RECEIVED
Jun 10 2021
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 REPLY BRIEF OF APPELLANT

David E. Rothstein, SC Bar No. 66295
Rothstein Law Firm, PA
1312 Augusta Street
Greenville, SC 29605
drothstein@rothsteinlawfirm.com
(864) 232-5870
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

COURT RULES

OTHER AUTHORITIES

Appellant, Donza H. Mattison (hereinafter "Ms. Mattison"), by and through her undersigned counsel, hereby submits this Final Reply Brief to respond to the arguments made in Respondents' Brief. Rather than directly addressing the eight specific issues on appeal raised by Appellant, Respondents instead attempt to recast the issues presented, ignore material issues raised by Appellant, such as Respondents' counsels' obvious and inherent conflict of interest, and allege additional sustaining grounds that have no basis in law or fact, especially on an appeal from a summary judgment order in Respondents' favor. Conspicuously absent from Respondents' discussion of the applicable standard of review is the well-established requirement that all facts and inference in the record must be taken in the light most favorable to the non-moving party–here, Ms. Mattison–and that defeating a motion for summary judgment merely requires a scintilla of evidence to support the claims at issue. See, e.g., Abdelgheny v. Moody, 432 S.C. 346, 349, 852 S.E.2d 225, 227 (Ct. App. 2020) ("We review a grant of summary judgment using the same yardstick as the trial court: we view the facts in the light most favorable to [plaintiff], the non-moving party, and draw all reasonable inferences in her favor. . . . Summary judgment is a drastic remedy to be invoked cautiously and must be denied if [plaintiff] demonstrates a scintilla of evidence in support of her claims.").

Respondents' assertion that Ms. Mattison "had for many years opposed nearly every business decision made by the otherwise unanimous vote of MPS's members," (Br. of Resps., at 1), is pure hyperbole. Although Ms. Mattison acknowledges that she has never been shy about raising serious questions or concerns about the operation of the firm (which makes her particularly well-suited to serve as a derivative action plaintiff), Respondents' efforts to portray her as a disgruntled former employee or a dissident member of the LLC are grossly unfair, especially on Respondents' motion

for summary judgment.

Furthermore, there is no such thing as "otherwise unanimous"[1] in either the South Carolina Uniform Limited Liability Company Act of 1996, as amended (hereinafter "LLC Act") or in MPS's governing documents. Pursuant to MPS's Operating Agreement,[2] certain business decision of the LLC, such as proposed amendments to the operating agreement that affect the voting rights or financial interests of a member or that ratify acts taken in contravention of the Operating Agreement, can only be effective if they garner unanimous approval of all members. (MPS Operating Agreement, at 8, Sec. 4.2(d)) (R. p. 1052). Similarly, the LLC Act also requires unanimous consent of all members to amend the operating agreement, to ratify or authorize an act or transaction that would otherwise violate the duty of loyalty, or to admit new members to the firm. S.C. Code Ann. § 33-44-404(c)(1), (2), and (7).

The derivative action filed by Ms. Mattison against the individual Respondents does not attempt to disenfranchise any member of the firm or to divest anyone of their ownership shares in the firm, as falsely asserted by Respondents. (Br. of Resps., at 2). The derivative action seeks only to require the managing members of the firm and the COO to return to the firm the value of the insider, self-dealing transactions they engaged in in violation of their fiduciary duties to the firm.[3]

---

[1]See Br. of Resps., at 1, 2, 3, 21, 22.

[2]The original Operating Agreement of MPS dated September 25, 2009 is the only viable operating agreement, at least with respect to any provisions affecting the voting rights or financial interests of the members, because no proposed amendment has ever received unanimous approval of the members.

[3]Respondents seem to be conflating the derivative action with the counterclaims Appellant raised against MPS. Appellant's Third Counterclaim seeks, among other relief, a declaratory judgment that various attempts to amend the LLC's operating agreement are not valid because they were not unanimously consented to and that purported actions taken by the managing members of

This remedy is perfectly consistent with the financial interests of the LLC itself and of the minority members of the LLC other than the individual Respondents.

As set forth in further detail below, there is no legitimate basis for disqualifying Appellant from bringing the derivative action she filed on behalf of the LLC. Accordingly, the lower court's order granting summary judgment in favor of Respondents should be reversed.

REPLY TO RESPONDENTS' COUNTER-STATEMENT OF THE CASE AND THE FACTS

Appellant takes issue with a number of representations made by Respondents in their Counter-Statement of the Case and the Facts, particularly when the Court must take the facts of record and all inferences from those fact in the light most favorable to Ms. Mattison. First of all, Ms. Mattison was not bitter or disgruntled about the separation of her employment with MPS. She was fully satisfied with the Severance Agreement she negotiated with MPS though her counsel. As she testified in her Affidavit, "I do not harbor any animosity or ill will towards MPS or any of the minority shareholders of the firm for how I was treated in being forced out of the firm. In fact, I believe that my attorney and I were able to negotiate a fair and equitable resolution relating to the separation of my employment from the firm." (Mattison Aff., at 6, ¶ 18) (R. p. 1095). There is nothing in the record to refute this testimony by Ms. Mattison.

Second, Respondents mischaracterize the substance of the Severance Agreement and General Release, which was plainly intended to address only Appellant's employment-related claims against MPS and its officers and managing members. At least four separate provisions in the Severance Agreement make clear that Ms. Mattison and MPS were only addressing any possible legal claims

---

the LLC in violation of the original Operating Agreement and the LLC Act are null and void.

relating to her employment with, or separation from employment with, the firm, not her financial interests as a member/owner of the LLC. The preamble to the Severance Agreement provides, in part, that "the Company and Employee do not anticipate that there will be any disputes between them or legal claims arising out of Employee's separation from employment, but nevertheless, desire to ensure a completely amicable parting and to settle fully and finally any and all differences or claims that might arise out of Employee's employment." (Severance Agreement, at 1) (R. p. 147) (emphasis added). The Severance Agreement expressly carves out the claims Appellant raised in her counterclaims and derivative action in this case: "***provided, however, that nothing in this Agreement shall have any effect on [Mattison's] rights and remedies relating to her dissociation from the Company.***" (Id. at 5, ¶ 4) (R. p. 151) (emphasis in original). The Covenant Not to Sue in Section 5 of the Severance Agreement applies only to "the claims released and forever discharged pursuant to this Agreement." (Id. at 5, ¶ 5) (R. p. 151). The Severance Agreement also expressly provides, "Nothing in this Agreement is intended to have any effect on Employee's ownership rights or interests upon dissociation." (Id. at 8, ¶ 13) (R. p. 154) (emphasis added). Of course, one of the rights of ownership as a member of an LLC is the right to bring a derivative action in the name of the LLC. S.C. Code Ann. § 33-44-1101. Furthermore, the Severance Agreement provides, "Employee is not waiving rights or claims that may arise after the date this Agreement is executed, nor is Employee waving any rights or claims relating to her financial interests as a member or owner of the Company." (Severance Agreement, at 10, ¶ 19(j)) (R. p. 156) (emphasis added).

