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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.

RECORD ON APPEAL (Volume 1 of 4)

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Certificate of Electronic Notification

Recipients

Samuel Outten - Notification transmitted on 03-20-2019 10:43:52 AM.

David Rothstein - Notification transmitted on 03-20-2019 10:43:52 AM.

Katie Towery - Notification transmitted on 03-20-2019 10:43:52 AM.

***** IMPORTANT NOTICE - READ THIS INFORMATION *****

NOTICE OF ELECTRONIC FILING [NEF]

-

A filing has been submitted to the court RE: 2019CP2300998

Official File Stamp: 03-20-2019 10:43:41 AM

Court: CIRCUIT COURT

Common Pleas

Greenville

Case Caption: McMillan Pazdan Smith LLC , plaintiff, et al vs.
Donza H Mattison , defendant, et al

Document(s) Submitted: Order/Case Assignment to Business Court
Approved Order/Case Assignment to Business
Court Approved

Filed by or on behalf of: Roger M. Young

This notice was automatically generated by the Court's auto-notification system.

-

The following people were served electronically:

David Eliot Rothstein for Donza H Mattison

Samuel W. Outten for McMillan Pazdan Smith
LLC

Katie Elizabeth Towery for McMillan Pazdan
Smith LLC

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

Brad B Smith

Joseph M Pazdan

Rondald G Smith

McMillan Pazdan Smith LLC

Donza H Mattison

Chad C Cousins

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2019CP-2300998

MCMILLAN PAZDAN SMITH, LLC
PLAINTIFF(S)

DONZA H. MATTISON
DEFENDANT(S)

Submitted by:

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

DISPOSITION TYPE (CHECK ONE)

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

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

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

ORDER INFORMATION

PLAINTIFF'S MOTION TO DISMISS DEFENDANT/ THIRD-PARTY PLAINTIFF'S NINTH DEFENSE AND FIRST COUNTERCLAIM IS DENIED.

PLAINTIFF'S MOTION TO DISMISS DEFENDANT/ THIRD-PARTY PLAINTIFF'S TENTH DEFENSE AND SECOND COUNTERCLAIM IS DENIED.

PLAINTIFF'S MOTION TO DISMISS DEFENDANT/ THIRD-PARTY PLAINTIFF'S ELEVENTH DEFENSE AND THIRD COUNTERCLAIM IS DENIED.

PLAINTIFF'S MOTION TO DISMISS DEFENDANT/ THIRD-PARTY PLAINTIFF'S TWELTH DEFENSE AND FOURTH COUNTERCLAIM IS DENIED.

PLAINTIFF'S MOTION TO DISMISS DEFENDANT/ THIRD PARTY PLAINTIFF'S THIRTEENTH DEFENSE AND FIRST THIRD PARTY COMPLAINT PURSUANT TO SOUTH CAROLINA RULE OF CIVIL PROCEDURE 23(B)(1)(PLEADING REQUIREMENT) IS GRANTED WITHOUT PREJUDICE. DEFENDANT/ THIRD PARTY PLAINTIFF SHALL HAVE THIRTY (30) DAYS FROM THE FILING OF THE FORMAL ORDER TO AMEND BOTH HER "PRESUIT DEMAND" AND THIS COURSE OF ACTION (ONLY) ALLEGED IN HER ANSWER, COUNTERCLAIMS, AND THIRD PARTY COMPLAINT.

PLAINTIFF'S MOTION TO DISMISS DEFENDANT/ THIRD PARTY PLAINTIFF'S THIRTEENTH DEFENSE AND FIRST THIRD PARTY COMPLAINT PURSUANT TO SOUTH CAROLINA RULE OF CIVIL PROCEDURE 23(B)(1) (FAIR REPRESENTATIVE REQUIREMENT) SHALL BE HELD IN ABEYANCE FOR FURTHER DISCOVERY.

MR. ROTHSTEIN IS TO PREPARE A FORMAL ORDER AND PROVIDE THE PROPOSED ORDER TO OPPOSING COUNSEL PRIOR TO FILING IT WITH THE COURT. IF THE PARTIES CANNOT AGREE ON THE WORDING OF THE ORDER, MR. ROTHSTEIN SHALL PROVIDE MYSELF AND MY LAW CLERK THE SAME. MR. OUTTEN SHALL THEN SUBMIT TO MYSELF AND MY LAW CLERK

**UNDERLINED AREAS OF MR. ROTHSTEIN'S ORDER WHICH HE WOULD LIKE TO BE DELETED
AND/OR AMENDED TOGETHER WITH THE REQUESTED AMENDMENTS.**

This order ☐ ends ☒ does not end the case.

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

_____	2155	_____
Circuit Court Judge	Judge Code	Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

_____	_____
_____	_____
ATTORNEY(S) FOR THE PLAINTIFF(S)	ATTORNEY(S) FOR THE DEFENDANT(S)
	CLERK OF COURT

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

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

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



Greenville Common Pleas

Case Caption: McMillan Pazdan Smith LLC , plaintiff, et al vs. Donza H Mattison , defendant, et al

Case Number: 2019CP2300998

Type: Order/Form 4

S/R. LAWTON McINTOSH

S/R.LAWTON McINTOSH

Electronically signed on 2019-06-14 13:37:28 page 4 of 4

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE) IN THE COURT OF COMMON PLEAS
FOR THE THIRTEENTH JUDICIAL CIRCUIT

McMillan Pazdan Smith, LLC,) Case No. 2019-CP-23-00998
) (Business Court–Judge McIntosh)
Plaintiff-Counterclaim)
Defendant,)
vs.) **MEMORANDUM OPINION AND**
) **ORDER ON PLAINTIFF’S AND**
Donza H. Mattison,) **THIRD-PARTY DEFENDANTS’**
) **MOTION TO DISMISS**
Defendant-Counterclaimant.)

Donza H. Mattison, in a Derivative
Capacity on Behalf of McMillan
Pazdan Smith, LLC,

Third-Party Plaintiff,

vs.

Rondald G. Smith, Joseph M. Pazdan,
Brad B. Smith, and Chad C. Cousins,

Third-Party Defendants.

I. Introduction

This matter is presently before the Court on Plaintiff’s and Third-Party Defendants’ Motion to Dismiss pursuant to Rule 12(b)(6), SCRCF. Plaintiff and Third-Party Defendants seek to dismiss Defendant’s Counterclaims and Third-Party Complaint for failure to state a claim upon which relief may be granted. The Court held a hearing on this motion on Thursday, May 16, 2019, in the Anderson County Courthouse. Present for Plaintiff, McMillan Pazdan Smith, LLC (hereinafter “MPS”), and Third-Party Defendants, Rondald G. Smith, Joseph M. Pazdan,

Brad B. Smith, and Chad C. Cousins (hereinafter “Third-Party Defendants”), were attorneys Sam Outten, Tom Keim, and Katie Towery. Defendant, Donza H. Mattison (hereinafter “Defendant” or “Ms. Mattison”), appeared at the hearing with her attorney, David Rothstein.

After carefully considering the parties’ briefs and submissions, listening to counsels’ arguments at the hearing, and researching the applicable law, the Court hereby denies MPS’s Motion to Dismiss Defendant’s First through Fourth Counterclaims. With respect to Defendant’s Third-Party Complaint, the Court hereby grants MPS’s and Third-Party Defendants’ Motion to Dismiss pursuant to Rule 23(b)(1), SCRCP, without prejudice. Defendant shall have thirty (30) days from the date of this Order to amend both her pre-suit demand and this course of action only. MPS’s and Third-Party Defendants’ argument relating to whether or not Defendant fairly and adequately represents the interests of the other members in enforcing the rights of the company under Rule 23(b)(1), SCRCP, is held in abeyance for further discovery. The basis for the Court’s Order is set forth in detail below.

II. Procedural History

On February 22, 2019, MPS brought this action against Ms. Mattison, a former employee and current member of the firm, seeking a declaratory judgment regarding the parties’ Severance Agreement and General Release. Ms. Mattison filed an Answer, Counterclaims, and Third-Party Complaint on March 4, 2019, asserting four counterclaims against Plaintiff in her individual capacity, as well as a derivative action on behalf of MPS against the individual Third-Party Defendants, who are the three managing members and the Chief Operating Officer of MPS. On March 20, 2019, this case was transferred to the Business Court by Order of the Hon. Roger M. Young, Chief Business Court Judge.

On April 1, 2019, MPS and Third-Party Defendants filed a Motion to Dismiss Defendant's Counterclaims and Third-Party Complaint. MPS and Third-Party Defendants argue that Defendant's Counterclaims and Third-Party Complaint are barred by the Severance Agreement and General Release Defendant signed on December 5, 2017, in connection with Ms. Mattison's separation of employment with MPS. MPS and Third-Party Defendants also argue that Ms. Mattison's purported derivative action fails to meet the heightened pleading requirements of Rule 23(b)(1), SCRCP, and that Ms. Mattison could not fairly and adequately represent the interests of the company and the other minority members.

III. Standard for Rule 12(b)(6) Motion to Dismiss

The standard for a motion to dismiss under Rule 12(b)(6), SCRCP, is well established in South Carolina: "The Court is required to view the allegations in the complaint [here, Counterclaims and Third-Party Complaint] in the light most favorable to the plaintiff [here, Defendant], and determine whether the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff [here, Defendant] to relief under any theory of the case." Dawkins v. Union Hosp. Dist., 408 S.C. 171, 176, 758 S.E.2d 501, 503 (2014). Under Rule 12(b)(6), SCRCP, "[t]he complaint [or here, Defendant's Counterclaims and Third-Party Complaint] should not be dismissed merely because the court doubts the plaintiff [here, Defendant] will prevail in the action." Patterson v. Witter, 425 S.C. 213, 225, 821 S.E.2d 677, 684 (2018) (quoting Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 248 (2007)).

In considering a Rule 12(b)(6) motion to dismiss, the Court is limited solely to the allegations set forth in the challenged pleading. Id. In the recent case of Skydive Myrtle Beach, Inc. v. Horry County, Op. No. 27867, 2019 WL 1146068 (S.C. Mar. 13, 2019), the South

Carolina Supreme Court held that “[w]hen a trial court finds a complaint fails ‘to state facts sufficient to constitute a cause of action’ under Rule 12(b)(6), the court should give the plaintiff an opportunity to amend the complaint pursuant to Rule 15(a) before filing the final order of dismissal.” Id. at *1.

IV. Facts in Light Most Favorable to Defendant

The relevant facts of this case for purposes of Plaintiff’s Motion to Dismiss are those set forth in Defendant’s Verified Answer, Counterclaims, and Third-Party Complaint. Ms. Mattison has been a partner or member of the Plaintiff architecture firm or its predecessor entity, McMillan Smith & Partners Architects, PLLC (hereinafter “MS”), since approximately late 1996. (Answer, at 9, ¶ 44). In September 2009, Plaintiff MPS was formed as the merger of the Spartanburg MS firm with the Greenville architecture firm of Pazdan-Smith Group, Inc. (Id. ¶ 45).

At the closing of the merger, 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. Defendant alleges that, although MPS attempted on several occasions to amend the MPS Operating Agreement, including on September 30, 2015, no amendment received the unanimous consent of all members, and, therefore, no amendment ever actually became effective. (Answer, at 9, ¶ 48).

On or about December 5, 2017, MPS and Ms. Mattison entered into a Severance Agreement and General Release (hereinafter “Severance Agreement”), a copy of which was originally attached as Exhibit A to Defendant’s Answer, Counterclaims, and Third-Party

Complaint, but has since been filed under seal upon motion of Plaintiff's counsel. The Severance Agreement provided that Ms. Mattison's dissociation from MPS would be treated as a "Proper Dissociation," and that "the value of [Ms. Mattison'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. The Proper Dissociation will be handled separately from this Agreement and will be done in accordance with the September 30, 2015 Operating Agreement." (Severance Agreement, at 2, ¶ 2(j)).

Paragraph 4 of the Severance Agreement contains a general release of claims ("General Release"), whereby Ms. Mattison released and forever discharged MPS, including all of MPS's officers and employees, from causes of action arising from or in connection with the terms of her employment, the termination of her employment, and any conduct by MPS occurring on or before December 5, 2018, the date of the Severance Agreement. (Id. at 3, ¶ 4). Paragraph 4 also expressly states, "provided, however, that nothing in this Agreement shall have any effect on [Ms. Mattison's] rights and remedies relating to her dissociation from the Company." (Id. at 5, ¶ 4).

The Severance Agreement contains a Covenant Not to Sue, whereby Ms. Mattison agreed "not to file, commence or initiate any suit, grievance, demand or cause of action against [MPS] based upon or relating to any of the claims released or forever discharged pursuant to this Agreement." (Id. at 5, ¶ 5).

The Severance Agreement further states that: "Nothing in this Agreement is intended to have any effect on Employee's ownership rights or interests upon dissociation." (Id. at 8, ¶ 13).

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.” (*Id.* at 10, ¶ 19(j)).

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

Plaintiff made an offer on August 3, 2018, to purchase Ms. Mattison’s ownership units based on a purported “valuation” that Plaintiff’s management committee had hired a third-party appraiser, HDH Advisors, to perform. (Answer, at 10, ¶ 56). Ms. Mattison, through her undersigned counsel, rejected Plaintiff’s offer as inadequate and formally requested additional financial information of Plaintiff that Defendant’s counsel alleges was necessary to calculate the fair market value of her membership units. Defendant further alleges that her counsel had previously requested certain financial information from Plaintiff’s counsel on several other occasions, but not all of the information requested was provided. (Answer, at 10-11, ¶¶ 56-59). *REN*

Court makes not finding regarding this assertion.

V. Analysis

A. Purported Waiver in Severance Agreement

Plaintiff and Third-Party Defendants first argue that Defendant’s counterclaims should be dismissed because they violate the Covenant Not to Sue and General Release in the Severance

Agreement. This argument is belied by the actual language of the Severance Agreement, which is quoted supra. In three separate places in the Severance Agreement, the parties expressly carved out from the general release any claims related to Ms. Mattison's financial interests as an owner or member of the company or her interests on proper dissociation from the firm. The Court agrees with Defendant's counter argument that the Severance Agreement expressly preserved Ms. Mattison's right to file the instant claims in a defensive posture, which have nothing to do with her employment at MPS, but raise issues that directly affect the proper valuation of her membership units as a partial owner of the firm. The Covenant Not to Sue in the Severance Agreement applies only to actions "based upon or relating to any of the claims released and forever discharged pursuant this Agreement." (Severance Agreement, at 5, ¶ 5). The plain language of the Severance Agreement compels denial of Plaintiff's and Third-Party Defendants' motion to dismiss on these grounds. All of the claims raised in Defendant's Answer, Counterclaims, and Third-Party Complaint appear to relate directly to the valuation of her ownership interests in the company, not to her employment or the circumstances surrounding her separation of employment.

At this stage of the litigation, the standard this Court must apply is whether Ms. Mattison's well-pled allegations, if taken as true, state a claim for which relief may be granted. Based upon the Court's review of the parties' pleadings, the Court finds that Ms. Mattison has met that standard with regard to her counterclaims. Accordingly, MPS's Motion to Dismiss based on the release and covenant not to sue in the Severance Agreement is denied.

B. Derivative Action

MPS and Third-Party Defendants next assert that Ms. Mattison's derivative claims should

be dismissed for failing to meet the heightened pleading requirements of Rule 23(b)(1), SCRCP. Rule 23(b)(1) provides, in relevant part, that a complaint asserting a derivative action “shall . . . 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.” Rule 23(b)(1), SCRCP.

Paragraph 105 of Defendant’s Answer is the only paragraph regarding Defendant’s demand pursuant to Rule 23(b)(1), SCRCP. It states, “On January 14, 2019, Defendant’s counsel sent a letter to Plaintiff’s counsel suggesting that the firm should take action against its Managing Members for breach of fiduciary duty based on the acts of misconduct described therein. To date, Plaintiff’s counsel has refused to commence such an action. In any event, the managing members of MPS are not likely to authorize the commencement of legal action by Plaintiff against themselves individually.” (Answer, at 19, ¶ 105).

“At a minimum, a demand must identify the alleged wrongdoers, describe the factual basis of the wrongful acts and the harm caused to the corporation, and request remedial relief.” Carolina First Corp. v. Whittle, 343 S.C. 176, 189, 539 S.E.2d 402, 409 (Ct. App. 2000). “Such a pre-suit demand must be alleged, not in a conclusory fashion, but through particularized allegations.” Id. at 189, 539 S.E.2d at 409-10. A shareholder “must make an earnest, not a simulated, effort with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court.... The efforts to induce such action as complainant desires on the part of the directors, ... and the cause of failure in these efforts, should be stated with particularity.” Id. at 188, 539 S.E.2d at 409 (quoting Latimer v. Richmond

& D.R. Co., 39 S.C. 44, 52-53, 17 S.E. 258, 261 (1893)).

After reviewing of the allegations in Ms. Mattison's Third-Party Complaint, this Court finds that Ms. Mattison has failed the meeting the pleading requirements of Rule 23(b)(1), SCRCF, because she failed to allege with sufficient particularity a pre-suit demand to the board of directors of MPS. Defendant's allegations regarding the January 14, 2019 letter do not satisfy the standards under Whittle and Rule 23(b)(1), SCRCF, for a pre-suit demand in a derivative action. Therefore, the derivative action is dismissed without prejudice. Defendant shall have thirty (30) days from the date of this Order to amend both her pre-suit demand and this course of action only. See Skydive Myrtle Beach, Inc. v. Horry County, Op. No. 27867 ____ S.E.2d ____, 2019 WL 1146068, *6 (S.C. Mar. 13, 2019) ("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.").

