.

9 MR. BELSER: Yeah, we've known each other for a
10 long time.

11 It's also our position that the allegations of the
12 complaint all relate to Mr. Hawkensen's conduct as a member
13 of the LLC itself. And the -- it's not alleging that, by
14 the way, he also didn't -- you know, he tripped me in the
15 parking lot or something like that. I mean, it's all
16 relating to their relationship as members of the LLC, and so
17 we think that this agreement is broad enough to cover all of
18 the allegations. I think that the idea that the language of
19 the LLC -- the language of the LLC statute somehow
20 supercedes the uniform arbitration act and makes any
21 arbitration clause unenforceable is flawed.

22 THE COURT: Well, he didn't make that argument, I
23 did.

24 MR. BELSER: Okay.

25 THE COURT: I ask the question and he says that's

1 not true.

2 MR. BELSER: Okay. And those factors combined
3 with the kind of over arcing the context which this argument
4 is being made which is that arbitration clauses are to be
5 broad and rigorously enforced, I think, weights in favor of
6 arbitration. I'm saying that for the record.

7 THE COURT: I understand.

8 MR. BELSER: I understand that Your Honor has
9 ruled, so I know when it's time to sit down.

10 THE COURT: All right. And since you've mentioned
11 it, I also believe that the nature of the claims of the
12 Plaintiff do not challenge the terms and conditions of the
13 operating agreement in any way.

14 MR. BELSER: Your Honor, you said in any way?

15 THE COURT: In any way. He hasn't contested a
16 thing about the agreement.

17 Okay. Is that it?

18 MR. MARTENS: Yes, sir.

19 MR. BELSER: Yes, sir.

20 THE COURT: Thank you very much.

21 MR. MARTENS: Thank you, Your Honor.

22 END OF PROCEEDINGS

23

24

25

1 \ COUNTY OF RICHLAND)

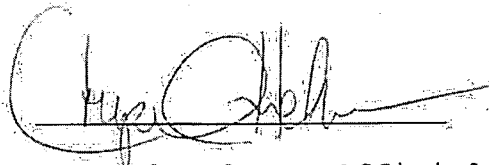
2 CERTIFICATE OF REPORTER

3 I, Crystal Holmes, hereby certify that I reported
4 the preceding case entitled Loyd c. Whitmire Vs. Johnny C.
5 Hawkensen, et al., Case No. 2016-CP-46-2458, at the Richland
6 County Courthouse, September 15, 2016.

7 I FURTHER CERTIFY that the foregoing pages 1
8 through 51 constitute a true, accurate and full transcript
9 of said hearing.

10 I FURTHER CERTIFY that I am not employed by any of
11 the parties hereto and I have no financial interest in the
12 outcome of said case.

13 IN WITNESS WHEREOF, I have heretofore set my hand
14 and seal at Richland County on this 18th day of January,
15 2017.

16 

17 Crystal Holmes, Official Court Reporter

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25

STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
)
COUNTY OF YORK) C/A #: 2016-CP-46-2458

Loyd C. (Chad) Whitmire,)
)
 Plaintiff,)
)
v.)
)
Johnny C. (Carl) Hawkensen)
and The Commons at Fort Mill, LLC,)
)
 Defendants.)
-----)

TRANSCRIPT OF HEARING

Monday, October 31, 2016

The hearing before the Honorable S. Jackson Kimball, Special Circuit Court Judge, which took place on the 31st day of October, 2016.



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EXHIBITS

(No exhibits were marked during the hearing.)



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1 **THE COURT:** This is October the 31st, 2016. This
2 is case number 2016-CP-46-2458. Lloyd C.,
3 (Chad), Whitmire against Johnny C. (Carl)
4 Hawkensen and others. Present and representing
5 the plaintiff, is Mr. Keith Martens. Present
6 and representing the -- both defendants is Mr.
7 Freeman Belser. I've got two Motions: one is
8 the defendant's Motion to Reconsider the Order
9 Denying the Motion to Compel Arbitration, the
10 other is a Motion to Reconsider or -- re- --
11 Denying the Appointment of a Deceiver, is the
12 way that Order was. Mr. Belser, both of those
13 are yours, so I'll here you.

14 **MR. BELSER:** Yes, sir. Your Honor, why don't I
15 start with the Order on the -- let me explain.

16 **THE COURT:** Sure.

17 **MR. BELSER:** The Order on -- Mr. Martens filed the
18 Motion for the Receivership with his Complaint.
19 And Your Honor denied that Motion when we had
20 the hearing in September. The -- when we were
21 at that hearing, one of the threshold questions
22 was whether or not Your Honor had the -- the --
23 if the matter of subject to arbitration, which
24 Your Honor later found that it was not, then --
25 did -- is -- does Your Honor have the ability



1 to -- to make a rule to -- to issue a receiver
2 in the first place. And what we -- at that
3 hearing -- at the end of the hearing, we -- the
4 defendants have no problem providing the bank
5 statements and the P&L's, which we've done for,
6 I guess -- yeah, for the period covering
7 September of this year. But that's something
8 they do in the order and course of business
9 anyway. But the next -- the next question is
10 if -- let's say that in November, December,
11 February of next year, there's something on the
12 P&L or the bank statement that -- that the
13 plaintiff objects to and wants to come back
14 before the Court to try to re-file the mot- --
15 to try to re-argue the Motion for a Receiver,
16 it's our -- it's our position that this whole
17 matter is subject to arbitration. And so, if
18 -- if we are -- if we -- the defendants intend
19 to -- well, you have this Motion to Reconsider
20 the Arbitration Order, if that is denied and
21 we're on appeal, then I still think that --
22 that whole -- that jurisdictional threshold
23 question rela- -- impacts the plaintiff's
24 ability to come back and file another a Motion
25 to Appoint a Receiver.



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1 **THE COURT:** Because if I had granted your Motion he
2 couldn't do that in arbitration, is that what
3 you're saying?

4 **MR. BELSER:** Well, if you had granted my Motion to
5 Compel Arbitration, then Mr. -- Mr. Whitmire's
6 avenue for redress with complaints about the
7 operations of the business receivership in
8 nature, you have to go through the arbitrator.

9 **THE COURT:** You have to go through the arbitrator.
10 Yes, sir. I understand.

11 **MR. BELSER:** Yes, sir. And so, that's the nature
12 of -- I filed this Motion to Reconsider on the
13 receivership Motion, it's our position that
14 they're kind of inextricably tied by this
15 arbitration order. But that's kind of what
16 we're going for. Now, the Motion to Reconsider
17 the Order of Arbitration ---

18 **THE COURT:** Well, all you want in -- in --
19 concerning the reconsideration of the Order
20 denying a receiver, you're simply saying you
21 want to preserve jurisdiction on the issue with
22 regard to that?

23 **MR. BELSER:** Uh-huh. Well, and really -- I mean,
24 it's already denied.

25 **THE COURT:** Right.



1 **MR. BELSER:** And so -- but -- and as part of mo- --
2 as part of the Order it's fine to say, you
3 know, in the language that, you know, we agree
4 to provide these things which already exist and
5 which we would provide anyway during the course
6 of arbitration or during litigation, but I
7 think that the -- the pendens -- if there's an
8 appeal pending on the arbitration matter, then
9 ---

10 **THE COURT:** I can't consider again the Motion to
11 Appoint a Receiver.

12 **MR. BELSER:** Yes, sir.

13 **THE COURT:** Well, I'm not sure I agree with that.

14 **MR. BELSER:** Okay.

15 **THE COURT:** But I understand what you're saying.

16 **MR. BELSER:** Okay. And so, the -- going to the
17 Order denying the arbitration, there -- I just
18 -- I set forth just three points in the ---

19 **THE COURT:** Would you like for me to appoint a
20 receiver?

21 **MR. BELSER:** No, sir.

22 **THE COURT:** Okay.

23 **MR. BELSER:** I'm just trying to preserve that.

24 **THE COURT:** Okay. I understand.

25 **MR. BELSER:** Okay.



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1 **THE COURT:** I mean I -- the logical result of a
2 Motion to Reconsider Appointing a Receiver is
3 appoint a receiver.

4 **MR. BELSER:** I know.

5 **THE COURT:** All right, go ahead.

6 **MR. BELSER:** Okay. The -- on the matter with the
7 arbitration Order, I think that, number one,
8 this matter does involve interstate commerce.
9 And as part of the ---

10 **THE COURT:** If I remember right, at the first
11 hearing, the only -- the only thing I recall
12 being raised about interstate commerce was the
13 fact that Mr. -- the plaintiff, Mr. Whitmire,
14 lives in North Car- -- no, that Carl Hawkensen
15 lives in North Carolina.

16 **MR. BELSER:** No. That the plaintiff lives in North
17 Carolina; and there's a piece of property that
18 both the plaintiff and Mr. Hawkensen have an
19 interest in, we alle- -- the defendants allege,
20 in Mooresville, North Carolina. And that was
21 raised -- that was raised previously. And just
22 -- we filed an Answer and a Counterclaim in
23 this matter since ---

24 **THE COURT:** Is that property -- does that property
25 have anything to do with the Commons?



1 **MR. BELSER:** Well, Your Honor, yes. The -- and the
2 -- as -- it's our position that the money that
3 -- there's a \$100,000 loan that was made to an
4 individual in North Carolina who had that
5 property. The source of that funds was com- --
6 not common funds, but from the Commons, the
7 entity. That's our position. And so ---

8 **THE COURT:** Say that again.

9 **MR. BELSER:** Well, there was a refinance in late
10 2014 for the Commons. Around that same period
11 of time, Mr. Hawkensen and Mr. Whit- --
12 principally Mr. Whitmire, but Mr. Hawkensen was
13 part of it also, were deal- -- were in talks
14 with a gentleman in Mooresville, North -- North
15 Carolina about developing that North Carolina
16 property: Mr. Hawkensen and Mr. Whitmire
17 partnering with Mr. Hyman in North Carolina to
18 develop that piece of property. There was some
19 contractual talks. It didn't actually come to
20 a conclusion, but Mr. Hyman did receive
21 \$100,000 bridge loan from Mr. Hawkensen and Mr.
22 Whitmire to, you know, bridge his financial
23 needs until a f- -- until a contract could
24 actually be executed. Mr. Hyman defaulted on
25 that loan, and so the property is now in the



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1 name of Mr. Whitmire -- that North Carolina
2 property is in the name of Mr. Whitmire, but
3 the source of the funds, and the intent of Mr.
4 Whitmire and Mr. Hawkensen, was that they have
5 a joint interest in that -- have a joint
6 interest in that property. The source of the
7 funds was from the Commons.

8 **THE COURT:** Is there a Note to the Commons?

9 **MR. BELSER:** The Note is -- these ---

10 **THE COURT:** Or Deed of Trust?

11 **MR. BELSER:** Well, the Note was to -- Mr. Whitmire
12 was principally dealing with Mr. Hyman. And so
13 -- I've not seen the Note personally, but the
14 Note -- I believe the -- the -- it's in -- Mr.
15 Whitmire, the plaintiff, it's in his name only.
16 But the source of the fund ---

17 **THE COURT:** The Note is.

18 **MR. BELSER:** The Note is. Yes, sir. But the source
19 of the funds and there -- we have some emails
20 that kind of, you know, relate -- indicate that
21 the intent of the parties was that -- that that
22 be a joint venture of sorts. And so, we have
23 filed a Counterclaim asking that a resulting
24 trust be imposed on that property because just
25 the title of the -- of the asset under these



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1 circumstances is not -- the way that it's
2 titled does not control the ownership in this
3 circumstance.

4 **THE COURT:** All right.

5 **MR. BELSER:** And so, number one, I think that this -
6 - this matter involves interstate commerce
7 because not only he's -- not only is Mr
8 Whitmire a North Carolina resident, but also
9 because of this property. Number two, it is --
10 it's correct that there is no separate itemized
11 numbered arbitration provision in the operating
12 agreement itself. There is this language on
13 the top of the front page of the contract that
14 says, I believe the terms and conditions of
15 this agreement are subject to arbitration.
16 Now, when we were at the last hearing, your
17 Honor, I had some questions about, well, what's
18 the procedure. It doesn't -- all it says is --
19 it doesn't -- it doesn't say where it's
20 supposed to be or how it's supposed to be or
21 who the -- or how many numbers of arbitrators
22 ... Well, the -- this notice, and which we
23 think is not only a notice but also an
24 arbitration clause, specifically references
25 the South Carolina Arbitration Act, which is --



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THE COURT: That's because it must.

MR. BELSER: And it -- in this -- in the act itself, sets forth all those procedures and the venue and the number of arbitrators and the different procedures. And so, it's -- it's our position that it is correct that in order for an act to be enforced according to the South Carolina Act, there has to be a notice on the front page. There's -- but there's nothing that says that that -- the language on the front can't be both a notice and an agreement. And furthermore, we think that the Federal Act applies anyway because of the -- this North Carolina property. And lastly, Your Honor, the standard for an arbitration clause -- yeah, they're liberally enforced. The -- the case law provides that if -- that if there's any susceptible reading of the language to apply the arbitration clause and to enforce the party's intent, then it should be enforced in favor of arbitration. The one -- there's one matter at the last hearing that was raised about -- well, their number -- there's the -- the complaint alleges a number of causes of



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1 action. Some of which relate to membership,
2 and clearly relate to the terms and conditions
3 of the operating agreement. And then there are
4 others like negligence and -- which are dif- --
5 which are maybe not directly -- arguably not
6 directly related to the terms and conditions of
7 the agreement. In the Zabinski case, the Court
8 found that if other disputes have a very
9 significant relationship to the terms and
10 conditions of the operating agreement, then
11 those should be inclu- -- then that's -- that
12 it should be subject to the arbitration. Now,
13 it's our position that the -- essenti- -- the
14 Complaint, in essence, relates to disputes
15 about ownership in -- in the Commons, and
16 management of the Commons by Mr. Hawkensen.
17 The terms and cond- -- the terms and conditions
18 of the operating agreement only relate to
19 ownership and that type of stuff. But also,
20 there's a separate paragraph that relates
21 management, it's in itself. And so, it's our
22 position that all this dispute relates to -- is
23 -- does relate to the terms and conditions of
24 enforced arbitration provision. But we're here
25 for a Motion to Reconsider, and I've -- I've

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1 made my points.

2 **THE COURT:** All right, sir.

3 **MR. BELSER:** Thank you.

4 **THE COURT:** Okay. Mr. Martens.

5 **MR. MARTENS:** Your Honor, I think it's ironic that
6 the defendants want to argue that the case is
7 subject to arbitration under the Federal Act,
8 and then they want to rely upon what they
9 contend is an agreement that says it's subject
10 to arbitration under the State Act. I'm not
11 sure how you reconcile those two arguments.
12 That -- frankly, I don't think it matters
13 whether you analyze this issue under the
14 Federal Act or the State Act. Both of those
15 talk about what you -- what the Court's
16 obligation is to do, is to enforce the parties'
17 argument. And the parties' agreement has to
18 exist. There has to be an agreement that says,
19 we agree to arbitrate disputes. There's not
20 one. There is just this notice under the State
21 Act typed to the top of the contract. So
22 whether you're looking at it under the Federal
23 Act or whether you look at it un- -- looking at
24 it under the State Act, there's no arbitration
25 agreement to be enforced. Again, I don't see



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R. 109

1 how you reconcile the argument that it's
2 subject to the FAA, when what they want to
3 enforce says it's subject to the State Act.

4 **THE COURT:** Well, I believe that there are -- I
5 don't remember the names, but I recollect
6 reading analyses of cases that -- where --
7 where for some reason the agreement didn't
8 comply with the State Act, but they found,
9 well, it's interstate commerce.

10 **MR. MARTENS:** That's right. But there was an
11 agreement in those cases.

12 **THE COURT:** No, I agree with that. Yes, that's
13 certainly true.

14 **MR. MARTENS:** There was an agreement. The --
15 counsel argues that arbitration agreements are
16 to be liberally enforced. That's not exactly
17 right. I think -- I think this -- the argument
18 is that if -- if a construction of the -- of
19 the parties' agreement can encompass the
20 dispute, then the arbitration agreement is to
21 be enforced as -- as it is written. I don't
22 think the Courts have said, if we're gonna
23 arbitrate type of dispute A, that it applies to
24 anything touching -- anything in dispute
25 between the parties. If in fact this is an



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R. 110

1 arbitration agreement, which of course we deny
2 and dispute vigorously, it says that the terms
3 and conditions of the operating agreement are
4 subject to arbitration. If the parties had
5 wanted an arbitration agreement that says all
6 disputes between the parties are subject to
7 arbitration, they could've easily drafted one
8 just like that. All the cases talk about the
9 contract being a mat- -- I'm sorry, arbitration
10 being a matter of -- of contract and agreement,
11 not of -- not of coercion. You can't just
12 force someone into arbitration because you want
13 them in arbitration. We believe that the
14 Court's Order is well reasoned. There haven't
15 been any new issues brought to the Courts's
16 attention. I don't think there's a basis to
17 reconsider the Order, and we believe it should
18 be denied.

