

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

McMillan Pazdan Smith, LLC,)
)
Plaintiff/Counter-Defendant,)

Civil Action No. 2019-CP-23-00998

vs.)

Donza H. Mattison,)
)
Defendant/Counterclaimant.)

**ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT AS TO
AMENDED THIRD-PARTY
COMPLAINT**

Donza H. Mattison, in a Derivative)
Capacity on Behalf of McMillan Pazdan)
Smith, LLC,)
)
Third-Party Plaintiff,)

vs.)

Rondald G. Smith, Joseph M. Pazdan,)
Brad B. Smith, and Chad C. Cousins,)
)
Third-Party Defendants.)

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SC Court of Appeals

McMillan Pazdan Smith, LLC (“MPS”), and Ron G. Smith, Joseph M. Pazdan, Brad B. Smith, and Chad C. Cousins (collectively, the “Third-Party Defendants”), filed a Motion for Summary Judgment as to Defendant Donza H. Mattison’s (“Mattison”) Amended Third-Party Complaint on February 21, 2020. The Motion came before the Court for hearing on May 12, 2020. Samuel W. Outten and Katie E. Towery appeared on behalf of MPS and the Third-Party Defendants. David E. Rothstein appeared on behalf of Mattison. Having heard the arguments and reviewed the submissions of the parties, MPS and the Third-Party Defendants’ Motion for Summary Judgment is hereby GRANTED.

FACTUAL AND PROCEDURAL BACKGROUND

MPS is a regional architectural and interior design firm with offices in South Carolina, North Carolina, and Georgia. Mattison is a former employee and current member of MPS, and worked as an architect in MPS's Spartanburg, South Carolina office. (Am. Third-Party Compl. ¶ 44.) Mattison's employment with MPS ended on February 12, 2018 with her voluntary resignation from the firm. (*Id.* at ¶¶ 49, 52.)

The parties memorialized Mattison's cessation of employment in a Severance Agreement and General Release ("Severance Agreement") dated December 5, 2017. (*See* Ex. A to May 6, 2020 Mem. Supp. Mot. Summ. J.) The Severance Agreement provides that Mattison's dissociation from MPS will be treated as a "Proper Dissociation," meaning that there was no penalty or reduction in the value of her financial rights. (*Id.*) The Severance Agreement provides: "The parties agree that the value of Employee's membership units shall be determined in early 2018 following the close of YR2017, with Company providing access to all current and prior year financial reports, tax returns, and other financial information as requested by Employee's Counsel. The Proper Dissociation will be handled separately from this Agreement and will be done in accordance with the September 30, 2015 Operating Agreement." (*Id.*)

MPS retained HDH Advisors LLC ("HDH") to conduct a 2017 valuation of the company in early 2018. MPS used HDH's 2017 valuation to determine a per unit price, and made an offer to Mattison on August 3, 2018 to purchase her membership units for this amount. (Am. Third-Party Compl. ¶ 56.) Mattison, however, contested this valuation and demanded a much higher per unit price. (*See id.* at ¶ 57.)

MPS filed a Declaratory Judgment Action on February 22, 2019, asking the Court to declare that the Severance Agreement is a valid and enforceable contract and Mattison's

membership units are to be valued in accordance with the terms of the Operating Agreement. (*See* Compl.) MPS further asked the Court to declare that it followed the Operating Agreement's provisions regarding the annual valuation of the company, and therefore the value of Mattison's membership units should be determined by applying the per unit price from the company's 2017 valuation conducted by HDH. (*Id.*)

Mattison filed an Answer, Counterclaims, and Third-Party Complaint on March 4, 2019, and an Amended Third-Party Complaint on July 30, 2019. Mattison asserted counterclaims for breach of contract, judicial determination of the fair value of her distributional interest, an accounting and order compelling production of MPS's financial records, and for declaratory judgment. (*See* Am. Third-Party Compl.) Mattison also asserted a derivative cause of action against Ron Smith, Joseph Pazdan, Brad Smith, and Chad Cousins for breach of fiduciary duty and breach of the Operating Agreement. (*Id.*) Mattison asserts that the Third-Party Defendants breached their fiduciary duties to MPS by receiving excessive compensation, bonuses, and fringe benefits for themselves and their spouses/family members. (*Id.* at ¶ 100.)