Third, Respondents wrongly assert that the Severance Agreement incorporates the 2015 Amended and Restated Operating Agreement of MPS to determine the value of Ms. Mattison's membership units. The only provision in the Severance Agreement regarding the valuation of Ms.

Mattison's membership units is found in the first two sentences of Paragraph 2(j): "The parties agree that Employee's dissociation from Company shall be treated as a Proper Dissociation with no penalty or reduction on the value of her financial rights. The parties agree that the value of Employee's membership units shall be mutually determined in early 2018 following the close of YR2017, with Company providing access to all current and prior year financial reports, tax returns, and other financial information as requested by Employee's counsel." (Id. at 2, ¶ 2(j)) (R. p. 148) (emphasis added). The provision about "mutually" determining value after disclosure of all relevant financial information is not found anywhere in the proposed 2015 Amended and Restated Operating Agreement, which Ms. Mattison never signed or approved. In other words, the valuation methodology expressly spelled out in the Severance Agreement is materially different from that provided for in the 2015 Amended and Restated Operating Agreement. Unfortunately, Respondents never provided all of the financial information requested by Appellant's counsel, nor did Respondents ever make an effort with Ms. Mattison to engage in negotiations to "mutually determine" the value of her membership units as required by Section 2(j) of the Severance Agreement. Instead, in early January 2018, approximately five or six weeks before the effective date of Appellant's resignation from the firm, Respondent Cousins, then COO of MPS, wrote to HDH Advisors stating that they were going to need a rush valuation because of the anticipated departure of a member of the firm in early 2018 (i.e., Ms. Mattison). The HDH Advisors valuation report is the amount Respondents ultimately insisted that Ms. Mattison accept for the redemption of her units.

From the very outset of this case, Respondents misled the circuit judge into believing that the Severance Agreement incorporated by reference the provisions in the 2015 Amended and Restated Operating Agreement for valuing a departing member's ownership interests in the firm.

A careful reading of the entirety of Paragraph 2(j) of the Severance Agreement reveals that the September 30, 2015 Operating Agreement governs the procedural aspects of "Proper Dissociation," not the actual valuation of Ms. Mattison's ownership interests upon her dissociation. Respondents repeat their same flawed argument here on appeal.

Fourth, the circuit court did not initially limit Appellant to taking the depositions of "three minority members of her choosing," as wrongly stated by Respondents. (Br. of Resps., at 10). In an informal telephone conference with counsel on the morning of December 13, 2019, in advance of the hearing on Appellant's Motion to Disqualify Counsel, which was scheduled for 2:00 p.m. that afternoon, the Judge McIntosh indicated that the six depositions that Appellant's counsel had noticed could proceed, but that such depositions would be limited to two issues: "(1) the valuation of Ms. Mattison's membership units in MPS, including possible normalizing entries for excessive compensation and bonuses paid to the managing members of the firm, as well as for related-party transactions such as the lease of the Spartanburg office; and (2) whether Ms. Mattison could fairly and adequately represent the interests of similarly situated members in enforcing the rights of MPS." (Letter of Dec. 16, 2019 summarizing court's oral ruling during telephone conference of Dec. 13, 2019) (R. p. 920). Respondents' counsel unilaterally attempted to limit Appellant to three depositions, filing their motion for summary judgment after the first three depositions, as well as filing a motion for protective order to prevent any further depositions from taking place. After the first summary judgment hearing on May 12, 2020, the court allowed Appellant to take the three remaining depositions from the original six that Appellant's counsel had initially noticed, but the court sua sponte limited those depositions even further to allow Appellant's counsel to explore only whether the minority members wanted a derivative action to proceed and, if so, whether they wanted

Ms. Mattison to serve as the representative in such an action. (Form 4 Order of May 15, 2020 and email from Judge McIntosh of May 15, 2020) (R. p. 40).

Fifth, Respondents repeatedly and inaccurately claim that both Appellant and her counsel have admitted to filing the derivative action for an improper purpose, namely as an effort to extort the individual Respondents into making a higher payout for her shares than fair market value. Respondents' mischaracterizations of Appellant's counsel's pre-suit letter of January 14, 2019, and of Appellant's counsel's colloquy with the court during the summary judgment hearings are flat wrong, even more so in the context of evaluating a summary judgment motion. Respondents' brief selectively edits the hearing transcript to give the false impression that Appellant's counsel conceded that the derivative action was improperly being used as leverage to force a higher buy-out of Appellant's membership units. Neither Appellant nor her undersigned counsel has ever admitted or even suggested that her derivative action was motivated by an improper purpose because it was not [FULL STOP]. The undersigned counsel for Appellant knows better than anyone what he meant when he said what he said during the summary judgment hearing. Respondents' effort to twist the words of Appellant's counsel is not a valid basis for summary judgment in their favor.

ARGUMENTS IN REPLY

1. RESPONDENTS CANNOT MEET THEIR BURDEN OF PROOF TO CHALLENGE APPELLANT'S CAPABILITY TO BE A FAIR AND ADEQUATE REPRESENTATIVE.

Respondents continue to push an argument that Appellant has the burden of proof on the "fair and adequate" representative issue. Respondents state in their brief that "Judge McIntosh correctly determined that Mattison could not clear this threshold hurdle." (Br. of Resps., at 15) (emphasis added). Similarly, Respondents later argue that "[t]he merits or demerits of [Mattison's] claim were

not before the court and were irrelevant until Mattison first cleared the threshold hurdle of proving her adequacy to bring the claim–a showing she failed to make." (Br. of Resps., at 25) (emphasis added). The overwhelming body of case law from other jurisdictions is clear that the burden of proof on this issue falls on the party opposing the derivative action, not on the party bringing the derivative action. In other words, Ms. Mattison is not the one who must jump over the hurdle to prove her adequacy to bring the derivative case. The "hurdle" is Respondents' obligation to clear.