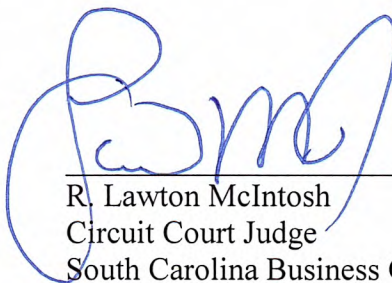
MPS's alternative argument that Defendant's derivative action should be dismissed because Defendant does not "fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the rights of the corporation or association" as required by Rule 23(b)(1), SCRCF, shall be held in abeyance for further discovery.

VI. Conclusion

For all of the foregoing reasons, MPS's Motion to Dismiss Defendant's counterclaims is denied. MPS's and Third-Party Defendant's Motion to Dismiss Defendant's Third-Party Complaint is granted without prejudice, and Defendant shall have thirty (30) days from the date of this Order to amend both her pre-suit demand and this course of action only. The issue of

whether Ms. Mattison fairly and adequately represents the interests of MPS's other members who are similarly situated shall be held in abeyance for further discovery. ^(RLM) Nothing contained in this order is intended nor shall act as a finding of fact in further litigation in this matter.

IT IS SO ORDERED.



R. Lawton McIntosh
Circuit Court Judge
South Carolina Business Court-Region 1

7-1, 2019

Anderson, South Carolina

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2019 CP-23-00998

Plaintiff:
McMillian Pazdan Smith, LLC

Defendant:
Donza H. Mattison

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

Third-Party Defendants:
Rondald G. Smith, Joseph M. Pazdan, Brad B.
Smith, Chad C. Cousins
DEFENDANT(S)

Submitted by:

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

DISPOSITION TYPE (CHECK ONE)

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

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

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

ORDER INFORMATION

THIRD-PARTY DEFENDANTS' MOTION TO DISMISS THE AMENDED THIRD-PARTY COMPLAINT IS DENIED. DAVID ROTHSTEIN TO PREPARE A FORMAL ORDER.

This order ☐ ends ☒ does not end the case.

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge	2155 Judge Code	Date
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For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

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

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



Greenville Common Pleas

Case Caption: McMillan Pazdan Smith LLC , plaintiff, et al vs. Donza H Mattison ,
defendant, et al

Case Number: 2019CP2300998

Type: Order/Form 4

S/R. LAWTON McINTOSH

S/R.LAWTON McINTOSH

Electronically signed on 2019-10-10 14:19:16 page 3 of 3

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	FOR THE THIRTEENTH JUDICIAL CIRCUIT
McMillan Pazdan Smith, LLC,	)	Case No. 2019-CP-23-00998
	)	(Business Court–Judge McIntosh)
Plaintiff-Counterclaim	)	
Defendant,	)	
	)	
vs.	)	ORDER DENYING THIRD-PARTY
	)	DEFENDANTS’ MOTION TO
Donza H. Mattison,	)	DISMISS AMENDED THIRD-PARTY
	)	COMPLAINT
Defendant-Counterclaimant.	)	
_____	)	
	)	
Donza H. Mattison, in a Derivative	)	
Capacity on Behalf of McMillan	)	
Pazdan Smith, LLC,	)	
	)	
Third-Party Plaintiff,	)	
	)	
vs.	)	
	)	
Rondald G. Smith, Joseph M. Pazdan,	)	
Brad B. Smith, and Chad C. Cousins,)	)	
	)	
Third-Party Defendants.	)	
_____	)	

I. Introduction

This matter is presently before the Court on Third-Party Defendants’ Motion to Dismiss Amended Third-Party Complaint, pursuant to Rule 12(b)(6), SCRCP, allegedly for failure to state a claim. The Court held a hearing on this motion on Tuesday, September 10, 2019, in the Oconee County Courthouse. Present for Plaintiff and Third-Party Defendants were attorneys Sam Outten, Tom Keim, and Katie Towery. Defendant, Donza H. Mattison (hereinafter “Ms. Mattison”), appeared at the hearing with her attorney, David Rothstein.

After carefully considering the parties' briefs and submissions, listening to counsels' arguments at the hearing, and researching the applicable law, the Court has determined that Defendant's Amended Third-Party Complaint contains sufficient allegations of a pre-suit demand on the managers of McMillan Pazdan Smith, LLC (hereinafter "MPS") to satisfy the prerequisite for a derivative action on behalf of MPS against Third-Party Defendants under Rule 23(b)(1), SCRCF. The court also agrees that Defendant has made sufficient, alternative allegations of the futility of such a demand. Accordingly, Third-Party Defendants' Motion to Dismiss is hereby denied.

II. Procedural History

The Court's previous Memorandum Opinion and Order filed on July 2, 2019 sets forth the relevant procedural history of the case. On June 14, 2019, the Court signed a Form 4 Order announcing its decision, inter alia, that "Defendant/Third Party Plaintiff shall have thirty (30) days from the filing of the formal order to amend both her 'presuit demand' and this course of action (only) alleged in her Answer, Counterclaims, and Third Party Complaint." Thereafter, Mattison's counsel sent a new demand letter to each of the three Managing Members of MPS on June 18, 2019, with copies to their counsel. The Court filed its formal Memorandum Opinion and Order on July 2, 2019, consistent with the ruling announced in its Form 4 Order, dismissing Defendant's derivative action without prejudice and allowing Defendant thirty (30) days "to amend both her pre-suit demand and this course of action only." Order, at 2, 9. No party filed any type of motion for reconsideration or to alter or amend with respect to either the Form 4 Order or the Memorandum Opinion and Order.

On July 30, 2019, Defendant filed her Amended Answer, Counterclaims, and Third-Party

Complaint under seal with the consent of the parties. Copies of the three demand letters were attached to the Amended Answer as Exhibits B-D.

On August 7, 2019, Third-Party Defendants filed a Motion to Dismiss Defendant's Amended Third-Party Complaint.

III. Discussion

Third-Party Defendants' Motion raises four grounds for dismissing Ms. Mattison's derivative claims against them:

- (1) Mattison's derivative claim does not meet the heightened pleading requirements of Rule 23(b)(1) of the South Carolina Rules of Civil Procedure.
- (2) Mattison has not made a valid Pre-Suit demand on McMillan Pazdan Smith, LLC ("MPS").
- (3) Mattison has failed to assert a valid reason for failure to make a demand.
- (4) Mattison does not fairly and adequately represent the interest of MPS's other members who are similarly situated.

(Motion, at 1-2).

Third-Party Defendants' primary argument is that the Court should disregard the June 18 demand letters¹ and should focus solely on events that occurred prior to March 4, 2019, the date Defendant filed her original Answer, Counterclaims, and Third-Party Complaint alleging a derivative action on behalf of MPS against Third-Party Defendants. According to Third-Party

¹During the hearing, counsel for Third-Party Defendants conceded that the June 18, 2019 letters from Defendant's counsel contained the necessary elements for a demand under the four-factor test set forth in Carolina First Corp. v. Whittle, 343 S.C. 176, 189, 539 S.E.2d 404, 408 (Ct. App. 2000). (Transcript, at 25, ll. 2-6) ("THE COURT: Does that demand letter meet the four factors that you cited to me as being a proper presuit demand? I know you're alleging it's post-suit, but just standing alone, does it meet the four factors test? MR. OUTTEN: Yes, sir, I

Defendants, the phrase “pre-suit demand” must be narrowly read to apply only to a demand that occurred prior to the commencement of any litigation between the parties. Third-Party Defendants assert that the underlying purpose of the pre-suit demand requirement of allowing the corporation the first opportunity to investigate and take appropriate remedial action to address the alleged problems and potentially avoid litigation would be thwarted if the Court were to allow a “post-suit” demand. In other words, Third-Party Defendants assert that a prospective plaintiff in a derivative action gets only one shot at making a valid pre-suit demand prior to filing a derivative shareholder action.

Third-Party Defendants’ arguments appear to be contrary to the South Carolina Supreme Court’s recent holding in Skydive Myrtle Beach, Inc. v. Horry County, 426 S.C. 175, 826 S.E.2d 585 (2019), upon which this Court relied in dismissing the Third-Party Complaint without prejudice, to allow Defendant a meaningful opportunity to file a subsequent pre-suit demand and an amended pleading if she wanted to pursue the derivative action against Third-Party Defendants. See id. at 198, 826 S.E.2d at 592 (“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.”).

Third-Party Defendants cite to several cases from other jurisdictions under analogous provisions of Rule 23.1 of the Federal Rules of Civil Procedure holding that a “post-suit” demand cannot be used to satisfy the demand pre-requisite for a derivative shareholder action. These cases are not persuasive to the Court. When the Court dismissed Defendant’s Third-Party

think it does.”).

Claims without prejudice through its Form 4 Order of June 14, 2019 and its subsequent Order of July 2, 2019, there was effectively no pending shareholder derivative litigation. Defendant's demand letters of June 18, 2019 provided adequate opportunity to MPS to investigate Defendant's allegations against the individual managing members of the firm and the COO and to take appropriate remedial action, if warranted, to avoid litigation about the allegations raised in Defendant's letters. As counsel for Defendant observed during the hearing on September 10, 2019, MPS still had not taken any type of remedial action to address Defendant's allegations against Third-Party Defendants by the time of the hearing on this motion, which was almost two months after the date of the June 18 letters. The Court believes that the approach taken by the Florida District Court of Appeals in McKane Family Ltd. Partnership v. Sacajawea Family Ltd. Partnership, 211 So. 3d 117, 121 (Fla. D. Ct. App. 2017), which is cited in Defendant's brief, is more consistent with the South Carolina Supreme Court's holding in the recent Skydive Myrtle Beach case. See McKane Family Ltd. Partnership, 211 So. 3d at 121 ("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.").

This Court's ruling is further supported by the procedural history of the South Carolina Supreme Court's case of Patterson v. Witter, 425 S.C. 213, 821 S.E.2d 677 (2018). In Patterson, the South Carolina Supreme Court approved a demand letter in a derivative action under Rule 23(b)(1), SCRCF involving a self-insured workers' compensation trust fund, 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 as well as the standard from Carolina First Corp. v. Whittle, 343 S.C. 176, 539 S.E.2d 402 (Ct. App. 2000). 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 an initial dismissal without prejudice is analogous to what has occurred here.

As counsel for Third-Party Defendants conceded, the June 18 letters clearly and unequivocally demanded that the managing members of MPS bring action against all Third-Party Defendants to recover excessive compensation and benefits provided to them for enriching themselves at the expense of MPS, in violation of the firm's operating agreement, the South Carolina LLC statute, and their fiduciary duties under common law. In addition, the letters expressly invoked the statutory derivative actions provisions under S.C. Code Ann. § 33-44-1101 *et seq.* and plainly conveyed notice of Defendant's intention to bring an action on behalf of MPS in a derivative capacity if no appropriate action by the managing members of the LLC were undertaken to remedy the wrongful conduct alleged by Defendant. Accordingly, Defendant's Amended Third-Party Complaint pleaded with sufficient particularity the pre-requisites to bringing the derivative claims, for purposes of satisfying Rule 23(b)(1), SCRCP and S.C. Code Ann. § 33-44-1103.

Defendant's counsel has addressed all of the concerns that movants' counsel raised about the previous pre-suit demand in the letter of January 14, 2019, as discussed during the hearing on May 16, 2019: (1) the letter was addressed to the individual managing members directly, rather

than through their counsel (with copies sent to counsel as well to comply with Rule 4.2 of the South Carolina Rule of Professional Conduct, Rule 407, SCACR); (2) the letter contains additional details about the alleged wrong-doing and the efforts by the managing members to conceal the financial records from the other members of the firm; (3) the letter was not written in the context of settlement negotiations and cannot be interpreted as merely a hollow threat to file a derivative action if no mutual settlement agreement was reached; (4) the letter clearly identifies all alleged, individual wrong-doers by name; and (5) the letter expressly demands the remedy sought—namely, to provide “a complete accounting of all financial records relating to these transactions and to recover all excessive compensation and benefits provided to the managing members or their family members.” (Exhibits B-D, at p. 2).

In her Amended Third-Party Complaint, Defendant has also pleaded, in the alternative, the futility of expecting MPS to bring an action against its managing members to remedy this situation, because such a decision would have to be authorized by the managing members themselves, or the managing members would have to agree to return their own, allegedly ill-gotten gains back to the firm. (Amended Answer, at 23-24, ¶ 119). Accepting these allegations as true, as the Court must do on a motion to dismiss under Rule 12(b)(6), SCRCP (see, e.g., Dawkins v. Union Hosp. Dist., 408 S.C. 171, 176, 758 S.E.2d 501, 503 (2014)), the Court agrees that Defendant has adequately pleaded in the alternative that a pre-suit demand would be futile in this case.

The Court acknowledges the South Carolina Court of Appeals’s statement in Whittle, 343 S.C. at 194-95, 539 S.E.2d at 412, that a plaintiff in a derivative action generally cannot establish futility merely by naming the majority of board members as defendants in a derivative action and

arguing that the majority could not be expected to sue themselves individually. However, a derivative action involving a large, publicly traded company, such as was at issue in Whittle, is very different than what is at issue here: a relatively small LLC with three managing members and a COO, who are all named as individual Third-Party Defendants. Furthermore, Defendant's Verified, Amended Third-Party Complaint alleges that "Third-Party Defendants have taken affirmative steps to conceal their acts of self-dealing from the other members of the firm, which further suggests that they have not been forthcoming in their dealings with the minority members of the firm." (Amended Answer, at 24, ¶ 119). These allegations, which again must be accepted as true for purposes of Third-Party Defendants' Motion to Dismiss, are sufficient to plead demand futility and would otherwise excuse the pre-suit demand requirement.

Finally, with regard to the issue of whether Defendant could fairly and adequately represent the interests of MPS and the minority shareholders of the Company, the Court has previously determined that this matter should be addressed only after an opportunity for discovery. Third-Party Defendants have acknowledged the Court's ruling in this regard and have expressly reserved their arguments for later proceedings. The Court is not making any determination at this time about Defendant's ability to serve as a fair and adequate representative in a derivative action.

VI. Conclusion

For all of the foregoing reasons, Third-Party Defendants' Motion to Dismiss the Amended Third-Party Complaint is hereby denied. The issue of whether Ms. Mattison could serve as a fair and adequate representative of MPS in a derivative action is held in abeyance pending the completion of discovery in this case.

IT IS SO ORDERED.

R. Lawton McIntosh
Circuit Court Judge
South Carolina Business Court–Region 1

_____, 2019
Anderson, SC.



Greenville Common Pleas

Case Caption: McMillan Pazdan Smith LLC , plaintiff, et al vs. Donza H Mattison ,
defendant, et al

Case Number: 2019CP2300998

Type: Order/Other

S/R. LAWTON McINTOSH

S/R.LAWTON McINTOSH

Electronically signed on 2019-10-30 09:34:42 page 10 of 10

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
McMillan Pazdan Smith, LLC,	)	Civil Action No. 2019-CP-23-00998
	)	
Plaintiff/Counter-Defendant,	)	
	)	
vs.	)	
	)	
Donza H. Mattison,	)	
	)	
Defendant/Counterclaimant.	)	
	)	<u>ORDER GRANTING MCMILLAN</u>
	)	<u>PAZDAN SMITH, LCC'S MOTION</u>
	)	<u>FOR PROTECTIVE ORDER AND</u>
	)	<u>TO QUASH NON-PARTY</u>
	)	<u>SUBPOENAS</u>
Donza H. Mattison, in a Derivative	)	
Capacity on Behalf of McMillan Pazdan	)	
Smith, LLC,	)	
	)	
Third-Party Plaintiff,	)	
	)	
vs.	)	
	)	
Rondald G. Smith, Joseph M. Pazdan,	)	
Brad B. Smith, and Chad C. Cousins,	)	
	)	
Third-Party Defendants.	)	
	)	

McMillan Pazdan Smith, LLC's ("MPS") Motion for Protective Order and to Quash Non-Party Subpoenas came before the Court for hearing on November 6, 2019. Samuel W. Outten, Katie E. Towery, and Thomas H. Keim, Jr. appeared on behalf of MPS. David E. Rothstein appeared on behalf of Defendant Donza H. Mattison ("Mattison"). Having heard the arguments and reviewed the submissions of the parties, MPS's Motion for Protective Order and to Quash Non-Party Subpoenas is hereby granted for the reasons stated below.

BACKGROUND

Mattison is a former employee and member of MPS. When Mattison's employment with MPS ended, the parties entered into a Severance Agreement and General Release ("Severance

Agreement”) dated December 5, 2017. The Severance Agreement provides, in relevant part, as follows: “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. The Proper Dissociation will be handled separately from this Agreement and will be done in accordance with the September 30, 2015 Operating Agreement.” (Severance Agreement at ¶ 2(j)). Thereafter, when the parties were unable to reach an agreement on the value of Mattison’s membership units, MPS initiated a Declaratory Judgment Action on February 22, 2019. MPS asked the Court to declare that the Severance Agreement is a valid and enforceable contract, and that MPS properly followed the September 30, 2015 Operating Agreement’s provisions in determining the value of Mattison’s membership units.

In response, Mattison filed an Answer, Counterclaims, and Third-Party Complaint on March 5, 2019. Mattison asserted counterclaims for breach of contract, judicial determination of the fair value of her distributional interest, an accounting and order compelling production of MPS’s financial records, and for declaratory judgment. Mattison also asserted a derivative cause of action against Ron Smith, Joseph Pazdan, Brad Smith, and Chad Cousins for breach of fiduciary duty and breach of the Operating Agreement.

