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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas, Business Court Program

R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2020-001645
Case No. 2019-CP-23-00998

McMillan Pazdan Smith, LLC, ... Plaintiff/Counterclaim Defendant-Respondent,

v.

Donza H. Mattison, ... Defendant/Counterclaimant-Appellant,

---

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

v.

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

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Authorities iii

Statement of Issues on Appeal 1

Statement of the Case 2

Facts 10

Arguments 19

1. THE CIRCUIT COURT MISTAKENLY ASSIGNED TO APPELLANT THE BURDEN OF PROOF AND DISREGARD MOST OF THE APPLICABLE FACTORS ON THE ISSUE OF WHETHER APPELLANT COULD FAIRLY AND ADEQUATELY REPRESENT THE INTERESTS OF SIMILARLY SITUATED MEMBERS OF THE LLC IN A DERIVATIVE ACTION ALLEGING SELF-DEALING AND BREACHES OF FIDUCIARY DUTY AGAINST THE LLC'S THREE LARGEST OWNERS AND ITS CHIEF OPERATING OFFICER. 19

2. THE CIRCUIT COURT IMPROPERLY ACCEPTED UNSWORN, BOILERPLATE STATEMENTS FROM RESPONDENTS' WITNESSES THAT WERE NOT BASED ON PERSONAL KNOWLEDGE AND DID NOT SET FORTH ADMISSIBLE FACTS, AS REQUIRED BY RULE 56(e), SCRCP FOR AFFIDAVITS ON A MOTION FOR SUMMARY JUDGMENT, BUT INSTEAD WERE BASED ENTIRELY ON HEARSAY AND SUBJECTIVE EXPRESSIONS OF BELIEF 23

3. THE CIRCUIT COURT INCORRECTLY ASCRIBED TO APPELLANT AN IMPROPER MOTIVE IN FILING HER DERIVATIVE ACTION BASED ON A MISINTERPRETATION OF A STATEMENT APPELLANT'S COUNSEL MADE DURING THE SUMMARY JUDGMENT ARGUMENTS AND BASED ON RESPONDENTS' COUNSELS' UNSUPPORTED CHARACTERIZATIONS OF APPELLANT AS A "DISGRUNTLED FORMER EMPLOYEE.". 26

4. THE CIRCUIT COURT ERRED IN CONSIDERING AND RELYING ON CONFIDENTIAL SETTLEMENT COMMUNICATIONS THAT WERE INADMISSIBLE UNDER

RULE 408, SCRE, WHEN THE COURT DETERMINED THAT APPELLANT WAS TRYING TO USE THE DERIVATIVE ACTION SOLELY AS LEVERAGE TO EXTORT AN ARTIFICIALLY HIGH VALUE FOR HER OWNERSHIP INTERESTS IN THE RESPONDENT LLC.. 33

5. THE CIRCUIT COURT FAILED TO VIEW THE FACTS AND INFERENCES IN THE RECORD IN THE LIGHT MOST FAVORABLE TO APPELLANT, AS REQUIRED ON RESPONDENTS' MOTION FOR SUMMARY JUDGMENT, BY DISREGARDING STATEMENTS MADE IN APPELLANT'S VERIFIED PLEADINGS AND SUPPLEMENTAL AFFIDAVIT. 35

6. THE CIRCUIT COURT ERRED IN REFUSING TO CONSIDER THE "CLASS OF ONE" ARGUMENT IN A DERIVATIVE ACTION WHERE APPELLANT IS THE ONLY MEMBER OF THE RESPONDENT LLC WHO IS NOT A CURRENT EMPLOYEE OF THE COMPANY AND, THEREFORE, IS THE ONLY PERSON WHO COULD BRING SUCH A CLAIM WITHOUT FEAR OF RETALIATION. 36

7. THE CIRCUIT COURT IMPROPERLY LIMITED THE SCOPE OF DISCOVERY IN THIS CASE WHERE THE MINORITY MEMBERS' KNOWLEDGE (OR LACK THEREOF) ABOUT THE UNDERLYING FACTS OF THE DERIVATIVE ACTION WAS CRUCIAL TO APPELLANT'S ALLEGATIONS THAT THOSE IN CHARGE OF THE MANAGEMENT OF THE LLC HAVE INTENTIONALLY CONCEALED EVIDENCE OF THEIR OWN MISCONDUCT FROM THE OTHER MEMBERS OF THE FIRM 41

8. THE CIRCUIT COURT ERRED IN REFUSING TO ADDRESS THE INTRACTABLE CONFLICT OF INTEREST THAT EXISTS IN THE SAME LAW FIRMS' REPRESENTING THREE DISTINCT CONSTITUENCIES SIMULTANEOUSLY IN THE DERIVATIVE ACTION: (A) THE RESPONDENT LLC, (B) THE INDIVIDUAL RESPONDENTS, AND (C) THE MINORITY MEMBERS OF THE RESPONDENT LLC, INCLUDING THE SIX MEMBERS WHO WERE DEPOSED BY APPELLANT'S COUNSEL. 44

Conclusion 45

Certification of Appellant's Counsel 46

TABLE OF AUTHORITIES

CASES

Angel Investors, LLC v. Garrity, 216 P.3d 944 (Ut. 2009) 37-38

Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991) 43

Brandon v. Brandon Const. Co., 776 S.W.2d 349 (Ark. 1989) 22, 38

Davis v. Comed, Inc., 619 F.2d 588 (6th Cir. 1980) 22

Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003) 35

Halsted Video, Inc. v. Guttillo, 115 F.R.D 177 (N.D. Ill. 1987) 21, 38

HER, Inc. v. Parenteau, 770 N.E.2d 105 (Ohio Ct. App. 2002) 38-39

Jordan v. Bowman Apple Prods. Co., 728 F. Supp. 409 (W.D. Va. 1990) 38

Khanna v. McMinn, No. Civ. A., 20545, 2006 WL (Del. Ch. Ct. May 6, 2006) 29, 30

Larson v. Dumke, 900 F.3d 1363 (9th Cir. 1990) 20, 22, 38

Palmer v. U.S. Sav. Bank, 553 A.2d 781 (N.H. 1989) 22

Recchion v. Kirby, 637 F. Supp. 1309 (W.D. Pa. 1986) 29, 31

Smith v. Ayers, 977 F.2d 946 (5th Cir. 1992) 29

South v. Baker, 62 A.3d 1 (Del. Ch. Ct. 2012) 20

Vanderbilt v. Geo-Energy Ltd., 725 F.2d 204 (3d Cir. 1983) 28

In re Wal-Mart Stores, Inc. Delaware Derivative Litig., 167 A.3d 513 (Del. Ch. 2017) 21

Ward v. Griffin, 295 S.C. 219, 367 S.E.2d 703 (Ct. App. 1998) 40

Watson v. Southern Ry. Co., 420 F. Supp. 483 (D.S.C. 1975) 43

Youngman v. Tahmoush, 457 A.2d 376 (Del. Ch. 1983) 20, 21

Zarowitz v. BankAmerica Corp., 866 F.2d 1164 (9th Cir. 1989) 29

STATUTES

S.C. Code Ann. § 33-44-404(c)(7) 32

S.C. Code Ann. § 33-44-1101 . . . . . 28, 37

S.C. Code Ann. § 33-44-1103 28

COURT RULES

Rule 6(d), SCRCP 7

Rule 11, SCRCP 19

Rule 12(b)(6), SCRCP 3, 5

Rule 23, SCRCP 23

Rule 23(b)(1), SCRCP . . . . . *passim*

Rule 30(b)(1), SCRCP 7

Rule 34, SCRCP 8, 34

Rule 56(e), SCRCP 1, 23, 25

Rule 56(f), SCRCP 8, 41, 43

Rule 59(e), SCRCP 10

Rule 408, SCRE 1, 33, 34

Fed. R. Civ. P. 23 21

Fed. R. Civ. P. 23.1 . . . . . 21, 29, 38

OTHER AUTHORITIES

C.J.S. Corporations, § 499 21

Cory Manning et al., "Dead on Arrival: The Perils of Litigating an Aggrieved Shareholder's Breach of Fiduciary Duty Claim," SC Lawyer 39 (Mar. 2020) 40

7A Wright & Miller, Federal Practice & Procedure § 1833 (1972) 20

STATEMENT OF ISSUES ON APPEAL

(1) Did the circuit court mistakenly assign to Appellant the burden of proof and disregard most of the applicable factors on the issue of whether Appellant could fairly and adequately represent the interests of similarly situated members of the LLC in a derivative action alleging self-dealing and breaches of fiduciary duty against the LLC's three largest owners and its Chief Operating Officer?

(2) Did the circuit court improperly accept unsworn, boilerplate statements from Respondents' witnesses that were not based on personal knowledge and did not set forth admissible facts, as required by Rule 56(e), SCRCP for affidavits on a motion for summary judgment, but instead were based entirely on hearsay and subjective expressions of belief?

(3) Did the circuit court incorrectly ascribe to Appellant an improper motive in filing her derivative action based on a misinterpretation of a statement Appellant's counsel made during the summary judgment arguments and based on Respondents' counsels' unsupported characterizations of Appellant as a "disgruntled former employee"?

(4) Did the circuit court err in considering and relying on confidential settlement communications that were inadmissible under Rule 408, SCRE, when the court determined that Appellant was trying to use the derivative action solely as leverage to extort an artificially high value for her ownership interests in the Respondent LLC?

(5) Did the circuit court fail to view the facts and inferences in the record in the light most favorable to Appellant, as required on Respondents' motion for summary judgment, by disregarding statements made in Appellant's verified pleadings and supplemental affidavit?

(6) Did the circuit court err in refusing to consider the "class of one" argument in a derivative action where Appellant is the only member of the Respondent LLC who is not a current

employee of the company and, therefore, is the only person who could bring such a claim without fear of retaliation?

(7) Did the circuit court improperly limit the scope of discovery in this case where the minority members' knowledge (or lack thereof) about the underlying facts of the derivative action was crucial to Appellant's allegations that those in charge of the management of the LLC have intentionally concealed evidence of their own misconduct from the other members of the firm?

(8) Did the circuit court err in refusing to address the intractable conflict of interest that exists in the same law firms' representing three distinct constituencies simultaneously in the derivative action: (a) the Respondent LLC, (b) the individual Respondents, and (c) the minority members of the Respondent LLC, including the six members who were deposed by Appellant's counsel?

STATEMENT OF THE CASE

This lawsuit arises out of a dispute over the valuation of Appellant's ownership interests as a member of an architectural firm that is organized as a South Carolina Limited Liability Company, upon her voluntary departure as an employee of the firm. On February 22, 2019, Respondent McMillan Pazdan Smith, LLC (hereinafter "MPS") filed the underlying Complaint against Appellant, Donza H. Mattison (hereinafter "Ms. Mattison"), for declaratory judgment seeking a court order forcing the redemption of her membership units as of YE2017 for a price determined by a third-party consultant hired by MPS's management committee.