Assuming that South Carolina appellate courts would adopt the eight-factor test articulated in the leading cases of Davis v. Comed, Inc., 619 F.2d 588 (6th Cir. 1980), and Larson v. Dumke, 900 F.3d 1363 (9th Cir. 1990), Respondents cannot demonstrate that Ms. Mattison should be disqualified from pursuing the derivative action here.

Under factor number one, there is no economic antagonism between Ms. Mattison and any of the other minority members of the firm. All of the firm (other than the individual Respondents, who then collectively owned a majority of over 75% of the outstanding member units) would benefit economically from a successful derivative action brought by Ms. Mattison. The situation presented here is nothing like the situation presented in Davis v. Comed, where the plaintiff brought a derivative shareholder suit seeking to have a contract between the corporation and a third-party to sell a hospital property rescinded so that he and his "cohorts" could acquire the property for themselves and develop the property "for their own benefit." 619 F.2d at 592. The Davis court stated, "In instituting this derivative action, Davis was supposed to be acting in the best interests of and for the benefit of the shareholders of Comed and C.M.S. when in truth he was not. Instead, he was acting for his own selfish interests and as a front for others whose interests were inimical to the interests of shareholders." Id. at 591-92.

Here, Ms. Mattison plainly recognizes her fiduciary duties to the firm and has acted consistently with those duties throughout this litigation. (Mattison Aff., at 7, ¶ 23) (R. p. 1096). If Ms. Mattison is ultimately successful in proving the merits of her derivative action, any recovery would directly benefit the firm and the minority shareholders; thus, her derivative claims do not present any antagonism with the economic interests of the other minority shareholders, but actually further those interests.

With respect to the second element, there is nothing about the remedies that Ms. Mattison seeks in her derivative action that would disqualify her from serving as a fair and adequate representative here. Ms. Mattison is not trying to rescind a corporate contract, like the plaintiff in Davis v. Comed, where the court specifically found that "Praying for rescission here is tantamount to an admission of ulterior motives." 619 F.2d at 597. Ms. Mattison seeks money damages from the individual Respondents to compensate the firm for excessive distributions and other benefits the managing members and the COO of the firm have taken out of the firm for their own, personal enrichment since late 2009, when MPS was formed.

There is also no indication here that Ms. Mattison "is not the driving force behind the litigation," under the third factor. Id. at 593-94. The Davis court highlighted a number of cases where the derivative action involved "competition between two entities in which the derivative plaintiff is involved." Id. at 594. Here, however, Ms. Mattison is not serving as a "front" for any other group or individuals, nor is she seeking to harm the firm financially or to advance the interests of a competing business.

Respondents have not even mentioned the fourth factor from Davis v. Comed because there is no question that Ms. Mattison is intimately familiar with the litigation. She has been particularly

conscientious and diligent in pursuing this matter, personally attending every proceeding in this case and advancing substantial sums of her own money in attorney's fees, expert fees, and other court costs. (Mattison Aff., at 7, ¶ 23) (R. p. 1096).

With respect to the fifth factor from Davis v. Comed, Ms. Mattison is not involved in any other litigation with Respondents, so she cannot possibly be using the derivative action as a means to gain an advantage in any collateral lawsuit. In fact, in the Severance Agreement with MPS, Ms. Mattison amicably resolved any potential legal claims that she might have had against the firm or its members relating to, or arising out of, her employment relationship with the firm. The only pending litigation between Ms. Mattison and Respondent MPS is the lawsuit that Respondent MPS itself brought against Ms. Mattison seeking to force her to accept a buy-out of her membership units for substantially less than she and her expert believe to be the true fair value of those units. MPS cannot use the fact that it started the litigation against Ms. Mattison as a basis for having her disqualified from pursuing a derivative action on behalf of the company in a defensive posture. In any event, Ms. Mattison's allegations in the derivative action are an integral part of the legal proceedings relating to the valuation of the company and her ownership interests in the company, because the remedy sought in the derivative action would substantially increase the value of the company overall and would lead to a higher unit price for all members of the firm. (Of course, the individual Respondents' personal financial positions would be negatively affected by a successful derivative action to the extent that they had to disgorge the proceeds of their years of self-dealing transactions).

As to the sixth factor from Davis v. Comed, Respondents have not identified (or even suggested) any alleged personal interests of Ms. Mattison whose relative magnitude as compared to

her interests in the derivative action would disqualify her from serving as a fair and adequate representative. Ms. Mattison is the eighth largest owner of the firm in terms of percentage of the outstanding units of MPS (fourth largest not counting the individual Respondents who are the alleged wrong-doers in the derivative action). Ms. Mattison plainly recognizes that she will only receive a pro-rata 2.278% of any benefits from the derivative action based on her ownership percentage of the firm; however, she also recognizes that, as a practical matter, she is the only minority member who can stand up to, and fight against the self-dealing of, the individual Respondents, because she is no longer dependent on the firm or its managing members for her professional livelihood or career advancement. (Mattison Aff., at 8-9, ¶¶ 29, 31) (R. pp. 1097-1098). This factor weighs heavily in favor of Ms. Mattison's suitability as a fair and adequate representative in the derivative action.

There is also nothing in the record in this case to establish any type of vindictiveness on the part of Ms. Mattison towards the defendants in the derivative action. The individual Respondents' own self-serving accusations that Ms. Mattison is a "disgruntled former employee" are not a sufficient basis for summary judgment, nor are the repeated, uncorroborated accusations to that effect from Respondents' counsel. As noted above in the Reply to Respondents' Counter-Statement of the Case and the Facts, Ms. Mattison's Affidavit squarely refutes any unsubstantiated allegation of vindictiveness on her part. (Mattison Aff., at 6, ¶ 18) (R. p. 1095). Ms. Mattison is understandably quite concerned about the evidence of wrong-doing she uncovered after she signed the Severance Agreement and was given limited access to detailed financial records of the firm that she had not seen before; however, her derivative action is not motivated by anything other than a desire to hold the managing members and COO of the firm accountable for years of lining their own pockets at the

expense of the firm.