MPS filed a Motion to Dismiss Mattison’s Counterclaims and Third-Party Complaint on April 1, 2019. The Court denied MPS’s Motion to Dismiss Mattison’s Counterclaims, but granted the Motion to Dismiss Mattison’s Third-Party Complaint without prejudice. Mattison filed an Amended Third-Party Complaint on July 30, 2019. The Third-Party Defendants filed a Motion to

Dismiss the derivative action on August 7, 2019. On October 30, 2019, the Court issued an Order denying Third-Party Defendants' Motion to Dismiss, finding that Mattison had made a valid pre-suit demand on MPS and, alternatively, that she had adequately pleaded demand futility. The Court did not rule on whether Mattison fairly and adequately represents the interests of the other members, and held that issue in abeyance pending further discovery.

On September 23, 2019, Mattison served Subpoenas on five non-parties that have provided financial and valuation services for MPS—Markel Valuation, PC; CEO Solutions, LLC; HDH Advisors, LLC; McAbee, Schwartz, Halliday & Co.; and Elliott Davis, LLC. Mattison also served a Subpoena on C & P of Spartanburg, LLC, a company with which founding member Ron Smith's wife is involved and which leases office space to MPS in Spartanburg. The Subpoenas seek a wide range of documents relating to MPS's financial statements, valuations of the company, communications with these third-party financial advisors, and forecasts and strategic planning materials.

Upon receiving copies of the Subpoenas, counsel for MPS moved this Court for a Protective Order quashing the non-party Subpoenas. MPS argued that the Subpoenas are premature because the Court has not yet determined whether Mattison is a fair and adequate representative of the other members of MPS as required by Rule 23 of the South Carolina Rules of Civil Procedure, and therefore the derivative action may still be dismissed. MPS raised the additional ground that the Subpoenas are improper because the parties themselves are still engaged in the discovery process, and thus it is unnecessary to burden non-parties to this action before first determining whether the information can be obtained by the opposing party. Lastly, MPS contended that the Subpoenas are overbroad and unduly burdensome because they seek information well beyond the scope of discovery allowed by Rule 26(b)(1), SCRCP.

RULING

Pursuant to Rule 26(c) of the South Carolina Rules of Civil Procedure, a party may move for a protective order to protect itself from “annoyance, embarrassment, oppression, or undue burden by expense.” In addition, Rule 45 of the South Carolina Rules of Civil Procedure sets forth the specific grounds on which a subpoena must or may be quashed by the Court. Rule 45(c)(1) establishes the issuing party and attorney’s responsibility to “take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena.” Rule 45(c)(3)(A) states: “On timely motion, the court by which a subpoena was issued ... shall quash or modify the subpoena if it ... subjects a person to undue burden.”

Rule 26(a) states that a court may limit discovery if “the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive.” While the scope of discovery is broad, there are limits which the Court must recognize and enforce. *See Oncology & Hematology Associates of S.C., LLC v. S.C. Dep’t of Health & Environmental Control*, 387 S.C. 380, 387, 692 S.E.2d 920, 924 (2010). “[T]he trial court must make an effort to impose reasonable discovery limits... . Thus, discovery requests must be ‘reasonably tailored’ to include only relevant matters.” *Id.* at 388, 692 S.E.2d at 924–25 (citing *In re CSX Corp.*, 124 S.W.3d 149 (Tex. 2003)).

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), SCRCF. 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.

In making a determination of whether the standing requirement of fair and adequate representation has been met, “a court should examine any indications that there are extrinsic factors which render it likely that the representative may disregard the interests of the class members. Indeed, ... the court may take into account outside entanglements that render it likely that the representative may disregard the interests of other class members.” *Davis v. Comed, Inc.*, 619 F.2d 588, 593 (6th Cir. 1980).¹ Thus, the Court should assess the following factors in determining whether the representational requirement has been met:

- (1) Economic antagonisms between the representative and members of the class;
- (2) The remedy sought by the plaintiff in the derivative action;
- (3) Indications that the named plaintiff is not the driving force behind the litigation;
- (4) Plaintiff's unfamiliarity with the litigation;
- (5) Other litigation pending between the plaintiff and defendants;
- (6) The relative magnitude of plaintiff's personal interests as compared to his or her interests in the derivative action itself;
- (7) Plaintiff's vindictiveness toward the defendants; and
- (8) The degree of support plaintiff is receiving from the shareholders he or she purports to represent.

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

Id. at 593–94; *see also Office of Strategic Services, Inc. v. Sadeghian*, 528 Fed. Appx. 336, 350 (4th Cir. 2013) (citing *Davis* as setting forth the factors to be considered when determining whether a plaintiff will adequately represent the interests of other shareholders). Thus, with respect to the derivative action, the Court finds that discovery should be limited at this time to the issue of whether Mattison meets the representational requirements of Rule 23(b)(1), SCRCF.

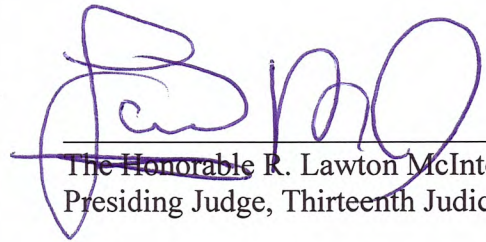
Based on the Court's determination of the relevant scope of discovery, the Court finds that the non-party Subpoenas request information that is not relevant to a resolution of the issues in this case. The non-party Subpoenas contain a number of requests that are: (1) cumulative or duplicative of information and documents previously produced by MPS; (2) burdensome on non-parties to this action; (3) not narrowly tailored so as to avoid the imposition of undue burden and expense on the non-parties; and (4) overbroad and beyond the relevant scope of discovery. For example, the Subpoenas request information dating all the way back to 2009, and also request confidential information from third-parties, such as distributions made by C & P of Spartanburg, LLC to its members for the past ten (10) years, that are clearly irrelevant.

Therefore, the Subpoenas violate Rules 26 and 45 of the South Carolina Rules of Civil Procedure. The Court declines to rewrite and narrowly tailor these requests so as to make them proper. Instead, the proper remedy is to order the Subpoenas be quashed. *See Oncology*, 387 S.C. at 389, 692 S.E.2d at 925.

For the reasons set forth above, MPS's Motion for Protective Order and to Quash Non-Party Subpoenas is granted, and discovery is limited to issues surrounding the valuation of Mattison's membership units and whether she fairly and adequately represents the interests of the other members of MPS.

PLM This Court's ruling on the factors of whether Plaintiff is a class representative is informational only and it not intended to nor shall it be construed to be the law of the case nor prohibit any party from establishing other factors or eliminating the stated factors.

AND IT IS SO ORDERED.



The Honorable R. Lawton McIntosh
Presiding Judge, Thirteenth Judicial Circuit

Anderson, South Carolina

11-22, 2019

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2019 CP-23-00998

MCMILLAN PAZDAN SMITH, LLC
PLAINTIFF(S)

DONZA H. MATTISON
DEFENDANT(S)

DONZA H. MATTISON, IN A DERIVATIVE
CAPACITY ON BEHALF OF MCMILLAN PAZDAN
SMITH, LLC

RONDALD G. SMITH, JOSEPH M. PAZDAN,
BRAD B. SMITH, AND CHAD C. COUSINS

THIRD-PARTY PLAINTIFF(S)

THIRD-PARTY DEFENDANT(S)

Submitted by:

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

DISPOSITION TYPE (CHECK ONE)

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

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

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

ORDER INFORMATION

PLAINTIFF AND THIRD-PARTY DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IS HELD IN ABEYANCE PENDING DEFENDANT AND THIRD-PARTY PLAINTIFF'S TAKING OF REMAINING MINORITY SHAREHOLDER DEPOSITIONS. UPON COMPLETION OF DEPOSITIONS, PARTIES SHALL NOTIFY THE COURT AND THIS MATTER SHALL BE DECIDED. NO FORMAL ORDER REQUESTED.

This order ☐ ends ☒ does not end the case.

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest

or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge	2155 Judge Code	Date
----------------------------	---------------------------	-------------

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

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

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



Greenville Common Pleas

Case Caption: McMillan Pazdan Smith LLC , plaintiff, et al vs. Donza H Mattison ,
defendant, et al

Case Number: 2019CP2300998

Type: Order/Form 4

S/R. LAWTON McINTOSH

S/R.LAWTON McINTOSH

Electronically signed on 2020-05-15 10:42:01 page 3 of 3

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2019- CP-23-00998

MCMILLAN PAZDAN SMITH, LLC
PLAINTIFF- COUNTERCLAIM DEFENDANT

DONZA H. MATTISON
DEFENDANT- COUNTERCLAIMANT

DONZA H. MATTISON, IN A DERIVATIVE
CAPACITY ON BEHALF OF MCMILLAN PAZDAN
SMITH, LLC.
THIRD PARTY PLAINTIFF

ROANLD G. SMITH, JOSEPH M. PAZDAN,
BRAD B. SMITH AND CHAD COUSINS
THIRD PARTY DEFENDANTS

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

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

DISPOSITION TYPE (CHECK ONE)

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

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

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

ORDER INFORMATION

PLAINTIFF'S AND THIRD PARTY DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PURSUANT TO RULES 56 AND 23 (B)(1) SCRPC IS GRANTED AS TO DEFENDANT AND THIRD PARTY PLAINTIFF'S DERIVATIVE ACTIONS. THE PLAINTIFF-THIRD PARTY DEFENDANT DOES NOT FAIRLY AND ADEQUATELY REPRESENT THE INTEREST OF OTHER MEMBERS OF MPS. THE REMAINING MINORITY SHAREHOLDERS ARE NOT IN FAVOR OF A DERIVATIVE ACTION CONTINUING (WHETHER PROSECUTED BY PLAINTIFF-THIRD PARY DEFENDANT OR ANYONE ELSE). PLAINTIFF-THIRD PARTY DEFENDANT'S INTEREST DO NOT COINCIDE WITH OTHER MEMBER OF MPS. PLAINTIFF-THIRD PARTY DEFENDANT IS USING THE DERIVATIVE CLAIM TO INCREASE THE PAYOUT OF HER EQUITY IN MPS. PLAINTIFF-THIRD PARTY DEFENDANT SEEKS TO DIVEST AT LEAST TWO MEMBERS OF MPS. MR. OUTTEN TO PREPARE A FORMAL ORDER INCLUDING THE ABOVE FINDINGS AS WELL AS WRITTEN AND ORAL ARGUMENTS TO THE COURT. INCLUDE IN THE ORDER THAT ATTORNEY'S FEE RELATED TO THE DERIVATIVE ACION ARE AWARDED BUT DO NOT SPECIFY AN AMOUNT. MR. ROTHSTEIN SHALL HAVE TEN (10) DAYS FROM THE FILING OF THE FORMAL ORDER (NOT FORM 4) TO REQUEST THE RIGHT TO CROSS EXAMINE PLAINTIFF'S THIRD PARY DEFENDANT'S COUNSEL AS TO THE AMOUNT OF FEES BEING CLAIMED.

This order ☐ ends ☒ does not end the case.

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
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	2155	
Circuit Court Judge	Judge Code	Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)	ATTORNEY(S) FOR THE DEFENDANT(S)
	CLERK OF COURT

Court Reporter:

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Greenville Common Pleas

Case Caption: McMillan Pazdan Smith LLC , plaintiff, et al vs. Donza H Mattison ,
defendant, et al

Case Number: 2019CP2300998

Type: Order/Form 4

S/R. LAWTON McINTOSH

S/R.LAWTON McINTOSH

Electronically signed on 2020-08-03 17:04:08 page 3 of 3

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

COURT OF COMMON PLEAS

McMillan Pazdan Smith, LLC,)
))
Plaintiff, - Counterclaim Defendant)

Case: 2019-CP-23-00998

vs.)
))
))

Donza H. Mattison)
))
Defendant, - Counterclaim Plaintiff)
_____)

Order Granting Donza H. Mattison's Motion
for Reconsideration of Award of Attorney's
Fees to Plaintiff-Counterclaim Defendants
Third-Party Defendant

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

Third- Party Plaintiff)
))

vs.)
))
))

Ronald G. Smith, Joseph M. Pazdan,)
Brad B. Smith and Chad C. Cousins)
))

Third- Party Defendant)
_____)

Upon review of Defendant-Counterclaimant's Donza H. Mattison's (hereinafter referred to as "Mattison"), Motion for Reconsideration of Award of Attorney's Fees to Plaintiff's Counterclaim-Defendant and Third-Party Defendant (hereinafter collectively referred to as "McMillan"), the party's supporting memoranda, the arguments of counsel, as well as the exhibits submitted or previously submitted, the court finds that its award of Attorney's fees based

upon Mattison's filing of a derivative action and this court's subsequent grant of Summary Judgment as to the same was erroneous.

Discussion

A. "Severance Agreement/Operating Agreement"

McMillan is an architectural firm and Mattison is a former employee and equity owner. Mattison and McMillan agreed that Mattison would voluntarily "properly" dissociate her employment with McMillan effective February 12, 2018. The parties executed a "Severance Agreement and General Release" memorializing the terms, conditions, compensation and obligations of the parties based upon the voluntary proper dissociation.

The "severance agreement" dealt with issues relating to Mattison as an employee of McMillan. The "severance agreement" specifically did not deal with Mattison as an equity owner in McMillan other than to provide:

- (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. The Proper Dissociation will be handled separately from this Agreement and will be done in accordance with the September 30, 2015 Operating Agreement. (Emphasis Added)

(p. 2 of 12 "Severance Agreement")

The "Severance Agreement" further provides:

Employee agrees and understands that any claims she may have under the aforementioned statutes, or any other federal, state or local law ordinance, rule or regulation, are effectively waived and released by this Agreement. Employee represents that she knows of no claim that she has that has not been released by this paragraph. This release does not extend to claims which as a matter of law cannot be waived. Employee acknowledges and understands that this paragraph is intended to prevent her from making any claim against the Released Parties regarding any matter or incident relating to or arising from the Operating Agreement, other operating agreements, the employment relationship or its

termination that occurs up to the date Employee executes this Agreement; provided, however, that nothing in this Agreement shall have any effect on Employee's rights and remedies relating to her dissociation from the company. (Emphasis added).

(p. 5 of 12 "Severance Agreement")

In the "severance agreement" Mattison released and forever discharged Mattison as follows:

4. General Release of Claims. Employee hereby releases and forever discharges the Company, its subsidiaries, business units, affiliates, and parent companies, past and present, its predecessors and successors and its respective managers, officers, directors, employees, agents, legal counsel, and assigns, past and present (hereinafter referred to collectively as the "Released Parties") from any and all known and unknown claims of action the Employee may have against the Released Parties arising from or in connection with: (a) the terms and conditions of her employment with the Company; (b) the termination of the employment from the Company; and (c) any conduct, actions or omissions, known or unknown, by the Released Parties occurring on or before the date Employee executes this Agreement. This release and the term "claim" or "claims" as used in this Agreement, include all benefits, grievances, proceedings, investigations, hearings, charges, complaints, claims, demands, actions, and causes of action, and suits of whatever nature, whether known or unknown, fixed, absolute or contingent, matured or unmatured, asserted or unasserted, however arising, and whether legal, equitable or administrative. The released claims include Employee's attorney fees, court costs, wages, back pay, front pay, severance pay, compensatory damages, punitive damages, general damages, special damages, penalties, benefits of any sort, liquidated damages, costs and disbursements, expert fees, injunctive relief, equitable relief, declaratory relief, interest, reinstatement, future employment, and any other legally recoverable category of damages or relief that Employee has ever had, or now has, or may claim to have, against the Company. It is expressly intended, understood and agreed that the claims released by Employee shall include, by way of example and without limitation, all claims arising under federal, state or local statute, ordinance, common law, regulation, equity or other sources, whether known or unknown, based upon:
 - (a) Actual or alleged defamation, invasion of privacy, injury to credit, personal inconvenience, damage to Employee's personal reputation, outrage, distress, humiliation, loss of standing and prestige, personal injury, bodily injury, tort, loss of consortium, intentional or negligent infliction of emotional distress, abuse of process, retaliation, negligence, fraud, extortion, or other common law causes of action or other compensation for bodily injury.

- (b) Failure to provide benefits or pay wages or commissions, including actual or alleged violations of the South Carolina Human Affairs Law, the South Carolina Payment of Wages Act, common law and any and all others applicable state, county or local codes, statutes, ordinances or regulations.
- (c) Actual or alleged violations of anti-discrimination laws, including, but not limited to, any and all claims of age, disability, race, color, sex, national origin, ancestry, religion, genetic information, or other discrimination, retaliation or harassment;
- (d) Actual or alleged violation of the federal Age Discrimination in Employment Act, as amended, the Civil Rights Acts of 1866, 1871, and 1964, Section 1981 of Title 42 of the U.S. Code, Title VII of the Civil Rights Act of 1964, as amended, the Civil Rights Act of 1991, all federal and state executive orders including Executive Order 11246, the Uniformed Services Employment and Reemployment Rights Act of 1994, the Equal Pay Act, the Americans with Disabilities Act of 1990, the Rehabilitation Act of 1973, the Family and Medical Leave Act, the Fair Labor Standards Act, the Genetic Information Nondiscrimination Act of 2008, the Worker Adjustment and Retraining Notification Act, the Pregnancy Discrimination Act, state and local wage-hour laws and regulations, and the federal Employee Retirement Income Security Act, including, but not limited to claims under Company-sponsored severance and termination pay plans, if any (provided, however, that nothing in this Agreement affects any claims relating to Employee's pending or anticipated claims for short- term or long-term disability benefits or to any claims relating to coverage for any ERISA-governed plan for health, dental or vision insurance);
- (e) Actual or alleged violations of any other federal or state codes, laws, ordinances, regulations or case law which prohibit employment discrimination, retaliatory termination of employment, wrongful discharge, and employment termination in violation of public policy.
- (f) Actual or alleged breach of express and implied contract, breach of contract, accompanied by a fraudulent act, breach of implied covenant of good faith and fair dealing, interference with contract, promissory estoppel, and claims under the Operating Agreement or any other operating agreement, any employment agreement, handbook or policy relating to her employment or separation of employment; and
- (g) Actual or alleged violations of the National Labor Relations Act and the Labor Management Relations Act.