19 **THE COURT:** Okay. I'm going to stick by what I said
20 in the first place. I don't -- there is no
21 arbitration agreement. There's no meeting of
22 the minds concerning arbitration. While the --
23 while the agreement says -- while the notice
24 says the terms and conditions are subject to
25 binding arbitration, there's no meeting of the



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R. 111

1 minds. It's just that, it's a notice. All
2 right. I think the language of the statute has
3 to be read to cover that. There's a notice and
4 then there's agreement, this is agreement. As
5 we all know, the law surrounding compelling
6 arbitration constantly evolves. But I'm going
7 to deny the Motion. I don't believe that -- I
8 don't believe there's any basis upon which to
9 find an agreement to arbitrator. Further as to
10 the -- as to the FAA, A, this still isn't an
11 arbitration agreement whether you want to
12 consider it under the FAA or the State Act. So
13 if we were to look to the FAA or find that
14 there was some -- some connection with
15 interstate commerce sufficient to invoke the
16 FAA, there still remains no agreement; number
17 one. Number two, the -- that there's nothing
18 in the record to indicate that the -- the
19 interstate connection has anything to do with
20 this operating agreement in any event. So, I
21 find there's not a sufficient connection with
22 interstate commerce. And to keep it simple, I
23 will -- I will do -- I'll just do a Form Four
24 Order denying it, because all you -- you still
25 want to preserve your position. And this

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R. 112

1 business about -- I understand your argument
2 about the jurisdiction to consider a receiver
3 if the -- if the -- if there was an enforceable
4 arbitration agreement. I'm not sure -- I'm not
5 sure whether that would -- if that -- if that
6 argument was actually before me I'm not sure
7 how it would turn out, because the business of
8 appointing a receiver is a peculiar statute.
9 But, I mean, to the extent you want to preserve
10 some argument that -- that would be the --
11 well, let me say it this way. If -- if the
12 matter comes back up, with regard to appointing
13 a receiver, you can make that argument then.
14 But I don't think it has anything to do with
15 what we're talking now, unless you want me to
16 appoint a receiver; because you've asked me to
17 reverse myself.

18 **MR. BELSER:** That's not what ---

19 **THE COURT:** I don't think you want me to do that.

20 **MR. BELSER:** Yes, sir.

21 **THE COURT:** So I deny the Motion. I'll do a Form
22 Four taking care of all that. It'll just be a
23 generic denial of the Motion to Reconsider.
24 Nothing new -- nothing omitted, nothing new.
25 It couldn't be anything new. And no error of



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R. 113

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law.

MR. BELSER: Thank you, Judge.

MR. MARTENS: Thank you.



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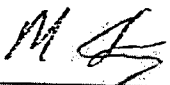
R. 114

CERTIFICATE

This is to certify the transcript of the hearing consists of eighteen (18) pages. This transcript was prepared by me without the benefit of my being present during the hearing. Additionally, this transcript was prepared from a audio recording provided to me.

I further certify that I am neither employed by nor related to any of the parties in this matter or their counsel; nor do I have any interest, financial or otherwise, in the outcome of same.

IN WITNESS WHEREOF I have hereunto set my hand and seal this December 21, 2016.



M. Sean Car
Court Reporter

Notary Public for South Carolina
My Commission Expires: January 29, 2023

STATE OF SOUTH CAROLINA

COUNTY OF YORK

Loyd C. (Chad) Whitmire,

☒ Plaintiff

v.

Johnny C. (Carl) Hawkensen, et al,

☐ Defendants.

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

CASE NUMBER: 2016-CP-46-0 2458

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

FILED-RECEIVED
2016 AUG 19 PM 1:14
DAVID S. HAMILTON
C.C.P. & G.S.
YORK COUNTY, SC

Plaintiff's Attorney: W. Keith Martens, Hamilton
Martens, LLC
Post Office Box 10940
Rock Hill, SC 29731
christi.cox@hamiltonmartens.com

Defendant's Attorney:
Phone:
e-mail:

- ☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: For Appointment of Receiver

Estimated Time Needed: 15 minutes Court reporter needed : ☒ YES / ☐ NO

SECTION II: Motion/Order Type

- ☒ Written motion attached
☐ Form Motion/Order

W. Keith Martens
Signature of Attorney for Plaintiffs

August 18, 2016
Date submitted

SECTION III: Motion Fee

- ☒ PAID - AMOUNT: \$25.00
☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE: Date:

CLERK'S VERIFICATION

Collected by: B. Hanke

Date Filed:

8/19/16

- ☒ MOTION FEE COLLECTED: \$25
☐ CONTESTED - AMOUNT DUE:

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) SIXTEENTH JUDICIAL CIRCUIT

Loyd C. (Chad) Whitmire,) C/A No. 2016-CP-46-2458

Plaintiff,

v.

MOTION TO APPOINT RECEIVER

Johnny C. (Carl) Hawkensen and
The Commons at Fort Mill, LLC,

Defendants.

FILED - RECEIVED
2016 AUG 19 PM 1:14
DAVID B. HAMILTON
C.C.C. & G.S.
YORK COUNTY, SC

Plaintiff moves, pursuant to S.C. Code Ann. § 15-65-10 (Law. Co-op. 2015) for an order appointing a receiver to take control of the business and accounts of The Commons at Fort Mill, LLC, and to operate the business during the pendency of this action. Alternatively, and only if the court determines that a receiver is unwarranted, then Plaintiff moves for an injunction that would prohibit Defendants from using the revenues, rents and profits of The Commons at Fort Mill, LLC for any purpose other than paying the Company's ordinary and bona fide operating expenses. In support of this motion, Plaintiff would allege and show as follows:

1. Plaintiff Loyd C. (Chad) Whitmire ("Whitmire") is a member of the Commons at Fort Mill, LLC ("The Company"). Defendant Johnny C. (Carl) Hawkensen ("Hawkensen") is the other member of the Company.¹

2. The Company is the owner and operator of a 144 unit apartment complex, located at the intersection of Highway 21 and Gold Hill Road in Fort Mill, South Carolina. The most recent appraisal report values the Company's real estate asset at a gross value of \$16,300,000,

¹ Whitmire and Hawkensen own 99 percent of the member interests in the Company. The remaining one percent is owned by Blue Wave Management, LLC. Whitmire and Hawkensen own 100 percent of the member interests in Blue Wave Management, LLC.

with a net value in excess of \$6,000,000. Based upon a review of the Company's 2015 operating ledgers, it appears that the Company generates approximately \$135,000 per month in recurring revenue.

3. This lawsuit arises from, among other things, the parties' dispute over the relative membership interests of Whitmire and Hawkensen in the Company. Whitmire contends that his membership interest in the Company is equal to the membership interest of Hawkensen, with each man holding approximately 50% of the membership interests in the Company. Hawkensen contends that Whitmire's membership interest in the Company is approximately 13%. While the parties dispute their relative membership interests in the Company, there is no dispute that Whitmire is a member of the Company.

4. As a member of the Company, Whitmire has a right to access the Company's property, accounts, books and records.

5. Despite the significant recurring monthly revenues of the Company and Whitmire's undisputed membership interest in the Company, Whitmire has not received a distribution from the Company in over a year. Furthermore, Hawkensen has taken possession and control of the Company's property and accounts, and has completely excluded Whitmire from the Company's property, business operations and accounts.

6. During the period that Hawkensen has seized complete control of the Company's accounts, Hawkensen has caused the Company to make numerous and significant loans and distributions to Hawkensen and to entities owned or operated by Hawkensen. In addition, Hawkensen has apparently utilized Company funds to finance his personal investments in other ventures and to pay fees to attorneys and outside professionals for matters wholly unrelated to the Company's business.

7. Based upon the Company's 2015 ledgers, Whitmire is informed and believes that Company's property, or the rents and profits generated of the Company's property, are in danger of being lost or materially injured or impaired during the pendency of this action.

8. In order to prevent loss or material injury to the Company's property, rents and profits, Whitmire is entitled to have a receiver appointed to: (a) take control of, and operate, the Company's property and accounts; (b) operate the business and collect the monthly rents and other revenues of tenants as they become due; (c) pay the Company's ordinary operating expenses, together with its mortgage payments, taxes and other liabilities, as they become due; and (c) prevent the loss, injury or impairment of the Company's property, rents and profits during the pendency of this action.

9. Alternatively, and at a minimum, Whitmire is entitled to an injunction which prohibits Hawkensen, during the pendency of this action, from utilizing the Company's assets, rents and profits for any purpose other than paying the Company's ordinary and bona fide operating expenses.

This motion will be based on the pleadings and affidavits of record, the appropriate statutory and case law, and the South Carolina Rules of Civil Procedure. Counsel certifies, pursuant to Rule 11 S.C. R. Civ. P., that given the nature of this motion, prior consultation with opposing counsel would serve no useful purpose.

August 18, 2016



W. Keith Martens
HAMILTON MARTENS, LLC
P.O. Box 10940
Rock Hill, SC 29731
(803) 329-7672
keith.martens@hamiltonmartens.com
ATTORNEYS FOR PLAINTIFF

STATE OF SOUTH CAROLINA

COUNTY OF YORK

Loyd C. (Chad) Whitmire

Plaintiff,

vs.

Johnny C. (Carl) Hawkensen, et al.

Defendant.

IN THE COURT OF COMMON PLEAS
16th JUDICIAL CIRCUIT

CASE NO.: 2016-CP-46-2458

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney:

W. Keith Martens, Bar No. _____

Address:

PO Box 10940, Rock Hill, SC 29731

Phone: _____ Fax: _____

E-mail: _____ Other: _____

Defendant's Attorney:

H. Freeman Belser, Bar No. 72403

Address:

P.O. Box 96, Cola, SC 29202

Phone: 803-929-0096 Fax 803-929-0196

E-mail: freeman@belserpa.com Other: _____

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**

☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**

☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion to Compel Arbitration

Estimated Time Needed: 30 Minutes

Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant

Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$ _____

☐ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRA)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by Dupuy Date Filed: _____

☒ MOTION FEE COLLECTED: \$ 25.00

☐ CONTESTED - AMOUNT DUE: \$ _____

STATE OF SOUTH CAROLINA)

COUNTY OF YORK)

Loyd C. (Chad) Whitmire,)

Plaintiff,)

v.)

Johnny C. (Carl) Hawkenen and)
The Commons at Fort Mill, LLC,)

Defendants.)

IN THE COURT OF COMMON PLEAS
IN THE 16th JUDICIAL CIRCUIT
Case Number 2016-CP-46-2458

**DEFENDANTS' MOTION TO
COMPEL ARBITRATION**

2016 SEP -6 PM 2:26
RECEIVED
DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

PLEASE TAKE NOTICE THAT the Defendants hereby move, pursuant to S.C. Code Ann. § 15-48-20, for an order compelling the plaintiff to submit to arbitration, on the following grounds:

1. The allegations of the Plaintiff's complaint all relate to the parties respective rights and responsibilities as members of Defendant The Commons at Fort Mill, LLC.
2. The Operating Agreement of The Commons at Fort Mill, LLC, a copy of which is attached hereto as Exhibit A, contains both a notice and a provision at the top of the first page, in all caps, bold, and underlined, that the terms and conditions of the Operating Agreement are subject to arbitration pursuant to the South Carolina Uniform Arbitration Act. Therefore, it is enforceable pursuant to S.C. Code Ann. § 15-48-10 (1976, as amended).
3. It is well established policy in South Carolina of enforcing arbitration clauses, and this matter involves interstate commerce, as the Plaintiff is a resident of North Carolina. "There is a strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor arbitration of disputes. . . . The South Carolina Uniform Arbitration Act (UAA) provides that in any contract evidencing a transaction involving commerce, a written provision to settle by arbitration shall be valid, irrevocable, and enforceable. S. C. Code Ann. § 15-48-10(a) (2005). Unless a court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should generally be ordered. . . .". *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007).
4. The Plaintiff has refused to submit to arbitration, as evidenced by the filing of this action after being informed by Defendants that any dispute is subject to arbitration.

5. The Plaintiff has not asked that the Operating Agreement be revoked, and there exists no grounds at law or in equity warranting the revocation thereof. Furthermore, none of the exceptions to the South Carolina Uniform Arbitration Act apply. See, e.g., S.C. Code Ann. § 36-2-302 (Unconscionable contract or clause), *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 550-51, 606 S.E.2d 752, 755 (2004) (fraud in the inducement of the arbitration agreement necessary to avoid arbitration.)

THEREFORE, the Defendants request an Order compelling the plaintiff to submit to arbitration pursuant to the South Carolina Uniform Arbitration Act.

BELSER & BELSER, P. A.



H. Freeman Belser, Esquire
1901 Main Street, Suite 1550
Post Office Box 96
Columbia, South Carolina 29202
(803) 929-0096
Attorneys for Defendants

Columbia, South Carolina

Aug. 30, 2016

**THE TERMS AND CONDITIONS OF THIS OPERATING AGREEMENT ARE SUBJECT TO
BINDING ARBITRATION PURSUANT TO S.C. CODE ANN. 15- 48-10, ET. SEQ. (1976 AS
MAY BE AMENDED)**

**OPERATING AGREEMENT OF
THE COMMONS AT FORT MILL, LLC**

A South Carolina Limited Liability Company

October 28, 2014

THIS OPERATING AGREEMENT for **THE COMMONS AT FORT MILL, LLC** ("the company") is executed by and between **BLUE WAVE MANAGEMENT, INC.** ("Managing Member"), **CARL HAWKENSEN**, and **CHAD WHITMIRE** (the "Members"). The Commons at Fort Mill, LLC is a duly organized limited liability company formed pursuant to the laws of the State of South Carolina as a single purpose real estate holding entity pursuant to Title 33, Chapter 43, Article I (S.C. Code Ann. 34-44-101, Et Seq.) pursuant to the purposes, terms and conditions set forth below, including all Exhibits and Attachments:

**ARTICLE I.
MEMBERS' INTEREST IN COMPANY**

Section 1. Certificates of membership interest. The company shall have the power to issue certificates of membership interest in registered form representing ownership of an interest in the company ("certificates"). The denominations of the certificates shall correspond to the amount of capital contributed by the member to the company. The certificate shall be transferable or interchangeable on presentation at the office of the company, properly endorsed or accompanied by an instrument of transfer and executed by the member or his or her authorized attorney, together with payment of any tax or governmental charge imposed upon the transfer of certificates. The company shall replace any mutilated, lost, stolen or destroyed certificate on proper identification, indemnity satisfactory to the company and payment of any charges incurred in the replacement. On a return of all or any portion of the capital of the company contributed by a member holding a certificate, the member shall surrender the certificate or certificates for appropriate adjustment prior to receipt of his or her capital contribution.

Section 2. Transfer of member's interest. Subject to the provisions set forth in Exhibit-A, an interest of a member in the company may be transferred or assigned by (a) transfer of a certificate, if certificates have been issued by the company, or (b) by any manner sufficient to transfer personal property under applicable law. However, if all of the other members of the company other than the member proposing to dispose of his or her interest do not approve of the proposed transfer or assignment by unanimous written consent, the transferee of the interest of the member shall have no right to participate in the management of the business and affairs of the company or to become a member. The transferee shall be entitled to receive only the share of profits or other compensation by way of income and the return of contributions to which that member otherwise would be entitled.

**ARTICLE II.
MEMBER MEETINGS**

**EXHIBIT
A**

LCW
11

Section 1. Annual meetings. Unless otherwise decided by resolution of the members, annual meetings of the members shall be held on the second day of January of each fiscal year of the company if not a legal holiday in the state in which the meeting shall be held, and if a legal holiday, then on the next business day following, beginning at 9:00 a.m., or at any other time and place as the members may decide by resolution and designate in the notice of the meeting. If the annual meeting or the election of a manager or managers is not held on the day designated in this Section, the members shall conduct the election a meeting of the members as soon as is convenient. The annual meeting shall be for the purpose of electing a manager or managers and for transacting any other business which may properly come before the meeting.