The final factor from Davis v. Comed–and the primary factor relied on by the lower court in granting summary judgment for Respondents–is the apparent absence of express support for the derivative action from other members of the firm. The trial court's statement that "every member of MPS opposes Mattison's derivative action," (Order of Sept. 30, 2020, at 7) (R. p. 61), is not supported by competent evidence in the record and should not have been the driving basis for the court's determination that Appellant cannot be allowed to pursue the derivative action here. Appellant's arguments in reply about the inadmissibility of the unsworn statements and about the "class of one" theory are addressed in more detail below.

In sum, seven of the eight factors from the test articulated in Davis v. Comed weigh heavily in favor of Appellant's serving as the derivative action plaintiff in this case. The mere fact that no other minority member of MPS has actually expressed support for her derivative action is not the type of "strong showing" that Appellant's "interests are actually inimical to those [s]he is supposed to represent fairly and adequately," 619 F.2d at 593, that would be necessary to disregard all seven of the other factors as articulated by the court in Davis v. Comed. This is not the type of situation where there is a risk that the putative plaintiff would abandon her fiduciary duties to the represented members in the derivative action in favor of her own personal interests.

If the summary judgment ruling in favor of Respondents were upheld on appeal here, no minority member of MPS would ever be able to pursue these allegations of self-dealing by the individual Respondents that occurred prior to the end of Ms. Mattison's employment, because those

allegations would be barred by the three-year statute of limitations applicable to those claims.[4] In other words, Ms. Mattison's derivative claim is the only way the minority members' interests in these matters could ever be vindicated.

2. THE UNSWORN MEMBER STATEMENTS SHOULD NOT HAVE EVEN BEEN CONSIDERED BY THE TRIAL JUDGE ON SUMMARY JUDGMENT, MUCH LESS SHOULD THEY HAVE BEEN CONSIDERED TO BE DISPOSITIVE.

Respondents brazenly argue that "a trial court may consider and rely on unsworn declarations or written statements at the summary judgment stage of the proceedings." (Br. of Resps., at 20). Respondents' brief sheepishly contains a "see, e.g." citation to a footnote from the South Carolina Supreme Court's case of Byrd v. City of Hartsville, 365 S.C. 650, 654, n.2, 620 S.E.2d 76, 78, n.2 (2005), as supposed authority for this proposition. The Byrd case provides no support whatsoever for Respondents' argument. Respondents glaringly ignore the critical portion from footnote 2 of the Byrd opinion: "The parties stipulated that these unsworn statements would be admissible at the trial of this case." Id. (emphasis added). No such stipulation has ever been made here. Furthermore, the unsworn statements at issue in Byrd were not material to the summary judgment decision in that case.[5] By contrast, the trial court here necessarily relied on the unsworn statements of minority

---

[4]In addition, the other minority members would have lost Ms. Mattison's arguments for delaying the running of the statute of limitations based on the discovery rule or equitable tolling for fraudulent concealment.

[5]The Byrd case was an inverse condemnation case by an owner of some property that was part of a farm that had been designated as a National Historic Landmark ("NHL"). The City of Hartsville delayed consideration of the property owner's application to re-zone a small portion of the property in question because the City was concerned about possible loss of the historic farm's NHL designation with the National Park Service. The plaintiff in Byrd brought suit against the City alleging that the delay in rezoning his property amounted to a taking because the plaintiff lost a contract for the sale of the property that was contingent on the property being zoned commercial. The Supreme Court affirmed the grant of summary judgment in favor of the City because the

members in finding that "every member of MPS opposes Mattison's derivative action." (Order of Sept. 30, 2020, at 7) (R. p. 61). Footnote 2 from the Byrd opinion plainly was not intended to overrule Rule 56(e), SCRCP, which requires that proffered evidence in connection with a summary judgment motion must be submitted in the form of an affidavit, "made on personal knowledge " and "set[] forth such facts as would be admissible in evidence." Rule 56(e), SCRCP.

Respondents do not even respond to Appellant's argument that the depositions of the six minority members in the record established that the "Member Statements" are worthless because they are nothing more than acknowledgments about what the minority members do not know with respect to the merits of the derivative action. Ironically, Respondents' brief asserts that "[t]he merits or demerits of [Ms. Mattison's] claim were not before the court and were irrelevant until [she] first cleared the threshold hurdle of proving her adequacy to bring the claim–a showing she failed to make." (Br. of Resps., at 25); yet, the entire thrust of the Member Statements is that the minority members do not support Ms. Mattison's derivative action because they are not personally aware of any evidence that would support her allegations. If the merits of the derivative action are not relevant to the "fair and adequate" representation issue, the lower court should not have accepted the Member Statements' comments about the perceived lack of merit of those claims as the primary basis for concluding that the minority members do not support her derivative action.

---

plaintiff could not demonstrate that the relatively short delay in approving the zoning change amounted to a taking. Id. at 662, 620 S.E.2d at 82. The "unsworn statements" mentioned in footnote 2 of the Byrd opinion were from employees of the National Park Service to the effect that NHL status does not prohibit a property owner from developing the property in question. Id. at 654, n.2, 620 S.E.2d at 78, n.2.

3. MS. MATTISON DID NOT FILE THE DERIVATIVE ACTION FOR AN IMPROPER PURPOSE.

Respondents' main argument for challenging the suitability of Ms. Mattison's bringing the derivative action is that she allegedly filed her derivative action for the improper purpose of trying to gain leverage to force MPS to re-purchase her shares for an artificially high price. Without any citation to any evidence in the record, Respondents assert that Ms. Mattison "admitted she had brought [the derivative action] for an improper purpose, namely to gain leverage in her dispute with MPS regarding the valuation of her membership units." (Br. of Resps., at 16-17). The reason Respondents' brief contains no citation to the record for this alleged fact is that Ms. Mattison never made such an admission. In fact, her Affidavit directly refutes such a theory: "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).

The circuit court's 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), appears to be based on two things: (1) Appellant's counsel's demand letter of January 14, 2019, and (2) several statements made by Appellant's counsel during the virtual summary judgment hearing in response to the court's questioning. Neither of these two items (either on their own or collectively) is sufficient to support the court's summary judgment order against Ms. Mattison, especially when the facts and inferences must be taken in the light most favorable to Ms. Mattison at this stage of the proceedings.