(p. 3-5 of 12 "Severance Agreement")

It is clear that Mattison was releasing claims that she individually may have against McMillan as an employee. To further make this point, the "severance agreement" also provides:

5. Covenant Not to Sue. Employee hereby covenants and agrees not to file, commence or initiate any suit, grievance, demand of cause of action against the Released Parties based upon or relating to any of the claims released and forever discharged pursuant to this Agreement. If Employee breaches this covenant not to sue, she hereby agrees to pay all of the reasonable costs and attorney fees actually incurred by the Released Parties in defending against such breaching conduct, together with such other and further damages as may result, directly or indirectly, from that breach. Moreover, Employee agrees that she will not persuade or instruct any person to file a suit, claim or complaint on her behalf based on a claim released in this Agreement with any state or federal court or administrative agency against the Released Parties. Employee expressly agrees not to commence or file any class action, including any class arbitration against Company, or serve in any representative capacity in any class action, including class arbitration, against or involving the Company. In accordance with 29 C.F.R. §1625.23(b), nothing in this covenant not to sue is intended to preclude Employees from challenging the validity of this Agreement under the Older Workers Benefit Protection Act, 29 U.S.C. § 626(f), with respect to claims under the Age Discrimination in Employment Act, and the Company shall not be entitled to recover any consideration paid under this Agreement, damages or its attorney fees and costs resulting from such challenge.

(p. 5 of 12 "Severance Agreement")

Finally, paragraph 13 of the "severance agreement" provides:

13. No Other Compensation Due. Employee acknowledges and agrees that neither the Company nor any of the Released Parties owes Employee any wages, salary, stock options, bonus, accrued vacation or sick leave, benefits, paid time off, notice pay, severance pay, commissions, equity or ownership, incentive pay, salary, reimbursement, expenses, deferred compensation, or other compensation in any amount whatsoever, including, but not limited to, any compensation pursuant to the Operating Agreement any other agreement, other than as expressly agreed to herein. Employee agrees that to the extent that Employee is otherwise due any such amounts or compensation or expenses of any nature, the Company's obligation to pay these amounts is satisfied and subsumed in full by the Severance Pay. The parties shall each bear their own costs and their own attorney fees in connection with this Agreement. Nothing in this Agreement is intended to have any effect on Employee's ownership rights or interest upon dissociation. (Emphasis added)

(p. 8 of 12 "Severance Agreement")

Based upon the clear language taken from the four (4) corners of the severance agreement, the severance agreement is limited by its terms to any claims that Mattison could have brought an individual employee. The derivative action, while brought in Mattison's individual name, is based not on her status as an employee but on her status as a minority equity owner. It is not an individual claim—it is a corporate claim. A derivative claim is brought in a representative capacity on behalf of the LLC.¹ The severance agreement is accordingly irrelevant other than to provide that it does not affect Mattison's ownership interest and that the value of her interest will be determined by the Operating Agreement (or some version thereof.) Further, the severance agreement drafted by McMillan specifically provides that "[t]he parties shall each bear their own cost and their own attorney's fees in connection with this agreement..."

Prior to bringing her derivative claim, Mattison's counsel wrote McMillan's counsel a letter which in pertinent part provides:

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

Mattison's counsel has acknowledged to the undersigned on several occasions that the threat of and filing of the derivative claim was to increase the payment to Mattison for her equity interest.

As pointed out above, the parties contractually agreed that "[t]he proper dissociation will be handled separately from this agreement and will be done in accordance with the September 15, 2015 operating agreement."

Inasmuch as Mattison's derivative claim is inextricably connected to her claim for valuation of her equity, the September 15, 2015 Operating Agreement (and possibly other documents) determines whether McMillan is entitled to its Attorney's fees.² No other documents

¹ Ward v. Griffin, 295 S.C. 219, 221, 367 S.E.2d 703, 704 (Ct. App. 1988)

² No statute was referenced which provides for Attorney's fees in the case.

purporting to provide for Attorney's fees other than the "severance agreement" and the September 15, 2015 Operating Agreement has been provided to the court.

McMillan points to paragraphs 1 sections 4.1 and 4.3(b) of the operating agreement read in conjunction with the "severance agreement" as the basis for a contractual award of Attorney's fees.

Section 4.1 provides:

- 4.1 No Right of Control. Except as otherwise expressly provided in the Agreement, or as authorized in writing by the Management Committee, no member shall take any part in or interfere in any manner with the management, conduct or control of the business or affairs of the Company, take any action to bind or otherwise act for or on behalf of the Company or have any rights or powers with respect to the Company. Each member shall indemnify and hold harmless the Company for any costs and damages incurred by the Company as a result of such Member's unauthorized action on behalf of the Company.

(p. 10 of 37 "Operating Agreement")

Section 4.3(b) provides:

- (b) A member who performs his duties (if any) in good faith and in a manner he reasonably believes to be in the best interests of the Company shall not have any liability solely by reason of being or having been a Member of the Company. A Member shall not be liable to the Company or to any Member for any loss or damage sustained by the Company or any Member, unless the loss or damage shall have been the result of such Member's fraud, deceit, gross negligence, willful misconduct, breach of this Agreement or a knowing violation of the law.

(p. 12 of 37 "Operating Agreement")

Clearly neither of these provisions from the "Operating Agreement" authorizes an award of Attorney's fees.³ Accordingly, the undersigned erred in its award of Attorney's fees to McMillan based upon either the "Severance Agreement" or the "Operating Agreement".

B. South Carolina Rules of Civil Procedure

³ The Court expresses no opinion as to whether paragraph 4.1 or 4.3(b) provides a claim for special damages upon a proper course of action being asserted.

The Court allowed Mattison to pursue discovery for purposes of establishing that she "fairly and adequately represents the interest of shareholders or members similarly situated in enforcing the right of the corporate or association." Mattison was limited in her discovery to this issue. McMillan claims that Mattison grossly exceeded the Court's discovery order and should be required to pay attorney's fees pursuant to Rules 26(c) and 37(a) (4), SCRPC. The court agrees that Mattison exceeded the scope of its order. However, there is no clearly delineated line between complying with the order or exceeding the order. Without prejudice to McMillan, the court presently finds that Mattison's discovery was not such as would warrant the harsh sanction of an award of attorney's fees under Rule 37 (a) (4), SCRPC.

Conclusion

The undersigned erred in awarding McMillan attorney's fees incurred in defending against the derivative claim either under the severance or operating agreements or pursuant to the South Carolina Rules of Civil Procedure. Accordingly, the attorney fees award is vacated. The order is without prejudice to McMillan or Mattison from subsequently seeking attorney's fees.

Anderson, SC

September _____, 2020

Judge



Greenville Common Pleas

Case Caption: McMillan Pazdan Smith LLC , plaintiff, et al vs. Donza H Mattison ,
defendant, et al

Case Number: 2019CP2300998

Type: Order/Form 4

S/R. LAWTON McINTOSH

S/R.LAWTON McINTOSH

Electronically signed on 2020-09-22 12:45:39 page 9 of 9

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
McMillan Pazdan Smith, LLC,	)	Civil Action No. 2019-CP-23-00998
	)	
Plaintiff/Counter-Defendant,	)	
	)	
vs.	)	
	)	
Donza H. Mattison,	)	
	)	
Defendant/Counterclaimant.	)	<u>ORDER GRANTING MOTION FOR</u>
	)	<u>SUMMARY JUDGMENT AS TO</u>
	)	<u>AMENDED THIRD-PARTY</u>
	)	<u>COMPLAINT</u>
Donza H. Mattison, in a Derivative	)	
Capacity on Behalf of McMillan Pazdan	)	
Smith, LLC,	)	
	)	
Third-Party Plaintiff,	)	
	)	
vs.	)	
	)	
Rondald G. Smith, Joseph M. Pazdan,	)	
Brad B. Smith, and Chad C. Cousins,	)	
	)	
Third-Party Defendants.	)	
	)	

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

FACTUAL AND PROCEDURAL BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

STANDARD OF REVIEW

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

RULING

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A: Yes.

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

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

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

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

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

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

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

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

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

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

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

...

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

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

...

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

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

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

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

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

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

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

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

(*Id.*)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

AND IT IS SO ORDERED.

The Honorable R. Lawton McIntosh

Anderson, South Carolina

_____, 2020



Greenville Common Pleas

Case Caption: McMillan Pazdan Smith LLC , plaintiff, et al vs. Donza H Mattison ,
defendant, et al

Case Number: 2019CP2300998

Type: Order/Summary Judgment

S/R. LAWTON McINTOSH

S/R.LAWTON McINTOSH

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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
McMillan Pazdan Smith, LLC,	)	Civil Action No. 2019-CP-23-00998
	)	
Plaintiff/Counter-Defendant,	)	
	)	
vs.	)	
	)	
Donza H. Mattison,	)	
	)	
Defendant/Counterclaimant.	)	
_____	)	<u>ORDER DENYING</u>
	)	<u>MOTION TO RECONSIDER</u>
Donza H. Mattison, in a Derivative	)	
Capacity on Behalf of McMillan Pazdan	)	
Smith, LLC,	)	
	)	
Third-Party Plaintiff,	)	
	)	
vs.	)	
	)	
Rondald G. Smith, Joseph M. Pazdan,	)	
Brad B. Smith, and Chad C. Cousins,	)	
	)	
Third-Party Defendants.	)	
_____	)	

On September 30, 2020, this Court entered an Order granting McMillan Pazdan Smith, LLC (“MPS”) and the Third-Party Defendants’ Motion for Summary Judgment as to Defendant Donza H. Mattison’s (“Mattison”) derivative action. Mattison filed a Motion to Reconsider on October 12, 2020. Having heard the arguments and reviewed the submissions of the parties and the record in this case, Mattison’s Motion to Reconsider is hereby DENIED.

LEGAL STANDARD

Rule 59(e), SCRCP, allows a court to alter or amend a judgment upon a party’s timely motion. “A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for

the court to reconsider or rule on it.” *Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). A party’s dissatisfaction with the outcome of the underlying litigation is not grounds for relief under Rule 59.

RULING

Mattison argues in her Motion to Reconsider that the Court erroneously granted summary judgment on her derivative action because she meets Rule 23(b)(1)’s requirement that a derivative plaintiff fairly and adequately represent the interests of the other members. Mattison raises eleven grounds in support of her Motion to Reconsider. The Court finds that these are the same grounds Mattison raised in opposition to the Motion for Summary Judgment, and the Court is not persuaded to change its ruling.

I. Every Other Member of MPS Opposes Mattison’s Derivative Action.

One factor that courts use to determine whether the representational requirement has been met is the degree of support the derivative plaintiff receives from the shareholders or members he or she purports to represent. *See Davis v. Comed, Inc.*, 619 F.2d 588, 593-94 (6th Cir. 1980). Here, every member of MPS signed a statement affirming that they do not join, or in any way support, Mattison’s derivative action. Mattison was permitted to depose six minority members of her choosing. During those depositions, the minority members affirmed under oath their member statements and their opposition to Mattison’s derivative action. Mattison did not cite any testimony from these depositions in her Memorandum in Support of the Motion to Reconsider. The Court reviewed the deposition transcripts and, based upon that testimony, determined that there was no testimony to support the continuation of the derivative action.

The Court does not accept Mattison’s argument that a 2% owner can, without some exceptional circumstance, bring a derivative action that is contrary to what 98% of the membership

thinks is in the best interest of the firm. Therefore, the Court stands by its prior ruling that Mattison cannot meet the requirements of Rule 23(b)(1).

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

The Court finds that Mattison's motivation in bringing the derivative action was to gain leverage in her dispute with MPS over the valuation of her equity interest. This finding is supported by counsel for Mattison's statements during the hearings held on May 12, 2020 and October 26, 2020. These statements, combined with the January 14, 2019 letter sent by Mattison's counsel to MPS threatening to bring a derivative action if the parties were unable to resolve the valuation of her membership units, confirm that Mattison pursued this derivative action to get a higher payout for her equity interest, and not to vindicate the interests of the other members of MPS. Case law is clear that derivative lawsuits brought for this purpose are improper. *See Palmer v. U.S. Sav. Bank of Am.*, 131 N.H. 433, 441, 553 A.2d 781, 786 (1989). The relevant case law and uncontroverted evidence in this case support the Court's dismissal of Mattison's derivative action.

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

The remedies Mattison seeks in her Amended Third-Party Complaint directly contradict what the other members of MPS want. Mattison cannot be a fair and adequate representative of the other members because she is trying to undo agreements, resolutions, and transactions that every other member voted on and supported. The relief sought in her Amended Third-Party Complaint is clear, and her views and beliefs about what is in the best interest of the company are completely divergent from the members she purports to represent.

The Court has carefully considered all of the points raised in Mattison's Motion to Reconsider. For the reasons set forth above, the Court affirms its September 30, 2020 Order Granting MPS and the Third-Party Defendants' Motion for Summary Judgment. Mattison's Motion to Reconsider is hereby DENIED.

IT IS SO ORDERED.

The Honorable R. Lawton McIntosh
Thirteenth Judicial Circuit

Greenville, South Carolina

_____, 2020



Greenville Common Pleas

Case Caption: McMillan Pazdan Smith LLC , plaintiff, et al vs. Donza H Mattison ,
defendant, et al

Case Number: 2019CP2300998

Type: Order/Other

S/R. LAWTON McINTOSH

S/R.LAWTON McINTOSH

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STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
 COUNTY OF GREENVILLE) THIRTEENTH JUDICIAL CIRCUIT

McMillan Pazdan Smith, LLC,) Civil Action No. 2019-CP-23-_____
)
) Plaintiff,)
) vs.)
))
))
))
))
) Defendant.)
)

SUMMONS

TO: THE DEFENDANT ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your Answer to the said Complaint upon the subscribers at 104 S. Main Street, Suite 900 (29601), Post Office Box 10084, Greenville, South Carolina 29603, within thirty (30) days after service hereof, and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

By: s/Samuel W. Outten

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Attorneys for McMillan Pazdan Smith, LLC

Greenville, South Carolina
 February 22, 2019

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
McMillan Pazdan Smith, LLC,	)	Civil Action No. 2019-CP-23-_____
	)	
Plaintiff,	)	
	)	
vs.	)	<u>COMPLAINT</u>
	)	(Declaratory Judgment)
Donza H. Mattison,	)	
	)	
Defendant.	)	
_____	)	

The Plaintiff, McMillan Pazdan Smith, LLC (“MPS” or “Plaintiff”), complaining of the Defendant, Donza H. Mattison (“Mattison” or “Defendant”), would respectfully show unto the Court as follows:

PARTIES

1. Plaintiff is a limited liability company organized and existing under the laws of the state of South Carolina and doing business in Greenville County, South Carolina.
2. Upon information and belief, Defendant is a citizen and resident of Spartanburg County, South Carolina.

JURISDICTION AND VENUE

3. This Court has personal jurisdiction over the parties pursuant to S.C. Code Ann. § 36-2-802.
4. Venue is proper in this Court pursuant to S.C. Code Ann. § 15-7-30(C)(2) because the most substantial part of the alleged acts or omissions giving rise to this action occurred in Greenville County, South Carolina.

FACTUAL BACKGROUND

5. MPS is a regional, studio-based architecture, planning, and interior design firm whose mission is to help clients create environments that embody their personalities, enrich their lives, and enhance the quality of their community.

6. MPS has offices in Charleston, Greenville, and Spartanburg, South Carolina; Asheville and Charlotte, North Carolina; and Atlanta, Georgia.

7. Mattison is a former employee and member of MPS, and worked as an architect in MPS's Spartanburg, South Carolina office.

8. Mattison's employment with MPS officially ended on February 12, 2018, although Mattison was on Family Medical Leave Act ("FMLA") leave from November 20, 2017 until February 12, 2018.

9. On December 5, 2017, the parties memorialized Mattison's cessation of employment in a Severance Agreement and General Release ("Severance Agreement").

10. The provisions of the Severance Agreement addressed Mattison's FMLA leave, paid time off, severance pay, 2017 bonus, and Mattison's dissociation from MPS.

11. The Severance Agreement provided that Mattison's dissociation from MPS would be treated as a "Proper Dissociation," meaning that there was no penalty or reduction in the value of her financial rights.

12. The Severance Agreement provided that the parties would agree on the value of Mattison's 2,035.34 membership units ("Units") in early 2018, following the close of fiscal year 2017.

13. Mattison's Proper Dissociation was to be handled in accordance with MPS's September 30, 2015 Operating Agreement ("Operating Agreement").

14. The Operating Agreement provides the process for dissociation, purchase, and valuation of a dissociating member's interest.

15. Specifically, Articles 10 and 11 of the Operating Agreement provide that a properly dissociating member will be paid "Fair Market Value" for their membership interest.

16. Article 1 defines "Fair Market Value" as "the value of the Units as determined by the Management Committee in accordance with the procedure set forth in Section 5.1(s) of this Agreement."

17. Article 5 provides that the Management Committee has the power and authority on behalf of MPS to determine the per unit price of any membership interest on an annual basis.