Section 2. Special meetings. Special meetings of the members, for any purpose or purposes, unless prescribed by statute or by the Articles of Organization of the company, shall be held when called for by a manager or when requested in writing by the holders of not less than fifty one percent of the then existing contributed capital of the company.

Section 3. Place. All meetings of the members shall be held within or without the State of South Carolina as shall be designated in the notice of meeting given pursuant to this Article or in a duly executed waiver of notice of the meeting.

Section 4. Notice. Whenever members are required or authorized to take any action at a meeting, a written notice of the meeting, stating the place, day and hour of the meeting and the purpose or purposes for which the meeting is called, shall be delivered no fewer than 10 nor more than 60 days prior to the date set for the meeting, either by hand delivery or by first class mail, to each member entitled to vote at the meeting. If mailed, notice shall be deemed delivered three days after deposit in the United States mail addressed to the member at his or her address as it appears on the books of the company, with first class postage prepaid. Written waiver by a member of notice of a members meeting, signed by him or her, whether before or after the time stated on the notice, shall be equivalent to the giving of the notice.

Section 5. Consents. Personal presence of a member shall not be required, provided a written consent to or rejection of the proposed action is submitted to the chairman of the meeting. Attendance by a member and voting in person at any meeting shall revoke any written consents or rejections of the member submitted with respect to action proposed to be taken at the meeting. Submission of a later dated written consent or rejection with respect to any action shall revoke an earlier one as to the action. Every consent or rejection must be signed by the member or his or her attorney-in-fact. All questions regarding the validity of consents or rejections shall be determined by the manager or managers presiding over the meeting.

Section 6. Action by written consent. Any matter on which the members are authorized to take action under law, the article of organization or these regulations may be taken by the members without a meeting assembled if written consents to the action by the members are signed by the members entitled to vote on the action at a meeting and who hold a majority in interest of the members (as defined in Section 8 of this Article) or any greater ownership interest in the company as may be required by law, by the articles of organization or by these regulations.

Section 7. Adjourned meeting. On an adjournment of a meeting, it shall not be necessary to give any notice of the adjourned meeting, provided that the time and place to which the meeting is adjourned are announced at the meeting at which the adjournment is taken, and any business which might have been transacted on the original date of the

meeting may be transacted at the adjourned meeting. If, however, after the adjournment, the manager or managers fix a new record date for the adjourned meeting, a notice of the adjourned meeting shall be given as provided in Section 4 of this Article to each member of record on the new record date entitled to vote at the meeting.

Section 8. Member quorum and voting. The holders of a majority of the then-outstanding contributed and not returned capital of the company ("majority in interest of the members") entitled to vote, represented in person or by written consent, shall constitute a quorum at a meeting of members, except as otherwise prescribed by law or by the articles of organization of the company. All members present in person or represented by written consent at the meeting may continue to do business until adjournment, notwithstanding the withdrawal of enough members to leave less than a quorum, except as prescribed by law or the articles of organization. If a quorum is present, the affirmative vote of a majority in interest of the members represented at the meeting and entitled to vote on the subject matter shall be the act of the members unless otherwise provided by law, these regulations or the articles of organization of the company. All questions regarding the qualification of voters and the acceptance or rejection of votes shall be decided by the manager or managers presiding over the meeting.

Section 9. Closing of transfer books or fixing of record date. For the purpose of determining members entitled to notice of or to vote at any meeting of members or any adjournment or postponement of any meeting of members, or in order to make a determination of members for any other proper purpose, the manager or managers of the company may provide that the transfer books shall be closed for a stated period, but not to exceed, in any case, ten days. If the transfer books shall be closed for the purpose of determining members entitled to notice of or to vote at a meeting of members, the books shall be closed for at least two days immediately preceding the meeting. In lieu of closing the transfer books, the manager or managers may fix in advance a date as the record date for any such determination of members, not less than ten days prior to the date on which the particular action requiring the determination of members is to be taken. If the transfer books are not closed and no record date is fixed for the determination of members entitled to notice of or to vote at a meeting of members, or members entitled to receive payment of a dividend, the date on which notice of the meeting is mailed shall be the record date for the determination of members. When a determination of members entitled to vote at any meeting of members has been made as provided in this section, the determination shall apply to any adjournment or postponement of the meeting.

ARTICLE III. MANAGEMENT

Section 1. Manager election, term, and responsibilities. The company shall be managed by one or more managers. The members shall elect the manager or managers annually at the annual meeting of the members, and each manager shall serve at the pleasure of the members. The members shall replace any manager or managers whom they remove with an interim manager or managers who shall serve until the next annual meeting of members and until a replacement is qualified and elected. The respective offices and responsibilities of the managers shall be determined by resolution of the members, which may be amended from time to time solely by the members. Provided, however, that should deadlock occur between members and managers in the general business affairs and government of the company, the members and managers agree to submit in writing any issue creating deadlock to a neutral third party, not related to the parties by business, blood, or married, which third party shall be authorized to case any tie breaker vote to

avoid disruption of the affairs of the company. The initial manager shall be Blue Wave Management, Inc.

Section 2. Powers. The powers of the manager or managers may be enlarged or restricted, as set forth in the resolution of the members; provided, however, that the manager or managers shall not have the right or power to do any of the following acts without a vote by the members approving the acts:

a. Sell, assign, pledge, mortgage or otherwise encumber any of the property, real, personal or mixed, of the company;

b. Borrow money in the name of the company or utilize collateral owned by the company as security for loans;

c. Assign, transfer, pledge, compromise or release any of the claims of or debts due the company except on payment in full, or arbitrate or consent to the arbitration of any of the disputes or controversies between the company and third parties;

d. Make, execute or deliver any assignment for the benefit of creditors, or any bond, confession or judgment, chattel mortgage, deed, guarantee, indemnity bond, surety bond, or contract to sell or contract of sale of all or substantially all of the property of the company; or

e. Lease or mortgage any real estate of the company or any interest in the real estate of the company or enter into any contract for any such purpose.

Provided, however, that so long as that certain acquisition loan (the "Loan") undertaken by the company from Cantor Commercial Real Estate Lending, L.P. ("Lender") remains outstanding, the terms and conditions of the attached Exhibit-A Special Purpose Bankruptcy Remote Entity Requirements, the terms and conditions of which are here incorporated by reference, shall apply and bind the company and the Members.

Section 3. Transfer of company property. Real or personal property owned or purchased by the company shall be held and owned, and conveyance shall be made, in the name of the company. When authorized in accordance with Section 2 of this Article, instruments and documents providing for the acquisition, mortgage, or disposition of property of the company shall be valid and bind the company if they are executed by one or more managers of the company.

Section 4. Compensation. The members shall have the authority to approve reasonable compensation of the manager or managers and to approve reasonable compensation for any member for the services actually rendered to this company. The members may, by resolution, reimburse all members and managers for actual expenses incurred in attending meetings of members.

Section 5. Indemnification. Subject to the provisions set forth in Exhibit-A, the company may indemnify to the fullest extent permitted by law any person who was or is a party or has threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative, by reason of the fact that he is a manager of the company, or is or was serving at the request of the company as a director, officer, employee or agent of any other company, partnership, joint venture, trust or other enterprise.

ARTICLE IV. FISCAL MATTERS

Section 1. Capital account. Each member shall have a capital account which shall be increased by:

a. The amount of money and the fair market value of property (net of liabilities that the company assumes or take the property subject to) contributed by him or her to the company; and

b. The amount of any company income and gain allocated to him or her; and shall be decreased by:

c. The amount of money and the fair market value of property (net of liabilities that the member assumes or takes the property subject to) distributed to him by the company; and

d. Allocations to him or her of company expenditures that are not deductible in computing the company's taxable income and are not capital expenditures; and

e. Allocations to him or her of company loss and deduction.

A member shall not be entitled to any part of his or her capital account or to receive any distribution from the company, except as may be authorized by the members or until the full and complete winding up and liquidation of the business and affairs of the company. No member shall be entitled or required to make any capital contributions to the company other than as provided in these Regulations or in the Articles of Organization of the company. No interest shall be paid on the initial or any subsequent capital contribution to the company.

Section 2. Profits and Losses. An individual income account shall be maintained for each member. The net profits or net losses of the company, after providing for the expenses of the company, shall be distributable or chargeable, as the case may be, to each of the members according to their pro rata interest in the company as determined with reference to their respective capital accounts. Profits and losses shall be credited or debited to the individual income accounts as soon as practicable after the close of each fiscal year or otherwise as may be agreed to by the members. If there is no balance in a member's income account, net losses shall be debited to the member's capital accounts. If the capital account of a member shall have been depleted by the debiting of losses, future profits allocable to that member shall not be credited to his or her income account until the depletion in his or her capital account shall have been made up, but shall be credited to his or her capital account. After the depletion in the member's capital account shall have been made up, the member's subsequent share of the profits of the company shall be credited to his or her income account.

Section 3. Loans. Any member may, but shall not be required to, make loans to the company in an amount, at a time and on terms as may be approved by resolution of the members. No loan in this manner shall be considered a contribution to capital. The company shall not loan or advance funds to any member, nor permit its assets to be encumbered to secure the obligations of a member, without the prior consent of each of the other members.

Section 4. Distributions. Available cash shall be distributable to the members in proportion to their respective then existing nonreturned, contributed capital. Available cash is (a) that sum of cash resulting from business operations, including sales revenues, royalties, interest income and any other income derived from sale or use of products developed by this company plus funds reserved in a previous fiscal year but released without expenditure, less (b) all cash expenditures, including, but not limited to, real and personal property taxes, principal and interest payments on all loans made to the company,

insurance, capital requirements, accounting and legal fees and supplies, and less any amount which the manager or managers may reasonably determine to be necessary as a reserve for operating expenses, capital improvements, security deposits or contingencies, but not including cost expenditures previously reserved against in a prior fiscal year. Distributions of available cash shall be made no less often than annually, as determined by the manager or managers.

ARTICLE V. FINANCIAL STATEMENTS AND BOOKS

Section 1. Books of account. The manager or managers shall keep adequate books of account of the company which shall record and reflect all of the capital contributions of the members to the company and all of the expenses and transactions of the company. The books of account shall be kept at the principal place of business of the company, and each member and his or her authorized representative shall have, at reasonable times during normal business hours, free access to and the right to inspect and, at his or her expense, copy the books of account and all records of the company, including a list of the names and addresses and interests owned of each of the members. All books and records of the company shall be kept on the basis of an annual accounting period ending on December 31 except for the final accounting period which shall end on the dissolution or termination of the company without reconstitution.

Section 2. Bank accounts, funds, and assets. The company's funds shall be deposited in a bank or banks as the manager or managers deem appropriate. These funds shall be withdrawn only by the authorized persons as designated by the manager or managers.

Section 3. Tax returns and reports. The manager or managers at the company's expense, shall cause income tax returns and reports for the company to be prepared and timely filed with the appropriate authorities. The manager or managers shall also, at the company's expense, cause to be prepared and timely filed, with appropriate federal and state regulatory and administrative bodies, all reports required to be filed with these entities under then current applicable laws, rules and regulations. Any member shall be provided with a copy of any such report on request without expense to him or her.

Section 4. Reports and financial statements. The manager or managers shall, at the company's expense, provide the following reports and financial statements to the members:

a. Within 90 days after the end of each fiscal year, (a) a balance sheet as of the end of that fiscal year, together with related statements of income, members' equity, and changes in financial position, (the balance sheet and statements to be prepared in accordance with generally accepted accounting principles and applicable law and shall be accompanied by an auditor's report containing an unqualified opinion of the independent certified public accountants preparing the report), and (b) a report of the activity of the company for the fiscal year; and

b. Within 60 days after the end of each fiscal quarter, a report of the period containing an unaudited balance sheet, statement of income and statement of changes in financial position and a report covering the activities of the company for the quarter; and

c. As soon as practicable after the end of each fiscal year but not later than April 15 of any year, all information necessary for the preparation of a member's federal income tax returns.

ARTICLE VI.
DISSOLUTION AND LIQUIDATION

Subject to the provisions set forth in Exhibit-A, The company shall be dissolved on the death, retirement, resignation, expulsion, bankruptcy or dissolution of a member or manager, or on the occurrence of any other event which terminates the continued membership of a member in the company, unless the business of the company is continued by the written consent of all the remaining members, provided there are at least two remaining members. On the company's dissolution, the members shall appoint a liquidating agent who, at the direction of the members, will proceed to make a full and general accounting of the assets and liabilities of the company, liquidate the assets of the company, discharge its liabilities, and otherwise wind up the affairs of the company. Profits and losses accruing during the course of the liquidation will continue to be allocated among the member as set forth in Section 2 of Article IV. A reasonable time shall be allowed for the orderly liquidation of the assets of the company and the discharge of liabilities to creditors so as to minimize the normal losses attendant on a liquidation; provided, however, that in no event shall the liquidation of the assets of the company, the payment of creditors, and the distribution of company assets to the members occur more than 90 days after the occurrence of the event causing the dissolution of the company. On completion of the liquidation of the company's assets and the restatement of the members' capital accounts pursuant to Section 1 of Article IV, any member with a deficit capital account shall be required to restore the deficit to the company in accordance with Reg § 1.704-1(b)(2)(ii)(b)(3). Any assets of the company remaining after liquidation shall then be applied as follows:

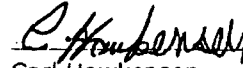
- a. First, to pay and discharge all the company's debts and other liabilities not already satisfied.
- b. Second, to establish a reserve for contingent liabilities of the company, if any, in an amount agreed to by the members.
- c. Last, the balance to the members in proportion to their respective positive capital accounts in accordance with Reg § 1.704-1(b)(2)(ii)(b)(2).

ARTICLE VII.
OPERATING AGREEMENT AMENDMENT

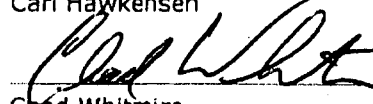
This operating agreement may be altered, amended, added to or repealed only by an affirmative majority vote of the members at any special meeting of the members, if notice of the proposed alteration, amendment, addition or repeal is contained in the notice of the meeting. This operating agreement is intended to govern and manage the affairs of the limited liability company, and no provision of this operating agreement, amended or otherwise, shall be inconsistent with law or the articles of organization.

This certifies that the preceding constitutes the operating agreement of THE COMMONS AT FORT MILL, LLC, as adopted on October 28, 2014, by the members of the company, all of whom sign below.

MEMBERS:

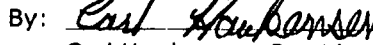


Carl Hawkensen



Chad Whitmire

BLUE WAVE MANAGEMENT, INC.