Appellant filed a Verified Answer, Counterclaims and Third-Party Complaint on March 4, 2019, raising various affirmative defenses, asserting counterclaims against MPS for breach of contract, judicial valuation of her membership interest, an equitable accounting, and a declaratory

judgment. Appellant also included in her Answer a Third-Party Complaint, pleaded as a derivative on behalf of MPS, against MPS's three managing members, Respondents Rondald G. Smith (hereinafter "R. Smith"), Joseph M. Pazdan (hereinafter "Pazdan"), and Brad B. Smith (hereinafter "B. Smith"), and the company's COO, Respondent Chad C. Cousins (hereinafter "Cousins"), for breach of fiduciary duty and breach of the operating agreement. Appellant asserted that the individual Respondents approved excessive compensation, bonuses, perquisites and other employment-related benefits for themselves and their family members, and authorized related-party transactions that unfairly enriched themselves at the expense of the firm, well beyond the proportions of their ownership interests in the firm.

On March 11, 2019, Appellant's counsel submitted a consent motion for case assignment to the Business Court Program for Region 1, which motion was granted by order of Chief Business Court Judge Roger M. Young on March 20, 2019. The case was assigned to the Hon. R. Lawton McIntosh, Circuit Court Judge for the Tenth Judicial Circuit in Anderson County.

On April 1, 2019, Respondents filed a motion under Rule 12(b)(6), SCRCP, seeking to dismiss Ms. Mattison's Counterclaims and Third-Party Complaint for failure to state a claim. Respondent MPS argued that the Counterclaims violated the covenant not to sue and the release contained in the Severance Agreement and General Release that Ms. Mattison signed on December 5, 2017, in connection with her voluntary separation of employment from MPS. Respondents also asserted that the Third-Party Complaint must be dismissed for failure to meet the heightened pleading requirements of Rule 23(b)(1), SCRCP, specifically that Ms. Mattison failed to make a valid pre-suit demand on MPS prior to filing the derivative action or to demonstrate the futility of such a demand. Respondents also argued that Ms. Mattison cannot fairly and adequately represent

the interests of other similarly situated members of MPS in enforcing the rights of the company.

On April 26, 2019, Appellant filed a motion to disqualify Respondents' counsel from continuing to represent both the Respondent LLC and the individual Respondents simultaneously in this action because of the inherent conflict of interest presented. Appellant did not object to Respondents' counsels' continuing to represent just the individual Respondents, but requested that independent counsel be hired to represent the Respondent LLC. Appellant also asserted that no financial resources of the Respondent LLC should be used to defend the individual Third-Party Defendants in the derivative action. Shortly before the scheduled hearing date of May 16, 2019 on all pending motions, Appellant agreed to withdraw the motion for disqualification, without prejudice, pending the Court's ruling on Respondents' motion to dismiss.

By Order dated July 2, 2019 (following a Form 4 Order on June 14, 2019), Judge McIntosh denied Respondents' motion to dismiss the Counterclaims, finding that the release and covenant not to sue applied only to Ms. Mattison's potential employment-related claims, and that the Severance Agreement expressly carved out the redemption of her ownership interests, as well as any potential claims relating to her financial interests as a member of MPS. With respect to the derivative action, Judge McIntosh ruled that a letter sent by Ms. Mattison's counsel on January 14, 2019 did not constitute a valid pre-suit demand under Rule 23(b)(1), SCRCP, as a prerequisite to bringing a derivative action, but was instead merely a negotiating position. Judge McIntosh dismissed the derivative action without prejudice, allowing Appellant 30 days to amend both her pre-suit demand and the derivative claims in her Third-Party Complaint. Judge McIntosh held in abeyance the issue of whether Ms. Mattison could fairly and adequately represent the interests of similarly situated members of MPS in enforcing the rights of the LLC, pending further discovery on this issue.

On June 18, 2019, the undersigned counsel for Appellant sent certified letters to the three managing members of MPS formally notifying them of Ms. Mattison's intent to pursue a derivative action on behalf of MPS if the firm did not take appropriate action by July 19, 2019. Thereafter, Ms. Mattison re-filed her Verified Amended Answer, Counterclaims, and Third-Party Complaint on July 30, 2019.

Respondents filed a second motion to dismiss under Rule 12(b)(6), SCRCP, on August 7, 2019, arguing that the derivative action raised in Appellant's Third-Party Complaint should be dismissed for the same reasons stated in their previous motion to dismiss. Respondents argued that the new letter of June 18, 2019 from Appellant's counsel could not be considered a valid pre-suit demand because litigation was already underway.

Respondents' second motion to dismiss was heard by Judge McIntosh on September 10, 2019. The court denied the motion to dismiss by formal Order on October 30, 2019 (following a Form 4 Order on October 10, 2019). The court ruled that the letter of June 18, 2019 was a valid pre-suit demand and that Appellant had properly pleaded the derivative action claims in her Amended Third-Party Complaint. The court reiterated its previous ruling that the issue of whether Ms. Mattison could be a fair and adequate representative in the derivative action could only be addressed after an opportunity for discovery.

Appellant resumed her discovery on the derivative action shortly after the hearing on the second motion to dismiss. On September 23, 2019, Appellant's counsel re-issued six subpoenas duces tecum to third-parties, seeking documents and financial records relating to both Appellant's counterclaims and the derivative action. On October 2, 2019, Respondents filed a motion for a protective order and to quash the non-party subpoenas. The court scheduled a hearing on this

discovery motion for November 6, 2019.

On October 24, 2019, Appellant filed a Renewed Motion for Disqualification of Plaintiff's Counsel following the entry of the court's Form 4 Order announcing its decision on Respondents' motion to dismiss the derivative action. Thereafter, Respondent's counsel specifically requested that the motion for disqualification not be heard during the upcoming hearing on November 6, 2019 because of the serious and consequential nature of the motion. The court scheduled a hearing for December 13, 2019 on the disqualification motion.

During the hearing on November 6, 2019 regarding the non-party subpoenas, the court sua sponte issued a ruling limiting discovery in the case to the issues of valuation of Appellant's ownership interests (including potential normalization of the alleged self-dealing and insider transactions) and whether Appellant could be a fair and adequate representative for the alleged derivative action. The court directed Respondents' counsel to prepare a formal written order, which was apparently signed by Judge McIntosh on November 22, 2019, but was not actually filed until on January 23, 2020.

On December 2, 2019, Respondents' counsel informed Appellant's counsel that Respondents had recently obtained written statements from all of the members of MPS (other than Ms. Mattison) expressing opposition to the derivative action and refusing to support the derivative action. Respondents' counsel provided copies of the statements to Appellant's counsel on December 3, 2019, only after Appellant's counsel agreed that Respondents' counsel could mark the statements as "Confidential." Later on December 3, 2019, Appellant's counsel prepared and served notice of the depositions of six of the minority members of MPS who had signed the member statements. Appellant's counsel schedule the depositions for three consecutive days (December 17-19, 2019),

the earliest possible dates given the 10-day notice provision of Rule 30(b)(1), SCRCP.

In response to the notice of depositions, Respondents' counsel filed a motion for protective order on December 11, 2019, asserting that the sole purpose of the six depositions was to subject members of MPS to annoyance, embarrassment, oppression, and undue burden and expense. Appellant's counsel filed a brief in opposition to the motion for protective order on December 12, 2019, and offered to waive the 10-day notice requirement under Rule 6(d), SCRCP, so the court could take up the motion for protective order during hearing on the motion for disqualification of counsel, which was already scheduled for the following day, December 13, 2019, at 2:00 p.m.

On the morning of December 13, 2019, the court requested that counsel for the parties be available for an off-the-record telephone conference to discuss the case. During the call, Judge McIntosh indicated that he believed the motion for disqualification of counsel was premature until the court first determined whether Ms. Mattison could fairly and adequately represent the interests of similarly situated members of the LLC in the derivative action. Judge McIntosh did indicate that he would allow the depositions of the six members of the LLC to proceed, but left it to the attorneys to work out the scheduling of the depositions. The court limited the depositions to the subjects previously announced in the court's sua sponte ruling during the hearing on November 6, 2019. At the court's invitation, Appellant's counsel submitted a letter to Judge McIntosh on December 16, 2019, memorializing the court's rulings for the record, since no court reporter was present during the informal telephone conference on the morning of December 13, 2019. Judge McIntosh responded by email on December 17, 2019, stating that Appellant's counsel's summary of the court's rulings during the telephone conference was accurate.

It took over two months to complete the first three depositions of minority members of MPS,

because of logistical disputes with Respondents' counsel over where and when the depositions would occur and how long they would be allowed to last. The first three depositions were taken on January 17, 2020, January 29, 2020, and February 19, 2020. After Appellant's counsel requested deposition dates for the three additional minority members from the original notice of December 3, 2019, Respondents filed two motions on February 21, 2020, two days later, seeking to prevent Appellant's derivative action from proceeding further: (1) a motion for protective order to preclude Appellant from conducting any further discovery in the derivative action, specifically including depositions of any other members of MPS and a requested inspection of MPS's office in Spartanburg, SC under Rule 34, SCRCP; and (2) a motion summary judgment and for attorney's fees and costs with respect to the derivative action.

The Court held a hearing on these motions May 12, 2020, via video conference because of the restrictions caused by the COVID-19 pandemic. Prior to the hearing, Appellant's counsel filed an Affidavit under Rule 56(f), SCRCP, requesting additional discovery before the summary judgment motion was considered. On May 15, 2020, the Court entered a Form 4 order holding Respondents' motion for summary judgment on the derivative action in abeyance, pending the taking of three additional depositions of minority members of MPS who were among the six witnesses originally noticed in December 2019. During the summary judgment hearing on May 12, 2020, the Court, again sua sponte, further limited any additional depositions to the issues of whether the minority members even wanted a derivative action to proceed and, if so, whether they wanted Ms. Mattison to be the representative of MPS in such action.

Following the three additional depositions of minority members, which were held on June 17, June 22, and July 10, 2020, Respondents' counsel submitted the full depositions transcripts to

the court by email on July 20, 2020. Thereafter, Appellant's counsel requested 30 days to submit supplemental briefing on summary judgment to discuss the new deposition testimony, but Respondents' counsel objected to any further briefing. On July 21, 2020, Judge McIntosh emailed counsel with his decision to allow supplemental briefing within 10 days, with the briefs limited to 20 pages and no exhibits unless approved by the court in advance. In his email of July 21, Judge McIntosh also requested that Respondents' counsel prepare a statement of attorneys' fees and costs associated with defending the derivative action, but the court specifically instructed counsel not to brief the issue of whether an award of attorney's fees was even appropriate at this juncture of the case.