18. For the last five years, MPS has retained the services of HDH Advisors LLC ("HDH") to provide an annual business appraisal.

19. HDH provided a valuation of MPS in accordance with the provisions of the Operating Agreement for fiscal year 2017.

20. MPS used HDH's 2017 valuation to determine a per unit price, and made an offer to Mattison on August 3, 2018 to purchase her Units at this amount.

21. Mattison, however, contested this valuation and demanded a much higher per unit price in a letter dated January 14, 2019.

FOR A FIRST CAUSE OF ACTION
(Declaratory Judgment)

22. The preceding paragraphs are incorporated as if fully restated herein.

23. The facts as set forth above constitute an actual controversy between the parties regarding the valuation of and proper purchase price for Mattison's Units.

24. Pursuant to S.C. Code Ann. § 15-53-10 *et seq.*, MPS seeks a judgment in this Court declaring the various rights, liabilities, and relations of the parties.

25. Specifically, MPS seeks the following judicial declarations:

- a. The Severance Agreement is a valid and enforceable contract between MPS and Mattison;
- b. Pursuant to the terms of the Severance Agreement, Mattison's Units are to be valued in accordance with the terms of the Operating Agreement;
- c. MPS followed the Operating Agreement's provisions regarding the annual valuation of the company;
- d. The value of Mattison's Units should be determined by applying the per unit price from the 2017 valuation conducted by HDH; and
- e. Mattison does not have the right to contest the 2017 valuation of MPS conducted by HDH.

WHEREFORE, Plaintiff respectfully requests this Honorable Court to declare and enter judgment as follows:

- (a) That the Severance Agreement constitutes a valid and enforceable contract;
- (b) That Mattison's Units shall be valued in accordance with the provisions of the Operating Agreement;
- (c) That MPS followed the Operating Agreement's provisions regarding the annual valuation of the company;
- (d) That Mattison's Units should be valued by applying the per unit price as determined from the 2017 valuation of MPS that was conducted by HDH;

- (e) That Mattison does not have the right to contest the 2017 valuation of MPS conducted by HDH; and
- (f) For such other and further relief as this Court may deem just and proper.

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Attorneys for McMillan Pazdan Smith, LLC

Greenville, South Carolina
February 22, 2019

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	FOR THE THIRTEENTH JUDICIAL CIRCUIT
McMillan Pazdan Smith, LLC,	)	Case No. 2019-CP-23-00998
	)	
Plaintiff-Counterclaim	)	
Defendant,	)	
	)	
vs.	)	ANSWER, COUNTERCLAIMS, AND
	)	THIRD-PARTY COMPLAINT
Donza H. Mattison,	)	
	)	(Jury Trial Demanded)
Defendant-Counterclaimant.	)	
_____	)	
	)	
Donza H. Mattison, in a Derivative	)	
Capacity on Behalf of McMillan	)	
Pazdan Smith, LLC,	)	
	)	
Third-Party Plaintiff,	)	
	)	
vs.	)	
	)	
Rondald G. Smith, Joseph M. Pazdan,	)	
Brad B. Smith, and Chad C. Cousins,	)	
	)	
Third-Party Defendants.	)	
_____	)	

Defendant, Donza H. Mattison, by and through her undersigned counsel and by way of her Answer in this matter, hereby responds to the allegations in the Plaintiff's Complaint as set forth in the paragraphs below. In addition, Defendant further asserts the Counterclaims and Third-Party Claims as set forth herein.

FOR A FIRST DEFENSE
(General Denial)

1. Each and every allegation of the Complaint not specifically admitted or qualified is hereby denied, and strict proof thereof is demanded.

2. Defendant admits the allegations of Paragraph 1.

3. Defendant admits the allegations of Paragraph 2.

4. Paragraph 3 asserts legal conclusions, not factual allegations, and does not require a response from Defendant. To the extent that a response is required, Defendant admits that the Circuit Court of Greenville County has personal jurisdiction over all parties to this case.

5. Paragraph 4 asserts a legal conclusion, not factual allegations, and does not require a response from Defendant. To the extent that a response is required, Defendant admits that venue is proper in the Circuit Court of Greenville County because many of the alleged actions or omissions alleged in Plaintiff's Complaint occurred in Greenville County.

6. Defendant admits the allegations of Paragraph 5.

7. Defendant admits the allegations of Paragraph 6.

8. In responding to the allegations of Paragraph 7, Defendant admits that she is a former employee and current member of Plaintiff and worked as an architect in Plaintiff's Spartanburg Office.

9. Defendant admits the allegations of Paragraph 8. Defendant would further allege that she voluntarily resigned her employment with Plaintiff effective February 12, 2018, for personal reasons.

10. Defendant admits the allegations of Paragraph 9. By way of further response, Defendant craves reference to the Severance Agreement and General Release (hereinafter "Severance Agreement"), which speaks for itself. A true and accurate copy of the Severance Agreement is attached hereto as Exhibit A.

11. In responding to the allegations of Paragraph 10, Defendant craves reference to the

Severance Agreement, which speaks for itself.

12. In responding to the allegations of Paragraph 11, Defendant craves reference to the Severance Agreement, which speaks for itself.

13. In responding to the allegations of Paragraph 12, Defendant craves reference to the Severance Agreement, which speaks for itself.

14. In responding to the allegations of Paragraph 13, Defendant craves reference to the Severance Agreement, which speaks for itself. By way of further response, Defendant craves reference to MPS's Amended and Restated Operating Agreement dated September 30, 2015 (hereinafter "September 30, 2015 Proposed Amendment"), which document speaks for itself. Defendant would further allege that the September 30, 2015 Proposed Amendment is not valid and has no force and effect as a matter of law because it was not consented to, or signed by, all of the members of MPS at the time, as required by MPS's Operating Agreement of September 25, 2009 (hereinafter "MPS Operating Agreement"), specifically Section 4.2(d)(i) of the MPS Operating Agreement, and the South Carolina Uniform Limited Liability Company Act of 1996, S.C. Code Ann. § 33-44-404(c)(1).

15. In responding to the allegations of Paragraph 14, Defendant craves reference to the September 30, 2015 Proposed Amendment, which document speaks for itself. Defendant would further allege that the September 30, 2015 Proposed Amendment is not valid and has no force and effect as a matter of law because it was not consented to, or signed by, all of the members of MPS at the time, as required by the MPS Operating Agreement, specifically Section 4.2(d)(i) of the MPS Operating Agreement, and the South Carolina Uniform Limited Liability Company Act of 1996, S.C. Code Ann. § 33-44-404(c)(1).

16. In responding to the allegations of Paragraph 15, Defendant craves reference to the September 30, 2015 Proposed Amendment, which document speaks for itself. Defendant would further allege that the September 30, 2015 Proposed Amendment is not valid and has no force and effect as a matter of law because it was not consented to, or signed by, all of the members of MPS at the time, as required by the MPS Operating Agreement, specifically Section 4.2(d)(i) of the MPS Operating Agreement, and the South Carolina Uniform Limited Liability Company Act of 1996, S.C. Code Ann. § 33-44-404(c)(1).

17. In responding to the allegations of Paragraph 16, Defendant craves reference to the September 30, 2015 Proposed Amendment, which document speaks for itself. Defendant would further allege that the September 30, 2015 Proposed Amendment is not valid and has no force and effect as a matter of law because it was not consented to, or signed by, all of the members of MPS at the time, as required by the MPS Operating Agreement, specifically Section 4.2(d)(i) of the MPS Operating Agreement, and the South Carolina Uniform Limited Liability Company Act of 1996, S.C. Code Ann. § 33-44-404(c)(1).

18. In responding to the allegations of Paragraph 17, Defendant craves reference to the September 30, 2015 Proposed Amendment, which document speaks for itself. Defendant would further allege that the September 30, 2015 Proposed Amendment is not valid and has no force and effect as a matter of law because it was not consented to, or signed by, all of the members of MPS at the time, as required by the MPS Operating Agreement, specifically Section 4.2(d)(i) of the MPS Operating Agreement, and the South Carolina Uniform Limited Liability Company Act of 1996, S.C. Code Ann. § 33-44-404(c)(1).

19. In responding to the allegations of Paragraph 18, Defendant admits that she has

recently learned that Plaintiff has retained HDH Advisors, LLC (hereinafter “HDH”) since in or about July 2013 as a “strategic engagement” to perform certain financial valuation services for Plaintiff. Defendant further alleges that she recently learned that HDH’s engagement letters since July 15, 2013, specifically state that HDH is not being engaged to perform a complete business appraisal of MPS. Defendant denies the remaining allegations of Paragraph 18.

20. In responding to the allegations of Paragraph 19, Defendant admits on or about April 12, 2018, Plaintiff’s counsel provided a copy of HDH’s report for FY2017 to Defendant’s counsel. Defendant denies the remaining allegations of Paragraph 19.

21. In responding to the allegations of Paragraph 20, Defendant admits on or about August 3, 2018, Plaintiff’s counsel made an offer to purchase Defendant’s ownership share of MPS for a steeply discounted price, which appears to correspond to the discounted per unit price from HDH’s report for FY2017. Defendant denies the remaining allegations of Paragraph 20.

22. In responding to the allegations of Paragraph 21, Defendant admits that she contests HDH’s purported valuation of MPS, that she has rejected Plaintiff’s offer to purchase her ownership units of MPS, and that she believes the fair market value of her ownership shares of MPS is substantially higher than what Plaintiff offered her. Defendant further alleges that her counsel sent a letter to Plaintiff’s counsel on January 14, 2019, which letter contains confidential settlement discussions under Rule 408 of the South Carolina Rules of Evidence; otherwise, the letter of January 14, 2019 speaks for itself. Defendant denies the remaining allegation of Paragraph 21.

23. In responding to the allegations of Paragraph 22, Defendant hereby incorporates by reference Paragraphs 1-22 above.

24. In responding to the allegations of Paragraph 23, Defendant admits that there is an

actual controversy between Plaintiff and Defendant regarding the valuation of, and proper purchase price for, Defendant's ownership units of MPS. Defendant denies the remaining allegations of Paragraph 23.

25. The allegations of Paragraph 24 assert legal conclusions, not factual allegations and do not require a response from Defendant. To the extent that a response is required, Defendant denies that Plaintiff is entitled to any of the relief requested in its Complaint.

26. Defendant denies the allegations of Paragraph 25, including subparagraphs a. through e. Defendant further alleges that Plaintiff has breached its obligations under the Severance Agreement as stated in detail in the Counterclaims below.

27. Defendant denies that Plaintiff is entitled to any of the relief set forth in subparagraphs (a) through (f) of its Prayer for Relief.

FOR A SECOND DEFENSE
(Failure to State a Claim)

28. Plaintiff's Complaint fails, in whole or in part, to state a cause of action upon which relief can be granted.

FOR A THIRD DEFENSE
(Waiver)

29. Plaintiff's Complaint is barred, in whole or in part, by the equitable doctrine of waiver.

FOR A FOURTH DEFENSE
(Estoppel)

30. Plaintiff's Complaint is barred, in whole or in part, by the equitable doctrine of estoppel.

FOR A FIFTH DEFENSE
(Unclean Hands)

31. Plaintiff's Complaint is barred, in whole or in part, by the equitable doctrine of unclean hands.

FOR A SIXTH DEFENSE
(Fraud in the Inducement)

32. Plaintiff's Complaint is barred, in whole or in part, because Plaintiff's managers, employees, or agents made numerous material misrepresentations to Defendant, knowing the same to be untrue, for the purpose of inducing Defendant to sign the Severance Agreement.

FOR A SEVENTH DEFENSE
(Prior Breach of Agreement)

33. Plaintiff's Complaint is barred, in whole or in part, because one or more managers, employees, or agents of Plaintiff committed one or more prior breaches of the Severance Agreement with Defendant, which excused any further obligations or responsibilities of Defendant to continue to perform her obligations under the Severance Agreement.

FOR AN EIGHTH DEFENSE
(Failure of Consideration)

34. Plaintiff's Complaint is barred, in whole or in part, because one or more managers, employees, or agents of Plaintiff failed or refused to provide to Defendant all of the promised consideration for the Severance Agreement, which excused any further obligation or responsibility of Defendant to continue to perform her obligations under the Severance Agreement.

COUNTERCLAIMS AND THIRD-PARTY CLAIMS

Defendant, by way of her Counterclaims and Third-Party Complaint, would allege and show upon the Court the following:

Parties, Jurisdiction, and Venue

35. Defendant-Counterclaimant is a citizen and resident of Spartanburg County, South Carolina. She brings these Counterclaims and Third-Party Claims individually and in a Derivative Capacity as a current member of MPS on behalf of the company itself.

36. Plaintiff-Counterclaim Defendant, McMillan Pazdan Smith, LLC (herein “MPS”), is a limited liability company organized and existing pursuant to the laws of the State of South Carolina, with its principal place of business in Greenville County, South Carolina. MPS owns property and conducts business within Greenville County, South Carolina.

37. Third-Party Defendant Rondald G. Smith (hereinafter “Ron Smith”) is a citizen and resident of Spartanburg County, South Carolina. Ron Smith is a managing member of MPS, owning approximately 34,740 ownership units, or approximately 38.86% of the company.

38. Third-Party Defendant Joseph M. Pazdan (hereinafter “Pazdan”) is a citizen and resident of Greenville County, South Carolina. Pazdan is a managing member of MPS, owning approximately 14,744 ownership units, or approximately 16.53% of the company.

39. Third-Party Defendant Brad B. Smith (hereinafter “Brad Smith”) is a citizen and resident of Greenville County, South Carolina. Brad Smith is a managing member of MPS, owning approximately 14,744 ownership units, or approximately 16.53% of the company.

40. Third-Party Defendant Chad C. Cousins (hereinafter “Cousins”) is a citizen and resident of Greenville County, South Carolina. Cousins is the Chief Operating Officer of MPS and as of December 31, 2017, purports to own approximately 3,350 ownership units, or approximately 3.75% of the company. Defendant cannot recall whether she ever consented to or signed off on Cousins’s purchase of any ownership shares of MPS. Cousins is on the Executive Committee of

MPS.

41. This Court has personal jurisdiction over MPS as Counterclaim Defendant and over all Third-Party Defendants.

42. This Court has jurisdiction over the subject matter of this action.

43. Venue is proper in this Court because Plaintiff is headquartered in Greenville County, South Carolina, and the wrongful conduct occurred, at least in part, within Greenville County, South Carolina.

Facts

44. Defendant is an architect duly licensed by the State of South Carolina since September 17, 1991. Defendant began working for Plaintiff's predecessor firm, McMillan Smith & Partners Architects, PLLC (hereinafter "MS"), in or about September 1994 and became a partner of the MS firm approximately two years later.

45. Plaintiff was formed on or about August 19, 2009, to effectuate the merger between MS and Pazdan-Smith Group, Inc., which transaction closed on or about September 30, 2009.

46. At the time of the merger, Defendant held a 5.825% membership interest in MS. Defendant currently holds 2,035 membership units of Plaintiff company.

47. At all times relevant hereto, Defendant was a good and dedicated member and employee of Plaintiff and performed her job duties and responsibilities in a professional and competent manner. Defendant satisfied all of her obligations under the original MPS Operating Agreement.

48. Defendant refused to consent to or sign the September 30, 2015 Proposed Amendment and prior proposed amendments to the MPS Operating Agreement.

49. On or about December 5, 2017, Plaintiff and Defendant voluntarily entered into the Severance Agreement, pursuant to which Defendant agreed to voluntarily resign her employment with Plaintiff in good standing, effective February 12, 2018.

50. The Severance Agreement also provides, in relevant part, that Defendant's Proper Dissociation from the company would be effectuated "in early 2018, following the close of YR2017, with [Plaintiff] providing access to all current and prior year financial reports, tax returns, and other financial information as requested by [Defendant's] Counsel."

51. In early January 2018, Defendant was diagnosed with breast cancer.

52. On February 12, 2018, Defendant submitted her written resignation of employment with Plaintiff, by letter to Cousins as Plaintiff's COO.

53. On or about April 12, 2018, Plaintiff's counsel provided to Defendant's counsel a copy of the purported valuation of Plaintiff's membership units as of December 31, 2017, which valuation was commissioned by Defendant's managing members and performed by a third-party appraisal firm, HDH.

54. On May 1, 2018, Defendant's counsel notified Plaintiff's counsel that Defendant had been undergoing difficult cancer treatments and would be required to focus on her health instead of on business-related matters.

55. On August 3, 2018, Defendant's counsel notified Plaintiff's counsel that Defendant was finished with her cancer treatments and that she was ready to get back to finalizing the terms of the buy-out of her membership interest from Plaintiff.

56. Also on August 3, 2018, Plaintiff's counsel conveyed to Defendant's counsel an offer (subject to formal approval by Plaintiff's members) for Plaintiff to purchase Defendant's

membership interests based on the HDH valuation report of MPS, discounted for lack of majority control and marketability.

57. Defendant rejected Plaintiff's preliminary offer later on August 3, 2018, and requested all information provided to HDH in connection with its latest valuation, as well as other financial information relating to MPS.

58. On August 16, 2018, Defendant's counsel submitted a written request to Plaintiff's counsel for various financial information and other data or records necessary to allow Defendant a full and fair opportunity to evaluate HDH's report and the fair market value of her membership shares of MPS.

59. To date, Plaintiff has provided some, but not nearly all, of the financial information requested by Defendant's counsel.

FOR A NINTH DEFENSE AND BY WAY OF
FIRST COUNTERCLAIM
(Breach of Contract)

60. Defendant repeats and realleges Paragraphs 35-59 as if restated verbatim.

61. Defendant's Severance Agreement with Plaintiff signed on or about December 5, 2017, is a valid and enforceable contract.