By: 

Carl Hawkensen, President

EXHIBIT-A

[SPECIAL PURPOSE BANKRUPTCY REMOTE ENTITY REQUIREMENTS]

Any capitalized terms not defined herein shall have the meaning set forth in that certain Loan Agreement by and between The Commons at Fort Mill, LLC (the "Company") and Lender executed in connection with the Loan (the "Loan Agreement"). At all times prior to, on and after the date hereof, the Company:

(a) was, is and will be organized solely for the purpose of acquiring, developing, owning, holding, selling, leasing, transferring, exchanging, managing and operating that certain real property located in Fort Mill, South Carolina known as The Commons at Fort Mill (the "Property") (and no other property), entering into the Loan Agreement and performing its obligations under all those certain loan documents executed in connection with the Loan (the "Loan Documents"), refinancing the Property in connection with a permitted repayment of the Loan, and transacting lawful business that is incident, necessary and appropriate to accomplish the foregoing;

(b) has not been, is not, and will not be engaged, in any business unrelated to the acquisition, development, ownership, management or operation of the Property;

(c) has not had, does not have, and will not have, any assets other than those related to the Property;

(d) has not engaged, sought or consented to, and will not engage in, seek or consent to, any dissolution, winding up, liquidation, consolidation, merger, sale of all or substantially all of its assets, or amendment of its articles of organization or operating agreement (as applicable) with respect to the matters set forth in this definition;

(e) has had, now has and will have at least one member that is a Special Purpose Entity (A) that is a corporation (B) that has at least one (1) Independent Director, and (3) that directly owns at least one-half-of-one percent (0.5%) of the equity of the Company;

(f) has not and will not (and has and will have a limited liability agreement or an operating agreement that provides that the Company shall not), (1) dissolve, merge, liquidate, consolidate; (2) sell all or substantially all of its; or (3) amend its organizational documents with respect to the matters set forth in this definition without the consent of Lender;

(g) has been, is and intends to remain solvent and has paid and shall pay its debts and liabilities from its then available assets (including a fairly-allocated portion of any personnel and overhead expenses that it shares with any Affiliate) from its assets as the same shall become due, and has maintained and shall maintain adequate capital for the normal obligations reasonably foreseeable in a business of its size and character and in light of its contemplated business operations;

(h) has not failed, and will not fail, to correct any known misunderstanding regarding the separate identity of such entity and has not and shall not identify itself as a division of any other Person;

- (i) has maintained and will maintain its accounts, books and records separate from any other Person and has filed and will file its own tax returns, except to the extent that it has been or is required to file consolidated tax returns by law;
- (j) has maintained and will maintain its own records, books, resolutions and agreements;
- (k) other than as provided in that certain Cash Management Agreement executed by the Company in connection with the Loan, (i) has not commingled, and will not commingle, its funds or assets with those of any other Person and (ii) has not participated and will not participate in any cash management system with any other Person;
- (l) has held and will hold its assets in its own name;
- (m) has conducted and shall conduct its business in its name or in a name franchised or licensed to it by an entity other than an Affiliate of itself, except for business conducted on behalf of itself by another Person under a business management services agreement that is on commercially reasonable terms, so long as the manager, or equivalent thereof, under such business management services agreement holds itself out as an agent of the Company;
- (n) has maintained and will maintain its books, bank accounts, balance sheets, financial statements, accounting records and other entity documents separate from any other Person and has not permitted, and will not permit, its assets to be listed as assets on the financial statement of any other entity except as required by GAAP; *provided, however*, that appropriate notation shall be made on any such consolidated statements to indicate its separateness from such Affiliate and to indicate that its assets and credit are not available to satisfy the debt and other obligations of such Affiliate or any other Person and such assets shall be listed on its own separate balance sheet;
- (o) has paid and will pay its own liabilities and expenses, including the salaries of its own employees, out of its own funds and assets, and has maintained and will maintain a sufficient number of employees in light of its contemplated business operations;
- (p) has observed and will observe all limited liability company formalities;
- (q) has had no and will have no Indebtedness (including loans, whether or not such loans are evidenced by a written agreement) other than (i) the Loan, (ii) unsecured trade and operational debt incurred in the ordinary course of business relating to the ownership and operation of the Property and the routine administration of the Company, in amounts not to exceed one percent (1%) of the original principal amount of the Loan, in the aggregate, which liabilities are not more than sixty (60) days past the date incurred, are not evidenced by a note and are paid when due, and which amounts are normal and reasonable under the circumstances, and (iii) such other liabilities that are permitted pursuant to the Loan Agreement;
- (r) has not assumed or guaranteed or become obligated for, and will not assume or guarantee or become obligated for, the debts of any other Person and has not held out and will not hold out its credit as being available to satisfy the obligations of any other Person except as permitted pursuant to the Loan Agreement;

- (s) has not acquired and will not acquire obligations or securities of its partners, members or shareholders or any other Affiliate;
- (t) has allocated and will allocate, fairly and reasonably, any overhead expenses that are shared with any Affiliate, including, but not limited to, paying for shared office space and services performed by any employee of an Affiliate;
- (u) has maintained and used, now maintains and uses, and will maintain and use, separate stationery, invoices and checks bearing its name, which stationery, invoices, and checks utilized by the Special Purpose Entity or utilized to collect its funds or pay its expenses have borne, shall bear its own name and have not borne and shall not bear the name of any other entity unless such entity is clearly designated as being the Special Purpose Entity's agent;
- (v) except pursuant to the Loan Documents, has not pledged and will not pledge its assets for the benefit of any other Person;
- (w) has held itself out and identified itself, and will hold itself out and identify itself, as a separate and distinct entity under its own name or in a name franchised or licensed to it by an entity other than an Affiliate of the Company and not as a division or part of any other Person, except for services rendered under a business management services agreement with an Affiliate that complies with the terms contained in clause (x) below of this definition, so long as the manager, or equivalent thereof, under such business management services agreement holds itself out as an agent of the Company;
- (x) has maintained and will maintain its assets in such a manner that it will not be costly or difficult to segregate, ascertain or identify its individual assets from those of any other Person;
- (y) has not made and will not make loans to any Person or hold evidence of indebtedness issued by any other Person or entity (other than cash and investment-grade securities issued by an entity that is not an Affiliate of or subject to common ownership with such entity);
- (z) has not identified and will not identify its partners, members or shareholders, or any Affiliate of any of them, as a division or part of it, and has not identified itself, and shall not identify itself, as a division of any other Person;
- (aa) has not entered into or been a party to, and will not enter into or be a party to, any transaction with its members or Affiliates except (i) in the ordinary course of its business and on terms which are intrinsically fair, commercially reasonable and are no less favorable to it than would be obtained in a comparable arm's-length transaction with an unrelated third party, and (ii) in connection with the Loan Agreement;
- (bb) other than capital contributions and distributions permitted under the terms of its organizational documents, has not entered into or been a party to, and shall not enter into or be a party to, any transaction with any of its partners, members, shareholders or Affiliates except in the ordinary course of its business and on terms which are commercially reasonable terms comparable to those of an arm's length transaction with an unrelated third party;

(cc) has not had and shall not have any obligation to, and has not indemnified and shall not indemnify its partners, officers, directors or members, as the case may be, in each case unless such an obligation or indemnification is fully subordinated to the Loan and shall not constitute a claim against it in the event that its cash flow is insufficient to pay any amount owed pursuant to the Loan;

(dd) does not and will not have any of its obligations guaranteed by any Affiliate except as provided in the Loan Documents;

(ee) has complied and will comply with all of the terms and provisions contained in its organizational documents and cause statements of facts contained in its organizational documents to be and to remain true and correct; and

(ff) has not permitted and shall not permit any Affiliate or constituent party independent access to its bank accounts except as permitted under the Loan Documents.

For the purposes hereof:

"Independent Director" shall mean (a) a natural Person who is not (at the time of initial appointment as director or manager, or at any time while serving as a director or manager) and is not, has never been, and will not be (at any time while serving as a director or manager): (i) a stockholder, partner, member or other equity owner, director (with the exception of serving as the Independent Director of the Company), officer, employee, attorney or counsel of the Company, Carl Hawkensen (the "Guarantor") or any Affiliate of the Company or Guarantor, (ii) a customer, supplier or other Person who derives any of its purchases or revenues from its activities with the Company, Guarantor or any Affiliate of the Company or Guarantor, (iii) a Person Controlling or under common Control with any such stockholder, partner, member or other equity owner, director, officer, customer, supplier or other Person, (iv) a member of the immediate family of any such stockholder, partner, member, equity owner, director, officer, employee, manager, customer, supplier or other Person, or (v) otherwise affiliated with the Company, Guarantor or any stockholder, member, partner, director, officer, employee, attorney or counsel of the Company or any Guarantor, and (b) has (i) prior experience as an independent director or independent manager for a corporation, a trust or a limited liability company whose charter documents required the unanimous consent of all independent directors or independent managers thereof before such corporation, trust or limited liability company could consent to the institution of bankruptcy or insolvency proceedings against it or could file a petition seeking relief under any applicable federal or state law relating to bankruptcy and (ii) at least three (3) years of employment experience with one or more nationally recognized professional service companies that provides, inter alia, professional independent directors or independent managers in the ordinary course of their respective business to issuers of securitization or structured finance instruments, agreements or securities or lenders originating commercial real estate loans for inclusion in securitization or structured finance instruments, agreements or securities and is at all times during his or her service as an Independent Director of the Company an employee of such a company or companies. A natural Person who otherwise satisfies the foregoing definition other than subclause (a)(i) of this definition by reason of being the Independent Director of a Special Purpose Entity affiliated with the Company shall not be disqualified from serving as an Independent Director of the Company, provided that the fees that such individual earns from

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serving as Independent Director of affiliates of the Company in any given year constitute in the aggregate less than five percent (5%) of such individual's annual income for that year.

As used in this definition and in the definition of "Independent Director," the term "nationally recognized professional service company" shall mean Corporation Services Company, CT Corporation, Stewart Management Corporation, National Registered Agents, Inc. and Independent Director Services, Inc. and any other Person approved in writing by Lender.

STATE OF SOUTH CAROLINA

COUNTY OF YORK

Loyd C. (Chad) Whitmire

Plaintiff,

vs.

Johnny C. (Carl) Hawkensen, et al.

Defendant.

IN THE COURT OF COMMON PLEAS
16th JUDICIAL CIRCUIT

CASE NO.: 2016-CP-46-2458

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney:
W. Keith Martens, Bar No. _____
Address:
PO Box 10940, Rock Hill, SC 29731
Phone: _____ Fax: _____
E-mail: _____ Other: _____

Defendant's Attorney:
H. Freeman Belser, Bar No. 72403
Address:
P.O. Box 96, Cola, SC 29202
Phone: 803-929-0096 Fax 803-929-0196
E-mail: freeman@belserpa.com Other: _____

- ☒ **MOTION HEARING REQUESTED** (attach written motion and complete **SECTIONS I and III**)
☐ **FORM MOTION, NO HEARING REQUESTED** (complete **SECTIONS II and III**)
☐ **PROPOSED ORDER/CONSENT ORDER** (complete **SECTIONS II and III**)

SECTION I: Hearing Information

Nature of Motion: Motion to Reconsider

Estimated Time Needed: 30 Minutes

Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

- ☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant

Date submitted 10/7/16

SECTION III: Motion Fee

☒ **PAID - AMOUNT: \$**

☐ **EXEMPT:**

(check reason)

- ☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: L/S Date Filed: _____

☒ **MOTION FEE COLLECTED: \$25.00**

☐ **CONTESTED - AMOUNT DUE: \$** _____

STATE OF SOUTH CAROLINA
COUNTY OF YORK

Loyd C. (Chad) Whitmire,

Plaintiff,

v.

Johnny C. (Carl) Hawkenen and
The Commons at Fort Mill, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS
IN THE 16th JUDICIAL CIRCUIT
Case Number 2016-CP-46-2458

**DEFENDANTS' MOTION TO
RECONSIDER ORDER ON
MOTION TO APPOINT RECEIVER**

PLEASE TAKE NOTICE THAT the Defendants hereby move the Court, pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, for an order altering or amending The Honorable S. Jackson Kimball's September 29, 2016 Order on Motion to Appoint Receiver ("the Order"). At the outset of the September 15, 2016 hearing on Plaintiff's Motion to Appoint Receiver and Defendants' Motion to Compel Arbitration, the Court raised a threshold jurisdictional question of whether the arbitration clause in the contract between the parties precluded the Court from awarding Plaintiff preliminary relief, even if Plaintiff could show that he was entitled to it. After hearing arguments from both sides on this issue, the Court ruled from the bench that the existence of arbitration clause did not preclude the Court granting Plaintiff preliminary relief. The parties then made arguments relative to Plaintiff's Motion to Appoint Receiver, but the arguments were all made subject to and specifically reserving the parties' respective positions on the threshold jurisdictional question. The Court subsequently denied Defendants' Motion to Compel Arbitration and has entered a written order. Defendants intend to appeal that order, which they contend is inextricably tied to the Order by the threshold jurisdictional question not addressed in the Order on Plaintiff's Motion to Appoint Receiver. Therefore, Defendants respectfully request that the Court alter or amend the September 29, 2016 Order on Motion to Appoint Receiver to address the threshold jurisdictional issue, on which the Order is silent, so that Defendants' appellate rights may be preserved.

[Counsel signature on following page.]

BELSER & BELSER, P. A.


H. Freeman Belser, Esquire
1901 Main Street, Suite 1550
Post Office Box 96
Columbia, South Carolina 29202
(803) 929-0096
Attorneys for Defendants

Columbia, South Carolina

October 7, 2016

STATE OF SOUTH CAROLINA)

COUNTY OF YORK)

Loyd C. (Chad) Whitmire)

Plaintiff,)

vs.)

Johnny C. (Carl) Hawkensen, et al.)

Defendant.)

IN THE COURT OF COMMON PLEAS
16th JUDICIAL CIRCUIT

CASE NO.: 2016-CP-46-2458

**MOTION AND ORDER INFORMATION
FORM AND COVER SHEET**

FILED-RECEIVED
OCT 14 PM 12:36
CLERK
YORK

Plaintiff's Attorney:

W. Keith Martens, Bar No. _____

Address:

PO Box 10940, Rock Hill, SC 29731

Phone: _____ Fax: _____

E-mail: _____ Other: _____

Defendant's Attorney:

H. Freeman Belser, Bar No. 7403

Address:

P.O. Box 96, Cola, SC 29202

Phone: 803-929-0096 Fax 803-929-0196

E-mail: freeman@belserpa.com Other: _____

☒ **MOTION HEARING REQUESTED** (attach written motion and complete **SECTIONS I and III**)

☐ **FORM MOTION, NO HEARING REQUESTED** (complete **SECTIONS II and III**)

☐ **PROPOSED ORDER/CONSENT ORDER** (complete **SECTIONS II and III**)

SECTION I: Hearing Information

Nature of Motion: Motion to Reconsider

Estimated Time Needed: 30 Minutes

Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant

Date submitted 10/7/16

SECTION III: Motion Fee

☒ **PAID - AMOUNT: \$** _____

☐ **EXEMPT:**

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: LD Date Filed: 10/14/16

☒ **MOTION FEE COLLECTED: \$** 25

☐ **CONTESTED - AMOUNT DUE: \$** _____

STATE OF SOUTH CAROLINA)

COUNTY OF YORK)

Loyd C. (Chad) Whitmire,)

Plaintiff,)

v.)

Johnny C. (Carl) Hawkensen and)
The Commons at Fort Mill, LLC,)

Defendants.)

IN THE COURT OF COMMON PLEAS
IN THE 16th JUDICIAL CIRCUIT
Case Number 2016-CP-462458

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22
**DEFENDANTS' MOTION TO
RECONSIDER ORDER DENYING
MOTION TO COMPEL ARBITRATION**

PLEASE TAKE NOTICE THAT the Defendants hereby move the Court, pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, for an order altering or amending The Honorable S. Jackson Kimball's October 5, 2016 Order Denying Defendants' Motion to Compel Arbitration ("the Order"). This motion is based on the following grounds:

1. The Order incorrectly finds that this dispute only involves property located in South Carolina.

This matter involves real estate in both North Carolina and South Carolina. Prior to the September 13, 2016 hearing on Defendants' Motion to Compel Arbitration, Defendants filed a Memorandum in Support of Motion to Compel Arbitration, in which Defendants informed the Court that "one of the many disputed issues between the parties is the ownership of real property located in Mooresville, South Carolina." Defendants' counsel elaborated on this dispute at the September 13, 2016 motions hearing. On September 29, 2016, Defendants filed an Answer and Counterclaim detailing the dispute over the North Carolina property. Therefore, the Order incorrectly finds the only evidence of interstate commerce in this case is the fact that the Plaintiff is a North Carolina resident. As a result, the Order should be altered or amended to reflect that the dispute does in fact involve interstate commerce and, therefore, is subject to binding arbitration under the Federal Arbitration Act.

2. The Order reads an unnecessary redundancy into the South Carolina Uniform Arbitration Act.

The Order finds that the Commons' Operating Agreement does not contain an arbitration agreement, even though there is unambiguous language to the contrary that is written in all-caps, underlined, and bold at the top of the first page. The agreement to arbitrate between the parties could not be clearer or more prominent in the Operating Agreement. Nevertheless, the Order finds that the notice and the agreement are two

separate requirements that cannot be combined in one location on the agreement, citing no authority that they cannot be one and the same. The Order finds that the arbitration agreement does not exist because it is not embedded within numbered paragraph buried in the Operating Agreement itself, but cites no authority that the arbitration agreement must be formatted in a certain way. The Order finds that the agreement lacks any specific arbitration procedures, even though it references the South Carolina Uniform Act, which outlines in detail the procedures for arbitration. The purpose of the notice provision is to prevent a party from overlooking an arbitration clause buried deep within the fine print of a contract. Very respectfully, the Order reaches is an incorrect conclusion and imposes an unnecessary technicality on arbitration agreement that it must be separate and distinct from the notice. Therefore, the Order should be altered or amended to finds that this dispute is subject to arbitration.