Both sides filed supplemental briefs on Friday, July 31, 2020. On Tuesday, August 4, 2020, the Court entered a Form 4 Order granting summary judgment in favor of Respondents on the derivative action and directing Respondents' counsel to prepare a proposed order, including a provision requiring Appellant to pay Respondents' attorneys' fees and costs relating to defending against the derivative action, but leaving the amount of fees to be determined. Respondents' counsel submitted the proposed order on August 11, 2020. Thereafter, Appellant's counsel sent a letter to Judge McIntosh objecting to the proposed order on August 12, 2020, including the attorney's fee award, for which the court had previously instructed the parties not to brief.

Judge McIntosh sent an email to counsel on August 13, 2020, allowing both sides to submit briefs within 10 days on the issue of the propriety of an award of attorneys' fees under either the South Carolina Rules of Civil Procedure or the contractual documents at issue in the case. Respondents' counsel filed their attorneys' fee brief on Friday, August 21, 2020, and Appellant's counsel filed his attorneys' fee brief on Monday, August 24, 2020.

On September 22, 2020, the Court entered an order vacating its prior decision to award attorneys' fees and costs in favor of Respondents.

On September 25, 2020, Respondents' counsel submitted a second proposed order on their motion for summary judgment regarding the derivative action, omitting the award of attorneys' fees. The Summary Judgment Order was signed and filed on September 30, 2020.

Appellant timely filed a Motion to Alter or Amend or for Reconsideration of Summary Judgment Order on Monday, October 12, 2020, pursuant to Rule 59(e), SCRCP. The circuit court scheduled a hearing on the motion for October 26, 2020. The court requested briefs to be filed by Friday, October 23, 2020, which were filed by both sides. At the conclusion of the hearing on October 26, 2020, the court requested Respondents' counsel to prepare a proposed order denying the motion for reconsideration. Respondents' counsel submitted the proposed order on October 30, 2020. The court signed the Order on November 9, 2020, denying Appellant's Rule 59(e) motion.

Appellant timely served and filed the Notice of Appeal on December 9, 2020.

FACTS

Appellant, Donza Mattison, has been a licensed architect in South Carolina since September 17, 1991. She had worked for the Spartanburg firm of McMillan Smith & Partners Architects, PLLC (hereinafter "MS") since approximately September 1994 and had been a partner in that firm since January 1, 1997. (Amended Answer, at 9, ¶ 44) (R. p. 127). MPS was formed at the end of September 2009, upon the merger of the MS firm with the Greenville firm of Pazdan-Smith Group, Inc. (Id. at ¶ 45) (R. p. 127). At the time of the merger, Ms. Mattison's membership interest in MPS was 3.883%, making her (tied with three of her colleagues from MS) the fifth largest owner of the firm. Currently, she holds 2,035 membership units of MPS, which makes her the eighth largest

owner among approximately two dozen current members. (Id. at ¶ 46) (R. p. 127). Of the members of MPS, only eleven individuals hold 2% or more of the outstanding membership units. Another eleven members of MPS hold less than one-tenth of 1% (< 0.10%) of the outstanding membership units of the firm, generally having been granted their units as a component of their compensation, rather than actually buying into the firm as Ms. Mattison and some of her colleagues had done. At the time of Ms. Mattison's departure from the firm in February 2018, the four individual Respondents cumulatively owned approximately 75.67% of MPS's outstanding membership units. (HDH Report, YE2017).

Upon the closing of the merger in September 2009, the members of MPS all signed an Operating Agreement dated September 25, 2009 (hereinafter "MPS Operating Agreement"), to govern the business of MPS and to set forth the rights, obligations, and relations of the members and managing members of the firm. Although MPS attempted on several occasions to amend the MPS Operating Agreement, including on or about September 30, 2015, no subsequent amendment has ever received the unanimous consent of all members. The original MPS Operating Agreement provides as follows: "Notwithstanding anything herein to the contrary, the following decisions shall require the approval of all of the Members: (i) any amendment of . . . this Agreement which affect the financial or voting rights of a Member." (MPS Operating Agreement, at 8, ¶ 4.2(d)(i)) (R. p. 1052). Ms. Mattison refused to sign the proposed Amended and Restated Operating Agreement in September 2015, primarily because it would have reduced the "required interest of the members," i.e., the supermajority of the firm's membership needed to approve certain company matters, from 75% to 66.67%. (Amended and Restated Operating Agreement of MPS (Sept. 30, 2015), at 6, Art. I) (definition of "Required Interest of the Members") (R. p. 779).

In mid-November 2017, the leadership of MPS began efforts to force Ms. Mattison out of the firm for what she believed to be unlawful and improper reasons. On November 14, 2017, the Management Committee of MPS met with Ms. Mattison and presented to her a memorandum outlining provisions from the Operating Agreement regarding a member's dissociation from the firm. (Mattison Affidavit, Ex. 1) (R. pp. 1100-1101). Shortly thereafter, Ms. Mattison hired the undersigned counsel, who assisted her in negotiating an amicable separation of her employment from MPS. The negotiations regarding Ms. Mattison's employment with MPS culminated in a Severance Agreement and General Release (hereinafter "Severance Agreement"), which was signed on December 5, 2017. (Severance Agreement) (R. pp. 147-158).

The parties' negotiations leading up to the Severance Agreement and the language of the Agreement itself made it clear that Ms. Mattison's employment-related matters were to be treated separately from her financial rights as a member of MPS. The Severance Agreement expressly provides, "nothing in this Agreement shall have any effect on [Mattison's] rights and remedies relating to her dissociation from the Company." (Severance Agreement at 5, ¶ 4) (R. p. 151). The Severance Agreement also provides, "Nothing in this Agreement is intended to have any effect on Employee's <u>ownership rights</u> or interests upon dissociation." (<u>Id.</u> at 8, ¶ 13) (R. p. 154) (emphasis added). Furthermore, the Severance Agreement provides, "Employee is not waiving rights or claims that may arise after the date this Agreement is executed, <u>nor is Employee waving any rights or claims relating to her financial interests as a member or owner of the Company</u>." (<u>Id.</u> at 10, ¶ 19(j)) (R. p. 156) (emphasis added).

With respect to the redemption of Ms. Mattison's membership interests in MPS upon her proper dissociation from the firm, the Severance Agreement provides as follows: "The parties agree

that the value of Employee's membership units shall be **mutually**[1] 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 [Mattison's] counsel." (Id. at 2, ¶ 2(j)) (R. p. 148) (emphasis added).

Pursuant to the Severance Agreement, Ms. Mattison voluntarily resigned her employment with MPS effective February 12, 2018, following the exhaustion of her FMLA leave. Shortly thereafter, she continued her medical treatments for breast cancer, which had been diagnosed in early January 2018, before the effective date of her resignation. (Amended Answer, at 10, ¶¶ 51-52) (R. p. 128). On August 3, 2018, Mattison's counsel notified MPS's counsel that Ms. Mattison had finished her cancer treatments and was ready to resume discussions about the buy-out of her interests in the company. (Amended Answer, at 10, ¶ 55) (R. p. 128).

On August 3, 2018, MPS, through its counsel, made an offer to purchase Ms. Mattison's ownership units based on a purported "valuation" prepared by a third-party appraisal that MPS's management committee had commissioned in early 2018 to perform, notwithstanding the terms of the Severance Agreement regarding the valuation of her membership units. In January 2018, MPS hired a firm from Atlanta–HDH Advisors (hereinafter "HDH")–to perform a valuation of the company as of YE2017. HDH had performed various calculations of the value of MPS for internal purposes since mid-2013, but such reports usually were not completed until well into the third quarter of each year, after the prior year's financial statements and tax returns had been completed. The HDH valuation for YE2017 was completed on or before April 12, 2018, as MPS's counsel

[1]Significantly, the circuit court's order granting summary judgment in favor of Respondents incorrectly omitted the word "mutually" in the quotation of this provision. (Summary Judgment Order, at 2) (R. p. 56).

provided a copy of that report to the undersigned counsel for Appellant on that date. (Amended Answer, at 10, ¶ 53) (R. p. 128).

Ms. Mattison, through her undersigned counsel, rejected MPS's offer from August 3, 2018 and formally requested additional financial information from the firm that she, her counsel, and her financial expert believed was necessary to calculate the fair market value of her membership units. Mattison's counsel had previously requested certain financial information from Respondents' counsel on several other occasions, but not nearly all of the requested information had been provided. (Amended Answer, at 10-11, ¶¶ 56-59) (R. pp. 128-129).

On December 3, 2018, Mattison and MPS entered into a Tolling Agreement to allow the parties to preserve the status quo while they continued their negotiations and discussions about the fair value of Ms. Mattison's membership units in MPS. (Mattison Aff., at 4, ¶ 14) (R. p. 1093). The Tolling Agreement itself acknowledges that the Severance Agreement "specifically reserv[ed] any and all issues relating to her Proper Dissociation from MPS" and that "a dispute has arisen between the parties hereto with regard to the valuation of Mattison's ownership units in MPS." (Tolling Agreement, at 1) (R. p. 1116). After an unsuccessful mediation on February 20, 2019, MPS filed a lawsuit against Defendant two days later, on February 22, 2019, less than ten minutes after the deadline the mediator had established to notify the mediator confidentially about whether or not the parties would accept the mediators' proposal regarding the fair value of Ms. Mattison's membership interests in the LLC. In addition, MPS's lawsuit was filed more than ten days prior to the deadline agreed to under a written Extension to the Tolling Agreement through March 4, 2019. (Mattison Affidavit, at 4, ¶ 13) (R. p. 1093); (Extension of Tolling Agreement) (R. p. 1120).

Once Ms. Mattison and her counsel had received and reviewed the limited financial

information from MPS as part of the valuation process agreed to in the Severance Agreement, Ms. Mattison discovered that the managing members and COO of MPS had approved substantial increases in their salary, bonuses, and benefits (not only for themselves, but also for spouses) that had never been approved by other members of MPS as required by the Operating Agreement. In addition, Ms. Mattison received for the first time details about the lease of MPS's office in Spartanburg, which was owned by a company called C & P of Spartanburg, LLC (hereinafter "C & P"), an entity that was owned by the wives of two of the founding partners of MS (and the two largest shareholders of MPS at the time of the merger in September 2009).

Records relating to the lease payments for the Spartanburg office revealed that shortly before the merger that created MPS, C & P had converted the Spartanburg building into office condominiums and sold off approximately half of the second floor to a law firm. After that transaction, MS (and later MPS) continued to pay the same monthly rent to C & P for approximately two years, based on the square footage for the <u>entire</u> building, even though approximately 25% of the square footage had been sold to a third party. None of the information relating to the lease of the Spartanburg office was ever disclosed to the minority shareholders of MS or to the minority members of MPS, nor did anyone other than Respondent Ron Smith and former MS/MPS partner Brian Deichman ever approve the lease that directly benefitted their own families.