62. Defendant has fully performed all of her obligations under both the Severance Agreement and the MPS Operating Agreement.

63. Plaintiff breached the Severance Agreement with Plaintiff and the MPS Operating Agreement, including the implied covenant of good faith and fair dealing, in the following particulars:

1. by failing or refusing to provide to Defendant notice of Plaintiff's

membership meetings since November 15, 2017;

2. by failing or refusing to provide Defendant the opportunity to vote on matters presented to Plaintiff's membership regarding the operation of the company since November 15, 2017;
3. by failing or refusing to include Defendant in any and all distributions for members after the close of FY2017;
4. by failing or refusing to provide in a timely manner all material, financial information about Plaintiff's operations as requested by Defendant's Counsel;
5. by utilizing a valuation method that deliberately and systematically underestimates the true, fair market value of the company in several respects, including by failing to make normalizing adjustments to account for managing members' excessive compensation, benefits, and self-interested, related-party transactions; and
6. by failing to negotiate in good faith for the purchase of Defendant's membership units as a Proper Distribution.

64. Defendant's breaches of contract as set forth herein have caused Plaintiff to suffer substantial damages.

65. Defendant is entitled to recover in this action actual damages from Plaintiff to compensate her for her actual losses and her foreseeable, consequential damages flowing from Plaintiff's breaches of contract as alleged herein.

66. Furthermore, some of the amounts due to Defendant are a sum certain or are an amount that is capable of being reduced to a certainty. Upon information and belief, Defendant is,

therefore, entitled to recover prejudgment interest on the amounts owed to her by Plaintiff, from the time each payment was demandable until the date of the judgment in this matter, at the statutory rate of 8.75% per annum.

67. Plaintiff is also entitled to an award of attorney's fees and costs incurred in bringing this action as provided for in Paragraph 17 of the Severance Agreement.

FOR A TENTH DEFENSE AND BY WAY OF
SECOND COUNTERCLAIM
(Judicial Determination of Fair Value of Distributional Interest)

68. Defendant repeats and realleges Paragraphs 35-67 as if restated verbatim.

69. Plaintiff is an at-will limited liability company.

70. Defendant, as a member of Plaintiff company, has agreed to Proper Dissociation from the company pursuant to the terms of the Severance Agreement and the MPS Operating Agreement.

71. Defendant's proposed dissociation from Plaintiff company will not result in a dissolution and winding up of the company's business.

72. On or about August 3, 2018, Plaintiff, through its counsel, made a preliminary offer (subject to formal vote by Plaintiff's membership) to purchase Defendant's membership interest for the discounted HDH value per share, to be paid according to the terms set forth in Section 11.4 of the September 30, 2015 Proposed Amendment.

73. Defendant has good and substantial reason to believe that Plaintiff's offer materially understates the true, fair value of Defendant's membership interest.

74. An agreement to purchase Defendant's distributional interest of Plaintiff company has not been made within 120 days after the effective date of Defendant's Proper Dissociation from Plaintiff company.

75. Defendant and Plaintiff company previously entered into a Tolling Agreement and Extension of Tolling Agreement to extend any statute of limitations through and until Monday, March 4, 2019, at 5:00 p.m. EST.

76. Pursuant to Section 33-44-701(d) of the South Carolina Code, Defendant brings this action to enforce the purchase of her membership interests in Plaintiff company for fair value.

77. Defendant requests that the Court independently determine the fair value of Defendant's distributional interest in Plaintiff company pursuant to Section 33-44-701(e) and -702 of the South Carolina Code, after consideration of any additional value from the Derivative Action set forth herein below, and order Plaintiff to purchase Defendant's interests accordingly.

78. Defendant also request that Plaintiff, at its own expense, notify in writing all of the remaining members of Plaintiff company of the commencement of this proceeding.

79. Plaintiff has acted arbitrarily, vexatiously, or not in good faith in connection with this matter. Accordingly, Defendant is also entitled to an award of attorney's fees, expert appraisal fees, and other costs related to this matter, pursuant to S.C. Code Ann. § 33-44-702(d)

80. Defendant is also entitled to pre-judgment interest pursuant to S.C. Code Ann. § 33-44-702(e), from the effective date of Defendant's Proper Dissociation until the date of payment, at the statutory rate of 8.75% per annum.

**FOR AN ELEVENTH DEFENSE AND BY WAY OF
THIRD COUNTERCLAIM**

(Accounting and Order Compelling Production of Defendant's Financial Records)

81. Defendant repeats and realleges Paragraphs 35-80 as if restated verbatim.

82. Defendant, as a member of Plaintiff company, has a right pursuant to the Severance Agreement, the MPS Operating Agreement, and Section 33-44-408 of the South Carolina Code, to

obtain financial records and other information from Plaintiff necessary to determine the profits and losses of the company and Defendant's rights upon proper dissociation.

83. Pursuant to Section 33-44-408(b)(2) of the South Carolina Code, Defendant, as a member of Plaintiff company, is entitled to receive, "on demand, other information concerning the company's business or affairs, except to the extent the demand or the information demanded is unreasonable or otherwise improper under the circumstances."

84. Defendant, through her undersigned counsel, has repeatedly requested financial records and other documents from Plaintiff, specifically including in the preservation letter of November 17, 2017; letters of November 19, 2017 (2); letter of November 28, 2017; email of December 20, 2017; letter of August 16, 2018; letter of August 28, 2018; and emails of September 25, 2018, October 8, 2018, and November 5, 2018.

85. The information sought by Defendant is reasonable and is necessary to conduct a reasonable and thorough analysis of the valuation conducted by Plaintiff's third-party appraiser, HDH, as well as the offer Plaintiff made to purchase Defendant's ownership share of the company.

86. Plaintiff has failed or refused to provide all information requested.

87. Pursuant to Section 33-44-410(a) of the South Carolina Code, Defendant respectfully requests that the Court require Plaintiff to provide an equitable accounting as to the company's business, as well as injunctive relief to enforce Defendant's rights to receive information under the Severance Agreement, the MPS Operating Agreement, and the South Carolina Uniform Limited Liability Company Act.

FOR A TWELFTH DEFENSE AND BY WAY OF
FOURTH COUNTERCLAIM
(Declaratory Judgment)

88. Defendant repeats and realleges Paragraphs 35-87 as if restated verbatim.

89. Defendant has a case of actual controversy with Plaintiff regarding the Severance Agreement, the MPS Operating Agreement, and/or the September 30, 2015 Proposed Amendment.

90. Defendant seeks a Declaratory Judgment pursuant to Rule 57, SCRPC, and the South Carolina Uniform Declaratory Judgments Act, S.C. Code Ann. § 15-53-10 et seq., and requests the Court to declare the rights, status, and other legal relations between Defendant and Plaintiff. Specifically, Defendant requests the Court to address the following by way of Declaratory Judgment:

1. that the September 20, 2015 Proposed Amendment is not valid because it was not unanimously consented to, and signed by, all members of MPS at the time;
2. that the two previous proposed amendments to the MPS Operating Agreement are not valid because they were not unanimously consented to, and signed by, all members of MPS at the time;
3. that the MPS Operating Agreement controls Defendant's rights in MPS; and
4. that any act taken by the managing members of Plaintiff in violation of the MPS Operating Agreement or the South Carolina Uniform Limited Liability Company Act of 1996, S.C. Code Ann. § 33-44-101 et seq., is null and void, including the addition of new members without unanimous consent.

91. Defendant seeks further necessary and proper relief, including injunctive relief, based on the Court's declaratory judgment.

FOR A THIRTEENTH DEFENSE AND BY WAY OF
FIRST, THIRD-PARTY COMPLAINT
(Derivative Action—Breach of Fiduciary Duty and Breach of Operating Agreement)

92. Defendant repeats and realleges Paragraphs 35-91 as if restated verbatim.

93. Defendant is a member of Plaintiff LLC as of the time of the commencement of this action and was a member of the Plaintiff LLC at the time of the transactions or decisions at issue in this Derivative Action. Accordingly, Defendant has standing to bring this Derivative Action on behalf of MPS and its members.

94. Third-Party Defendant Ron Smith is member of Plaintiff LLC and has served as a Managing Member since the formation of MPS in September 2009.

95. Third-Party Defendant Pazdan is a member of Plaintiff LLC and has served as a Managing Member since the formation of MPS in September 2009.

96. Third-Party Defendant Brad Smith is a member of Plaintiff LLC and has served as a Managing Member since the formation of MPS in September 2009.

97. Third-Party Defendant Cousins is a member of Plaintiff LLC and has served on the Executive Committee of Plaintiff since his employment with MPS in mid-2013. Cousins is also an officer of MPS, serving as COO.

98. Third-Party Defendants each owe fiduciary duties to MPS by virtue of their membership on the Management Committee or as an officer of the company.

99. Third-Party Defendants have acted in their own self-interest by systematically overpaying themselves in the form of excessive compensation, bonuses, perquisites, and fringe benefits for themselves and their spouses or family members at least since Cousins was hired as COO. The total compensation of Third-Party Defendants has increased at a rate that is three to five

times higher than that of other members of MPS since the formation of MPS in September 2009. Since Cousins's employment in mid 2013, the disparity in the rate of increase of the Third-Party Defendants is substantially higher.

100. In addition, Third-Party Defendant Ron Smith's spouse, Caroline B. Smith, is the principal owner of C & P of Spartanburg, LLC (hereinafter "C & P"), which owns the office building in Spartanburg, South Carolina where Plaintiff's offices are located. Upon information and belief, Mrs. Smith owns 90% of the membership of C & P. Upon further information and belief, Third-Party Defendant Ron Smith has acted as a manager of C & P and has gained self-enrichment through this related-party transaction, at the expense of MPS's interests.

101. Third-Party Defendants Ron Smith, Pazdan, and Brad Smith, as the Managing Members of MPS, have approved the related-party lease transaction of MPS's Spartanburg office for years, despite the fact that the rental rates are substantially in excess of fair market rental rates for similar office space in down-town Spartanburg. In addition, the Managing Members of MPS have repeatedly authorized the payment of capital improvements of the leased property through Plaintiff's operating account, instead of through the appropriate account of C & P.

102. The details of the compensation, bonuses, perquisites, and fringe benefit of the Third-Party Defendants, such as life insurance, disability insurance, club membership dues, university alumni donations, automobile leases, and retirement benefits, as well as the lease transactions between Plaintiff and C & P, have been deliberately withheld from the other members of MPS, in violation of the duty of disclosure with complete candor. Accordingly, the Required Interest of the Members of MPS has never had an opportunity to vote to approve or disapprove of Third-Party Defendants' compensation and other benefits.

103. Third-Party Defendants have also controlled the financial information and assumptions provided to HDH Advisors to enable them to manipulate the prices of Plaintiff's membership units to enable Third-Party Defendants to re-purchase shares of the company from dissociating or departing members at substantially below true fair market value. At the same time, Third-Party Defendants have attempted to amend the Operating Agreement of MPS to allow the value of the Managing Members' interests to be determined by themselves in the form of key-man life insurance policies for the benefit of their spouses and estates.

104. Third-Party Defendants' actions as described herein, including breaches of fiduciary duties, the duty of loyalty, and the duty of care, were taken in a grossly negligent or reckless manner or constitute intentional misconduct or a knowing violation of the law.

105. On January 14, 2019, Defendant's counsel sent a letter to Plaintiff's counsel suggesting that the firm should take action against its Managing Members for breach of fiduciary duty based on the acts of misconduct described herein. To date, Plaintiff's counsel has refused to commence such an action. In any event, the managing members of MPS are not likely to authorize the commencement of legal action by Plaintiff against themselves individually.

106. As a direct and proximate result of Third-Party Defendants' numerous breaches of fiduciary duties, duty of loyalty, duty of care, gross negligence, recklessness, intentional misconduct and/or knowing violations of the law, MPS has been injured by significant reductions in its annual operating income and by substantial reductions in its value as a going concern.

107. Defendant is entitled to an award of actual damages against Third-Party Defendants, the proceeds of which are to be remitted to MPS.

108. Defendant is also entitled to an award of expenses, including reasonable attorney's

fees, in connection with the prosecution of this Third-Party Complaint.

109. Defendant is also entitled to recover punitive damages against Third-Party Defendants in an amount to be determined by a jury sufficient to deter these Third-Party Defendants and others from engaging in such actions in the future.

110. Finally, Defendant seeks injunctive relief from the Court ordering Third-Party Defendants to cease and desist any continued violations of their duties to toward the company and requiring any related-party transactions to be authorized by the Requisite Interest of Members, after full and complete disclosure of all financial information surrounding such transactions.

WHEREFORE, having fully responded to the allegations in Plaintiff's Complaint, Defendant respectfully requests that the Court enter an order dismissing the Complaint, with prejudice, and requiring Plaintiff to pay the costs and attorneys' fees incurred by Defendant in responding to the Complaint. In addition, having fully set forth her allegations against Plaintiff and Third-Party Defendants by way of the foregoing Counterclaims and Third-Party Claims respectively, Defendant respectfully requests the following relief:

1. Actual, compensatory damages for economic and non-economic injuries;
2. Pre-judgment interest;
3. Judicial determination of the fair value of Defendant's ownership interests of Plaintiff and an order requiring Plaintiff to purchase Defendant's membership units for the fair value, after consideration of any proceeds from Defendant's Derivative Action against Third-Party Defendants;
4. Declaratory judgment as requested above;
5. Injunctive relief as requested above;

6. Damages to Plaintiff LLC caused by Third-Party Defendants' breaches of duties, gross misconduct, recklessness, intentional wrong-doing or knowing violations of the law;
7. Punitive damages against Third-Party Defendants; and
8. Such further relief as the Court deems just and appropriate.

DEFENDANT HEREBY DEMANDS A JURY TRIAL ON ALL LEGAL CAUSES OF ACTION, COUNTERCLAIMS, AND THIRD-PARTY CLAIMS.

Respectfully submitted,

s/ David E. Rothstein
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Attorney for Defendant, Donza H. Mattison,
Individually and in a Derivative Capacity on Behalf
of McMillan Pazdan Smith, LLC

March 4, 2019

Greenville, SC.

Exhibit A

SEVERANCE AGREEMENT AND GENERAL RELEASE

This Severance Agreement and General Release ("Agreement") is made by and between McMillan Pazdan Smith, LLC ("Company"), which term includes all affiliated companies and all Released Parties as defined below, where appropriate) and Donza H. Mattison ("Employee").

WHEREAS, Employee and Company mutually agree that Employee's employment with the Company will end effective February 12, 2018;

WHEREAS, 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;

THE PARTIES HEREBY AGREE, in consideration of the foregoing and the following terms, conditions, and obligations, as follows:

1. **Employment Ended.** The parties agree that Employee's employment with the Company (and any and all of its affiliates) will voluntarily end on February 12, 2018. Employee shall thereafter no longer be employed by Company in any capacity, and Employee shall not represent to any third party that Employee retains any employment or other relationship with Company.

2. **Membership and Severance Terms.**

- (a) Beginning November 20, 2017, and continuing through a maximum end date of February 12, 2018, Employee will be placed on Family Medical Leave Act ("FMLA") Leave provided Employee submits appropriate FMLA paperwork in a timely fashion.
- (b) During Employee's FMLA Leave, Employee will be paid 120 hours of Paid Time Off ("PTO"). In addition, Employee will receive pay for normal Company Holidays during the FMLA Leave period to include Thanksgiving Day, the Day after Thanksgiving, Christmas Eve, Christmas Day, and New Year's Day. In the event FMLA Leave is not approved for any period of time between November 20, 2017 and February 12, 2018, Employee will still receive PTO pay and Holiday pay as described above.
- (c) Employee shall receive a minimum of 23 weeks of Severance pay at her current salary. If Long Term Disability (LTD) benefits are not approved by the end of the 23rd week, Employee shall receive an additional seven (7) weeks of severance pay. Severance payments will begin upon expiration of the PTO pay described in Paragraph (b) above. Employee's receipt of LTD benefits will not otherwise affect the amount of Severance pay.

- (d) Employee will be paid a bonus of \$15,000 for 2017, plus Company-paid matching 401(k) contribution of 4% for year 2017. The bonus will be paid at the same time payments are made to similarly situated employees of Company.
- (e) Employee shall receive distributions as described in the September 30, 2015 Operating Agreement based on Employees distribution rights thereunder. The distribution will be paid in the regular course of Company's business, and at the time other Members receive a distribution.
- (f) With regard to Employee's application for disability benefits, the Company agrees to confirm Employee's job duties and responsibilities including on-site observations and inspections of large construction sites.
- (g) Company will transfer ownership of the life insurance policy Company currently holds on Employee's life according to the policy terms on or about February 12, 2018. The Company will have no premium payment or other responsibilities regarding the policy once ownership is transferred. Employee may designate whomever she chooses to be the beneficiary of such policy.
- (h) During Employee's FMLA Leave, Company will continue to provide Employee with insurance benefits at the same level as if Employee was actively at work. Upon the end of Employee's FMLA Leave or February 12, 2018, Company will provide Employee insurance continuation benefits as required by Federal law.
- (i) By executing this Agreement, Employee resigns Employee's employment voluntarily effective February 12, 2018. All Company documents will reflect that Employee voluntarily resigned in good standing. Employee agrees not to apply for employment with Company at any point in the future. Company agrees to positively announce Employee's resignation including thanking Employee for over 23 years of dedicated service to the Company.
- (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. The Proper Dissociation will be handled separately from this Agreement and will be done in accordance with the September 30, 2015 Operating Agreement.