3. The Order tortures the language of the arbitration clause and of the Complaint to avoid arbitration.

The Order correctly states: "This lawsuit arises, among other things, the parties' dispute over their relative membership interests in The Commons at Fort Mill". That statement puts directly in issue Article I of the Operating Agreement, titled "Membership Interests in the Company". The Order also correctly states: "Whitmire filed this action in August, 2016, alleging that, since approximately December 2014, he has been wrongfully excluded from the business, operations, and accounts of the Company." That statement puts directly in issue Article IV of the Operating Agreement, titled "Fiscal Matters", and Article V, titled, "Financial Statements and Books". The Order also correctly states: "Whitmire also alleges that Hawkensen has refused to recognize Whitmire's proper membership interest in the Company, and that Hawkensen is operating the Company without regard for Whitmire's rights as a member." That statement puts directly in issue Article III, titled, "Management", and Article VI, titled, "Dissolution and Liquidation". However, the Order then reaches inconsistent and erroneous conclusion: "Plaintiff's claims do not turn upon the 'terms and conditions' of the Operating Agreement." The Complaint unquestionable creates a dispute about the terms and conditions of the Operating Agreement. The only way to find otherwise is to read the arbitration clause and the Complaint applying a rule of construction *against* arbitration, which is contrary to the well-established rules of construction and policies in South Carolina *in favor* of arbitration. Therefore, the Order should be altered or amended to finds that this dispute is subject to arbitration. To the extent that one or more of the issues do not involve "the terms and conditions of the Operating Agreement", the South Carolina Uniform Arbitration Act contemplates that there may be issues that are severable and stayed pending the outcome of the arbitration. S.C. Code Ann. § 15-48-20(d).

[Counsel signature on following page.]

BELSER & BELSER, P. A.

A handwritten signature in black ink, appearing to read 'H. Freeman Belser', written over a horizontal line.

H. Freeman Belser, Esquire
1901 Main Street, Suite 1550
Post Office Box 96
Columbia, South Carolina 29202
(803) 929-0096
Attorneys for Defendants

Columbia, South Carolina

October 7, 2016

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Loyd C. (Chad) Whitmire,)
)
Plaintiff,)

C/A No. 2016-CP-46- 2458

v.)

AFFIDAVIT OF LLOYD C. WHITEMIRE

Johnny C. (Carl) Hawkensen and)
The Commons at Fort Mill, LLC,)
)
Defendants.)

FILED-RECEIVED
2016 AUG 19 PM 1:14
DAVID H. COLTON
C.C.P. & S.S.
YORK COUNTY, SC

1. I am the plaintiff in this lawsuit. I am a citizen and resident Mecklenburg County, North Carolina and am over the age of eighteen. I am legally competent to give this affidavit.

2. Carl Hawkensen and I have a long-standing business relationship involving the purchase and development of approximately 20 acres of real property at the intersection of Highway 21 and Gold Hill Road in Fort Mill, South Carolina. Dating back to 2007, Carl and I have been members of several ownership groups and limited liability companies that were formed for the purpose of acquiring the property, developing it, and then ultimately constructing and owning a 144 unit apartment complex on that property.

3. While we have had many investors involved with various aspects of the project at various times, Carl and I have been continuously involved in this project from the start.

4. In 2014, Carl and I were members of a limited liability company, Crossroads Commons Phase I, LLC that owned the property and operated the apartment complex. Carl had a 20% interest in that company and I had a 20% interest. There were also two other men, Thomas Holderby and Dean Biasucci, who held the remaining membership interests in that LLC.

5. In October 2014, Carl and I bought out the other two members of Crossroads Commons Phase I, LLC, and we became the only members of that company.

6. Shortly thereafter, Carl and I formed a new company, The Commons at Fort Mill, LLC. (the "Company"), with the intention of transferring the apartment complex from Crossroad Commons Phase I, LLC into the Company. Both Carl and I were members and both of us were listed as managers of the Company on the Articles of Organization. A true and accurate copy of the Articles of Organization for the Company are attached as Exhibit A.

6. In December 2014, we transferred the property of Crossroads Commons Phase I, LLC to the Company. The Company did not pay Crossroads Commons Phase I, LLC for the property, and neither Carl nor I received a distribution or other form of financial compensation in connection with that transfer.

7. In December 2014, we also refinanced the mortgage debt covering the property. The loan of Crossroads Commons Phase I, LLC was satisfied and the Company took out a new loan with Cantor Commercial Real Estate Lending, L.P. That transaction closed on or about December 9, 2014. On December 24, 2014, I received a \$30,000 distribution from the Company. Carl Hawkensen took a distribution in excess of \$300,000 at closing.

8. I have received two other small distributions from the Company since that time. In April 2015, I received a \$3,000 payment and in June 2015, I received a \$2,400 payment. While these payments are shown on the Company's ledgers as "draws," both payments were actually for specific work that I performed on behalf of the Company. I have not received ANY compensation from the Company since June 2015.

9. I have not been allowed access to the Company's bank accounts or records since December 2014. In March 2015, Carl actually had locks changed on the apartment clubhouse, so

that the only access I had to the Company's offices from that point forward was if Carl or his girlfriend (who is not a member of the Company) gave me access.

10. On several occasions throughout 2015, I asked Carl when I would be receiving a distribution from the Company. Each time I asked, Carl told me that the Company was "not profitable" and that we could not make distributions to members.

11. In February 2016, my attorney wrote the Company to demand that I be provided with financial and other records to which I am entitled as a member of the Company. On February 24, 2016, the Company responded, providing ledgers, tax and bank account records in response to my attorney's letter. Copies of the Company's 2015 bank account records which were provided to me are attached as Exhibit B. Those records reflect that in 2015, the Company had recurring monthly revenues of \$135,512.67, on average. The lowest monthly deposits were posted in September (\$120,477.98) and the highest in June (\$153,849.67). Total revenues for 2015 exceeded \$1,600,000.

The Company's monthly mortgage payment was \$80,551.30, meaning that the Company's monthly revenues exceeded its mortgage payment by \$39,926.98 in September (the worst month) and by \$73,398.37 in June (the best month). The Company had, or should have had, significant positive cash flow in each month of 2015.

11. The bank account records provided to my attorney also reflect numerous cash withdrawals or direct transfers from the Company's bank account to companies controlled by Carl (Hawkensen Construction, Inc. and Blue Wave Management, LLC). A summary of withdrawals and transfers is attached as Exhibit C. This summary includes only withdrawals and cashed checks in excess of \$1000. There are several other cashed checks or withdrawals for

less than \$1000 which I have not listed in this summary. As reflected on that summary, cash withdrawals and transfers from the Company's accounts exceeded \$225,000 in 2015.

Even though I was a member of the Company, I was not aware of any of these transfers or withdrawals until I saw them in the records that were provided to my attorney in February 2016. I did not approve any of the withdrawals or the transfers to Hawkensen Construction, and I was not asked to approve any of the withdrawals or transfers. I did not make any of the cash withdrawals or receive any money from the cashed checks. While I do not know who made those withdrawals, I do know that Carl Hawkensen had control of the Company's bank account throughout 2015.

12. In addition to these cash withdrawals and transfers, the Company's accounting ledgers (which were also provided in response to my attorney's request) reflect a \$200,000 "note payable" from a company listed as "HCI." From my dealings with Carl, I know that he refers to Hawkensen Construction, Inc. as "HCI" and I believe that "HCI" listed in the Company's ledgers is actually an acronym for Hawkensen Construction, Inc. I was never asked to approve a \$200,000 loan from the Company to Hawkensen Construction, Inc. and I was not aware that a loan had been made until I saw it in the Company's ledgers that were provided to my attorney in February 2016.

I do know that Carl is attempting to use Hawkensen Construction Company, Inc. to become involved in various oil and energy business ventures. These ventures include companies called BIA Energy, HCI Energy Sources and NGV Systems. I am not involved in any of these ventures, and neither is the Company.

I have attached a copy of Carl's "Linked In" profile, dated August 15, 2016 as Exhibit D. In this profile, Carl represents that his primary business is in "Oil & Energy" and that his

company "BIA Energy" is a "leader in the Natural Gas Industry." I suspect, but do not know with certainty, that the Company's \$200,000 "loan" to Hawkensen Construction, Inc. has been used to help finance this venture. I can see no other reason that Hawkensen Construction, Inc. would have borrowed \$200,000 from the Company.

13. The Company's accounting ledgers also reflect more than \$20,000 in payments to attorneys, including more than \$16,000 paid to Matthew Cox, a litigation attorney in Columbia, in 2015. The first payment to Mr. Cox was for \$5,000, and was paid on March 12, 2015. On March 27, 2015, Mr. Cox filed a lawsuit on behalf of Carl in Richland County, captioned Carl Hawkensen and NGV Systems, LLC v. Michael R. Kilburn, et al., C/A No. 2015-CP-40-1848.

I am familiar with the dispute giving rise to that lawsuit. Hawkensen v. Kilburn has nothing to do with the Company, but involves a failed business venture of Carl's. Neither the Company nor I have any stake in that business venture, though it appears that the Company and I have been funding Carl's litigation.

To my knowledge, the Company was not involved in any active litigation in 2015, other than tenant eviction matters, etc. filed in magistrate's court. Mr. Cox did not represent the Company in those matters. I am not aware of any legitimate Company-related business that would have required the Company to pay more than \$16,000 to Mr. Cox in 2015.

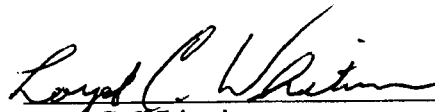
14. The Company's accounting ledgers also reflect that the Company paid \$2,500 to Dewain Morrison in February 2015. The ledger initially listed this payment as "for investment," but was later reclassified as "consulting fees."

I was introduced to Mr. Morrison at some point by Carl. Mr. Morrison is a financing broker, with a company called Secure Business Finance, LLC, in California. Carl was working with Mr. Morrison to obtain financing or investment support for BIA Energy. Carl frequently

discussed his plans for BIA Energy with me, and boasted that he would make so much money from this planned venture that the money he made from the Company's apartment complex would be "insignificant" by comparison. I was not a participant or investor in BIA Energy, and I was not asked to be. BIA Energy has no connection to the Company or the Company's business operations. Mr. Morrison did not provide any services to the Company in February 2015. Nonetheless, the Company apparently paid \$2,500 to Mr. Morrison in 2015 as a "consulting fee."

15. After reviewing the Company's account ledgers and bank records with my attorney, I became convinced that Carl is operating the Company as his personal "piggy bank," with no regard for my rights as a member in the Company. After attempting to negotiate a buyout of my interest with Mr. Hawkensen for several months, I forced the issue by dissociating from the Company on July 31, 2015. I am informed and believe that, as a dissociated member, I am now entitled to have my interest in the Company valued and the Company is then required to purchase my interest. I have also filed direct claims against Carl for the damages that he has already caused me.

16. I believe that a receiver is necessary to protect the assets of the Company during this litigation.


Lloyd C. Whitmire

Sworn to before me this

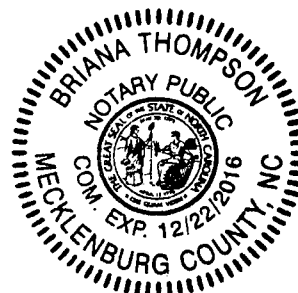
17 day of August, 2016

 (Notary's signature)

Briana Thompson (Notary's printed name)

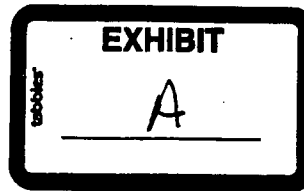
Notary Public for Mecklenburg County

My commission expires: 12-22-2016



Jul 22 2016
REFERENCE ID: 1607221214443

Mark Hammond
Secretary of State of South Carolina



STATE OF SOUTH CAROLINA
SECRETARY OF STATE
ARTICLES OF ORGANIZATION
Limited Liability Company – Domestic
Filing Fee - \$110.00

TYPE OR PRINT CLEARLY IN BLACK INK

The undersigned delivers the following articles of organization to form a South Carolina limited liability company pursuant to S.C. Code of Laws §33-44-202 and §33-44-203.

1. The name of the limited liability company (Company ending must be included in name*)

The Commons at Fort Mill, LLC

***NOTE:** The name of the limited liability company must contain one of the following endings: "limited liability company" or "limited company" or the abbreviation "L.L.C.", "LLC", "L.C." "LC", or "Ltd. Co."

2. The address of the initial designated office of the limited liability company in South Carolina is

221 Embassy Drive

Street Address

Fort Mill

29715

City

Zip Code

3. The initial agent for service of process is

Carl Hawkensen

Name

Carl Hawkensen
Signature of Agent

and the street address in South Carolina for this initial agent for service of process is

304 Mark Trail Lane

Street Address

Fort Mill

29715

City

Zip Code

4. List the name and address of each organizer. Only one organizer is required, but you may have more than one.

- (a) Carl Hawkensen

Name

304 Mark Trail Lane

Street Address

Fort Mill

SC

29715

City

State

Zip Code

- (b)

Name

Street Address

City

141014-0104 FILED: 10/14/2014
COMMONS AT FORT MILL, LLC THE
Filing Fee \$110.00 ORIG

Mark Hammond

South Carolina Secretary of State

Jul 22 2016

REFERENCE ID: 1607221214443

Mark H. ...
SECRETARY OF STATE OF SOUTH CAROLINA

Name of Limited Liability Company The Commons at Fort Mill, LLC

5. ☐ Check this box only if the company is to be a term company. If the company is a term company, provide the term specified. _____
6. ☒ Check this box only if management of the limited liability company is vested in a manager or managers. If this company is to be managed by managers, include the name and address of each initial manager.
- (a) Carl Hawkensen
- | | | |
|---------------------|-------|----------|
| Name | | |
| 304 Mark Trall Lane | | |
| Street Address | | |
| Fort Mill | SC | 29715 |
| City | State | Zip Code |
- (b) Chad Whitmire
- | | | |
|------------------|-------|----------|
| Name | | |
| 929 West Hill St | | |
| Street Address | | |
| Charlotte | NC | 28208 |
| City | State | Zip Code |
7. ☐ Check this box only if one or more of the members of the company are to be liable for its debts and obligations under §33-44-303(c). If one or more members are so liable, specify which members, and for which debts, obligations or liabilities such members are liable in their capacity as members. This provision is optional and does not have to be completed.
8. Unless a delayed effective date is specified, these articles will be effective when endorsed for filing by the Secretary of State. Specify any delayed effective date and time. _____
9. Any other provisions not inconsistent with law which the organizers determine to include, including any provisions that are required or are permitted to be set forth in the limited liability company operating agreement may be included on a separate attachment. Please make reference to this section if you include a separate attachment.
10. Each organizer listed under number 4 must sign.

Carl Hawkensen
Signature of Organizer

10-14-2014

Date

Signature of Organizer

Date

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
IN THE 16th JUDICIAL CIRCUIT
Case Number 2016-CP-46-2458

Loyd C. (Chad) Whitmire,
Plaintiff,

v.

Johnny C. (Carl) Hawkensen and
The Commons at Fort Mill, LLC,
Defendants.

AFFIDAVIT OF CARL HAWKENSEN

FILED
2016 SEP 13 AM 11:00
DAVID HAMILTON
CLERK
YORK COUNTY, SC

The Affiant, Carl Hawkensen, hereby deposes and says that:

1. My name is Carl Hawkensen. I am a defendant in this case. I have read the allegations made by Chad Whitmire in his Complaint, Motion to Appoint Receiver, and his Affidavit.
2. The origin of my relationship with Mr. Whitmire was a limited liability company called R&D of the Carolinas, LLC, of which I owned 85% and Mr. Whitmire owned 15%. Over the past decade, we have been involved with the development of 29.84 acre piece of property in York County. The development has had challenges, including, but not limited to, disputes with partners and economic downturns. Mr. Whitmire and I are now members of The Commons at Fort Mill, LLC, which owns 10.24 acres with six apartment buildings with a total of 144 units and a clubhouse.
3. The Commons purchased the property and apartment complexes on December 9, 2014. At closing, the lender agreed to loan approximately \$1,000,000 excess cash to The Commons. Mr. Whitmire did not receive any of the excess cash at closing because he had taken a large amount of money from Crossroads Commons Phase 1 (the predecessor entity). Some of the money that he took was without approval. Some of the money were loans that he never repaid. Consistent with our respective ownership interests in R&D of the Carolinas, LLC, I was entitled to 85% of the excess cash, or \$850,000. I applied \$600,000 of that amount to purchase the interests that Holderby and Biasucci had in Crossroads Commons Phase 1 and loaned the remaining \$250,000 to The Commons.
4. I own 86% of The Commons at Fort Mill and Mr. Whitmire owns 13%. Blue Wave Management, Inc., a company in which I own 87% and Mr. Whitmire owns 13%. As a condition of our financing to purchase the apartment complex, the lender required that we put our respective ownership interests in writing; therefore, we

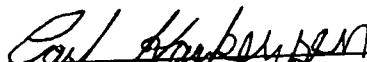
signed an organizational chart. Mr. Whitmire and I never agreed to any other arrangement, even though he claimed months after the closing that he owned 26% and now claims that he owns 50% of The Commons.