The demand letter of January 14, 2019, was written at the specific request of Respondents' counsel, for Ms. Mattison to make a demand prior to the pre-suit mediation, which was eventually

held on February 20, 2019. At that time, Appellant had made repeated requests for material financial information from Respondent MPS, which was never fully produced. Appellant's financial expert, Dr. Charlie Alford, used the limited information provided by Respondent MPS at that time to critique the valuation report of HDH Advisors, the firm MPS had used since 2013 to manipulate the share price of the firm for the benefit of the managing members, the COO, and the members of MPS's executive committee. (Mattison Aff., at 6, ¶¶ 19-21) (R. p. 1095). The monetary demand Appellant's counsel conveyed in the letter of January 14, 2019, was the exact amount that Dr. Alford had calculated to be the fair market value of Ms. Mattison's shares simply by correcting the flawed analysis of HDH Advisors and using the limited information provided by Respondents at that time. There was never an effort by Ms. Mattison or her counsel to use the threat of a derivative action to extort an artificially high price for the redemption of her membership units beyond Dr. Alford's calculation. (Id. at 5, ¶ 15) (R. p. 1094).

Respondents' feigned indignity that Ms. Mattison's initial demand was "*quadruple*[6] the appraised value of her shares," (Br. of Resps., at 17), is an improper revelation of confidential settlement discussions and should not have been considered by the circuit court under Rule 408, SCRE. It is patently unfair for Respondents' counsel to imply that Ms. Mattison was trying to use the threat of a derivative action to extort the managing members into paying a grossly high amount for her units, when Respondents know very well that during the mediation on February 20, 2019, Ms.

[6]Respondents' math seems to be a bit off here. Ms. Mattison's initial demand was only 3.1 times higher than the HDH Advisors calculation. Nevertheless, the circuit judge was clearly swayed by Respondents' improper disclosure of the actual figures from the settlement negotiations and their argument to that effect because he described it as "the biggest thing I've seen [with regard to] whether or not Ms. Mattison could perform as a fidiciary [in the derivative action]." (Tr. of Hearing, May 12, 2020, at 8, ll. 17-18) (R. p. 315).

Mattison's negotiating position was substantially lower than the number in the initial demand letter of January 14, 2019. (Mattison Aff., at 5, ¶ 16) (R. p.1094). Appellant has respected the rules regarding the confidentiality of mediation, which Respondents have tried to exploit by creating a false impression that Ms. Mattison's negotiations were essentially a hostage-ransom situation.

The demand letter of January 14, 2019, should not have been treated as evidence of an allegedly improper motive on Ms. Mattison's behalf, because both the LLC Act and the civil rules governing derivative actions require a pre-suit demand before a derivative action is filed. S.C. Code Ann. §§ 33-44-1101 and -1103; Rule 23(b)(1), SCRCP. The undersigned's letter of January 14, 2019, was intended to serve two purposes: (1) to convey a monetary demand for the redemption of Ms. Mattison's units prior to the mediation, as Respondents' counsel had specifically requested; and (2) to satisfy the pre-suit demand requirement in the event that settlement negotiations were unsuccessful and Ms. Mattison had to pursue the derivative action.

There is nothing about Ms. Mattison's pre-suit demand letter that would suggest she would be unable to carry out her fiduciary duties to fairly and adequately represent similarly situated minority members in pursuing the interests of the LLC in the derivative action. If Ms. Mattison had settled her individual claims at mediation before any lawsuit had been filed, no minority members would have had their rights affected at all by such a settlement; only Ms. Mattison would have been precluded from filing such a derivative action, but any other minority member would have been completely free to do so. After filing the derivative action in her original Third-Party Complaint in this case, Ms. Mattison has <u>never</u> suggested the possibility of compromising the derivative claim in exchange for receiving a higher payout for the redemption of her membership units (nor has her counsel). In fact, Respondents are actually the ones who repeatedly proposed that Ms. Mattison drop

the derivative action, with prejudice, in exchange for Respondents' offer to waive its potential claim for attorneys' fees, which Ms. Mattison immediately rejected. (Mattison Aff., at 9, ¶ 30) (R. p. 1098).

The fact that Appellant attached the pre-suit demand letter to her initial pleadings in this case and later designated it as part of the Record on Appeal does not mean that the trial judge could have properly relied on the confidential settlement discussions contained in that letter. Trial courts frequently instruct juries that they should consider only certain portions of exhibits or that they should consider evidence only for some limited purpose but not for another, improper purpose.

Ms. Mattison's consistent position throughout this litigation has been that her membership units are worth substantially more than the amount Respondent MPS offered to pay her for them. Her legal position in this regard is based on two different factors: (1) numerous flaws in the methodology and assumptions HDH Advisors used in their valuation report, and (2) the fact that the individual Respondents, through self-dealing and related-party transactions, have been taking out of the company substantially more than their ownership percentages should have allowed them to take. These two factors overlap somewhat because one of the material mistakes that Appellant's expert has identified in the analysis of HDH Advisors is their failure to normalize the excessive compensation, benefits, and above-market rent that the individual Respondents have taken out of the firm for their own, personal benefit. See, e.g., Blackburn v. TKT & Assocs., Inc., 378 S.C. 589, 596, 693 S.E.2d 919, 922-23 (2010) ("Because the [business appraiser's] Report did not make any allowance for Respondent's excessive salaries, it failed to comply with the 'income approach' by failing to 'normalize' earnings of the corporation."); see generally Sharon Foote, ADA, CFE, "The Role of Normalization Adjustments in Business Valuation" (posted Sept. 25, 2015):

> A shareholder owning a controlling interest in a business entity can make control adjustments, whereas a non-controlling (or minority) shareholder would not be able to force those changes. *Control adjustments* that could be made to reflect the cash flow available to a potential buyer include the following, for example:
>
> • Excess (or deficient) officers' compensation, benefits (such as health insurance and retirement contributions) and perquisites (such as luxury cars, country club memberships, and the like),
>
> • Excess or below-market rent paid to shareholders or related entities, [and]
>
> • Personal travel and entertainment of shareholders and management.[7]

The statements made by the undersigned counsel for Appellant during the virtual hearing on Respondents' summary judgment motion were not any type of admission, despite Respondents' counsel's strained efforts to twist them into one. With all due respect, the undersigned counsel knows better than anyone what he said during the hearing (and what he meant by saying those words). During the summary judgment hearing on May 12, 2020, when the undersigned counsel voiced his agreement with the court's observation that Ms. Mattison "is trying to seek a higher payout [for her membership units]" and that her "ultimate goal is to increase what her buy-out is," Appellant's counsel was merely acknowledging that the natural effect of her legal claims would be to increase the valuation the company and, therefore, her proportionate share of it. Appellant's counsel clarified this point during the hearing, which portion of the transcript Respondents' brief conveniently omits: "I'm not using it [i.e., the derivative action] as a strike suit or a retaliatory thing. . . . This is - - we legitimately think there [was] a lot of money taken out of the firm by the managing third-party defendants that needs to be put back before her share [are valued]." (Tr. of

---

[7]https://www.bpbcpa.com/the-role-of-normalization-adjustments-in-business-valuation-by-sharon-foote-asa-cfe/.