MPS and Third-Party Defendants filed a Motion to Dismiss Mattison's Amended Third-Party Complaint on August 7, 2019, based, in part, upon the ground that Mattison does not fairly and adequately represent the interests of MPS's other members as required by Rule 23(b)(1), SCRCRCP. By Form 4 Order dated October 10, 2019, the Court denied the Motion to Dismiss. The Court issued a formal Order on October 30, 2019, stating that the issue of whether Mattison fairly and adequately represents the interests of MPS and the other members should be addressed only after an opportunity for discovery.

On December 2, 2019, counsel for MPS and the Third-Party Defendants emailed counsel for Mattison to advise that they had obtained statements from every member of the firm, except

Mattison, expressing opposition to the continued pursuit of the derivative action (the “Member Statements”). (Exs. D and E to May 6, 2020 Mem. Supp. Mot. Summ. J.) The Member Statements provide that each member of MPS has reviewed and considered Mattison’s allegations in the derivative action and determined that it is not in the best interests of the other members of MPS. (*See id.* at Ex. F.) Every minority member of MPS stated that they do not join, or in any way support, Mattison’s derivative action. (*Id.*) Based upon this evidence, counsel for MPS and the Third-Party Defendants requested that Mattison dismiss her derivative action. (*Id.* at Exs. D and E.)

In response, Mattison noticed the depositions of six of MPS’s members. The Court held a telephone status conference with the parties to discuss the pending depositions, during which counsel for Mattison alleged that the Member Statements were not given voluntarily and were coerced by the Third-Party Defendants or their counsel. Primarily on that basis, this Court permitted Mattison to depose minority members of MPS. The depositions of William Joslin, KJ Jacobs, and Paulette Myers took place on January 17, 2020, January 29, 2020, and February 19, 2020, respectively.

Following the completion of these three depositions, MPS and the Third-Party Defendants filed a Motion for Summary Judgment on February 21, 2020. A hearing was held on the Motion for Summary Judgment on May 12, 2020. The Court entered a Form 4 Order on May 15, 2020, holding the Motion for Summary Judgment in abeyance pending the taking of the remaining three minority member depositions. The Court limited the scope of these depositions to the issues of whether or not the members want a derivative action to continue and, if so, whether Mattison should be the representative.

The depositions of Donnie Love, Cullen Pitts, and Dave Ballard took place on June 17, 2020, June 22, 2020, and July 10, 2020, respectively. Counsel for MPS and the Third-Party Defendants provided the Court with full transcripts of these depositions on July 20, 2020. Both parties filed supplemental briefs for the Court's consideration on July 31, 2020.

STANDARD OF REVIEW

"The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRPC. "When a plaintiff is faced with a defendant's motion for summary judgment that is supported by evidence, the plaintiff must show the court the existence of a genuine issue of fact." *Dyer v. Moss*, 284 S.C. 208, 211, 325 S.E.2d 69, 70 (Ct. App. 1985). "In such a case, the plaintiff cannot defeat the defendant's motion by relying upon the mere allegations of his complaint but must disclose the facts he intends to rely on by affidavit or other proof." *Id.*; *Skywaves I Corp. v. Branch Banking & Tr. Co.*, 423 S.C. 432, 454, 814 S.E.2d 643, 655 (Ct. App. 2018), reh'g denied (June 21, 2018) (affirming the lower court's grant of summary judgment where plaintiff relied solely on its complaint for proving an element of its claim).

RULING

In South Carolina, the authority to direct the business and affairs of a company is delegated to the board of directors or management committee, not the individual shareholders or members. *See* S.C. Code Ann. § 33-8-101. Rule 23(b)(1), SCRPC, "seeks to prevent the unrestrained use of derivative actions by minority shareholders, which would undermine the basic principle of corporate governance that the decisions of the corporation should be made by its management or, in certain situations, by an affirmative vote of a majority of the shareholders." *See* 5 James Wm.

Moore et al., *Moore's Federal Factice* ¶ 23.1.02[4] (3d ed. 2000) (citing *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 530 (1984)).¹ Rule 23(b)(1)'s pleading requirements are intended to allow the court to perform a gatekeeping function to prevent the unrestrained use of derivative actions. *Id.* "A derivative action is, in essence, a challenge to the board's managerial authority." *Carolina First Corp. v. Whittle*, 343 S.C. 176, 187, 539 S.E.2d 402, 408 (Ct. App. 2000). As such, it is a remedy of last resort, and the law imposes strict prerequisites on a stockholder's right to sue derivatively. *Id.*

One of the requirements of Rule 23(b)(1), SCRCF, is that "[t]he derivative action *may not* be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association." (emphasis added). "This requirement would be meaningless if 'the plaintiff' meant every member because a plaintiff would always fairly and adequately represent the shareholders if he or she was considered the equivalent of all shareholders." *Star v. TI Oldfield Development, LLC*, No. 9:18-CV-02489-DCN, 2018 WL 4501095, at *14 (D.S.C. July 24, 2018).