5. Currently, The Commons remains at nearly 100% occupancy, in large part due to the excellent condition of the apartments and the common areas and facilities. Since December 2014, maintenance and repairs have been made to the parking lot, the sewer system, the apartments and the clubhouse (painting, carpeting, lighting, fans, etc.), to the landscaping, and to the pool, among other things. I work approximately 90 hours/week in the summer and approximately 55 hours/week in the winter, but do not take a paycheck.
6. Some of the work is performed by my company, Hawkensen Construction, Inc. I have known Mr. Whitmire for years, and he has always known that Hawkensen Construction performs work at the apartment complex. The rates that Hawkensen Construction charges are reasonable and at market rates, if not below them. The same is true for relatives of mine who perform work at The Commons.
7. Mr. Whitmire's only interest in The Commons is money. He has never volunteered to help at The Commons, even though he has been asked repeatedly. The only times that he has worked, he has been paid.
8. In his Affidavit, Mr. Whitmire alleges that I have excluded him from The Commons facilities, bank accounts, and records. This is false. When he has asked for records, they have been provided to him. He has never asked for access.
9. In his Affidavit, Mr. Whitmire alleges that I have wrongfully withdrawn large amounts of money from The Commons without his knowledge or permission. This is false. Any money that I have received from The Commons was for services rendered by Hawkensen Construction or to repay me for money that I left in The Commons at closing.
10. In his Affidavit, Mr. Whitmire alleges that The Company is paying for litigation that is not related to The Company's business. This is false. There were a number of legal matters directly relating to The Commons that required attention in 2015. Matthew Cox, Esq. assisted The Commons in those matters.
11. In his Affidavit, Mr. Whitmire alleges that I am using funds from The Commons for my personal investments. That is false.
12. I have reviewed and investigated Exhibit C to Mr. Whitmire's Affidavit, on which he lists 35 transactions in 2015 that he says he was not aware of until records were provided to his attorney. This is not correct. Two of the payments were checks that he received. The other payments were either for services rendered

for the benefit of The Commons or to repay me for money that I left in The Commons at the December 9, 2014 closing. Karen Correll has gone through each of these transactions and provided comments.

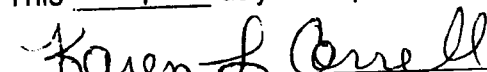
13. In paragraph 12 of his Affidavit, Mr. Whitmire references a \$200,000 loan from The Commons to Hawkensen Construction, Inc. Mr. Whitmire did not provide a date for this transaction, but I believe he is referring to a loan that my brother in law made to The Commons prior to the December 2014 close to pay taxes. My brother in law was paid back after closing through Hawkensen Construction. I do not know why this is characterized as a loan to Hawkensen Construction, because that it not what it was. Mr. Whitmire may not have been aware of this transaction because he was not able to be reached prior to closing, even though he knew that it was happening.

14. In paragraph 14 of his Affidavit, Mr. Whitmire references a \$2,500 payment made to Dewain Morrison. Mr. Morrison assisted in the effort to evaluate an investment in property in Mooresville, North Carolina. Mr. Whitmire is well aware of the role that Mr. Morrison played in that transaction. The \$2,500 payment has nothing to do with my other investments that are not related to The Commons.


Carl Hawkensen

SWORN TO AND SUBSCRIBED BEFORE ME

This 9 day of September, 2016


Notary Public for South Carolina

My Commission Expires: 3-21-23

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS
IN THE 16th JUDICIAL CIRCUIT
Case Number 2016-CP-46-2458

Loyd C. (Chad) Whitmire,)
)
Plaintiff,)

v.)

Johnny C. (Carl) Hawkensen and)
The Commons at Fort Mill, LLC,)
)
Defendants.)

AFFIDAVIT OF KAREN CORRELL

FILED-RECEIVED
2016 SEP 13 AM 11:20
DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

The Affiant hereby deposes and says that:

1. My name is Karen Correll. I am an employee of The Commons at Fort Mill, LLC. My title is Office Manager. My duties include, but are not limited to, handling accounts payable and receivable, keeping the books and sending them to our accountant to reconcile, reporting to the lender, leasing and renewing the apartments, and managing tenant relations. I am paid \$13/hour. I request payment for approximately 30 hours/week, even though I actually work 60 hours/week. I am doing this to reduce overhead for The Commons.
2. I have had a business and personal relationship with Carl Hawkensen for more than a decade. I have known Chad Whitmire for more than a decade through my and his business relationship with Mr. Hawkensen.
3. I have read the Affidavit filed by Mr. Whitmire in this case. Mr. Whitmire's description of his relationship with Mr. Hawkensen is inaccurate in many ways.
4. I recall seeing Mr. Whitmire on two occasions since December 2014. The first time, Mr. Whitmire came by the office and asked for money. Mr. Hawkensen told him that he would pay him if he agreed to perform some work for the benefit of The Commons. Mr. Whitmire performed a day's work and received \$2,400. The second time, Mr. Whitmire brought his stepfather to the office to review the financials with Mr. Hawkensen and The Common's accountant, Doug Gentile.
5. Since December 2014, Mr. Whitmire has never called me directly to ask for permission to review the records relating to the operating of The Commons. Had he asked, I would of course let him. I was aware that Mr. Whitmire asked Mr. Hawkensen for financial records in the summer of 2015, so I sent Mr. Whitmire an email telling him that I had forwarded his request to Mr. Gentile. [Exhibit A] On

August 12, 2015, I forwarded Mr. Whitmire financial information received from Mr. Gentile and Mr. Gentile's contact information. [Exhibit B]

6. Since December 2014, Mr. Whitmire has never volunteered to do any work for the benefit of The Commons, even though he has been asked many times. I believe that Mr. Whitmire is only interested in receiving money from The Commons and not in helping in any way to make it better.
7. The locks were changed on The Commons' clubhouse after an employee was fired for cause. This was done to protect The Commons, not to keep Mr. Whitmire out. Mr. Whitmire would have known this if he had been engaged in the operations of The Commons.
8. Over the years, Mr. Hawkensen has loaned money to Mr. Whitmire on numerous occasions based on Mr. Whitmire's promises to repay the debt with money or with work, only to have Mr. Whitmire fail to perform on his promises. Over the years, there have also been large stretches of time when Mr. Whitmire has been absent and not reachable to help Mr. Hawkensen do the necessary tasks to protect and improve their shared interests. That pattern of behavior has been present since December 2014 as well.
9. Mr. Whitmire's allegation that Mr. Hawkensen treats The Commons as his "piggy bank" is absolutely false. Carl works tirelessly for the benefit of The Commons. I believe that Carl views this as his contribution to The Commons, which is why he does not request or receive any salary. The money that he has received is to repay loans or to compensate Hawkensen Construction for services rendered.
10. I have reviewed and investigated Exhibit C to Mr. Whitmire's Affidavit, on which he lists 35 transactions in 2015 that he says he was not aware of until records were provided to his attorney. This exercise is something that I would have liked to have more time to perform, as I have had to balance this task with my regular duties. That being said, at this time, my comments on those transactions are as follows:
 - 1/14/15, \$10,000: this was to repay Mr. Hawkensen in part for the money he left in The Commons at closing. This was shortly after Mr. Whitmire withdrew a total of \$40,000 from the Commons in late December 2014.
 - 1/15/15, \$5,000: this was paid to Secure Business Finance, LLC, a financial consulting firm that helped in the acquisition of The Commons and consulted thereafter [Exhibit C]
 - 1/21/15, \$3,500: this was used to purchase a golf cart for The Commons [Exhibit D]

- 1/29/15, \$7,780: this was a payment to Hawksensen Construction and its subcontractors for work performed at The Commons [Exhibit E]
- 2/4/15, \$1,500: this was paid to Secure Business Finance, LLC, a financial consulting firm that helped in the acquisition of The Commons and consulted thereafter [Exhibit C]
- 2/17/15, \$2,000: this was paid to Secure Business Finance, LLC, a financial consulting firm that helped in the acquisition of The Commons and consulted thereafter [Exhibit C]
- 4/1/15, \$5,791: this was a payment to Hawksensen Construction and for payroll for work performed at The Commons [Exhibit F]
- 4/7/15, \$1,617: this was for furniture for The Commons [Exhibit G]
- 4/17/15, \$3,080: this was a payment to Hawksensen Construction for work performed at The Commons [Exhibit H]
- 4/24/15, \$4,580: this was for legal services and painting [Exhibit I]
- 4/27/15, \$3,000: this is money that Mr. Whitmire received [Exhibit J]
- 5/1/15, \$3,092: this was for payroll and to subcontractors for worked performed at The Commons [Exhibit K]
- 5/11/15, \$65,000: this was to repay Mr. Hawkensen in part for the money in The Commons at closing
- 5/13/15, \$1,500: this was paid to Secure Business Finance, LLC, a financial consulting firm that helped in the acquisition of The Commons and consulted thereafter [Exhibit L]
- 5/14/15, \$2,119: this was for furniture for The Commons [Exhibit M]
- 5/20/15, \$5,000: this was a payment to Hawksensen Construction for work performed at The Commons [Exhibit N]
- 6/1/15, \$4,000: this was for legal services [Exhibit O]
- 6/15/15, \$2,400: this is money that Mr. Whitmire received [Exhibit P]
- 6/29/15, \$25,010: this was to settle a lawsuit involving The Commons [Exhibit Q]

- 7/3/15, \$6,060: this was paid to Hawksen Construction for services performed at The Commons [Exhibit R]
- 7/27/15, \$5,000: this was paid to Hawksen Construction for services performed at The Commons [Exhibit S]
- 8/14/15, \$2,266: this was paid for payroll and to subcontractors for services performed at The Commons [Exhibit T]
- 8/28/15, \$4,000: this was paid to Hawksen Construction for services performed at The Commons [Exhibit U]
- 9/16/15, \$600: this was paid to Hawksen Construction for services performed at The Commons [Exhibit V]
- 9/21/15, \$4,000: this was paid to Hawksen Construction for services performed at The Commons [Exhibit W]
- 9/24/15, \$5,000: this was paid to Hawksen Construction for services performed at The Commons [Exhibit W]
- 9/25/15, \$2,335: this was paid to Hawksen Construction for services performed at The Commons [Exhibit X]
- 9/28/15, \$1,274: this was for legal services for The Commons [Exhibit Y]
- 10/23/15, \$3,000: this was an error, the money should have gone to Hawksen Construction
NOTE: Neither Mr. Hawksen nor Blue Wave Management has never received a management fee for services performed at The Commons
- 10/25/15, \$1,325: this was paid to Hawksen Construction for services performed at The Commons [Exhibit Z]
- 11/12/15, \$4,635: this was paid to Hawksen Construction for services performed at The Commons [Exhibit AA]
- 11/17/15, \$1,151: this was for supplies [Exhibit BB]
- 11/19/15, \$20,000: this was to repay Mr. Hawksen in part for the money he left in The Commons at closing
- 12/7/15, \$5,950: this was paid to Hawksen Construction for services performed at The Commons [Exhibit CC]

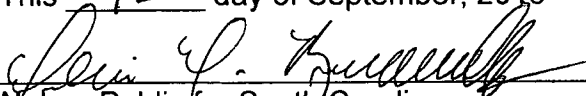
11. A number of the transactions that Mr. Whitmire questions are ones where Hawkensen Construction, Inc. was the payee. Hawkensen Construction, Inc. performs a substantial amount of work at The Commons. Mr. Whitmire has always been aware that Hawkensen Construction, Inc. was doing work at The Commons. It is wrong for Mr. Whitmire to claim that he is unaware of these transactions and did not approve them. It is worth noting that there are a large number of invoices from Hawkensen Construction that have not been paid. [Exhibit DD]

12. A number of the transactions that Mr. Whitmire questions are ones where Mr. Hawkensen's family members were paid. Mr. Hawkensen hired his family members to perform work at The Commons. Mr. Whitmire has always been aware that Mr. Hawkensen's family members were doing work at The Commons. It is wrong for Mr. Whitmire to claim that he is unaware of these transactions and did not approve them.


Karen Correll

SWORN TO AND SUBSCRIBED BEFORE ME

This 9th day of September, 2016


Notary Public for South Carolina

My Commission Expires: MY COMMISSION EXPIRES 7/31/2019

STATE OF SOUTH CAROLINA

COUNTY OF YORK

Loyd C. (Chad) Whitmire,

Plaintiff,

v.

Johnny C. (Carl) Hawkensen and
The Commons at Fort Mill, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS
IN THE 16th JUDICIAL CIRCUIT
Case Number 2016-CP-46-2458

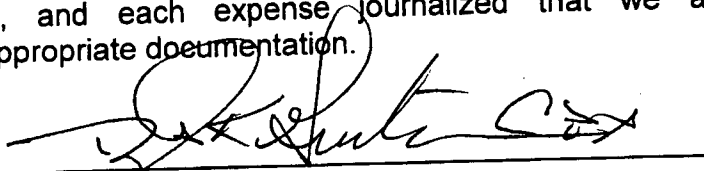
AFFIDAVIT OF DOUGLAS K. GENTILE

FILED-RECEIVED
2016 SEP 13 AM 11:26
DAVID H. DILLON
C.C. & S.S.
YORK COUNTY, SC

The Affiant hereby deposes and says that:

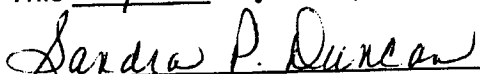
1. My name is Douglas K Gentile. I am a certified public accountant and have been since 1987.
2. My firm has been engaged by The Commons at Fort Mill, LLC since it was organized in the fall of 2014 to reconcile the books and to prepare the tax returns. We have online access to the checking account for The Commons. Each month, we log into The Commons' computer and reconcile the bank account with The Commons' journal entries. Each month, we also reconcile the mortgage account and the related escrow accounts. My office also does the tax returns for The Commons and prepares K-1s for its members.
3. I perform similar services for other apartment complexes and am familiar with usual and customary expenses and income/expense ratios.
4. I have read the Affidavit filed by Mr. Whitmire in this case.
5. I disagree with Mr. Whitmire that The Commons is profitable and that Mr. Hawkensen is treating The Commons as his "piggy bank".
6. Attached to this Affidavit as Exhibit A are the Profit and Loss Statements for the Commons covering two periods, January 1 – December 31, 2015 and January 1 – August 31, 2016.
7. As demonstrated on these Profit and Loss Statements, The Commons was not profitable in 2015, but is now marginally profitable. The Profit and Loss Statements do contain the non-cash expense of depreciation expense, but do not contain the offsetting cash of principal reduction, so these documents reflect of the actual cash flow of The Commons.

8. I met with Mr. Whitmire and his step-father on October 27, 2015 and explained to them that The Commons was not profitable at that time. They appeared to be satisfied at the time. I have not spoken to him relative to profitability since.
9. Based on my familiarity with The Commons' financial records, as well as my experience with apartment complexes generally, there does not appear to be unusual expenses or transactions relating to the maintenance and operations of the apartments, and each expense journalized that we analyzed had corresponding appropriate documentation.

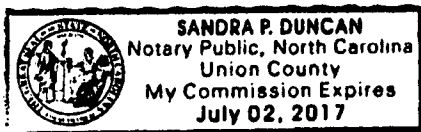

Douglas K Gentile

SWORN TO AND SUBSCRIBED BEFORE ME

This 9 day of September, 2016


Notary Public for North Carolina

My Commission Expires: 7-2-17



STATE OF SOUTH CAROLINA
COUNTY OF YORK

Loyd C. (Chad) Whitmire,
Plaintiff,

v.

Johnny C. (Carl) Hawkensen and
The Commons at Fort Mill, LLC,
Defendants.