Ms. Mattison also observed, based on the financial information provided to her following her acceptance of the Severance Agreement, that the managers or executive committee members of MPS had appeared to use HDH's valuations of the firm since 2013 to manipulate the price for membership units in the company to benefit only those in control of the firm, including COO and Third-Party Defendant Cousins. (Mattison Aff., at 6, ¶¶ 19-21) (R. p. 1095).

On January 14, 2019, the undersigned counsel for Appellant sent a demand letter to MPS's attorney notifying him of some of the financial irregularities that had been uncovered in reviewing MPS's financial records and indicating that Ms. Mattison intended to file a derivative action lawsuit if the upcoming mediation was not successful. The offer price that Ms. Mattison made to sell her shares back to MPS was the figure that her financial expert had calculated based on his review and critique of HDH's report, again with the limited information that had been produced by MPS at that time. (Rothstein Letter of Jan. 14, 2019) (R. p. 845-847).

The parties agreed to participate in pre-litigation mediation on February 20, 2019, in an effort to resolve the dispute without resort to the judicial system. At the end of the all-day mediation, the mediator proposed that he would not declare an impasse, but would leave the mediation open until Friday, February 22, 2019, at 5:00 p.m. for the parties to consider a confidential mediators' proposal. (Mattison Aff., at 5, ¶ 16) (R. p. 1094). MPS filed its lawsuit against Ms. Mattison at 5:10 p.m. on February 22, 2019, per the time-stamp on the Complaint, ten minutes after the deadline established by the mediator expired. (Complaint) (R. pp. 78-82)).

On November 4, 2019, Ms. Mattison submitted a formal protest at a special member meeting of MPS called to vote on the proposed slate of candidates for the newly created board of directors for the firm. This was the first opportunity Ms. Mattison had to communicate with any members of the firm about the allegations in the lawsuit, including her derivative action against the individual Respondents. (Mattison Aff., at 7, ¶¶ 24-25) (R. p. 1096). In her written statement, Ms. Mattison encouraged her colleagues to read her Amended Answer, Counterclaims, and Third-Party Complaint, particularly the derivative action. (Mattison Aff., Ex. 5) (R. pp. 1122-1124). Ms. Mattison summarized the general allegations in the derivative action of self-dealing by the managing members

of MPS and the COO, including excessive compensation and benefits, as well as the related-party transactions involving the lease of the Spartanburg office, but did not include any specific details or dollar amounts of the disputed transactions. (Id.) (R. pp. 1122-1124).

In response to Ms. Mattison's protest statement, on November 13, 2019, Respondent Cousins sent an email to all members of MPS (other than Ms. Mattison) attacking Ms. Mattison's statement as untrue, informing the members that if they all banded together to oppose the derivative action it would be dismissed by the court, and encouraging the members to sign a template statement disavowing the derivative action. Respondent Cousins attached a blank form statement to his email to the members. (Cousins email, Nov. 13, 2019) (R. pp. 942-946). Although Respondent Cousins's email does not contain a explicit threat to any of the minority members, his attached document entitled "Response to Donza H. Mattison's November 4, 2019 Letter" states the following: "In closing, we know the members of MPS are united in their commitment to the firm and its continued success. Ms. Mattison, however, is not aligned with our mission, and we believe her actions show that she is putting her interests above the best interests of the other members. We will not allow her or this lawsuit to distract from our business and the continued success of MPS." (Response Statement) (R. p. 946). All members signed the form statements within a couple of days of Mr. Cousins's email.

Respondent Cousins's email and response letter also informed the members that the firm had hired "independent counsel" as a resource to be available to minority members if they had any questions about Ms. Mattison's derivative action. (R. pp. 943, 946). The attorney identified by Cousins as "independent counsel"–Columbia attorney William Higgins–is the same attorney Respondents' counsel had previously hired as an expert witness to oppose Appellant's motion for

disqualification about the potential conflict of interest in representing both the company and the alleged individual wrong-doers simultaneously in the same action. The six minority members who were deposed in this case all testified that MPS's offer of "independent counsel" alone was material to their decisions to sign the member statements, but that they are not aware of any minority member who ever actually reached out to Mr. Higgins for advice. (Joslin Depo., at 13, ll. 12-19) (R. p. 413); (Jacobs Depo., at 10, ll. 12-16) (R. p. 434); (Myers Depo., at 137, l. 21 to 138, l. 3) (R. pp. 481-482); (Love Depo., at 117, ll. 5-14) (R. p. 529); (Pitts Depo., at 139, ll. 1-10 (R. p. 575); at 140, ll. 20-24 (R. p. 576)); (Ballard Depo., at 131, l. 20 to 133, l. 3 (R. pp. 627-629); at 148, ll. 8-17 (R. p. 638)). None of these witnesses was aware of Mr. Higgins' previous involvement in the case regarding the potential conflict of interest issue. (Joslin Depo., at 13, ll. 12-19) (R. p. 413); (Jacobs Depo., at 154, ll. 2-14) (R. p. 445); (Myers Depo., at 136, l. 24 to 137, l. 14) (R. pp. 480-481); (Love Depo., at 213, l. 20 to 214, l. 11) (R. pp. 544-545); (Pitts Depo., at 140, ll. 3-16) (R. p. 576); (Ballard Depo., at 133, l. 4 to 134, l. 2) (R. pp. 629-630).

All of the members of MPS (other than Ms. Mattison), including Respondents R. Smith, Pazdan, B. Smith, and Cousins, signed the identical, boilerplate member statement form as provided by Mr. Cousins, without alteration, other than one member (Joslin) who wrote in the word "verbally" in the margin of his statement. (Signed Member Statements). All six members who were deposed in this case testified that at the time they signed their statement, they had not actually read or reviewed Ms. Mattison's Verified, Amended Answer, Counterclaims, and Third-Party Complaint in this case. (Joslin Depo., at 31, ll. 12-17) (R. p. 418); (Jacobs Depo., at 8, ll. 4-15) (R. p. 432); (Myers Depo., at 40, ll. 3-22) (R. p. 463); (Love Depo., at 12, ll. 1-14 (R. p. 502); at 79, l. 23 to 80, l. 2 (R. pp. 517-518)); (Pitts Depo., at 8, ll. 8-11) (R. p. 557); (Ballard Depo., at 8, ll. 3-9 (R. p. 594);

at 39, l. 17 to 40, l. 12 (R. pp. 608-609)).

All of the information the minority members reviewed or were provided prior to their signing the statements came directly from Respondent Cousins or from one of the other individual Respondents. (Jacobs Depo., at 75, ll. 10-20) (R. p. 438); (Myers Depo., at 76, ll. 9-16) (R. p. 467); (Love Depo., at 80, l. 3 to 81, l. 2 (R. pp. 518-519); at 120, ll. 22-25 (R. p. 532); at 172, ll. 4-21 (R. p. 538); at 174, ll. 7-11 (R. p. 540)); (Pitts Depo. at 148, ll. 10-13) (R. p. 583); (Ballard Depo., at 148, ll. 8-17) (R. p. 638).

Importantly, the member statements do not actually refute the merits of any factual allegation raised in the derivative action; the statements merely acknowledge that they "know of no facts which support Mattison's derivative action against the Third-Party Defendants." (Member Statements) (R. pp. 816-836).

Immediately after obtaining the Member Statements in Opposition to Derivative Action, Respondents' Counsel sent a Rule 11 letter to Appellant's counsel indicating that the member statements were dispositive of the derivative action and that the case should be dropped immediately. (R. pp. 813-814).

ARGUMENTS

1. THE CIRCUIT COURT MISTAKENLY ASSIGNED TO APPELLANT THE BURDEN OF PROOF AND DISREGARD MOST OF THE APPLICABLE FACTORS ON THE ISSUE OF WHETHER APPELLANT COULD FAIRLY AND ADEQUATELY REPRESENT THE INTERESTS OF SIMILARLY SITUATED MEMBERS OF THE LLC IN A DERIVATIVE ACTION ALLEGING SELF-DEALING AND BREACHES OF FIDUCIARY DUTY AGAINST THE LLC'S THREE LARGEST OWNERS AND ITS CHIEF OPERATING OFFICER.

There appears to be no published, appellate precedent in South Carolina about the standard

for "fair and adequate" representation in the context of a shareholder derivative action under Rule 23(b)(1), SCRCP. Because one seeking to bring a derivative action stands in a representative capacity on behalf of the corporation, the court's main concern is ensuring that the person bringing the derivative claim can carry out her "fiduciary capacity as representative of persons whose interests are in plaintiff's hands and the redress of whose injuries is dependent upon her diligence, wisdom and integrity." South v. Baker, 62 A.3d 1, 21 (Del. Ch. Ct. 2012). In the leading case of Larson v. Dumke, 900 F.3d 1363 (9th Cir. 1990), the court stated, "An adequate representative must have the capacity to vigorously and conscientiously prosecute a derivative suit and be free from economic interests that are antagonistic to the interests of the class." Id. at 1367 (emphasis added).

The Larson court identified a number of factors that other courts have looked at to determine whether a derivative action plaintiff can be considered a fair and adequate representative:

> (1) indications that the plaintiff is not the true party in interest; (2) the plaintiff's unfamiliarity with the litigation and unwillingness to learn about the suit; (3) the degree of control exercised by the attorneys over the litigation; (4) the degree of support received by the plaintiff from other shareholders; (5) the lack of any personal commitment to the action on the part of the representative plaintiff; (6) the remedy sought by plaintiff in the derivative action; (7) the relative magnitude of plaintiff's personal interests as compared to his interest in the derivative action itself; and (8) plaintiff's vindictiveness toward the defendants.

Id. (internal citations and quotations omitted). Similarly, in Youngman v. Tahmoush, 457 A.2d 376, 381 (Del. Ch. 1983), the court stated "before a plaintiff can be found to be disqualified to maintain [a derivative action] defendant must show that a serious conflict of interest exists, by virtue of one factor or a combination of factors, and that the plaintiff cannot be expected to act in the interests of others because doing so would harm his other interests." Id. at 381 (citing 7A Wright & Miller, Federal Practice & Procedure § 1833 (1972)).

The party challenging a derivative action bears the burden of proof on the adequacy of representation issue. A leading legal encyclopedia, Corpus Juris Secundum, summarized the law on this issue as follows:

> A stockholder bringing a derivative action generally bears the burden of proof, and must overcome a presumption that corporate directors are faithful to their fiduciary duties, but a challenge to the adequacy of the stockholder's representative status places the burden on the party challenging the plaintiff's standing. . . .
>
> Whether a derivative action plaintiff fairly and adequately represents other stockholders and the corporation and thus has standing to maintain the action involves a factual determination by the court, and the burden of proof is on the party challenging the plaintiff's standing. In challenging the adequacy of a derivative plaintiff, the defendant bears the burden to show a substantial likelihood that the derivative action is not being maintained for the benefit of the stockholders.