In making the determination of whether Mattison has met Rule 23(b)(1)'s requirement of fair and adequate representation, the Court has considered the following factors:

- (1) Economic antagonisms between the representative and members of the class;
- (2) The remedy sought by the plaintiff in the derivative action;
- (3) Indications that the named plaintiff is not the driving force behind the litigation;
- (4) Plaintiff's unfamiliarity with the litigation;
- (5) Other litigation pending between the plaintiff and defendants;

¹ South Carolina adopted Federal Rule 23.1 as Rule 23(b)(1), SCRCF. Thus, Rule 23(b)(1) allows courts called on to interpret the new South Carolina rule to have a large body of federal precedent from which to draw. *Carolina First Corp v. Whittle*, 343 S.C. 176, 185, 539 S.E.2d 402, 407, n.5 (Ct. App. 2000).

- (6) The relative magnitude of plaintiff's personal interests as compared to his or her interests in the derivative action itself;
- (7) Plaintiff's vindictiveness toward the defendants; and
- (8) The degree of support plaintiff is receiving from the shareholders he or she purports to represent.

Davis v. Comed, Inc., 619 F.2d 588, 593-94 (6th Cir. 1980); *see also Office of Strategic Services, Inc. v. Sadeghian*, 528 Fed. Appx. 336, 350 (4th Cir. 2013) (citing *Davis* as setting forth the factors to be considered when determining whether a plaintiff will adequately represent the interests of other shareholders).

Considering these factors, and for the reasons set forth below, the Court finds that Mattison does not fairly and adequately represent the interests of the other members of MPS.

A. Every Other Member of MPS Opposes Mattison's Derivative Action.

One factor used to determine whether the representational requirement has been met is the degree of support the derivative plaintiff receives from the shareholders or members he or she purports to represent. *See Davis v. Comed, Inc.*, 619 F.2d at 593-94. Here, every member of MPS opposes Mattison's derivative action. (*See Ex. F. to May 6, 2020 Memo. Supp. Mot. Summ. J.*) Specifically, every minority member of MPS (except Mattison) signed a statement affirming that (1) they reviewed and were provided adequate information about the allegations of Mattison's derivative action; (2) they considered Mattison's allegations and determined that the derivative action is not in the best interests of the other members of MPS; (3) they know of no facts which support Mattison's derivative claims; and (4) they do not join, or in any way support, Mattison's derivative action. (*Id.*)

In addition, six minority members of MPS were deposed and affirmed under oath their Member Statements and opposition to Mattison's derivative action. The Court has reviewed the

transcripts from the depositions of William Joslin, KJ Jacobs, Paulette Myers, Donnie Love, Cullen Pitts, and Dave Ballard. Based upon the testimony given by these six members, the Court finds that there is no issue of material fact, and Mattison is not a fair and adequate representative of the other members of MPS.

The deposed minority members all testified that they had no complaint or concern about the compensation paid to the Third-Party Defendants, which is the chief allegation of Mattison's Third-Party Complaint. (Joslin Depo. at 80:6-24, 170:24-171:3; Jacobs Depo. at 109:6-17; Myers Depo. at 167:5-8; Love Depo. at 85:9-24, 236:21-24; Pitts Depo. at 75:3-19; Ballard Depo. at 35:14-21, 72:15-25.) Even after counsel for Mattison showed the members an exhibit detailing the compensation paid to the Third-Party Defendants compared to the other members of MPS, they continued to have no interest in participating in Mattison's derivative action. For example, KJ Jacobs testified as follows:

... referring to the compensation, I come to work at 7:45 every morning and I leave at 5:30 every night, and I know what this firm has been through, I know what they contribute. And even after having the benefit of this, I don't have any interest in participating in an action against them.

(Jacobs Depo. at 109:11-17.) In addition, Dave Ballard testified:

Q: Now, having seen the compensation of Ron Smith, Brad Smith, Joe Pazdan, and Chad Cousins, do you have any concerns about their compensation at McMillan Pazdan & Smith?

A: No, I believe it reflects the value that they bring to the firm compared to other members.

Q: Do you believe the value contributed by Ron Smith, Brad Smith, Joe Pazdan, and Chad Cousins is consistent with the compensation they receive?

A: Yes.