IN THE COURT OF COMMON PLEAS
IN THE 16th JUDICIAL CIRCUIT
Case Number 2016-CP-46-2458

AFFIDAVIT OF MATTHEW COX

FILED
20 SEP 13 AM 11:20
AND HAMILTON
C.C.D. # 13-00000000
YORK COUNTY, SC

The Affiant hereby deposes and says that:

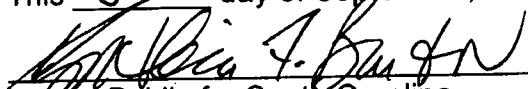
1. My name is Matthew Cox. I am a member of the South Carolina Bar practicing law in Columbia. I have represented The Commons at Fort Mill, LLC and/or its predecessor entities on several legal matters since the summer of 2014.
2. I have read paragraph 13 of the Affidavit of Lloyd C. Whitmire that was filed with his Motion to Appoint Receiver.
3. In 2015, I represented the predecessor to The Commons at Fort Mill, LLC in a lawsuit filed by an adjacent property owner who was also a former partner styled, Crossroads Retail, LLC and Gateway Fort Mill, LLC v. Crossroads Commons Phase II, LLC, Crossroads Commons Phase I, LLC, and R&D Development of the Carolinas, LLC, 2014-CP-46-1983.
4. On January 30, 2015, I opened my own law firm and took this file with me, at the request of the client.
5. The totaling billings for this file in 2015, by my law firm were \$17,271.55, which included the costs of depositions transcripts and the mediator in the matter.
6. This matter was settled in July of 2015, however, immediately after settlement, partners from the releasing party began to place signs and trespass on the Commons property.
7. I was consulted and assisted on writing cease and desist letters, even after litigation ended. These account for \$577.00 of the billings stated in paragraph 5.
8. I was consulted on two other legal matters in 2015.

9. One involved a dispute between The Commons and the South Carolina Department of Transportation, which was not billed to The Commons.
10. A second involved a dispute with the water utility reader for The Commons. This matter accounts for \$110.00 of the billings stated in paragraph 5.
11. Based on my review of my account records, I have never received a check from The Commons for work unrelated to The Commons.
12. I spoke with Mr. Whitmire in the summer of 2014 when the lawsuit referenced above in paragraph 3 was filed.
13. In the two-plus years since, during which time I have done a significant amount of legal work for The Commons, Mr. Whitmire has never contacted me to discuss the matters on which I was working or to discuss concerns that he has with Mr. Hawkensen.


Matthew E. Cox, Esq.

SWORN TO AND SUBSCRIBED BEFORE ME

This 8th day of September, 2016


Notary Public for South Carolina

My Commission Expires: 11/21/23

STATE OF SOUTH CAROLINA

COUNTY OF YORK

Loyd C. (Chad) Whitmire,

Plaintiff,

v.

Johnny C. (Carl) Hawkensen and
The Commons at Fort Mill, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS
IN THE 16th JUDICIAL CIRCUIT
Case Number 2016-CP-46-2458

DEFENDANTS'
MEMORANDUM IN SUPPORT OF
MOTION TO COMPEL ARBITRATION

FILED-RECEIVED
2016 SEP 15 PM 4:29
DAVID HAMILTON
C.C.P. & G.S.
YORK COUNTY, S.C.

The Defendants respectfully submit this Memorandum in Support of the Motion to Compel Arbitration. As set forth below, the Defendants' Motion to Compel Arbitration should be granted on the grounds that:

1. The Plaintiff's claims are encompassed by an unambiguous arbitration clause;
2. The South Carolina Uniform Arbitration Act applies to this dispute by the express agreement of the parties; and
3. The Federal Arbitration Act would apply to the extent the Court determines the arbitration clause fails to meet the technical requirements of the South Carolina Uniform Arbitration Act.

FACTUAL BACKGROUND

The Plaintiff has alleged numerous causes of action against the Defendants.¹ Without exception, each of these causes of action is based exclusively on allegations regarding the operations and management of defendant The Commons at Fort Mill,

¹ The causes of action are (1) breach of duty of loyalty, (2) breach of duty of care, (3) breach of contract, (4) breach of contract accompanied by fraudulent act, (5) gross negligence, (6) unfair trade practices, (7) declaratory judgment regarding percentage ownership interest, (8) reformation of organizational chart, and (8) dissociation.

LLC. The Operating Agreement for this entity, a copy of which is attached as an exhibit to the subject motion to compel, contains in bold font a provision at the top of the page stating that:

**"THE TERMS AND CONDITIONS OF THIS OPERATING AGREEMENT ARE
SUBJECT TO BINDING ARBITRATION PURSUANT TO S.C. CODE ANN. 15-48-10,
ET SEQ. (1976 AS MAY BE AMENDED)"**

The Operating Agreement then specifies in detail the rights and responsibilities of the parties with regard to membership interests, management, compensation, books of account, dissociation, and a number of other issues.

ARGUMENTS

1. The Plaintiff's claims are encompassed by an unambiguous arbitration clause.

The parties have unambiguously agreed to submit the types of disputes at issue in this litigation to arbitration. "The policy of the United States and South Carolina is to favor arbitration of disputes." Zabinski v. Bright Acres Associates, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). "Courts should apply ordinary state-law principles that govern the formation of contracts in determining whether an agreement to arbitrate exists." The Hous. Auth. of City of Columbia v. Cornerstone Hous., LLC, 356 S.C. 328, 335, 588 S.E.2d 617, 621 (Ct. App. 2003).

"The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." Maybank v. BB&T Corp., 416 S.C. 541, 787 S.E.2d 498, 516 (2016), reh'g denied (July 13, 2016). "When the contract's language is clear and unambiguous, the language alone determines its force and effect." Id. "Whether enforcing an agreement to arbitrate or construing an

arbitration clause, courts and arbitrators must give effect to the contractual rights and expectations of the parties. In this endeavor, as with any other contract, the parties' intentions control." Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 682 (2010) (internal citations omitted).

Furthermore, beyond the initial question of the existence of an enforceable agreement, "[t]o decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim. Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Zabinski at 597, 553 S.E.2d at 118 (internal citations omitted).

"A broadly-worded arbitration clause applies to disputes that do not arise under the governing contract when a 'significant relationship' exists between the asserted claims and the contract in which the arbitration clause is contained." Id. at 598, 553 S.E.2d at 119.

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. 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.

Id. at 597, 553 S.E.2d at 118–19 (emphasis added).

In the case a hand, the parties have unambiguously agreed that "**THE TERMS AND CONDITIONS OF [the] OPERATING AGREEMENT ARE SUBJECT TO BINDING ARBITRATION**". The plain language of the contract demonstrates the parties' clear intention to subject disputes over the operation of the LLC to arbitration. Each of the Plaintiff's claims is clearly based on allegations about the operation and

management of the company. While the liberal standard for enforcement of the arbitration clause requires consideration only of whether "the clause is not susceptible to any interpretation which would cover the asserted dispute", Zabinski, supra, in this case it is difficult to conceive of any interpretation of the clause that would *not* encompass the Plaintiff's claims.

2. The South Carolina Uniform Arbitration Act applies to this dispute by the express agreement of the parties.

Regardless of whether the dispute at hand involves interstate commerce, the parties have entered into an enforceable agreement to resolve the dispute according to the terms of the South Carolina Uniform Arbitration Act ("SCUAA"). S.C. Code § 15-48-10, et seq. While the Federal Arbitration Act ("FAA"), 9 U.S.C. §1, et seq., preempts state laws purporting to invalidate agreements to arbitrate matters of interstate commerce, "it does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself." Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989). "[P]arties are free to enter into a contract providing for arbitration under rules established by state law rather than under rules established by the FAA." Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 363 fn.2 (2001).

3. The Federal Arbitration Act would apply to the extent the Court determines the arbitration clause fails to meet the technical requirements of the South Carolina Uniform Arbitration Act.

Finally, assuming for the sake of argument that the Court determines that the arbitration agreement in this case is somehow technically deficient under the SCUAA, the agreement would nonetheless be enforceable under the FAA. The S.C. Supreme Court has held that a dispute over a contract with an agreement to submit to

"ARBITRATION PURSUANT TO SECTION 15-48-10, CODE OF LAWS OF SOUTH CAROLINA (1976)", although technically deficient under the strict terms of the South Carolina statute, was nonetheless subject to arbitration under the FAA. Soil Remediation Co. v. Nu-Way Envtl., Inc., 323 S.C. 454, 456, 476 S.E.2d 149, 150 (1996) (finding the quoted language deficient because it was not underlined). As the Court explained in a later opinion discussing Soil Remediation Co., "[s]tate law was therefore preempted to the extent it would have invalidated the arbitration agreement." Munoz at 539, 542 S.E.2d at 363, fn.2 (emphasis in original).

This case involves interstate commerce for multiple reasons. For a first example, the Plaintiff is a resident of North Carolina and the Defendants are residents of South Carolina. For a second example, one of the many disputed issues between the parties is the ownership of real property located in Mooresville, South Carolina.

CONCLUSION

For the reasons set forth above, the Defendants pray that this Court grant Defendants' Motion to Compel Arbitration and enter an order to stay this matter pending resolution of the underlying issues by arbitration.

Respectfully submitted,

BELSER & BELSER, P. A.


H. Freeman Belser, Esquire
William C. Dillard, Jr., Esquire
1901 Main Street, Suite 1550
Post Office Box 96
Columbia, South Carolina 29202
(803) 929-0096
Attorneys for Defendants

Columbia, South Carolina
September 15, 2016

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

Loyd C. (Chad) Whitmire,)
)
Plaintiff,)
)
v.)
)
Johnny C. (Carl) Hawkensen and)
The Commons at Fort Mill, LLC,)
)
Defendants.)
_____)

IN THE COURT OF COMMON PLEAS
IN THE 16th JUDICIAL CIRCUIT
Case Number 2016-CP-462458

FILED-RECEIVED
SEP 13 AM 11:20
CLERK OF COURT
YORK COUNTY, S.C.

**DEFENDANTS' MEMORANDUM IN
OPPOSITION TO PLAINTIFF'S
MOTION TO APPOINT RECEIVER**

Subject to and specifically reserving their right to arbitration pursuant to the October 28, 2014 Operating Agreement of The Commons at Fort Mill, LLC, Defendants Johnny C. (Carl) Hawkensen ("Hawkensen") and The Commons at Fort Mill, LLC ("The Commons"), hereby respectfully submit their Memorandum in Opposition to the Plaintiff's Motion to Appoint a Receiver.

As set forth hereinbelow, Plaintiff's Motion to Appoint Receiver should be denied on the grounds that:

1. The Operating Agreement vests jurisdiction over this dispute with an arbitrator pursuant to the S.C. Uniform Arbitration Act;
2. Plaintiff has not demonstrated that he is entitled to the drastic remedy of appointment of a receiver;
3. Plaintiff forfeited his right to participate in the management and conduct of The Commons and to access its records by voluntarily dissociating from The Commons; and

4. Plaintiff has not demonstrated that he is entitled to the drastic remedy of a temporary injunction.

The Defendants have filed the Affidavits of Matthew Cox, Douglas K. Gentile, Karen Correll, and Carl Hawkensen in support of this memorandum.

FACTUAL BACKGROUND

This is a dispute between members in a limited liability company, The Commons, which owns 10.24 acres with six apartment buildings containing 144 units and a clubhouse. The Commons purchased the property on December 9, 2014. The purchase was financed by an \$11,000,000 loan from Cantor Commercial Real Estate Lending, L.P. The Loan Agreement, a copy of which is attached as Exhibit A, has a number of provisions that are material to this motion:

- Section 4.1.1: contains a representation that the members' respective ownership interests in The Commons were set forth on Schedule III.
- Schedule III: contains an organizational chart¹ identifying the respective ownership interests of Plaintiff and Hawkensen in The Commons as follows:
 - 86%: Hawkensen
 - 13%: Plaintiff
 - 1%: Blue Wave Management, Inc., of which Hawkensen owned 87% and Plaintiff owned 13%
- Section 4.1.8: contains a representation that the information provided to the lender was full and accurate

¹ Attached as Exhibit B is a copy of the Organizational chart signed by Plaintiff and Hawkensen.

- Section 4.1.33: contains a representation that the information provided to the lender was complete and correct in all material respects
- Section 5.1.3: contains a representation that the lender will be provided with notice of litigation
- Section 10.22: contains a merger clause providing that it contains the entire agreement and that it supersedes all prior agreements, whether oral or written

Since December 2014, Hawkensen has worked tirelessly to protect and preserve The Commons assets. He has enforced The Commons' rights in litigation. He has engaged an accountant known to Plaintiff named Doug Gentile to reconcile the books and prepare the tax returns. He sees to it that the assets are maintained. He has managed substantial improvements to the assets. In doing so, he has done what he has always done: (1) use his construction company to assist in the maintenance and repairs at a reasonable cost and (2) pay his friends, family members, and others to help out as needed. Plaintiff and Hawkensen have a relationship that spans more than a decade, so Plaintiff is well aware of Hawkensen's system.

On the contrary, Plaintiff has never done anything at The Commons without expecting remuneration. He has been to The Commons on a handful of occasions since December 2014, even though he has been repeatedly asked to come and help. When he has come, he has been paid.

The Commons was not profitable in 2015, during which time Hawkensen worked to improve the assets and to stabilize rents. In 2016, as a direct result of Hawkensen's efforts, operation of The Commons' rental property has stabilized and is marginally profitable.

Cash flow is different from net value. Plaintiff is incorrect in asserting that The Commons has significant cash flow. However, Plaintiff is correct that the lender appraised The Commons's assets for \$16,300,000 prior to the December 9, 2014 purchase. While there is substantial equity in The Commons, it is "paper equity" based on ordinary assumptions of marketability, not on the extraordinary condition of coercive action by a member.

Plaintiff now claims in his Complaint that he owns 50% of The Commons. This is contrary to the adverse position that he first took many months after the December 2014 closing, when he claimed that he owned 26.6% of The Commons. There is not a single piece of paper that supports either contention. There is certainly no logical basis to explain Plaintiff's change in position that results in a doubling of his claim.

Plaintiff voluntarily dissociated from The Commons effective August 1, 2016. The Commons is not winding up.

APPLICABLE LAW

1. The pre-judgment appointment of a receiver

"The appointment of a receiver is a drastic remedy." Midlands Util., Inc. v. S. Carolina Dep't of Health & Env'tl. Control, 301 S.C. 224, 228, 391 S.E.2d 535, 538 (1989). "It is a stronger measure than that of injunction, in that the effect is to transfer the custody of the property in controversy from a litigant to a third party, under the direction of the court, during the litigation." Pelzer v. Hughes, 27 S.C. 408, 3 S.E. 781, 784-85 (1887).

The receivership statute, S.C. Code Ann. § 15-65-10(1), sets forth what an applicant must demonstrate to secure pre-judgment appointment of a receiver:

"A receiver may be appointed by a judge of the circuit court, either in or out of court: (1) Before judgment, on the application of either party, when he establishes an apparent right to property which is the subject of the action and which is in the possession of an adverse party and the property, or its rents and profits, are in danger of being lost or materially injured or impaired, except in cases when judgment upon failure to answer may be had without application to the court. . ."

Id. (emphasis added.)

"[A] receiver will not be appointed during the progress of a cause, unless there is the strongest reason to believe that the plaintiff is entitled to the relief demanded in his complaint, and there is danger that the property will be materially injured before the case can be determined." Pelzer, 3 S.E. at 785 (discussing prior S.C. Code section with language identical to current § 15-65-10(1)). "Receivership is a drastic course, allowed only under pressing circumstances and granted only with reluctance and caution." Vasiliades v. Vasiliades, 231 S.C. 366, 376, 98 S.E.2d 810, 815 (1957). "The burden is upon the plaintiff to make this necessity appear." Brookshire v. Farmers' All. Exch., 73 S.C. 131, 52 S.E. 867, 867 (1905) (reporting and approving circuit court order). "[T]he appointment of a receiver is within the discretion of the circuit judge." Midlands Util., Inc., *supra*.

The reluctance of the courts to appoint receivers is based in part on the judicial imperative to avoid unnecessarily burdening the Circuit Court with supervisory responsibilities over the business affairs of litigants, as "[a] receiver represents the Court appointing him; he is an officer of the Court and is the agency through which the Court acts. As he has no power other than that given him by the Order of appointment, his authority is derived solely from the Court. He is subject only to the Court's direction." Kirven v. Lawrence, 244 S.C. 572, 580, 137 S.E.2d 764, 768 (1964).

Appointment of a receiver, an exercise of the courts' equitable jurisdiction, is not available where the applicant has an adequate remedy at law. Whilden v. Chapman, 80 S.C. 84, 61 S.E. 249, 251 (1908). Where "plaintiffs ha[ve] not obtained judgments on their demands, and . . . ha[ve] not exhausted their legal remedies against the debtor . . . the judge ha[s] no jurisdiction to appoint a receiver, unless there was something in the case which made it exceptional." Id. (quoting Pelzer at 785). In the case of a creditor of a partnership, the applicant must show that he lacks an adequate legal remedy as to both the partnership and the individual partners:

"We think the appellants are right in the position that a creditor of a co-partnership in order to maintain an action for the appointment of a receiver of partnership assets must show he has no adequate remedy at law, that is, that he cannot enforce payment of his debt by judgment and execution. It is therefore necessary for him to allege and prove, not only the insolvency of the partnership as such, but the insolvency of the copartners as individuals."