Hearing, May 12, 2020, at 21, ll. 1-8) (R. p. 328). In any event, arguments of counsel are not record evidence, nor are opposing counsel's misinterpretations of those arguments. The only legitimate evidence in the record about Ms. Mattison's motivations in bringing the derivative claims are in her Affidavit, where she states, "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" and that she was "trying to ensure that some checks and balances exist over Third-Party Defendants' history of self-dealing in the operation and management of MPS." (Mattison Aff., at 5, ¶ 15 (R. p. 1094), and at 8, ¶ 27 (R. p. 1097)). Ms. Mattison has never sought a higher payout for her shares through extortion or improper "leverage," but instead merely sought to enhance the value of her shares by first bringing the value of the self-dealing transactions back into the firm before her membership units are valued. What Respondents describe as an "inescapable reality" is simply their uncorroborated assertions, which are an improper basis for granting summary judgment against Appellant on the derivative action. All Ms. Mattison seeks in this litigation is fair value for her shares, after the proceeds from the derivative action are first rightfully restored to the company's balance sheet.

4. MS. MATTISON CAN PURSUE A DERIVATIVE ACTION AS A "CLASS OF ONE" IF ALL OTHER MINORITY MEMBERS INDICATE NO DESIRE TO PROSECUTE SUCH A CLAIM.

With respect to Appellant's alternative theory known as the "class of one," Respondents' sole argument is that Appellant did not timely raise this argument below. Respondents' are flat wrong in this assertion. Appellant discussed the "class of one" theory extensively in her original summary judgment brief, which was filed on May 11, 2020. (Def.'s Memo. of Law in Opp. to Mot. For Sum. Judgment on Derivative Action, at 17-19) (R. pp. 870-872). When Appellant's counsel started to

discuss the "class of one" theory during the virtual summary judgment hearing on May 12, 2020, Judge McIntosh immediately cut him off, stating "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 one similarly situated being the nonemployee shareholder. I don't buy that. Okay." (Tr. of Hearing, May 12, 2020, at 12, ll. 7-11) (R. p. 319). Although Respondents' new appellate counsel were not involved in the case during the summary judgment briefing and argument, Appellant's counsel was clearly raising the "class of one" argument that he previously made in his brief. Respondents' assertion that Appellant was making a different argument is simply wrong. Appellant's Motion for Reconsideration was not the first time Appellant raised the class-of-one theory, despite Respondents' inaccurate representation.

Even if all other minority members of the firm have disavowed the claims raised in the derivative action or have otherwise expressed their willingness to waive those claims, Ms. Mattison can still pursue the derivative action as a class of one. In fact, a derivative action is the only way that she could pursue those claims to vindicate her rights as a member of the firm. As noted above, there is a reason the LLC Act requires the unanimous consent of all members to authorize or ratify an act or transaction that would otherwise violate the duty of loyalty. S.C. Code Ann. § 33-44-404(c)(2). The fact that Section 33-44-1101 of the South Carolina Code gives the power to bring a derivative action to "a member" (singular, emphasis added), indicates that a lone member has the right and power to bring a derivative action as a check on majority abuses, without the requirement than any other minority members affirmatively join in or affirmatively express support for her derivative action.

5. THE TRIAL JUDGE UNFAIRLY AND UNREASONABLY LIMITED THE SCOPE OF DISCOVERY PRIOR TO THE SUMMARY JUDGMENT RULING.

The circuit court's successive narrowing of the scope of discovery in this case, as well as Respondents' persistent efforts to keep Appellant from conducting discovery about the derivative action, unfairly and unreasonably hampered Appellant's ability to respond fully to Respondents' motion for summary judgment. The mere facts that MPS produced "over 9,500 pages of documents" and that Appellant took six, narrowly limited depositions of minority members for several hours each do not sufficiently refute the Rule 56(f) Affidavit of Appellant's counsel. Because the Member Statements were phrased in terms of evidence about the merits of the derivative claim–"I know of no facts which support Mattison's derivative action against the Third-Party Defendants" (Member Statements, ¶ 8) (R. pp. 816-836)–Appellant should have been given more opportunity to conduct discovery on the merits of the underlying transactions and on the individual Respondents' effort to filter the information the minority members received about those allegations.

The two cases cited by Respondents involving preliminary issues such as personal jurisdiction (Sullivan v. Hawker Beechcraft Corp., 397 S.C. 143, 723 S.E.2d 835 (Ct. App. 2012)) and standing (Owens v. Magill, 308 S.C. 556, 419 S.E.2d 786 (1993)) are not applicable here. The Sullivan case was an appeal from a motion to dismiss, not a motion for summary judgment. The court of appeals noted, "Sullivan has offered mere speculation and conclusory assertions to support his request for jurisdictional discovery." Sullivan, 396 S.C. at 152, 723 S.E.2d at 840. Here, Ms. Mattison's verified pleadings and Affidavit are substantially stronger than the "speculation and conclusory assertions" of the plaintiff in Sullivan.