C.J.S. Corporations, § 499 (emphasis added); see also Halsted Video, Inc. v. Guttillo, 115 F.R.D 177, 179 (N.D. Ill. 1987) ("The burden is on the defendant[2] to show that the plaintiff will not fairly and adequately represent the corporation and its shareholders."); Youngman, 457 A.2d at 381 ("The defendant . . . must show a substantial likelihood that the derivative action is not being used as a device for the benefit of all the stockholders."); In re Wal-Mart Stores, Inc. Delaware Derivative Litig., 167 A.3d 513, 527–28 (Del. Ch. 2017) ("Both Federal Rule 23 and Rule 23.1 require the proposed class or stockholder representative to be 'adequate,' and there are some similarities in the standard of adequacy under the two rules. But in the class action context, the purported class representative has to affirmatively demonstrate his adequacy in order to obtain certification. In a derivative action, by comparison, the burden is on the defendant to show that the plaintiff is an

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[2]In the typical shareholder derivative action, the plaintiff shareholder seeks to bring the action on behalf of the corporation, and the defendant would be opposing the derivative action. Here, because MPS brought the suit originally against Ms. Mattison, she is actually the Defendant in this case, bringing the derivative action as a Third-Party Complaint.

inadequate representative.") (emphasis added); Palmer v. U.S. Sav. Bank, 553 A.2d 781, 785 (N.H. 1989) ("The burden is on the defendant or on other interested shareholders to establish that a particular plaintiff or plaintiffs cannot provide fair and adequate representation for other similarly situated shareholders."); Brandon v. Brandon Const. Co., 776 S.W.2d 349, 353 (Ark. 1989) ("The burden of showing that the party bringing a derivative action does not fairly and adequately represent the interests of the shareholders is always on the defendant.").

As an initial matter, the circuit court failed to recognize that Respondents bear the burden of proof under Rule 23(b)(1), SCRCP, to demonstrate that Ms. Mattison cannot fairly and adequately represent the interests of similarly situated members in enforcing the rights of the LLC against its self-dealing managers and COO through the asserted Derivative Action. In fact, the language of the court's summary judgment order appears to have flipped the burden of proof on this issue to Ms. Mattison: "In making the determination of whether Mattison has met Rule 23(b)(1)'s requirement of fair and adequate representation . . . ." (Summary Judgment Order at 6) (emphasis added). This was not Ms. Mattison's burden to meet. Respondents, as the parties opposing the derivative action, had the burden of showing that Appellant "does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association." Rule 23(b)(1), SCRCP.

Next, the circuit court quotes the eight-factor test from the case of Davis v. Comed, Inc., 619 F.2d 588, 593-94 (6th Cir. 1980), which is almost identical to those articulated in the Ninth Circuit's case of Larson v. Dumke, 900 F.3d 1363 (9th Cir. 1990), quoted above. However, the circuit court focused almost entirely on only one of the eight factors: "the degree of support plaintiff is receiving from the shareholders he or she purports to represent."

All of the other seven factors weigh in favor of Appellant here, but the circuit court did not even address those other seven factors.

In assessing the preliminary, "fairly and adequately represent" issue, the circuit court should not delve too deeply into the merits of the case, but should focus on Ms. Mattison's ability and willingness to vigorously pursue the derivative claims. Like other forms of representative actions under Rule 23, SCRCP, the crucial concern the court must examine in a derivative action is fairness to the non-party owners of the entity whose interests might be conclusively determined in the underlying suit based on principles of res judicata or collateral estoppel, without their direct participation as a party in the case.

Almost every one of the minority member who were deposed thus far in the case testified that Ms. Mattison is a conscientious, outspoken, and thorough person, who has never given any of them a reason to question her integrity or truthfulness. (Jacobs Depo., at 145, l. 19 to 146, l. 7) (R. pp. 441-442); (Love Depo., at 20, l. 19 to 21, l. 7 (R. pp. 508-509); at 21, ll. 12-16 (R. p. 509)); (Pitts Depo., at 22, ll. 1-24) (R. p. 562); (Ballard Depo., at 19, ll. 16-24 (R. p. 596); at 30, ll. 10-18 (R. p. 601); at 37, ll. 16-23 (R. p. 606)). Accordingly, the court erred in finding that Ms. Mattison could not be a fair and adequate representative of the minority members of MPS.

2. THE CIRCUIT COURT IMPROPERLY ACCEPTED UNSWORN, BOILERPLATE STATEMENTS FROM RESPONDENTS' WITNESSES THAT WERE NOT BASED ON PERSONAL KNOWLEDGE AND DID NOT SET FORTH ADMISSIBLE FACTS, AS REQUIRED BY RULE 56(e), SCRCP FOR AFFIDAVITS ON A MOTION FOR SUMMARY JUDGMENT, BUT INSTEAD WERE BASED ENTIRELY ON HEARSAY AND SUBJECTIVE EXPRESSIONS OF BELIEF.

In concluding that Ms. Mattison's derivative action must be dismissed because no other member of the LLC has expressed support for it, the court improperly relied on unsworn statements

of minority members that were based entirely on hearsay and subjective beliefs. A careful review of the member statements reveals that they confirm only what the minority members do not know about the merits of Ms. Mattison's allegations. The member statements actually raise more questions than they answer, as Appellant demonstrated in the six limited depositions that were taken. The summary statement by each minority member that "I have reviewed and have been provided adequate information about the allegations of Mattison's derivative action against the Third-Party Defendants" (Member Statements, at ¶ 6) (R. pp. 816-836) (emphasis added) begs at least the following questions: who provided the information? what information was provided? and how did each member determine such information was "adequate"? All six of the minority members who were deposed confirmed that the information in question was provided solely by one or more of the individual Respondents (or by Respondents counsel in the meeting to prepare for the deposition). (Jacobs Depo., at 75, ll. 10-20) (R. p. 438); (Myers Depo., at 76, ll. 9-16) (R. p. 467); (Love Depo., at 80, l. 3 to 81, l. 2 (R. pp. 518-519); at 120, ll. 22-25 (R. p. 532); at 172, ll. 4-21 (R. p. 538); at 174, ll. 7-11) (R. p. 540)); (Pitts Depo. at 148, ll. 10-13) (R. p. 583); (Ballard Depo., at 148, ll. 8-17) (R. p. 638).

Each member statement further states, "I know of no facts which support Mattison's derivative action against the Third-Party Defendants." (Member Statements, ¶ 8) (R. pp. 816-836). This statement is meaningless: just because the minority members are not aware of facts supporting Ms. Mattison's allegations does not mean the allegations are untrue; it simply means that Respondents have succeeded in concealing the true facts from the other members of the firm.

Ms. Mattison became privy to the financial information of the firm only after her departure from the firm and pursuant to an express provision in her Severance Agreement that required MPS

to turn over such information to Appellant's counsel. Accordingly, she is uniquely positioned among the minority members of the firm to pursue the derivative action.

Perhaps most importantly, the Member Statements plainly did not meet the requirements of a proper affidavit in support of a motion for summary judgment. Rule 56(e), SCRCP states that "Supporting and opposing affidavits shall be <u>made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein</u>." Rule 56(e), SCRCP (emphasis added). The member statements failed to meet any of the pre-requisites of Rule 56(e): (1) the statements were not sworn or notarized; (2) they were not based on personal knowledge, but were merely expressions of belief and opinion; (3) they were based on inadmissible hearsay from unspecified information that was "provided" to them from the individual Respondents themselves, without any identification or description of the nature or the information or the source of the information; and (4) the members did not demonstrate that they are competent to testify about the conclusory and self-serving statements.

The minority members who were allowed to be deposed in this case testified that the Member Statements are essentially meaningless. For example, member William Joslin, who owns 53 member units (approximately 0.06% of the outstanding units of MPS), testified that he has not done anything to determine whether Ms. Mattison's allegations in the derivative action are accurate, nor does he have an opinion about whether such allegations are true. (Joslin Depo., at 32, ll. 3-12) (R. p. 419). Similarly, member K.J. Jacobs, who was a member of the MPS Executive Committee testified, with respect to the allegations in Ms. Mattison's derivative lawsuit that the individual Respondents authorized excessive compensation for themselves, "I have absolutely no way of knowing if those are true." (Jacobs Depo., at 75, ll. 16-17) (R. p. 438). The third minority member to be deposed,

Paulette Myers, who is now on the newly created Board of MPS, repeatedly testified as follows: "I don't have enough knowledge to refute or support this information. I don't have enough background." (Myers Depo., at 99, ll. 11-16) (R. p. 473). "First of all, I don't have knowledge to substantiate this information. . . . So I do not have knowledge this information is correct or incorrect." (Id. at 111, ll. 8-9, 17-18) (R. p. 476). "I don't have facts to support or refute that." (Id. at 148, ll. 2-24) (R. p. 485). Ms. Myers summed up her opposition to Ms. Mattison's derivative action as follows: "Why do I oppose the derivative action? Well, I feel like – yeah, it's a feeling, so I can't say it.") (Id. at 173, ll. 4-12) (R. p. 496).

In sum, the Member Statements are nothing more than a reverberation from the echo-chamber of Respondents' own making. The statements are not a legitimate basis for the circuit court to conclude that Ms. Mattison cannot fairly and adequately represent the interests of the minority members in enforcing the rights of the LLC, especially on a motion for summary judgment at a very early stage in the case, when all facts in the record must be construed in the light most favorable to Ms. Mattison.

3. THE CIRCUIT COURT INCORRECTLY ASCRIBED TO APPELLANT AN IMPROPER MOTIVE IN FILING HER DERIVATIVE ACTION BASED ON A MISINTERPRETATION OF A STATEMENT APPELLANT'S COUNSEL MADE DURING THE SUMMARY JUDGMENT ARGUMENTS AND BASED ON RESPONDENTS' COUNSELS' UNSUPPORTED CHARACTERIZATIONS OF APPELLANT AS A "DISGRUNTLED FORMER EMPLOYEE."