3. **Cooperation.** Employee agrees to cooperate reasonably with the Company and all of its affiliates and/or the Released Parties, as defined below (including its and their outside counsel), in connection with the contemplation, prosecution, and defense of all phases of existing, past and future claims or litigation about which the Company believes the Employee may have knowledge or information. Employee further agrees to make herself available at mutually convenient times during and outside of regular business hours as reasonably deemed necessary by the Company's counsel. Employee agrees to appear without the necessity of a subpoena to testify truthfully in any legal proceedings in which the Company calls her as a witness. Employee will be compensated for any time spent in connection with any such claims or litigation, including any required travel, at an effective hourly rate based on her last regular base salary with the Company. Employee further agrees that she shall not voluntarily provide information to or otherwise cooperate with any individual or entity that is contemplating or pursuing litigation against any of the Released Parties or that is undertaking any investigation or review of any of the Released Parties' activities or practices; provided, however, that Employee may participate in or otherwise assist in any investigation or inquiry conducted by the Equal Employment Opportunity Commission or any analogous state agency.

4. **General Release of Claims.** Employee hereby releases and forever discharges the Company, its subsidiaries, business units, affiliates, and parent companies, past and present, , its predecessors and successors and its respective managers, officers, directors, employees, agents, legal counsel, and assigns, past and present (hereinafter referred to collectively as the "Released Parties") from any and all known and unknown claims of action that Employee may have against the Released Parties arising from or in connection with: (a) the terms and conditions of her employment with the Company; (b) the termination of her employment from the Company; and (c) any conduct, actions or omissions, known or unknown, by the Released Parties occurring on or before the date Employee executes this Agreement. This release, and the term "claim" or "claims" as used in this Agreement, include all benefits, grievances, proceedings, investigations, hearings, charges, complaints, claims, demands, actions, causes of action, and suits of whatever nature, whether known or unknown, fixed, absolute or contingent, matured or unmatured, asserted or unasserted, however arising, and whether legal, equitable or administrative. The released claims include Employee's attorney fees, court costs, wages, back pay, front pay, severance pay, compensatory damages, punitive damages, general damages, special damages, penalties, benefits of any sort, liquidated damages, costs and disbursements, expert fees, injunctive relief, equitable relief, declaratory relief, interest, reinstatement, future employment, and any other legally recoverable category of damages or relief that Employee has ever had, or now has, or may claim to have, against the Company. It is expressly intended, understood, and agreed that the claims released by Employee shall include, by way of example and without limitation, all claims arising under federal, state or local statute, ordinance, common law, regulation, equity or other sources, whether known or unknown, based upon:

- (a) Actual or alleged defamation, invasion of privacy, injury to credit, personal inconvenience, damage to Employee's personal reputation, outrage, distress, humiliation, loss of standing and prestige, personal injury, bodily injury, tort, loss of consortium, intentional or negligent infliction of

emotional distress, abuse of process, retaliation, negligence, fraud, extortion, or other common law causes of action or other compensation for bodily injury.

- (b) Failure to provide benefits or pay wages or commissions, including actual or alleged violations of the South Carolina Human Affairs Law, the South Carolina Payment of Wages Act, common law and any and all other applicable state, county or local codes, statutes, ordinances or regulations.
- (c) Actual or alleged violations of anti-discrimination laws, including, but not limited to, any and all claims of age, disability, race, color, sex, national origin, ancestry, religion, genetic information, or other discrimination, retaliation or harassment;
- (d) Actual or alleged violations of the federal Age Discrimination in Employment Act, as amended, the Civil Rights Acts of 1866, 1871, and 1964, Section 1981 of Title 42 of the U.S. Code, Title VII of the Civil Rights Act of 1964, as amended, the Civil Rights Act of 1991, all federal and state executive orders including Executive Order 11246, the Uniformed Services Employment and Reemployment Rights Act of 1994, the Equal Pay Act, the Americans with Disabilities Act of 1990, the Rehabilitation Act of 1973, the Family and Medical Leave Act, the Fair Labor Standards Act, the Genetic Information Nondiscrimination Act of 2008, the Worker Adjustment and Retraining Notification Act, the Pregnancy Discrimination Act, state and local wage-hour laws and regulations, and the federal Employee Retirement Income Security Act, including, but not limited to, claims under Company-sponsored severance and termination pay plans, if any (provided, however, that nothing in this Agreement affects any claims relating to Employee's pending or anticipated claims for short-term or long-term disability benefits or to any claims relating to coverage for any ERISA-governed plan for health, dental, or vision insurance);
- (e) Actual or alleged violations of any other federal or state codes, laws, ordinances, regulations or case law which prohibit employment discrimination, retaliatory termination of employment, wrongful discharge, and employment termination in violation of public policy;
- (f) Actual or alleged breach of express and implied contract, breach of contract accompanied by a fraudulent act, breach of implied covenant of good faith and fair dealing, interference with contract, promissory estoppel, and claims under the Operating Agreement or any other operating agreement, any employment agreement, handbook or policy relating to her employment or separation of employment; and

- (g) Actual or alleged violations of the National Labor Relations Act and the Labor Management Relations Act.

Employee agrees and understands that any claims she may have under the aforementioned statutes, or any other federal, state or local law ordinance, rule or regulation, are effectively waived and released by this Agreement. Employee represents that she knows of no claim that she has that has not been released by this paragraph. This release does not extend to claims which is a matter of law cannot be waived. Employee acknowledges and understands that this paragraph is intended to prevent her from making any claim against the Released Parties regarding any matter or incident relating to or arising from the Operating Agreement, other operating agreements, the employment relationship or its termination that occurs up to the date Employee executes this Agreement; provided, however, that nothing in this Agreement shall have any effect on Employee's rights and remedies relating to her dissociation from the Company.

5. **Covenant Not to Sue.** Employee hereby covenants and agrees not to file, commence or initiate any suit, grievance, demand or cause of action against the Released Parties based upon or relating to any of the claims released and forever discharged pursuant to this Agreement. If Employee breaches this covenant not to sue, she hereby agrees to pay all of the reasonable costs and attorney fees actually incurred by the Released Parties in defending against such breaching conduct, together with such other and further damages as may result, directly or indirectly, from that breach. Moreover, Employee agrees that she will not persuade or instruct any person to file a suit, claim or complaint on her behalf based on a claim released in this Agreement with any state or federal court or administrative agency against the Released Parties. Employee expressly agrees not to commence or file any class action, including any class arbitration against Company, or serve in any representative capacity in any class action, including class arbitration, against or involving the Company. In accordance with 29 C.F.R. § 1625.23(b), nothing in this covenant not to sue is intended to preclude Employee from challenging the validity of this Agreement under the Older Workers Benefit Protection Act, 29 U.S.C. § 626(f), with respect to claims under the Age Discrimination in Employment Act, and the Company shall not be entitled to recover any consideration paid under this Agreement, damages or its attorney fees and costs resulting from such challenge.

6. **Non-Interference.** Nothing in this Agreement shall interfere with Employee's right to file a charge, cooperate or participate in an investigation or proceeding conducted by the Equal Employment Opportunity Commission, or other federal or state regulatory or law enforcement agency. However, the consideration provided to Employee in this Agreement shall be the sole relief provided to Employee for the claims that are released by her herein. To the maximum extent permitted by law, Employee agrees that Employee will not seek and waives any right to accept any relief or award from any charge or action against the Released Parties before any federal, state or local administrative agency or federal, state or local court, whether filed by Employee or on Employee's behalf with respect to any claim or right released in this Agreement.

7. **No Admission of Wrongdoing or Liability.** Nothing contained in this Agreement shall constitute, or be construed as or is intended to be, an admission or an acknowledgment by the Company or the Released Parties of any wrongdoing or liability, all such wrongdoing and liability being expressly denied.

8. **Confidentiality and Nondisclosure Provisions.** Employee agrees to maintain absolute confidentiality and secrecy concerning the terms of this Agreement and will not reveal or disseminate by publication in any manner whatsoever this document or any matters pertaining to it to any other person except as required by legal process. This confidentiality provision does not apply to communications necessary between Employee's immediate family members or legal and financial planners or tax preparers who are also bound by this confidentiality provision. Employee also agrees to honor and remains obligated under any confidentiality agreement(s) that Employee entered into with the Company or the Released Parties, and nothing in this Agreement shall be deemed to limit, void, abrogate or lessen any otherwise existing obligation of the Employee to keep confidential any trade secret or confidential information belonging to the Company, including, but not limited to, any such contractual or common law confidentiality obligations Employee owes to the Company.

9. **Restrictive Covenants Obligations.** Nothing in this Agreement shall void, abrogate or lessen any otherwise existing obligation of Employee to refrain from solicitation of the Company's employees or customers, including, but not limited to, the obligations contained in statutory or common law, or those contained in the Confidentiality and Non-solicitation Agreement effective on September 30, 2009, with the Company or referenced in other written agreements with the Company.

10. **Non-Disparagement.**

- (a) Employee agrees not to make any statements, written or verbal, or cause or encourage others to make any statements, written or verbal, including, but not limited to, any statements made via social media, on websites or in blogs, that defame, disparage or in any way criticize the personal or business reputation, practices, products, management or conduct of the Company, or any of the Released Parties. Employee acknowledges and agrees that this prohibition extends to statements, written or verbal, made to anyone, including, but not limited to, the news media, competitors, vendors, employees (past and present), customers, clients, governmental agencies, educational institutions, and associated professional organizations. Employee further understands and agrees that this paragraph is a material provision of this Agreement and that any breach of this paragraph shall be a material breach of this Agreement, and that the Company would be irreparably harmed by violation of this provision.
- (b) The Company agrees that its officers, Managers, and members will not make any statements, written or verbal, or direct any third party to make



any statements, written or verbal, including, but not limited to, any statements made via social media, on websites or in blogs, that defame or disparage the personal or business reputation, practices or conduct of the Employee. Nothing herein prevents disclosure, in the sole discretion of the Company and its management, of this Agreement and discussion of Employee's employment with and separation of employment from the Company and the circumstances regarding such separation from the Company (i) by and among employees and agents of Company and the Released Parties or (ii) to or in response to any governmental entity or in response to material provision of this Agreement and that any breach of this paragraph shall be a material breach of this Agreement, and that the Employee would be irreparably harmed by violation of this provision.

11. **Disclosure.** Employee acknowledges and warrants that she is not aware of, or that she has fully disclosed to the Company, any matters for which Employee was responsible or which came to Employee's attention as an employee of the Company that might give rise to, evidence or support any claim of illegal conduct, regulatory violation, unlawful discrimination, or other cause of action against the Company.

12. **Company Property.**

- (a) All records, files, lists, including computer-generated lists, data, drawings, documents, equipment, keys, building access or parking passes, credit card, and similar items relating to the Company's business that Employee generated or received from the Company remain the Company's sole and exclusive property. Employee agrees to promptly return to the Company all property of the Company in her possession. Employee further represents that she has not copied or caused to be copied, printed out, or caused to be printed out any documents or other material originating with or belonging to the Company, except in the ordinary course of Employee's employment with the Company. Employee additionally represents that she will not retain in her possession any such documents or other material originating with or belonging to the Company. Employee agrees not to delete Company information or any other electronic information from Employee's computer or other devices belonging to the Company before or after the Effective Date. Employee further agrees not to access the Company's computer system or other electronic systems following the Effective Date. Employee may retain documents relating to her ownership or membership in the Company or her financial rights or interests in the Company for her own personal, tax, or business purposes.
- (b) Any and all social media and other online accounts and profiles created or used by Employee on behalf of Company or otherwise for the purpose of promoting or marketing Company or similar business purposes, including

such profiles and accounts featuring or displaying Company's name and trademarks ("Company Social Media Accounts") belong solely to Company. As of the Effective Date, Employee agrees to cease accessing, using, updating or modifying any and all Company Social Media Accounts.

- (c) Upon the separation of Employee's employment, Company will retain ownership and control of all Company Social Media Accounts created or used during the course of Employee's employment with the Company, including all related data and information. Prior to the Effective Date, Employee agrees to provide to Company the log-in information, including usernames and passwords, for each Company Social Media Account that Employee created, used or managed. Employee also agrees to assist Company, both prior to and after the Effective Date (as may be necessary), with the transition and maintenance of each Company Social Media Account created or used by Employee during the course of her employment with the Company, including providing information that may be necessary to ensure that Company is able to access the Company Social Media Accounts.

13. **No Other Compensation Due.** Employee acknowledges and agrees that neither the Company nor any of the Released Parties owes Employee any wages, salary, stock options, bonus, accrued vacation or sick leave, benefits, paid time off, notice pay, severance pay, commissions, equity or ownership, incentive pay, salary, reimbursement, expenses, deferred compensation, or other compensation in any amount whatsoever, including, but not limited to, any compensation pursuant to the Operating Agreement and any other agreement, other than as expressly agreed to herein. Employee agrees that to the extent that Employee is otherwise due any such amounts or compensation or expenses of any nature, the Company's obligation to pay these amounts is satisfied and subsumed in full by the Severance Pay. The parties shall each bear their own costs and their own attorney fees in connection with this Agreement. Nothing in this Agreement is intended to have any effect on Employee's ownership rights or interests upon dissociation.

14. **No Other Considerations.** Employee affirms that the only consideration for the signing of this Agreement is that set forth in this Agreement and that no other promises or assurances of any kind have been made to Employee by the Company, the Company's attorneys, or any other person, as an inducement to sign this Agreement relating to her employment with, or separation of Employment from, the Company. The consideration for this Agreement tendered and herewith accepted is solely by way of settlement, compromise, and final disposition of disputed claims, and it is therefore specifically agreed that this Agreement shall forever be a final and complete bar to and full satisfaction of Employee's claims and suits for injuries or damages of whatsoever nature resulting from the aforesaid matters.

15. **No Assignment.** Employee hereby represents and warrants that Employee has not assigned, transferred or conveyed to any individual or entity any alleged right, claim or cause of



action of any kind which is included within the above releases. Employee further represents and warrants that Employee is aware of no lien or other encumbrance on Employee's rights, claims, and causes of action, and that Employee is entitled to receive from the Company payment of the full amount of the proceeds due to Employee under this Agreement.

16. **No Reinstatement.** Employee agrees that she will not seek reinstatement or reemployment with Company of its affiliates. In the event that Employee violates this provision, Company shall have the right to reject Employee's application without recourse by Employee, and such rejection shall not constitute retaliation or violation under federal or state statutory or common law. If, in violation of this provision, Employee applies for and is inadvertently given employment by Company, Company has the right to terminate her employment without recourse.

17. **Breach of Agreement.** If either party brings a claim for breach of the terms of this Agreement, the prevailing party shall be entitled to its reasonable attorney fees and expenses incurred in prosecuting or defending such an action.

18. **Binding Effect.** This Agreement shall be binding upon and inure to the benefit of Employee and the Company, and their officers, directors, employees, agents, legal counsel, heirs, successors and assigns.

19. **Warranties/Representations.** Employee hereby warrants and represents that:

- (a) Throughout her employment, she was fully and appropriately compensated for all hours worked in accordance with the Fair Labor Standards Act and other applicable law, if any;
- (b) Employee has been provided with all leave to which she is entitled under the Company policy and applicable law including, but not limited to, the Family and Medical Leave Act;
- (c) Employee has carefully read and fully understands the comprehensive terms and conditions of this Agreement and the releases set forth herein;
- (d) Employee is executing this Agreement knowingly and voluntarily, without any duress, coercion or undue influence by the Company, its representatives or any other person;
- (e) Employee has consulted with legal counsel of her own choice before executing this Agreement;
- (f) Employee has no pending claim, complaint, grievance or any document with any federal or state agency or any court seeking money damages or relief against the Company;

- (g) The Severance Pay recited above constitutes good and valuable consideration;
- (h) Employee is fully satisfied with the terms and conditions of this Agreement including without limitation the consideration paid to her by the Company;
- (i) Employee has not made a claim for workers' compensation related to her employment with the Company, and that she is currently unaware of any injury or illness that would support such a claim; and
- (j) Employee is not waiving rights or claims that may arise after the date this Agreement is executed, nor is Employee waiving any rights or claims relating to her financial interests as a member or owner of the Company.

20. **Entire Agreement; Severability of Terms.** This Agreement contains the entire agreement and understanding of the parties with respect to the subject-matters addressed herein and supersedes and replaces all prior discussions or negotiations between the parties or their counsel. The terms of this Agreement are severable, such that if any provision of this Agreement is found to be invalid, unlawful, or unenforceable by any judge or arbitrator, the other provisions of this Agreement will remain in full force and effect. Any invalid, unlawful, or unenforceable term will be stricken from the Agreement, and the remainder of the Agreement will survive to the fullest extent possible.

21. **Compliance with the Older Workers Benefit Protection Act.** To comply with the Older Workers Benefit Protection Act of 1990, the Company has advised Employee of the legal requirements of that Act, and this Agreement fully incorporates those legal requirements by reference and as follows:

- (a) This Agreement is written in layman's terms, and Employee hereby represents to the Company that Employee understands and comprehends its terms;
- (b) Employee is hereby advised, and has had an opportunity, to consult with an attorney to review this Agreement prior to executing it.
- (c) This Agreement specifically refers to rights and claims arising under the Age Discrimination in Employment Act;
- (d) Employee does not waive any rights or claims that result from events occurring after the date this Agreement is executed by Employee;
- (e) Employee hereby acknowledges that Employee is receiving consideration beyond anything of value to which Employee already is entitled;

- (f) Employee has twenty-one (21) days from Employee's receipt hereof (the Offer Date) to consider this proposed Agreement. Employee's failure to accept this proposed Agreement by close of business on the twenty-first day following Employee's receipt of this Agreement may be deemed rejection off its terms; and
- (g) Employee has the right to revoke this Agreement for seven (7) days following Employee's signing of this Agreement, and after the expiration of that seven (7) days the executed Agreement shall be of full validity, force, and effect. To exercise this right, Employee is required to deliver written notice to the Company prior to expiration of this right to revoke, and such revocation is not valid or effective unless and until the written notice of same is received by the Company, at the address (physical or email) or facsimile number specified at the end of this Agreement, within the revocation period. Otherwise, such revocation shall be invalid and ineffective and this Agreement shall be deemed accepted.