Next, the Owens case involved a dispute about the ownership of approximately two dozen

original artworks by Andrew Wyeth, which had been on display at the Greenville County Art Museum for over a decade. The Supreme Court affirmed the trial court's determination that the plaintiff tax-payer lacked standing to pursue the claim on behalf of the citizens of Greenville County after the Greenville County Museum Commission acknowledged the owner's withdrawal of the paintings and declined to challenge his right to do so. The trial court denied plaintiffs' motion to compel discovery seeking the defendant's income tax returns and information about the insurance policies on the paintings because such discovery was not relevant to the threshold issue of standing, which turned on whether the Museum Commission had abused its discretion in declining to pursue a legal claim to the paintings. Id. at 563, 419 S.E.2d at 790-91. Here, the discovery Ms. Mattison sought to conduct in her derivative action was nothing like the completely collateral issues about which the plaintiff in Owens sought to conduct discovery before the court there considered defendant's motion for summary judgment.

Furthermore, personal jurisdiction and standing are issues for which a plaintiff, as the party who filed the lawsuit, bears the burden of proof. Here, as discussed in detail above, Respondents bear the burden of demonstrating that Ms. Mattison could not "fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation." Rule 23(b)(1), SCRCP.

Respondents also fail to mention the standard from Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991), where 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)).

6. THE TRIAL COURT'S FAILURE TO ADDRESS THE INTRACTABLE CONFLICT OF INTEREST OF RESPONDENTS' COUNSEL AT THE OUTSET OF THE CASE ALLOWED THE INDIVIDUAL RESPONDENTS TO INFLUENCE THE MINORITY MEMBERS' VIEW OF THE DERIVATIVE ACTION.

Respondents have completely ignored the serious conflict of interest issue raised in Appellant's opening brief, which issue the circuit court also refused to address prior to the summary judgment order on the derivative action. Unfortunately, the trial court's failure to address the alleged conflict of interest allowed the individual Respondents to push their own narrative to the minority members that Ms. Mattison's allegations had no merit and were nothing more than the wild accusations of a disgruntled former employee who was trying to hi-jack the firm on the way out the door. The inherently coercive nature of having the three individuals who have run the firm since its inception plus the COO leading the charge to circle the wagons against the derivative action and portraying Ms. Mattison as a woman scorned demands careful scrutiny. This is the epitome of the proverbial "fox watching the henhouse." Ironically, Respondents' primary attack on Ms. Mattison's carrying the mantel in the derivative action is their argument that her alleged personal vendetta conflicts with the interests of the minority shareholders. Appellant suggests that Respondents are projecting onto her their own conflicts of interest and breaches of fiduciary duty.

7. THE SEVERANCE AGREEMENT SPECIFICALLY CARVED OUT ANY CLAIMS RELATING TO APPELLANT'S FINANCIAL INTERESTS AS A MEMBER OF THE LLC AND APPELLANT'S REDEMPTION OF HER OWNERSHIP INTERESTS IN THE LLC.

Respondents attempt to raise two additional sustaining grounds as a basis to dismiss

Appellant's derivative action, neither of which is a valid basis for affirming summary judgment for Respondents. First of all, Respondents are incorrect in asserting that the valuation of Appellant's shares is the "sole carveout" in the Severance Agreement. As quoted above in the Reply to Respondents' Counter-Statement of the Case and Facts, there are actually at least four separate places in the Severance Agreement where the language of the document confirms the clear intention of the parties to treat Ms. Mattison's potential employment-related claims entirely separate from her financial rights as an owner/member of the firm. The undersigned counsel for Appellant is keenly aware of the intent of the Severance Agreement because, unlike Respondents' lead litigation attorneys and Respondents' newer appellate counsel, Appellant's counsel was actually involved in the negotiation and drafting of that document. The valuation of Ms. Mattison's membership units is intimately tied to the allegations raised in the derivative action and because the same underlying transactions would be part of the required normalization calculations, and the disgorgement of the excess proceeds from the self-dealing transactions would substantially increase the value of the firm as a going concern.

8. APPELLANT SATISFIED THE PREREQUISITES FOR FILING A DERIVATIVE MEMBER ACTION.

Secondly, Respondents assert that Appellant muffed her one shot at making a pre-litigation demand, which is a prerequisite to filing a derivative action, because the letter of January 14, 2019 was not specific enough, was not addressed directly to the managers of the firm, and was made in the context of settlement discussions over the redemption of Appellant's membership units.

The letter of January 14, 2019, from Appellant's counsel to Respondents' counsel easily satisfied the standard for a pre-litigation demand, which is one of the possible pre-requisites to filing

a derivative action as the court of appeals recognized in Carolina First Corp. v. Whittle, 343 S.C. 176, 189, 539 S.E.2d 404, 408 (Ct. App. 2000). The letter in question, which was attached to the original Answer, Counterclaims, and Third-Party Complaint, contained very detailed discussion about "the managing members' excessive compensation, perks, and benefits, as well as above-market lease payments to related parties (an entity owned by spouses of one current and one former founding member of the firm) for the Spartanburg Office." (Letter of Jan. 14, 2019) (R. p. 845). The letter concludes as follows:

> If we are unable to resolve this matter before the tolling agreement expires on February 1, 2019, Ms. Mattison intends to file not only an action for judicial valuation of her shares, but also a shareholder derivative action on behalf of MPS against the members of the management committee for systematically overpaying themselves in the form of excessive compensation, bonuses, fringe benefits, and related-party lease transactions for years, at the expense of the bests interests of the firm as a whole, while taking affirmative efforts to conceal the actual financial records of the company relating to their compensation and benefits. Ms. Mattison believes this to be a breach of the managing members' fiduciary duties to co-owners of the firm and to the firm as a whole. Please accept this letter as notice to MPS, pursuant to S.C. Code Ann. §§ 33-44-1101 et seq., that Ms. Mattison believes that the firm should take legal action against its managing members, whose total compensation has increased at a rate that is three to five times greater than Ms. Mattison's has since the merger in Q4 of 2009.

(Id. at 3) (R. p. 847) (emphasis added). The January 14, 2019 letter clearly satisfied the Whittle standard for a pre-suit demand in a derivative action: it identified the wrongdoers (the three managing members and the COO, who form the MPS management committee); it laid out the factual basis of the alleged wrongdoing (payment of excessive compensation, bonuses, fringe benefits, and related-party lease transactions, as well as the concealment of the records from the other members); it specified the harm to the company as a whole (breach of fiduciary duty); and it requested specific relief (recoupment of the payments the managing members made through self-dealing).