Next, the circuit court made an unsupportable factual finding that "Mattison brought the derivative action to gain leverage in her dispute regarding the valuation of her membership units." (Summary Judgment Order, at 10-11) (R. pp. 64-65). In so ruling, the circuit court misinterpreted or misconstrued Appellant's counsel's acknowledgment during the summary judgment hearing that

her derivative claims were brought to increase the value of her ownership interests in MPS. This statement was not evidence that the derivative claims were brought merely as leverage to extort a higher settlement for the buy-out of her units than "fair value." The exchange between Appellant's counsel and the court during the summary judgment hearing on May 12, 2020, which is quoted in the court's order, was not an admission of any type of improper motive on the part of Appellant. Obviously, the underlying goal of Appellant in this lawsuit is to obtain more for her ownership interests than what MPS offered her prior to the firm's filing of this lawsuit against her. As Appellant's counsel repeatedly tried to explain to the court, the derivative action seeks first to restore the proceeds of the individual Respondents' self-dealing transactions back into the coffers of the firm before the final valuation of her shares is calculated. When the undersigned counsel stated, "there's nothing wrong with that," in referring to Appellant's "ultimate goal [of] increas[ing] what her buyout is," (Order, at 10) (R. p. 64) (quoting Hearing Tr., at 15, ll. 6-10 (R. p. 322), at 17, ll. 10-17 (R. p. 324), and at 20, ll. 23-24 (R. p. 327)), that was simply not an admission of an improper motivation in bringing the derivative claim, especially under the summary judgment standard.

Every derivative action lawsuit, by definition, seeks to increase the value of the corporation as a whole and is brought by someone with an ownership interest in the entity. Neither Ms. Mattison nor her counsel has ever offered to drop her derivative action claims in exchange for an above-market payment for her shares. All she is seeking, both through the derivative action and her counterclaims, is to obtain the true fair value of her shares. As Ms. Mattison plainly stated in her Affidavit, which was filed on May 14, 2020, "I was not seeking any additional value or 'premium' on the value of my shares to 'purchase my silence' with respect to the possible derivative shareholder claim." (Mattison Aff., at 5, ¶ 15) (R. p. 1094).

Similarly, the letter of January 14, 2019, from Appellant's counsel to MPS's counsel prior to the mediation in this case is not evidence of any type of improper motivation by Ms. Mattison in raising the prospect of a derivative action. One prerequisite to bringing a derivative action claim is making a pre-suit demand on the corporation itself. S.C. Code Ann. §§ 33-44-1101 & -1103; Rule 23(b)(1), SCRCP. Appellant's efforts to comply with that prerequisite is not evidence of some improper motivation on her part when she later followed through on the demand. There is no competent evidence that Ms. Mattison improperly brought the derivative action Complaint as some type of strike suit. Under the court's twisted logic, if the pre-suit demand itself could be considered as evidence of bias on the part of the derivation action plaintiff against the company, no one could ever successfully bring a derivative action.

From the very outset of this dispute, after Ms. Mattison requested and received some of the financial information from MPS following her Severance Agreement, she has consistently alleged that the individual Respondents have taken out of MPS more than their fair share of the firm's profits in the form of excessive compensation and benefits and related-party transactions, which should ultimately be reflected in the fair valuation of the firm through the well-established process of normalization.

This litigation started with MPS filing the lawsuit against Ms. Mattison, not the other way around. Respondents cannot use the filing of their own pre-emptive lawsuit as a basis for saying that Ms. Mattison cannot bring the derivative action because she is already engaged in litigation with MPS. See Vanderbilt v. Geo-Energy Ltd., 725 F.2d 204, 208 (3d Cir. 1983) ("[H]ere it was the corporate defendants who initiated the first round of litigation. Under these circumstances less weight should be given to a corporate defendant's claim for the disqualification of the representatives

of the shareholder class where the corporate defendant was the one who initiated the litigation about which it now complains.").

The circuit court's reliance on cases like Zarowitz v. BankAmerica Corp., 866 F.2d 1164 (9th Cir. 1989), Smith v. Ayers, 977 F.2d 946 (5th Cir. 1992), Recchion v. Kirby, 637 F. Supp. 1309 (W.D. Pa. 1986), and Khanna v. McMinn, No. Civ. A., 20545, 2006 WL (Del. Ch. Ct. May 6, 2006), is simply unavailing.

The case of Zarowitz v. BankAmerica Corp. was an appeal from an approval of a settlement in a derivative action case. The intervenor-appellant in that case was the sole shareholder who objected to the settlement, primarily because the settlement would have had preclusive effect on his pending wrongful termination case against the bank. In dicta, the Court stated that the intervenor would not have been qualified under Fed. R. Civ. P. 23.1 from bringing a derivative action against the bank because of his obvious conflict of interest. 866 F.2d at 1166. The court noted that the appeal "borders on the frivolous." Id. The Zarowitz case offers nothing of value in the analysis of this case.

In Smith v. Ayers, the court stated that "A catalog of the various lawsuits between these two parties and their affiliates would consume well over a full page. . . . While those lawsuits bear no direct relationship to the instant case, they suggest the virulent antagonism [plaintiff] holds for [defendant]." 977 F.2d at 949. The Smith court stated that "the trial court should beware allowing a derivative suit to proceed where the 'representative could conceivably use the derivative action as 'leverage' in other litigation.'" Id. at 949 (emphasis added) (quoting Blum v. Morgan Guar. Trust Co., 539 F.2d 1388, 1390 (5th Cir. 1976)). In addition, the plaintiff in the Ayres case owned an "infinitesimal" stake of 1/10,000,000th of the defendant company's authorized shares. Id. at 948.

Here, this lawsuit is the only legal dispute Ms. Mattison has ever had with MPS or its officers or managing members; there is no "other" litigation between the parties. Furthermore, Ms. Mattison is the eighth largest owner of the firm, not an "infinitesimal" stakeholder in the company.

The instant case is also nothing like the facts in the unpublished case of Khanna v. McMinn, where the plaintiff was a disgruntled former general counsel of the company, who had been terminated amidst charges of sexual impropriety. The court disqualified Mr. Khanna from serving as a derivative action plaintiff for two reasons: (1) he was ethically disqualified from bringing suit relating to issues that were substantially related to his prior representation of the corporation as its general counsel; 2006 WL 1388744, at * 41; and (2) "a substantial likelihood exists that the representative action is 'not being maintained for the benefit of the shareholders.'" Id. at * 43. The court noted that the plaintiff's "employment dispute with [the defendant company] has impaired [his] capacity to vindicate shareholders' best interests." Id.

Here, by contrast, Ms. Mattison was not and is not a disgruntled employee, despite the unsubstantiated allegations to the contrary. She was able to reach an amicable settlement of her employment-related claims with the help of undersigned counsel, without animosity or litigation, specifically reserving the issue of the valuation and buy-out of her membership units. The oft-repeated, rank speculation of Respondents' counsel is clearly not sufficient to disqualify Ms. Mattison from continuing her derivative claims. There is no competent evidence in the record to support the circuit court's finding that Ms. Mattison is a "disgruntled" former employee of MPS who is "pursuing this derivative action for her own interests, and not to vindicate the interests of other members of MPS." (Summary Judgment Order, at 14) (R. p. 68). As Ms. Mattison testified in her Affidavit, she does not "harbor any animosity or ill will towards MPS or any of the minority

shareholders of the firm for how [she] was treated in being forced out of the firm." (Mattison Aff., at 6, ¶ 18) (R. p. 1095). She plainly testified that she amicably resolved any employment-related disputes on terms that she believes to be "fair and equitable." (Id.) (R. p. 1095).

The case of Recchion v. Westinghouse Elec. Corp. is also inapplicable to the situation here. In Recchion, the plaintiff was a former employee in Westinghouse's accounting department who had been asked to resign from the company in April 1980 for improperly approving excessive expenditures of company funds. The plaintiff purchased one share of Westinghouse in April 1983 (out of more than 174 million outstanding shares), after he and his wife had already brought suit against Westinghouse for wrongful termination in September 1982. The plaintiff in Recchion bought his one share for the sole purpose of trying to establish standing to bring a subsequent derivative action lawsuit. Recchion, 637 F. Supp. at 1312. Not surprisingly, the court had no trouble in dismissing the case after a specific hearing about the plaintiff's adequacy as a representative on the derivative action.

There is no "other litigation" pending between Ms. Mattison and MPS that might affect or compromise the vigor with which she pursues the derivative action. Both the derivative action and the underlying counterclaims she has asserted in the original action have consistent a objective: to achieve a true fair valuation of her shares in the company. These goals are not antagonistic with any interests of the minority members, who would benefit substantially if Ms. Mattison is successful in her derivative action. Only the individual Respondents, who have allegedly taken from the company more than they rightfully should have for years, would have conflicting interests with Ms. Mattison (as well as the other minority members in this case.)

The circuit court used an odd phrase in its Summary Judgment Order–"additional sustaining

grounds"–at the end of the Order to tick off a hand-full of other factual findings that allegedly demonstrate a conflict between Ms. Mattison and the other minority members of MPS. (Summary Judgment Order, at 14) (R. p. 68). None of these issues would preclude Ms. Mattison from fairly and adequately pursuing the derivative action here. There is no competent evidence in the summary judgment record that Ms. Mattison is seeking to divest any members of MPS of their ownership interests as part of this lawsuit. In fact, Ms. Mattison has repeatedly offered to sign whatever paperwork would be necessary to ratify the member status of individuals who were purportedly made members of MPS after her separation of employment from the firm. As Ms. Mattison clearly stated in her Affidavit of May 14, 2020, "My intention in filing the Counterclaims against MPS is not to strip any current shareholder or members of MPS of their partnership status. Although my research shows that Section 33-44-404(c)(7) requires unanimous consent of all members of an LLC to admit new members, **I have offered to sign whatever documents would be necessary to ratify the admission of any current members of MPS**." (Mattison Aff., at 7-8, ¶ 26) (R. pp. 1096-1097) (emphasis in original). Ms. Mattison brought her Counterclaims against MPS to "ensure that MPS follows its original Operating Agreement," which plainly requires that any amendments to the operating agreement that affect the voting or financial interests of a member must be passed by unanimous vote. (Operating Agreement) (R. p. 1052).

Ms. Mattison is also not "trying to undue agreements, resolutions, and transactions that every other member voted on and supported" as found by the circuit court. (Summary Judgment Order, at 14) (R. p. 68). The derivative action is simply not based on Ms. Mattison's "dissatisfaction with how the other members believe the company should be run," despite the court's unsupported assertion to that effect. (Id.) (R. p. 68). The fact that Ms. Mattison protested the MPS board election

in November 2019 has nothing to do with her derivative action, which was filed over a year earlier challenging prior acts by the individual Respondents, when they were solely in charge of managing the affairs of MPS.

4. THE CIRCUIT COURT ERRED IN CONSIDERING AND RELYING ON CONFIDENTIAL SETTLEMENT COMMUNICATIONS THAT WERE INADMISSIBLE UNDER RULE 408, SCRE, WHEN THE COURT DETERMINED THAT APPELLANT WAS TRYING TO USE THE DERIVATIVE ACTION SOLELY AS LEVERAGE TO EXTORT AN ARTIFICIALLY HIGH VALUE FOR HER OWNERSHIP INTERESTS IN THE RESPONDENT LLC.