(Ballard Depo. at 199:1-10.)

The depositions of MPS's minority members also confirmed that Mattison's allegation that the Member Statements were forced or coerced was inaccurate. To the contrary, the deposed members testified that the Member Statements were signed voluntarily, and of their own will and volition. (See Joslin Depo. at 168:22-169:10; Jacobs Depo. at 164:14-25; Myers Depo. at 165:8-14; Love Depo. at 231:18-232:1; Pitts Depo. at 190:24-191:3; Ballard Depo. at 196:1-5.)

In short, the Court's review of the deposition transcripts reveals that Mattison has received no support from the other members of MPS whom she purports to represent. Mattison's subjective belief that the Third-Party Defendants are overpaid is insufficient to state a valid derivative claim. *See Dyer v. Moss*, 284 S.C. at 211, 325 S.E.2d at 70 ("the plaintiff cannot defeat the defendant's motion by relying upon mere allegations of his complaint"). Mattison has presented no facts, by affidavit or otherwise, to support her allegations against the Third-Party Defendants. Instead, the testimony of these minority members was that the Third-Party Defendants are honest and ethical in how they conduct business, and the other members believe the allegations made in Mattison's derivative action are false. (See Joslin Depo. at 170:11-15; Jacobs Depo. at 78:21-24, 165:22-166:3, 167:4-168:3; Myers Depo. at 41:14-19; Love Depo. at 233:10-234:12; Pitts Depo. at 192:4-15; Ballard Depo. at 37:8-15, 54:3-13, 196:25-198:3.)

The minority members do not believe that Mattison can fairly and adequately represent them because her "accusations are unfounded and they're not interested in participating in that kind of derivative lawsuit." (Jacobs Depo. at 39:25-40:6, 40:25-41:5; *see also* Love Depo. at 48:14-24, 230:17-231:17; Pitts Depo. at 55:21-56:20, 188:14-189:12; Ballard Depo. at 52:6-15, 193:24-195:19.)

Mattison cannot maintain this derivative action because her views and beliefs about what is in the best interest of the company are completely divergent from the members she purports to

represent. Therefore, the Court grants summary judgment in favor of MPS and the Third-Party Defendants as to Mattison's derivative claims because there is no genuine issue of material fact that she does not fairly and adequately represent the interests of the other members of MPS.

B. Mattison Brought the Derivative Action to Gain Leverage in Her Dispute Regarding the Valuation of Her Membership Units.

In determining whether a derivative plaintiff is a fair and adequate representative of the other members or shareholders, another factor courts have routinely analyzed is whether the derivative plaintiff is using the lawsuit as a means of gaining leverage in other pending litigation. *See Davis v. Comed, Inc.*, 619 F.2d at 593-94; *see also Palmer v. U.S. Sav. Bank of Am.*, 131 N.H. 433, 441, 553 A.2d 781, 786 (1989) (stating that "[a] number of courts have held that plaintiffs who had large personal suits against the company which they purported to represent were not adequate representatives because of the likelihood that they would use the derivative suit as leverage in settling the personal suit").

During the hearing on May 12, 2020, counsel for Mattison made the following statements on the record:

THE COURT: ... the real issue behind this derivative case, in my view, is that she's trying to seek a higher payout.

MR. ROTHSTEIN: No question about that, Your Honor, but there's nothing wrong with that.

...

THE COURT: ... your ultimate goal is to increase what her buyout is.

MR. ROTHSTEIN: Absolutely. ... I agree with that 100 percent that's the goal, but there's nothing wrong with that.

...

MR. ROTHSTEIN: ... we're trying to maximize the value of her claim, that's absolutely what we're trying to do.

(May 12, 2020 Hearing Tr. at 15:6-10, 17:10-17, 20:23-24.)

Mattison, by her own admission, is using this derivative action to gain a higher value for her equity interest. In doing so, she is improperly using a derivative action to inflict harm on MPS, and hoping that will result in receiving more for her equity. Despite Mr. Rothstein's assertions that "there's nothing wrong with that," courts across the country have routinely dismissed derivative actions on the basis that the derivative plaintiff is using the lawsuit as a means of gaining leverage in other pending litigation. *See Zarowitz v. BankAmerica Corp.*, 866 F.2d 1164, 1166 (9th Cir. 1989) (holding that plaintiff was not a proper derivative plaintiff because his interest in the derivative suit was "dwarfed by his interest in pursuing his litigation with the Bank"); *Smith v. Ayres*, 977 F.2d 946, 949 (5th Cir. 1992) (finding that plaintiff's vindictiveness toward the defendant and use of the derivative action as leverage in other litigation disqualified him from serving as a fair and adequate representative of the other shareholders).