Furthermore, the letter was addressed to attorney Tom Keim, who Respondent Cousins had previously indicated was representing MPS in this matter. Once the undersigned counsel learned that MPS was a represented party, all communications relating to this matter had to go through MPS's attorney at the time, Mr. Keim. See Rule 4.2, SCACR Rule 407 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."). Mr. Keim's signature as counsel of record for MPS appears in the original Summons and Complaint in this case; thus, Respondents could not sincerely argue that the company was not aware of Ms. Mattison's pre-suit demand that the company take action that is the subject of her derivative claims.

According to Respondents' flawed argument, if a defective pre-litigation demand is made, the derivative plaintiff can never cure the defect. This is simply not the law in South Carolina and would be contrary to the South Carolina Supreme Court's ruling in Skydive Myrtle Beach, inc. v. Horry County, 426 S.C. 175, 826 S.E.2d 585 (2019), which case is omitted entirely from Respondents' brief. In the Skydive Myrtle Beach case, the Supreme Court held that "A circuit court does not have 'discretion' to dismiss a complaint with prejudice for failure to state a claim under Rule 12(b)(6) without at least considering whether to allow leave to amend under Rule 15(a). Under Rules 12(b)(6) and 15(a), the circuit court may not dismiss a claim with prejudice unless the plaintiff is given a meaningful chance to amend the complaint, and after considering the amended pleading, the court is certain there is no set of facts upon which relief can be granted." Id. at 189, 826 S.E.2d at 592. Although the trial judge was wrong about the sufficiency of the January 14, 2019 letter, he was correct to give Ms. Mattison a chance to cure any perceived deficiency by allowing her leave

to submit a second notice letter and an amended pleading.

The principal theme of the Skydive Myrtle Beach case has been recognized by other courts in the context of derivative actions. See McKane Family Limited Partnership v. Sacajawea Family Limited Partnership., 211 So. 3d 117, 121 (Fla. D. Ct. App. 2017) ("We find that . . . a party's failure to comply with a statute's pleading requirement that a pre-suit demand was made is not necessarily fatal and that the demand may be made post-suit and alleged in an amended complaint."). Similarly, in Patterson v. Witter, 425 S.C. 213, 821 S.E.2d 677 (2018), the South Carolina Supreme Court approved a demand letter in a derivative action under Rule 23(b)(1), SCRCP involving a self-insured workers' compensation matter, even though the demand was sent after the hearing on defendants' motion to dismiss, but before the circuit court issued a formal order dismissing the case without prejudice. The Patterson court held that the post-complaint demand letter satisfied Rule 23(b)(1)'s pleading requirements and the court of appeals's standard from Carolina First Corp. v. Whittle. The Patterson court impliedly approved of a "pre-suit" demand that was actually sent after the original lawsuit was filed, but before the re-filed complaint was filed in probate court. Although the Patterson case involved a very different procedural history than the instance case, the principle of giving effect to a "pre-suit" demand letter after a dismissal without prejudice is analogous to what occurred here.

In her original pleading, Appellant alternatively alleged that a pre-suit demand for MPS to sue its own managing members and COO would be a futile act because those in charge of the company would most certainly not decide to sue themselves individually. A showing of the futility of a pre-litigation demand would dispense with the notice requirement altogether. See Rule 23(b)(1), SCRCP ("The [derivative action] complaint shall also allege with particularity the efforts, if any,

made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort.").

Respondents incorrectly argue that Appellant could not demonstrate demand futility "merely because the majority of the board members are named as defendants and cannot be expected to sue themselves." (Br. of Resps., at 33) (emphasis added). Of course, here, Appellant named all three of the managing members plus the firm's COO as Defendants, not just a "majority" of them. MPS is a small, closely held company that did not have a board of directors at that time, but was run by the managing members and the COO, all of whom combined held a substantial majority of the firm's outstanding membership units.

The cases cited by Respondents on the issue of demand futility are clearly distinguishable from the underlying facts presented here. The Whittle case, which is most heavily relied on by Respondents, was a derivative action by Carolina First Corporation, whose parent company, The South Financial Group, Inc. was one of the largest banks in South Carolina at the time, prior to its acquisition by TD Bank in 2010. (https://en.wikipedia.org/wiki/South_Financial_Group). According to the South Carolina Court of Appeals's decision in Whittle, only 10 of Carolina First Corporation's 17 Board members were actually named as defendants in the suit, and only two of the board members (Defendants Whittle and Sebastian) actually participated in or benefitted from any of the alleged fraud or self-dealing at issue in that case. Whittle, 343 S.C. at 183, n.3, 194, 539 S.E.2d at 406, n.3, 412.

Here, by contrast, MPS is a closely held LLC, with only three managing members and a COO, who made virtually all of the business decisions for the company. All four of those

individuals were named by Appellant as Third-Party Defendants in the derivative action. In addition, all four of the individual Respondents were alleged to have profited personally and directly by their self-dealing and excessive compensation and bonus packages they approved for themselves and their families funded by the LLC. Unlike the underlying facts of the Whittle case, all of named Third-Party Defendants in this relatively small, closely held LLC were not only the decision-makers, but also the direct beneficiaries of the alleged self-dealing.

Finally, Respondents' argument that "the management committee of MPS was not given an opportunity to remedy the alleged wrongs that Mattison complains of *before* the derivative action was filed," (Br. of Resps., at 37), is disingenuous. Respondents made this exact same argument in early August 2019, in connection with their second Rule 12(b)(6) motion to dismiss the derivative action. In the roughly 20 months since then, Respondents have taken never taken any action to investigate or remedy the allegations made in Ms. Mattison's derivative action, but instead have continued to mislead the minority member into believing that Ms. Mattison has fabricated her allegations out of thin air to deliberately harm the company in some misguided revenge plot or extortion scheme. These are clearly not additional sustaining grounds to support the dismissal of the derivative action as a matter of law at this early stage of the case.

CONCLUSION

For all of the foregoing reasons and for the reasons previously articulated in the Initial Brief of Appellant, this Court should reverse the Circuit Court's order granting summary judgment against Appellant on her derivative action and remand the case for complete discovery and trial.

* * *

RECEIVED
Jun 10 2021
SC Court of Appeals

CERTIFICATION OF APPELLANT'S COUNSEL

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

Respectfully submitted,

June 10, 2021

David E. Rothstein, SC Bar No. 66295
Rothstein Law Firm, PA
1312 Augusta Street
Greenville, SC 29605
drothstein@rothsteinlawfirm.com
(864) 232-5870
Attorney for Appellant