The circuit court also erred in considering evidence submitted in Respondents' summary judgment brief that improperly revealed the substance of pre-litigation settlement discussions, which is clearly inadmissible evidence. During the summary judgment hearing on May 12, 2020, the court specifically referenced that fact that Appellant's original demand for the value of her shares prior to mediation was $829,000, in response to MPS's offer to pay her $267,000 for her units. (Hearing transcript at 8, ll. 17-24) (R. p. 315) ("[T]he biggest thing that I've seen is whether or not Ms. Mattison could perform as a fiduciary with her underlying claim for increased [equity] from 829,000 to 267,000. And that, quite frankly, based on prior submissions in the record, that this derivative action is purely leverage[] to increase the amount of her take."). During the hearing, Appellant's counsel objected that it was improper for Respondents' counsel to have disclosed the specific numbers under Rule 408, SCRE. (Id. at 9, ll. 4-7) (R. p. 316).

Rule 408 of the South Carolina Rules of Evidence provides, "Evidence of . . . accepting or offering or promising to accept, a valuable consideration or attempting to compromise a claims which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise

negotiations is likewise not admissible." Rule 408, SCRE.

Ms. Mattison has respected the confidentiality of the mediation process and refused to disclose the specific offers and counter-offers that were discussed during the mediation on February 20, 2019. In her Affidavit, she stated, "Although I understand that I am not allowed to disclose the substance of anything that occurred during the mediation, I believe that I attended the mediation and participated in good-faith in attempting to resolve the case for substantially less than the January 14 demand letter that Mr. Rothstein had previously conveyed." (Mattison Aff., at 5, ¶ 16) (R. p. 1094). It was improper for Respondents' counsel to argue based on the initial negotiation numbers that Ms. Mattison raised the specter of a derivative action lawsuit solely as leverage to obtain higher than fair value for her shares. Ms. Mattison further testified in her affidavit, "I was not seeking any additional value or 'premium' on the value of my shares to 'purchase my silence' with respect to the possible derivative shareholder claim." (Id. ¶ 15) (R. p. 1094).

The circuit court made the following finding, which is not supported by any evidence in the record: "Mattison, by her own admission, is using the 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." (Summary Judgment Order, at 11) (R. p. 65). The court has obviously relied on Respondents' counsel's repeated assertions that Ms. Mattison is trying to hold the company hostage through the derivative action; yet Ms. Mattison has never made any type of corresponding "ransom" demand upon Respondents since the commencement of this case.

The circuit court concludes, "Only when such threats failed did Mattison choose to bring the derivative action." (Summary Judgment Order at 13) (R. p. 67). In making this statement, the circuit

court overlooked the indisputable fact that MPS, not Ms. Mattison, started this litigation. Appellant's counterclaims and third-party derivative action were asserted in a defensive posture as compulsory counterclaims against MPS and as necessarily related claims that are indispensable in setting the proper fair value of her membership interests in the LLC.

5. THE CIRCUIT COURT FAILED TO VIEW THE FACTS AND INFERENCES IN THE RECORD IN THE LIGHT MOST FAVORABLE TO APPELLANT, AS REQUIRED ON RESPONDENTS' MOTION FOR SUMMARY JUDGMENT, BY DISREGARDING STATEMENTS MADE IN APPELLANT'S VERIFIED PLEADINGS AND SUPPLEMENTAL AFFIDAVIT.

In the order granting summary judgment to Respondents on the derivative action, the circuit court stated, "Mattison has presented no facts, by affidavit or otherwise, to support her allegations against the Third-Party Defendants." (Summary Judgment Order at 9) (R. p. 63). The court erred in disregarding Ms. Mattison's Affidavit filed on May 14, 2020, as well as the fact that her Amended Answer, Counterclaims, and Third-Party Complaint was actually verified by Ms. Mattison. A verified pleading is the equivalent of an affidavit for purposes of summary judgment. See Dawkins v. Fields, 354 S.C. 58, 67, 580 S.E.2d 433, 438 (2003).

The procedural posture of this case is on a motion for summary judgment filed by Respondents after a very limited discovery. Ms. Mattison's Verified, Amended Answer, Counterclaims, and Third-Party Complaint contains very detailed allegations about the underlying self-dealing transactions engaged in by Third-Party Defendants. (Verified, Amended Answer, Counterclaims, and Third-Party Complaint, at 7-25, ¶¶ 35-124) (R. pp. 125-143). All of these allegations must be taken as true on Plaintiff's and Third-Party Defendants' Motion for Summary Judgment. Furthermore, Ms. Mattison submitted a Supplemental Affidavit on May 14, 2020, which

contains additional sworn testimony about other facts, which again should have been accepted as true by the court. Ms. Mattison's Affidavit confirms that she can fairly and adequately represent the interests of similarly situated minority members in enforcing the rights of MPS against Third-Party Defendants: "In bringing this Derivative Action, I understand that I have a fiduciary duty to act in the interests of the firm and similarly situated minority members. I have conscientiously and diligently attempted to carry out my fiduciary obligations in this case by doing independent research on derivative actions and by personally attending every deposition and hearing in this case thus far." (Mattison Aff., at 7, ¶ 23) (R. p. 1096). For the circuit court to find that "Mattison has presented no facts, by affidavit or otherwise, to support her allegations against the Third-Party Defendants," (Order at 9) (R. p. 63), is demonstrably wrong, especially on a motion for summary judgment.

6. THE CIRCUIT COURT ERR IN REFUSING TO CONSIDER THE "CLASS OF ONE" ARGUMENT IN A DERIVATIVE ACTION WHERE APPELLANT IS THE ONLY MEMBER OF THE RESPONDENT LLC WHO IS NOT A CURRENT EMPLOYEE OF THE COMPANY AND, THEREFORE, IS THE ONLY PERSON WHO COULD BRING SUCH A CLAIM WITHOUT FEAR OF RETALIATION.

The circuit court also gave no consideration to the "class of one" derivative action theory argued by Appellant's counsel in the alternative. Even if no other member of MPS is expressly willing to join her case, Ms. Mattison could still represent herself as a "class of one" in this case as the only member who is no longer an active employee of MPS. In this narrower category of "similarly situated" members, Ms. Mattison is actually in the unique position of being able to challenge the actions of the individual Respondents, without fear of retaliation or employment-related retribution. Even Mr. Jacobs and Ms. Myers acknowledged that fact in their depositions. (Jacobs Depo., at 171, ll. 8-15) (R. p. 453) ("Q. You understand that Ms. Mattison is the only

current member of the firm who is not presently employed by McMillan Pazdan Smith, right? A. I do understand that, yes, sir. Q. So she can make the allegations that she's made without fear of losing her job, isn't that right? A. I understand your question. Yes."); (Myers Depo., at 33, ll. 15-22) (R. p. 460) ("Q. Well, she doesn't have to worry about being retaliated against by one of the managing members, does she? THE WITNESS: "That is true, but that is not – that is not something that – I don't think anyone would be afraid of within our firm.").

The South Carolina Limited Liability Company Act and Rule 23(b)(1), SCRCP specifically contemplate that a sole shareholder/member can bring a derivative action without the express support of other members of the corporation/LLC. See S.C. Code Ann. § 33-44-1101 ("A member [not two or more members] of a limited liability company may maintain an action in the right of the company . . . .") (emphasis added); Rule 23(b)(1), SCRCP ("In a derivative action brought by one or more shareholders or members . . . .") (emphasis added). If the South Carolina legislature or the Supreme Court intended to require other owners to join a derivative action, the language of the statute and rules would have used the plural, not the singular, form of the words member or shareholder.

Numerous courts from around the country have recognized that a single shareholder in a small or closely held corporation can bring a derivative action claim without being joined by any other shareholders. This so-called "class of one" derivative action is actually fairly common in small or closely held corporations. For example in Angel Investors, LLC v. Garrity, 216 P.3d 944 (Ut. 2009), the court recognized that "the nature of a closely held corporation, where there is often a small number of shareholders and many of those may have close ties to each other, lessens the likelihood that a minority shareholder will speak out against corporate malfeasance." Id. at 951. The Garrity

court stated, "In light of the greater vulnerability to malfeasance that is present in closely held corporations, we hold that a sole dissenting shareholder in a closely held corporation qualifies as a class of one for purposes of derivative standing when that shareholder (1) seeks by its pleading to enforce a right of the corporation and (2) does not appear to be similarly situated to any other shareholder." Id.; see also Jordan v. Bowman Apple Prods. Co., 728 F. Supp. 409, 412 (W.D. Va. 1990) ("Rule 23.1 places no minimum numerical limits on the number of shareholders who must be 'similarly situated.' In appropriate circumstances a single shareholder may be situated in a unique position and thus constitute a legitimate 'class of one.'"); Brandon v. Brandon Const. Co., 776 S.W.2d 349, 352 (Ark. 1989) ("The fact that the appellant is the only person willing to continue this suit does not automatically disqualify her from individually maintaining a derivative action. The first sentence of Rule 23.1 refers to 'a derivative action brought by one or more shareholders or members to enforce a right of a corporation . . . .' If the rule intended to prevent one person from maintaining such an action, it would have been simple enough to require that an action be brought by 'two or more shareholders.'"); Larson v. Dumke, 900 F.2d 1363, 1368 (9th Cir. 1990) ("Although the cases are not uniform, we are persuaded that a single shareholder may bring a derivative suit."); Halsted Video, Inc. v. Guttillo, 115 F.R.D. 177, 179 (N.D. Ill. 1987) ("Rule 23.1 does not require that derivative action plaintiffs have the support of a majority of the shareholders or even that they be supported by all of the minority shareholders. The true measure of adequacy of representation under Rule 23.1 is not how many shareholders the plaintiff represents but rather how well the representative plaintiff advances the interests of similarly situated shareholders."); HER, Inc. v. Parenteau, 770 N.E.2d 105, 112–13 (Ohio Ct. App. 2002) ("The fact that the only other shareholder in Stonebridge directly opposes this litigation does not preclude a finding that appellant can fairly

and adequately represent similarly situated shareholders.").

The circuit court rejected out of hand Appellant's argument that she could be considered a "class of one" under the derivative action because she is the only member of MPS who is not also a current employee of the company and, therefore, is the only person who could bring such a claim without fear of job-related retaliation. Not only did Ms. Mattison have substantially greater access to the firm's financial records than other minority members, but also she is no longer dependent on the discretion of the individual Respondents for her livelihood or for the progression of her career as an architect. Every other minority member of MPS is "under the thumb" of the individual Respondents, who had been given the sole power to make conclusive decisions about firing employees of the firm or to make decisions regarding the compensation and bonuses of the members of the firm. This inherently coercive situation demonstrates that Ms. Mattison is not only a fair and adequate representative of the interests of the firm, she is the <u>only</u> minority member who could realistically be expected to bring these allegations to light and to hold the individual Respondents accountable for their years of self-dealing.