Id.

South Carolina courts have also made it clear that imperfect management of corporate affairs, as opposed to fraudulent misfeasance or gross ongoing mismanagement, is insufficient to justify appointment of a receiver:

Nor are mere irregularities in the management of a corporation, without fraud committed or intended, sufficient for the appointment of a receiver, courts of equity being very reluctant to appoint receivers for corporations, because such appointment is a practical displacement of the boards of directors and the lawfully constituted corporate authorities. . . . That a corporation has lost the greater part of its property and permanently abandoned its business is not alone ground for the appointment of a receiver for its remaining assets on the application of minority stockholders. It must be shown in addition that its officers have been guilty of such mismanagement of its affairs as renders a receivership necessary to preserve the existing corporate property."

Brookshire, 52 S.E. at 867-69 (reporting and approving circuit court order).

A party who moves for appointment of a receiver bears the risk of an assessment on the non-moving party's resulting damages and defense costs:

Whenever a receiver shall have been appointed of any property against the opposition of any party to the cause and shall have taken possession of the property and thereafter by any final adjudication such receiver shall be held to have been improperly appointed, the costs, charges and expenses of such receivership shall not be charges upon the property as a whole but only upon the interests therein of the party procuring the appointment. And any party to the cause having opposed such receivership may apply to the court after final adjudication, as aforesaid, and have it referred to a master, referee or jury, as the practice in the case presented may be proper, to have his actual damages by reason of such receivership ascertained and assessed and for judgment therefor against the party or parties having procured such receiver.

S.C. Code Ann. § 15-65-90.

2. Effect of a member's dissociation from a limited liability company

A member forfeits his right to participate in the management and conduct of the company's business when he dissociates and the company does not wind up:

"upon a member's dissociation . . . (3) the member's right to participate in the management and conduct of the company's business terminates . . . and the member ceases to be a member and is treated the same as a transferee of a member."

S.C. Code Ann. § 33-44-603(3).

A transferee of a member has no right to access the company's records:

"A transferee who does not become a member is not entitled to participate in the management or conduct of the limited liability company's business, require access to information concerning the company's transactions, or inspect or copy any of the company's records."

S.C. Code Ann. § 33-44-503(d).

ARGUMENT

1. The Operating Agreement vests jurisdiction over this dispute with an arbitrator pursuant to the S.C. Uniform Arbitration Act

As set forth in the Defendants' previously filed Motion to Compel Arbitration, pursuant to the Operating Agreement this dispute is subject to arbitration under the S.C. Uniform Arbitration Act. § 15-48-10, et seq. Accordingly, the Plaintiff is not entitled to the cumbersome equitable remedies he seeks from the Circuit Court. "When a case is sent to arbitration, the circuit court is divested of jurisdiction over the case." Steinmetz v. Am. Media Servs., LLC, 393 S.C. 72, 74, 709 S.E.2d 708, 709 (Ct. App. 2011).

"Arbitration is not litigation carried on by other means, but is an alternative means for resolving disputes without the cost and delay of a lawsuit. Judicial review of an arbitration award is limited in scope, and any attempt to convert arbitration into a trial-like judicial proceeding is looked upon with disfavor." Lauro v. Visnapuu, 351 S.C. 507, 516, 570 S.E.2d 551, 555 (Ct. App. 2002). "In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 685 (2010).

By contracting to gain the efficiencies and advantages of the arbitration process, the Plaintiff also gave up the right to request the judicial action, and ongoing judicial supervision, requested in his motion for appointment of a receiver. While "[t]he question of arbitrability of a claim is an issue for judicial determination," Partain v. Upstate Auto. Grp., 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010), a request for judicial review of

that limited threshold issue is clearly distinct in substance and degree from the drastic equitable relief the Plaintiff seeks.

2. Plaintiff has not demonstrated that he is entitled to the drastic remedy of appointment of a receiver.

Plaintiff has not demonstrated that The Commons' apartment buildings, or its rents and profits, are in danger of being lost or materially injured or impaired if a receiver is not appointed. This is an express requirement of the receivership statute. § 15-65-10(1). Plaintiff has not only failed to offer a shred of evidence on this point, but he has in fact alleged to the contrary, to wit, that The Commons is very profitable and that he is not receiving any benefit from it. This is the first fatal flaw in Plaintiff's motion.

Plaintiff has also not demonstrated that he lacks an adequate remedy at law against both Hawkensen and The Commons, as required by the Whilden case, *supra*. Again, Plaintiff alleges the exact opposite, to wit, that The Commons is very profitable, that he is not receiving any benefit from it, and that the Defendants are liable on a number of legal causes of action including breach of contract, negligence, and unfair trade practices. Plaintiff has offered no evidence at all that Hawkensen is insolvent. Based on the Plaintiff's own allegations, if he were to prevail against the Defendants, then he would have the ability to collect the amount that he claims he is entitled to. This is the second fatal flaw in Plaintiff's motion.

As discussed above, the appointment of a receiver is a drastic remedy that should only be granted with reluctance and caution and that is only appropriate under pressing circumstances. In light of the fact that Plaintiff has failed to demonstrate two threshold points, this is clearly not a situation that warrants the appointment of a receiver. Therefore, his motion should be denied.

3. Plaintiff forfeited his right to participate in the management and conduct of The Commons and to access its records by voluntarily dissociating from The Commons.

Plaintiff voluntarily dissociated from The Commons effective August 1, 2016. His rights after dissociation are clearly laid out in the South Carolina Uniform Limited Liability Company Act of 1996. See § 33-44-601, et seq. The Act does not give him the right to have a receiver appointed. In fact, as a result of his choice to dissociate, he has forfeited his right to participate in the management and conduct of The Commons and to access its records. §§ 33-44-503(d), -603(3). His only right is to have his interest in The Commons bought out after appropriate offsets are made. S.C. Code Ann. § 33-44-702. Therefore, his motion should be denied.

4. Plaintiff has not demonstrated entitlement to the drastic remedy of a temporary injunction.

"An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff." Scratch Golf Co. v. Dunes W. Residential Golf Properties, Inc., 361 S.C. 117, 121, 603 S.E.2d 905, 907 (2004). "For a preliminary injunction to be granted, the plaintiff must establish that (1) it would suffer irreparable harm if the injunction is not granted; (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law." Id. at 121, 603 S.E.2d at 908. "The sole purpose of a temporary injunction is to preserve the status quo and thus avoid possible irreparable injury to a party pending litigation." FOC Lawshe Ltd. P'ship v. Int'l Paper Co., 352 S.C. 408, 413, 574 S.E.2d 228, 231 (Ct. App. 2002).

In this case, the Plaintiff has failed to make any adequate showing of either irreparable harm or the lack of a legal remedy for its claims. To the contrary, the Plaintiff alleges that the Commons is continuing to engage in a profitable apartment rental

business which should therefore, it logically follows, continue to have similar revenues and ability to satisfy any judgment that might hypothetically be obtained.

Furthermore, the Plaintiff's specific request for an impermissibly vague injunction against use of company assets "for any purpose other than paying the Company's ordinary and bona fide operating expenses" does not adequately identify the conduct sought to be enjoined. By defining the prohibition entirely in terms of what *is* allowed (i.e., "ordinary and bona fide" expenditures), the proposed injunction would effectively be the "especially drastic remedy" of a mandatory injunction. See Johnson v. Phillips, 315 S.C. 407, 417, 433 S.E.2d 895, 901 (Ct. App. 1993) (*rev'd in part on other grounds by Smith v. Phillips*, 318 S.C. 453, 458 S.E.2d 427 (1995)).

South Carolina law requires that any injunction "shall be specific in terms [and] shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained." Rule 65(d), S.C. Rules of Civil Procedure. "Before a person may be held in contempt for violating a court order, the order should inform him in definite terms as to the duties thereby imposed upon him, and the command must therefore be express rather than implied." City of Spartanburg v. Kimbrell's Inv. Co., 259 S.C. 203, 215-16, 191 S.E.2d 150, 155 (1972) (quoting 17 Am.Jur.(2d) 54, Contempt. Sec. 52).

Accordingly, in the event that the Court does determine that some preliminary injunctive relief is appropriate, the Defendants request (1) notice and opportunity for a hearing on the specific conduct to be prohibited and (2) clear injunctive language on the specific conduct to be prohibited. Otherwise, there is a significant likelihood that the parties could end up before this Court once more in enforcement proceedings arguing

over the meaning of "ordinary and bona fide operating expenses", which would be an unnecessary waste of judicial resources and would unfairly subject the Defendants to the possibility of being held in contempt based on ambiguous injunctive language sought at a stage of the proceedings where the Plaintiff has not even been required to prove its allegations.

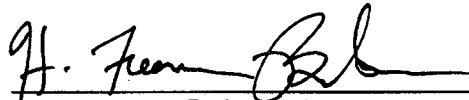
CONCLUSION

For the reasons set forth above, the Defendants pray that this Court:

- (A) Deny Plaintiff's Motion to Appoint Receiver;
- (B) Deny Plaintiff's request in the alternative for a preliminary injunction; and
- (C) Award the Defendants their attorney's fees and costs in defending this motion.

Respectfully submitted,

BELSER & BELSER, P. A.



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September 13, 2016

LOAN AGREEMENT

Dated as of December 9, 2014

between

THE COMMONS AT FORT MILL, LLC,
as Borrower

and

CANTOR COMMERCIAL REAL ESTATE LENDING, L.P.,
as Lender

11/10/14
47-2156118

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LOAN AGREEMENT

This **LOAN AGREEMENT**, dated as of December 9, 2014 (as amended, restated, replaced, supplemented or otherwise modified from time to time, this "**Agreement**"), between **CANTOR COMMERCIAL REAL ESTATE LENDING, L.P.**, a Delaware limited partnership, having an address at 110 East 59th Street, 6th Floor, New York, New York 10022 ("**Lender**"), and **THE COMMONS AT FORT MILL, LLC**, a South Carolina limited liability company, having its principal place of business at 221 Embassy Drive, Fort Mill, South Carolina ("**Borrower**").

WITNESSETH:

WHEREAS, Borrower desires to obtain a loan in the original principal amount of Eleven Million and No/100 Dollars (\$11,000,000) from Lender pursuant to this Agreement (the "**Loan**"); and

WHEREAS, Lender is willing to make the Loan to Borrower, subject to and in accordance with the terms of this Agreement and the other Loan Documents (as hereinafter defined).

NOW THEREFORE, in consideration of the making of the Loan by Lender and the covenants, agreements, representations and warranties set forth in this Agreement, the parties hereto hereby covenant, agree, represent and warrant as follows:

ARTICLE I

DEFINITIONS; PRINCIPLES OF CONSTRUCTION

Section 1.1 Definitions: For all purposes of this Agreement, except as otherwise expressly required or unless the context clearly indicates a contrary intent:

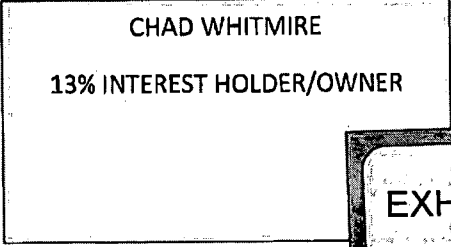
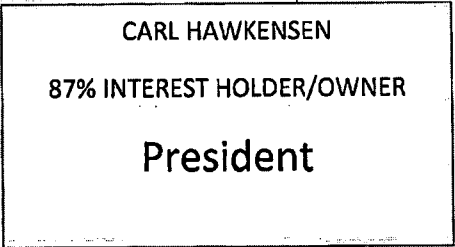
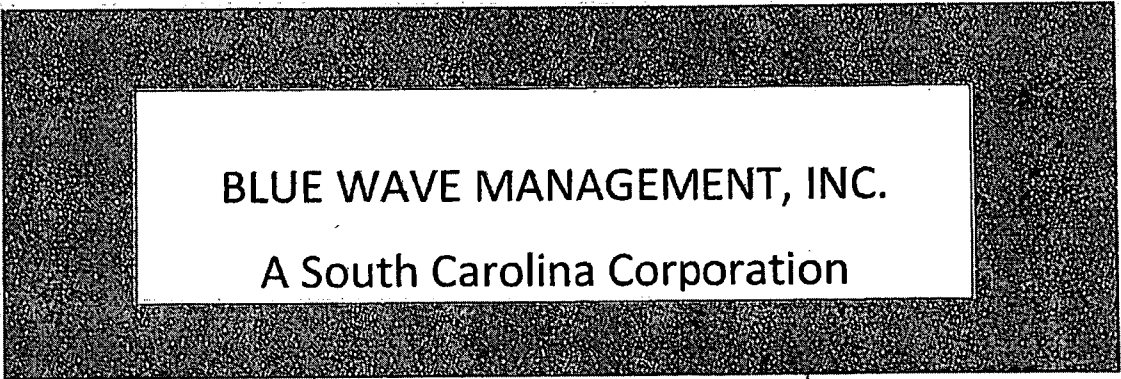
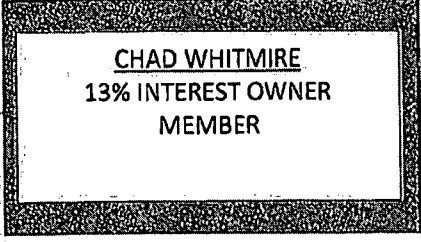
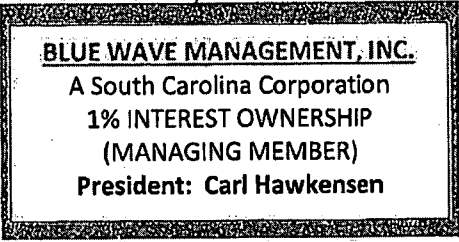
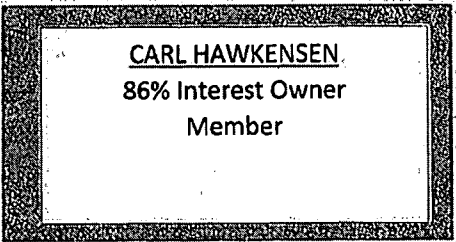
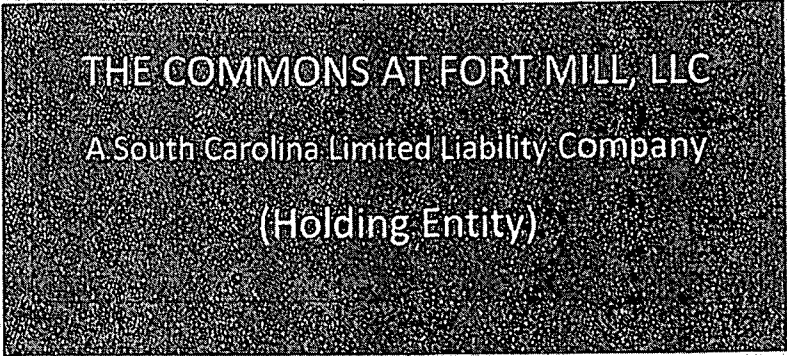
"**Affiliate**" shall mean, as to any Person, any other Person that, directly or indirectly, is in Control of, is Controlled by or is under common Control with such Person or is a director or officer of such Person or of an Affiliate of such Person.

"**Affiliated Manager**" shall mean any Manager in which Borrower or Principal has, directly or indirectly, any legal, beneficial or economic interest.

"**Agreement**" shall mean this Loan Agreement, as the same may be amended, restated, replaced, supplemented or otherwise modified from time to time.

"**ALTA**" shall mean American Land Title Association or any successor thereto.

"**Annual Budget**" shall mean the operating budget, including all planned Capital Expenditures, for the Property prepared by Borrower in accordance with Section 5.1.11(d) hereof for the applicable Fiscal Year or other period.



Carl Hawkenen

This is a handwritten signature of Carl Hawkenen.

Chad Whitmire

This is a handwritten signature of Chad Whitmire.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Appellate Case No. 2016-002317

Lloyd C. (Chad) Whitmire Respondent,

v.

Johnny C. (Carl) Hawkensen and
The Commons at Fort Mill, LLC, ... Appellants.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

May 25, 2017



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