For example, in *Recchion v. Kirby*, the derivative plaintiff brought suit on behalf of Westinghouse against past and present officers or directors of the company, alleging that they presented false financial information in order to meet their financial performance goals and realize greater executive compensation. 637 F. Supp. 1309, 1311 (W.D. Pa. 1986). The derivative plaintiff was previously employed by Westinghouse until he was forced to resign. *Id.* at 1312. Because of the circumstances surrounding his departure from the company, the derivative plaintiff had vindictive feelings towards Westinghouse, and had previously filed suit against Westinghouse for wrongful discharge. *Id.* The defendants moved for dismissal maintaining that the derivative plaintiff did not fairly and adequately represent the interests of the other shareholders. *Id.* at 1314. The court agreed, and noted that other courts "have recognized that the representative plaintiff might use the derivative action as leverage to obtain a favorable settlement in other actions brought against the corporation." *Id.* at 1315. As such, "[a] derivative suit can constitute a particularly

effective weapon for purposes of obtaining a favorable settlement in other actions.” *Id.* “In such circumstances, where there is substantial likelihood that the derivative action will be used as a weapon in the plaintiff shareholder’s arsenal, and not as a device for the protection of all shareholders, other courts have properly refused to permit the derivative action to proceed.” *Id.* (citing *Owen v. Diversified Industries, Inc.*, 643 F.2d 441, 443 (6th Cir. 1981)). The court ultimately found that because the plaintiff had a pending wrongful discharge action against Westinghouse, and due to his small percentage of ownership of Westinghouse stock, it was obvious that he was pursuing the derivative action for his own interests, and not the interests of the other shareholders. *Id.* The court specifically noted that no other shareholders of Westinghouse had evidenced any support for the derivative action. *Id.* Accordingly, the court found that the derivative plaintiff did not fairly and adequately represent the interests of the other shareholders. *Id.*

The Court’s finding is further supported by the fact that before bringing the derivative action, Mattison’s counsel sent MPS a letter dated January 14, 2019 in response to MPS’s offer to purchase Mattison’s membership units for the per unit price as determined by HDH’s 2017 valuation. (See Ex. H to May 6, 2020 Mem. Supp. Mot. Summ. J.) Mattison declined MPS’s offer and instead demanded a much higher value for her units. (*Id.*)

In the last paragraph of the letter, Mattison’s counsel stated:

If [the parties] are unable to resolve this matter before the tolling agreement expires..., Ms. Mattison intends to file not only an action for judicial valuation of her shares, but also a shareholder derivative action on behalf of MPS against the members of the management committee for systematically overpaying themselves in the form of excessive compensation, bonuses, fringe benefits, and related-party lease transactions for years....

(*Id.*)

Mattison and her counsel threatened that she would bring a derivative action for leverage in her attempt to get more money for her membership units. Only when such threats failed did Mattison choose to bring her derivative claims.

Similar to the facts of this case, in *Khanna v. McMinn*, the plaintiff was a co-founder and shareholder of Covad Communications Group, Inc., and served as its General Counsel and Executive Vice President from its formation until he was removed from these positions amidst charges of sexual impropriety. No. Civ. A. 20545, 2006 WL 1388744, at *1 (Del. Ch. May 9, 2006). He brought a derivative action challenging certain acts and omissions of Covad's board. *Id.* The defendants moved to dismiss the Complaint because they contended that the derivative plaintiff was not a fair and adequate representative because of the mixed motives that prompted him to file the action, and the fact that he was a disgruntled former employee. *Id.* The court agreed, and found that the derivative plaintiff was an inadequate representative of the other shareholders. *Id.* at *44. Citing to the factors set forth in *Davis v. Comed, Inc.*, the court found that the derivative plaintiff's employment dispute with Covad impaired his capacity to vindicate the shareholders' best interests. *Id.* at *43. The plaintiff's initial motive in threatening to bring the derivative action was to provide leverage in his attempt to regain his position at Covad after his suspension as General Counsel. *Id.*

The court analyzed a letter that the plaintiff sent the Covad board before bringing the derivative action. The letter contained demands of reinstatement and increased compensation, and threatened to bring a derivative action if such demands were not met. *Id.* The court found that none of plaintiff's demands were for the benefit of the shareholders—instead, plaintiff made demands for his own benefit and self-interest. *Id.*

Like the derivative plaintiff in *Khanna v. McMinn*, Mattison is not a fair and adequate representative of the other members of MPS because her individual dispute with MPS has impaired her capacity to act in the best interests of the other members. Mattison's threat of bringing a derivative action was made only to provide leverage in an attempt to gain more money for her membership units.