During the oral argument on Respondents' Motion for Summary Judgment, when Defendant's counsel tried to raise the "class of one" argument that many courts around the country have recognized and adopted in derivative actions, the circuit court summarily dismissed it: "I don't buy that argument, but you can try it. And I thought it was very clever, but I don't buy the fact that she's the only similarly situated being the nonemployee shareholder. I don't buy that. Okay." (Hearing Tr., at 12, ll. 7-11) (R. p. 319).

The circuit court apparently accepted Respondents' repeated assertions that Ms. Mattison's derivative action is contrary to the wishes of 98% of the membership of MPS. In doing so, the

circuit court disregarded the crucial fact that the individual Respondents themselves make up over 75.6% of the outstanding shares of MPS. Of the truly disinterested members in the derivative action–the remaining 24.4% minority owners collectively–Ms. Mattison holds almost 10% of those membership units and is the fourth largest minority shareholder in the firm, again not including the individual Respondents.

The circuit court's ruling would effectively preclude Appellant or any other minority member of MPS from holding the individual Respondents accountable for the breaches of fiduciary duty alleged in Appellant's derivative action. The claims at issue could not have been brought directly by Appellant in her individual capacity, because such claims belong to the company, and the alleged wrong-doing adversely affects Appellant only because of her interests as a member of the company. See Ward v. Griffin, 295 S.C. 219, 221, 367 S.E.2d 703, 703-04 (Ct. App. 1998) ("If misconduct by the management of a corporation has caused a particular loss to an individual stockholder, the liability for the mismanagement is an asset of the individual stockholder. Of course, a suit based on the misconduct can be brought by the individual stockholder. If, on the other hand, the misconduct has caused a loss to the corporation, and not to any particular stockholder, the liability is an asset of the corporation, ordinarily remediable by a suit in the name of the corporation."); see generally Cory Manning et al., "Dead on Arrival: The Perils of Litigating an Aggrieved Shareholder's Breach of Fiduciary Duty Claim," SC Lawyer 39, 40 (Mar. 2020). Here, because Ms. Mattison was injured by the self-dealing transactions of the individual Respondents, just like every other minority member of the firm was, a derivative action in the name of the LLC is her only potential remedy, even if the other members have purportedly renounced it.

7. THE CIRCUIT COURT IMPROPERLY LIMITED THE SCOPE OF DISCOVERY IN THIS CASE WHERE THE MINORITY MEMBERS' KNOWLEDGE (OR LACK THEREOF) ABOUT THE UNDERLYING FACTS OF THE DERIVATIVE ACTION WAS CRUCIAL TO APPELLANT'S ALLEGATIONS THAT THOSE IN CHARGE OF THE MANAGEMENT OF THE LLC HAVE INTENTIONALLY CONCEALED EVIDENCE OF THEIR OWN MISCONDUCT FROM THE OTHER MEMBERS OF THE FIRM.

Although the circuit court based its summary judgment ruling almost entirely on the minority members' boilerplate statements about their subjective view of the merits of Defendant's alleged derivative action, the court refused to allow Appellant to conduct sufficient discovery about the merits of the derivative claims or to question the minority members about crucial elements of derivative claims. Ms. Mattison's derivative action is not based on her own "subjective belief that the Third-Party Defendants are overpaid," as the circuit court incorrectly stated. (Summary Judgment Order, at 9) (R. p. 63). If Respondents' counsel have been telling the other minority members of MPS that this is "the entirety of her evidence," it is no wonder why all of the minority members signed the flimsy statements that Respondent Cousins asked them to sign. Ms. Mattison's derivative action is based on financial information that she alone (among the minority members) has been provided access to following the separation of her employment, which information shows a systematic practice of self-dealing by the individual Respondents in setting their own salary, bonuses, and benefits, as well as approving related-party transactions like the lease of the Spartanburg Office that are objectively unreasonable. Perhaps most concerning is the extent to which the individual Respondents have concealed their self-dealing by not being transparent with the minority members or submitting their compensation to a vote of the requisite number of disinterested members, as required by the MPS Operating Agreement.

In response to Respondents' Motion for Summary Judgment on the derivative action, the undersigned counsel for Appellant filed a Rule 56(f) Affidavit asserting that Appellant did not have sufficient opportunity to complete discovery necessary to address the affirmative defense alleged by Respondents that Ms. Mattison "does not fairly and adequately represent the interests of . . . members who are similarly situated in enforcing the rights of the [company]." Rule 23(b)(1), SCRCP. (R. pp. 875-881). Counsel for Respondents have thwarted Ms. Mattison's legitimate efforts to conduct necessary discovery in this matter at almost every turn, unilaterally attempting to limit Appellant to three depositions, instructing the witnesses who were deposed not to answer valid, relevant questions, refusing to provide key financial information and to supplement discovery responses, blocking crucial third-party subpoenas, and refusing to allow a Rule 34 inspection of the Spartanburg office to allow Appellant's expert witness to assess the condition of the building and measure the square footage of the office space and common areas of the building. Respondents' obvious and extensive efforts to stone-wall Appellant's attempted discovery in this case begs the question: if the individual Respondents have nothing to hide from the minority members, why are they so adamant about keeping everything confidential?

For Respondents to argue in their summary judgment brief that Ms. Mattison's "subjective belief" about the Third-Party Defendants' compensation "sums up the entirety of her evidence" (Pl.'s Br., at 7) (R. p. 1019), is particularly galling because Respondents and their counsel have prevented Ms. Mattison from conducting sufficient discovery on the underlying merits of this case.

The circuit court did not bifurcate discovery in this case, but sua sponte placed limits on the subject matters for permissible discovery:

> The Court finds that there are two relevant matters for discovery in this action

at this time. First, with respect to the individual dispute between MPS and Mattison, the parties' claims and defenses relate to the valuation of Mattison's membership units in the firm. Second, with respect to the derivative action brought by Mattison, the Court has not yet determined whether Mattison fairly and adequately represents the interests of the other members of MPS, as required by Rule 23(b)(1), SCRCP. As stated in the Court's prior Orders, this issue has been held in abeyance pending further discovery. Thus, as it relates to the derivative action, discovery shall be conducted at this time only on the issue of whether Mattison fairly and adequately represents the interests of other members.

Order of Nov. 22, 2019, at 4 (R. p. 36).

In Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991), the South Carolina Supreme Court stated, "Since it is a drastic remedy, summary judgment 'should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues.' This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery." Id. at 112, 410 S.E.2d at 543 (quoting Watson v. Southern Ry. Co., 420 F. Supp. 483, 486 (D.S.C. 1975)). The Baughman court noted that a party asserting that a summary judgment motion is premature must demonstrate two elements: (1) "a likelihood that further discovery will uncover additional evidence relevant to the [material issues in dispute] and that they are not merely engaged in a 'fishing expedition'"; and (2) that the non-moving party was "not dilatory in seeking discovery on [the material issues in dispute]." Id. at 112, 410 S.E.2d at 544 (quotations omitted).

Rule 56(f), SCRCP provides, "Should it appear from the affidavits of a party opposing the motion [for summary judgment] that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just." Rule 56(f), SCRCP.

The circuit court largely rejected Appellants' counsel Rule 56(f) request for additional time to conduct discovery in this case on the issue of whether she can fairly and adequately represent the interests of the other, similarly situated minority members in pursuing the rights of MPS in the derivative action. At the conclusion of the hearing on May 12, 2020, the court only allowed Appellant the opportunity to take three additional depositions on minority members, further limited to two issues: (1) whether they wanted a derivative action to proceed in the first place, and (2) if so, whether they wanted Ms. Mattison to serve as the representative of such an action. Appellant never even had an opportunity to take the deposition of Respondent Cousins, as expressly requested in the Rule 56(f) Affidavit.

8. THE CIRCUIT COURT ERRED IN REFUSING TO ADDRESS THE INTRACTABLE CONFLICT OF INTEREST THAT EXISTS IN THE SAME LAW FIRMS' REPRESENTING THREE DISTINCT CONSTITUENCIES SIMULTANEOUSLY IN THE DERIVATIVE ACTION: (A) THE RESPONDENT LLC, (B) THE INDIVIDUAL RESPONDENTS, AND (C) THE MINORITY MEMBERS OF THE RESPONDENT LLC, INCLUDING THE SIX MEMBERS WHO WERE DEPOSED BY APPELLANT'S COUNSEL.

Finally, the circuit court erred in refusing to address the intractable conflict of interest that exists in having the same law firms represent three distinct constituencies simultaneously in the derivative action: (a) the Respondent LLC, (b) the individual Respondents accused of self-dealing to the detriment of the Respondent LLC; and (c) the minority members of the Respondent LLC, including the six who were deposed by Appellant's counsel. The circuit court's decision to hold Appellant's Renewed Motion to Disqualify Counsel in abeyance pending a decision on the preliminary issue of whether Ms. Mattison could fairly and adequately represent the interests of

similarly situated minority members in enforcing the rights of the LLC allowed the individual Respondents (with the aid of Respondents' counsel) to exploit the intractable conflict of interest to obtain the Member Statements and effectively to control the deposition testimony of the six minority members.

Ironically, perhaps the most egregious example of the conflict is Respondent Cousins's clear misrepresentation to the minority members that MPS had hired attorney Bill Higgins as an "independent counsel" to advise them about the derivative action. Mr. Higgins was actually hired by Respondents' counsel earlier in this case as an expert witness in ethics law to submit an affidavit opining that there was no conflict of interest between or among the Third-Party Defendants, MPS, and the minority members of MPS arising out of the allegations in Ms. Mattison's derivative action lawsuit. For Respondents' counsel to meet with each of the minority members to prepare them for depositions and then to ask the same leading, self-serving questions at the conclusion of each deposition would be akin to defendant's counsel in a class action lawsuit being allowed to communicate directly with the members of the putative class to get them to repudiate the allegations in the class action. Even if no direct threat of retaliation or reprisal was ever made by Respondents or their counsel, the inherent coercion that was present in this situation cannot be ignored or marginalized.

CONCLUSION

For all of the foregoing reasons, Appellant respectfully requests that this Court reverse the Circuit Court's order granting summary judgment against Appellant on her derivative action.

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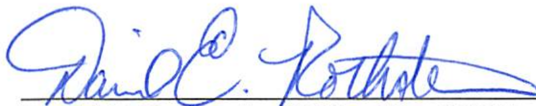
Jun 10 2021
SC Court of Appeals

CERTIFICATION OF APPELLANT'S COUNSEL

The undersigned counsel for Appellant hereby certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR, and that no changes were made from the Initial Brief of Appellant other than the correction of obvious typographical errors and misspellings.

Respectfully submitted,



June 10, 2021

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