The evidence in this case shows that Mattison is pursuing this derivative action for her own interests, and not to vindicate the interests of the other members of MPS. Therefore, the Court finds that there is no genuine issue of material fact as to Mattison's inability to fairly and adequately represent the interests of the other members of MPS. Pursuant to Rule 23(b)(1), SCRCR, her derivative claim must be dismissed.

C. Mattison Seeks Relief in the Derivative Action Contrary to the Interests of the Other Members of MPS.

As additional sustaining grounds, the Court finds that the remedies Mattison is seeking in her Amended Third-Party Complaint directly contradict what the other members of MPS want. *See Davis v. Comed, Inc.*, 619 F.2d at 593-94 (finding that the remedy sought by the derivative plaintiff is a factor to be considered in a court's determination of whether the derivative plaintiff is a fair and adequate representative). Thus, Mattison cannot be a fair and adequate representative of the other members because she is trying to undo agreements, resolutions, and transactions that every other member voted on and supported. Her dissatisfaction with how the other members believe the company should be run is not a proper basis for a derivative suit.

The following are examples of why Mattison cannot represent the other members of MPS:

- (1) In her Amended Third-Party Complaint, Mattison asserts a counterclaim against MPS seeking a declaration from the Court that the September 30, 2015 Operating Agreement is invalid because she did not sign the agreement. (Am. Third-Party Compl. ¶¶ 48, 90.)

However, Mattison was the *only* member of MPS who did not sign the Operating Agreement. (*See* Ex. B to May 6, 2020 Memo. Supp. Mot. Summ. J.) All other members of MPS have acted pursuant to the provisions of this Operating Agreement for years.

- (2) Mattison asks the Court to declare invalid any proposed amendments to MPS's Operating Agreement which were not adopted by unanimous consent. (Am. Third-Party Compl. ¶ 90.) MPS recently adopted a Second Amended and Restated Operating Agreement dated September 16, 2019, which every member of MPS signed except for Mattison. (July 31, 2020 Suppl. Memo. Supp. Mot. Summ. J.) Thus, Mattison is asking the Court to declare invalid an agreement that the members she purports to represent signed, consented to, and support.
- (3) Mattison asks the Court to find that the addition of any new members without unanimous consent be declared null and void. (Am. Third-Party Compl. ¶ 90.) Essentially, Mattison seeks to divest two current members of their ownership interests. (*See* Ex. G. to May 6, 2020 Memo. Supp. Mot. Summ. J.) Mattison cannot represent members she seeks to strip of their equity. Every other member of MPS approved the issuance of units to these two members. (*Id.*)
- (4) In Mattison's Supplemental Memorandum in Opposition to MPS and the Third-Party Defendants' Motion for Summary Judgment, she tried to discredit the Member Statements and testimony of the six minority members who were deposed by arguing that the other members have an "inherent bias ... because they all still work for MPS." (July 31, 2020 Suppl. Mem. Opp. Mot. Summ. J. at 13-14.) She not only alleged that the Member Statements were "self-serving" and that the testimony of the deponents was "scripted," but she even went so far as to say that "each of the minority members has *substantial, inherent*

bias because of their current employment with [MPS].” (*Id.* at 2 (emphasis added).) Based upon Mattison’s own statements to this Court, she cannot represent the other members of MPS.

The Court finds that Mattison’s objectives in bringing this derivative action run counter to what all other members of MPS view to be in the best interest of the company. For this additional reason, the Court holds that Mattison is not a fair and adequate representative of the other members of MPS. Therefore, summary judgment is granted in favor of MPS and the Third-Party Defendants as to Mattison’s derivative claims.

For the reasons set forth above, MPS and the Third-Party Defendants’ Motion for Summary Judgment is hereby granted, and Mattison’s Amended Third-Party Complaint is dismissed with prejudice.

AND IT IS SO ORDERED.

The Honorable R. Lawton McIntosh

Anderson, South Carolina

_____, 2020



Greenville Common Pleas

Case Caption: McMillan Pazdan Smith LLC , plaintiff, et al vs. Donza H Mattison ,
defendant, et al
Case Number: 2019CP2300998
Type: Order/Summary Judgment

S/R. LAWTON McINTOSH

S/R.LAWTON McINTOSH

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