22. **Neutral Reference.** Employee agrees to refer all requests for employment references from the Company directly and exclusively to the Company's HR Manager (currently Jamie Kemp). Employee further understands that, in accordance with the Company's policy on employment references, the Company will provide only the dates of Employee's employment, positions held, and the salary earned by Employee. Company will provide a letter of reference for Employee, on Company letterhead, addressed "To Whom it May Concern" in language mutually agreed to by the parties.

23. **Governing Law.** This Agreement shall be governed by and construed and enforced in accordance with the laws of the State of South Carolina, without regard to the choice of law principles. This Agreement may be enforced only in a court of competent jurisdiction in Greenville County, South Carolina, and the parties hereby consent and submit themselves to the exclusive venue and personal jurisdiction of said court with respect to all such disputes and controversies whether or not Employee is then residing in South Carolina.

24. **Counterparts.** This Agreement may be executed in any number of counterparts, each of which shall be an original, but all of which taken together shall constitute one and the same agreement. Delivery of an executed counterpart of this Agreement by facsimile or other electronic means shall have the same force and effect as the delivery of an original executed counterpart of this Agreement.

THIS IS A LEGALLY ENFORCEABLE AGREEMENT.

Dated:

H. Lorraine McEllen
Witness

Donza H. Mattison
EMPLOYEE - DONZA H. MATTISON

Dated: December 15, 2017

McMILLAN PAZDAN SMITH, LLC

By: [Signature]

Name: Chad C. Cousins

Title: COO / Principal

Address: Suite 200 400 Augusta St.
Greenville, SC 29601

E-mail: ccousins@mcmillanpazdan-smith.com

Facsimile: _____

WSACTIVELLP:9483873.1

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	FOR THE THIRTEENTH JUDICIAL CIRCUIT
McMillan Pazdan Smith, LLC,	)	Case No. 2019-CP-23-00998
	)	
Plaintiff-Counterclaim	)	
Defendant,	)	
	)	
vs.	)	VERIFICATION OF DEFENDANT'S
	)	ANSWER, COUNTERCLAIMS, AND
	)	THIRD-PARTY COMPLAINT
Donza H. Mattison,	)	
	)	
Defendant-Counterclaimant.	)	
	)	
Donza H. Mattison, in a Derivative	)	
Capacity on Behalf of McMillan	)	
Pazdan Smith, LLC,	)	
	)	
Third-Party Plaintiff,	)	
	)	
vs.	)	
	)	
Rondald G. Smith, Joseph M. Pazdan,	)	
Brad B. Smith, and Chad C. Cousins,	)	
	)	
Third-Party Defendants.	)	
	)	
STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF SPARTANBURG	)	

PERSONALLY appeared before me Donza H. Mattison, who, after first being duly sworn, deposes and states the following:

1. My name is Donza H. Mattison. I am older than 18 years of age and am otherwise competent to make this Verification.

2. I am the Defendant-Counterclaimant and Third-Party Plaintiff in the above-captioned matter.

3. I have read the Answer, Counterclaims, and Third-Party Complaint, which was filed on or about March 4, 2019, and I know the contents thereof. All allegations in the Counterclaims and Third-Party Complaint are true of my own, personal knowledge; except that as to any matters alleged to be based upon information and belief, I reasonably believe such allegations to be true.

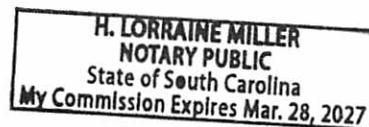
FURTHER AFFIANT SAYETH NOT.


Donza H. Mattison

SWORN to and subscribed before me,

this 10th day of May, 2019


Notary Public for South Carolina (L.S.)



My commission expires: 3/28/27

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	FOR THE THIRTEENTH JUDICIAL CIRCUIT
McMillan Pazdan Smith, LLC,	)	Case No. 2019-CP-23-00998
	)	(Business Court–Judge McIntosh)
Plaintiff-Counterclaim	)	
Defendant,	)	
	)	
vs.	)	VERIFIED, AMENDED ANSWER,
	)	COUNTERCLAIMS, AND THIRD-
Donza H. Mattison,	)	PARTY COMPLAINT
	)	
Defendant-Counterclaimant.	)	(Jury Trial Demanded)
	)	
Donza H. Mattison, in a Derivative	)	<u>** FILED UNDER SEAL **</u>
Capacity on Behalf of McMillan	)	
Pazdan Smith, LLC,	)	
	)	
Third-Party Plaintiff,	)	
	)	
vs.	)	
	)	
Rondald G. Smith, Joseph M. Pazdan,	)	
Brad B. Smith, and Chad C. Cousins,	)	
	)	
Third-Party Defendants.	)	
	)	

Pursuant to the Court’s Order filed on July 2, 2019, Defendant-Counterclaimant and Third-Party Plaintiff, Donza H. Mattison, by and through her undersigned counsel, hereby files this Amended Answer, Counter-Claims and Third-Party Complaint.

FOR A FIRST DEFENSE
(General Denial)

1. Each and every allegation of the Complaint not specifically admitted or qualified is hereby denied, and strict proof thereof is demanded.
2. Defendant admits the allegations of Paragraph 1.

3. Defendant admits the allegations of Paragraph 2.

4. Paragraph 3 asserts legal conclusions, not factual allegations, and does not require a response from Defendant. To the extent that a response is required, Defendant admits that the Circuit Court of Greenville County has personal jurisdiction over all parties to this case.

5. Paragraph 4 asserts a legal conclusion, not factual allegations, and does not require a response from Defendant. To the extent that a response is required, Defendant admits that venue is proper in the Circuit Court of Greenville County because many of the alleged actions or omissions alleged in Plaintiff's Complaint occurred in Greenville County.

6. Defendant admits the allegations of Paragraph 5.

7. Defendant admits the allegations of Paragraph 6.

8. In responding to the allegations of Paragraph 7, Defendant admits that she is a former employee and current member of Plaintiff and worked as an architect in Plaintiff's Spartanburg Office.

9. Defendant admits the allegations of Paragraph 8. Defendant would further allege that she voluntarily resigned her employment with Plaintiff effective February 12, 2018, for personal reasons.

10. Defendant admits the allegations of Paragraph 9. By way of further response, Defendant craves reference to the Severance Agreement and General Release (hereinafter "Severance Agreement"), which speaks for itself. A true and accurate copy of the Severance Agreement is attached hereto as Exhibit A (placed under seal by Consent Order of March 13, 2019).

11. In responding to the allegations of Paragraph 10, Defendant craves reference to the Severance Agreement, which speaks for itself.

12. In responding to the allegations of Paragraph 11, Defendant craves reference to the Severance Agreement, which speaks for itself.

13. In responding to the allegations of Paragraph 12, Defendant craves reference to the Severance Agreement, which speaks for itself.

14. In responding to the allegations of Paragraph 13, Defendant craves reference to the Severance Agreement, which speaks for itself. By way of further response, Defendant craves reference to MPS's proposed Amended and Restated Operating Agreement dated September 30, 2015 (hereinafter "September 30, 2015 Proposed Amendment"), which document speaks for itself. Defendant would further allege that the September 30, 2015 Proposed Amendment is not valid and has no force and effect as a matter of law because it was not consented to, or signed, by all of the members of MPS at the time, as required by MPS's Operating Agreement of September 25, 2009 (hereinafter "MPS Operating Agreement"), specifically Section 4.2(d)(i) of the MPS Operating Agreement, and the South Carolina Uniform Limited Liability Company Act of 1996, S.C. Code Ann. § 33-44-404(c)(1).

15. In responding to the allegations of Paragraph 14, Defendant craves reference to the September 30, 2015 Proposed Amendment, which document speaks for itself. Defendant would further allege that the September 30, 2015 Proposed Amendment is not valid and has no force and effect as a matter of law because it was not consented to, or signed, by all of the members of MPS at the time, as required by the MPS Operating Agreement, specifically Section 4.2(d)(i) of the MPS Operating Agreement, and the South Carolina Uniform Limited Liability Company Act of 1996, S.C. Code Ann. § 33-44-404(c)(1).

16. In responding to the allegations of Paragraph 15, Defendant craves reference to the

September 30, 2015 Proposed Amendment, which document speaks for itself. Defendant would further allege that the September 30, 2015 Proposed Amendment is not valid and has no force and effect as a matter of law because it was not consented to, or signed, by all of the members of MPS at the time, as required by the MPS Operating Agreement, specifically Section 4.2(d)(i) of the MPS Operating Agreement, and the South Carolina Uniform Limited Liability Company Act of 1996, S.C. Code Ann. § 33-44-404(c)(1).

17. In responding to the allegations of Paragraph 16, Defendant craves reference to the September 30, 2015 Proposed Amendment, which document speaks for itself. Defendant would further allege that the September 30, 2015 Proposed Amendment is not valid and has no force and effect as a matter of law because it was not consented to, or signed, by all of the members of MPS at the time, as required by the MPS Operating Agreement, specifically Section 4.2(d)(i) of the MPS Operating Agreement, and the South Carolina Uniform Limited Liability Company Act of 1996, S.C. Code Ann. § 33-44-404(c)(1).

18. In responding to the allegations of Paragraph 17, Defendant craves reference to the September 30, 2015 Proposed Amendment, which document speaks for itself. Defendant would further allege that the September 30, 2015 Proposed Amendment is not valid and has no force and effect as a matter of law because it was not consented to, or signed, by all of the members of MPS at the time, as required by the MPS Operating Agreement, specifically Section 4.2(d)(i) of the MPS Operating Agreement, and the South Carolina Uniform Limited Liability Company Act of 1996, S.C. Code Ann. § 33-44-404(c)(1).

19. In responding to the allegations of Paragraph 18, Defendant admits that she has recently learned that Plaintiff has retained HDH Advisors, LLC (hereinafter “HDH”) since in or

about July 2013 as a “strategic engagement” to perform certain financial valuation services for Plaintiff. Defendant further alleges that she recently learned that HDH’s engagement letters since July 15, 2013, specifically state that HDH is not being engaged to perform a complete business appraisal of MPS. Defendant denies the remaining allegations of Paragraph 18.

20. In responding to the allegations of Paragraph 19, Defendant admits on or about April 12, 2018, Plaintiff’s counsel provided a copy of HDH’s report for FY2017 to Defendant’s counsel. Defendant denies the remaining allegations of Paragraph 19.

21. In responding to the allegations of Paragraph 20, Defendant admits on or about August 3, 2018, Plaintiff’s counsel made an offer to purchase Defendant’s ownership share of MPS for a steeply discounted price, which appears to correspond to the discounted per unit price from HDH’s report for FY2017. Defendant denies the remaining allegations of Paragraph 20.

22. In responding to the allegations of Paragraph 21, Defendant admits that she contests HDH’s purported valuation of MPS, that she has rejected Plaintiff’s offer to purchase her ownership units of MPS, and that she believes the fair market value of her ownership shares of MPS is substantially higher than what Plaintiff offered her. Defendant further alleges that her counsel sent a letter to Plaintiff’s counsel on January 14, 2019, which letter contains confidential settlement discussions under Rule 408 of the South Carolina Rules of Evidence; otherwise, the letter of January 14, 2019 speaks for itself. Defendant denies the remaining allegation of Paragraph 21.

23. In responding to the allegations of Paragraph 22, Defendant hereby incorporates by reference Paragraphs 1-22 above.

24. In responding to the allegations of Paragraph 23, Defendant admits that there is an actual controversy between Plaintiff and Defendant regarding the valuation of, and proper purchase

price for, Defendant's ownership units of MPS. Defendant denies the remaining allegations of Paragraph 23.

25. The allegations of Paragraph 24 assert legal conclusions, not factual allegations and do not require a response from Defendant. To the extent that a response is required, Defendant denies that Plaintiff is entitled to any of the relief requested in its Complaint.

26. Defendant denies the allegations of Paragraph 25, including subparagraphs a. through e. Defendant further alleges that Plaintiff has breached its obligations under the Severance Agreement as stated in detail in the Counterclaims below.

27. Defendant denies that Plaintiff is entitled to any of the relief set forth in subparagraphs (a) through (f) of its Prayer for Relief.

FOR A SECOND DEFENSE
(Failure to State a Claim)

28. Plaintiff's Complaint fails, in whole or in part, to state a cause of action upon which relief can be granted.

FOR A THIRD DEFENSE
(Waiver)

29. Plaintiff's Complaint is barred, in whole or in part, by the equitable doctrine of waiver.

FOR A FOURTH DEFENSE
(Estoppel)

30. Plaintiff's Complaint is barred, in whole or in part, by the equitable doctrine of estoppel.

FOR A FIFTH DEFENSE
(Unclean Hands)

31. Plaintiff's Complaint is barred, in whole or in part, by the equitable doctrine of unclean hands.

FOR A SIXTH DEFENSE
(Fraud in the Inducement)

32. Plaintiff's Complaint is barred, in whole or in part, because Plaintiff's managers, employees, or agents made numerous material misrepresentations to Defendant, knowing the same to be untrue, for the purpose of inducing Defendant to sign the Severance Agreement.

FOR A SEVENTH DEFENSE
(Prior Breach of Agreement)

33. Plaintiff's Complaint is barred, in whole or in part, because one or more managers, employees, or agents of Plaintiff committed one or more prior breaches of the Severance Agreement with Defendant, which excused any further obligations or responsibilities of Defendant to continue to perform her obligations under the Severance Agreement.

FOR AN EIGHTH DEFENSE
(Failure of Consideration)

34. Plaintiff's Complaint is barred, in whole or in part, because one or more managers, employees, or agents of Plaintiff failed or refused to provide to Defendant all of the promised consideration for the Severance Agreement, which excused any further obligation or responsibility of Defendant to continue to perform her obligations under the Severance Agreement.

COUNTERCLAIMS AND THIRD-PARTY CLAIMS

Defendant, by way of her Counterclaims and Third-Party Complaint, would allege and show upon the Court the following:

Parties, Jurisdiction, and Venue

35. Defendant-Counterclaimant is a citizen and resident of Spartanburg County, South Carolina. She brings these Counterclaims and Third-Party Claims individually and in a Derivative Capacity as a current member of MPS on behalf of the company itself.

36. Plaintiff-Counterclaim Defendant, McMillan Pazdan Smith, LLC (herein “MPS”), is a limited liability company organized and existing pursuant to the laws of the State of South Carolina, with its principal place of business in Greenville County, South Carolina. MPS owns property and conducts business within Greenville County, South Carolina.

37. Third-Party Defendant Rondald G. Smith (hereinafter “Ron Smith”) is a citizen and resident of Spartanburg County, South Carolina. Ron Smith is a managing member of MPS, owning approximately 34,740 ownership units, or approximately 38.86% of the company.

38. Third-Party Defendant Joseph M. Pazdan (hereinafter “Pazdan”) is a citizen and resident of Greenville County, South Carolina. Pazdan is a managing member of MPS, owning approximately 14,744 ownership units, or approximately 16.53% of the company.

39. Third-Party Defendant Brad B. Smith (hereinafter “Brad Smith”) is a citizen and resident of Greenville County, South Carolina. Brad Smith is a managing member of MPS, owning approximately 14,744 ownership units, or approximately 16.53% of the company.

40. Third-Party Defendant Chad C. Cousins (hereinafter “Cousins”) is a citizen and resident of Greenville County, South Carolina. Cousins is the Chief Operating Officer (“COO”) of MPS and as of December 31, 2017, purports to own approximately 3,350 ownership units, or approximately 3.75% of the company. Defendant cannot recall whether she ever consented to or signed off on Cousins’s purchase of any ownership shares of MPS. Cousins is on the Executive

Committee of MPS.

41. This Court has personal jurisdiction over MPS as Counterclaim Defendant and over all Third-Party Defendants.

42. This Court has jurisdiction over the subject matter of this action.

43. Venue is proper in this Court because Plaintiff is headquartered in Greenville County, South Carolina, and the wrongful conduct occurred, at least in part, within Greenville County, South Carolina.

Facts

44. Defendant is an architect duly licensed by the State of South Carolina since September 17, 1991. Defendant began working for Plaintiff's predecessor firm, McMillan Smith & Partners Architects, PLLC (hereinafter "MS"), in or about September 1994 and became a partner of the MS firm approximately two years later.

45. Plaintiff was formed on or about August 19, 2009, to effectuate the merger between MS and Pazdan-Smith Group, Inc., which transaction closed on or about September 30, 2009.

46. At the time of the merger, Defendant held a 5.825% membership interest in MS. Defendant currently holds 2,035 membership units of Plaintiff company.

47. At all times relevant hereto, Defendant was a good and dedicated member and employee of Plaintiff and performed her job duties and responsibilities in a professional and competent manner. Defendant satisfied all of her obligations under the original MPS Operating Agreement.

48. Defendant refused to consent to or sign the September 30, 2015 Proposed Amendment and prior proposed amendments to the MPS Operating Agreement.

49. On or about December 5, 2017, Plaintiff and Defendant voluntarily entered into the Severance Agreement, pursuant to which Defendant agreed to voluntarily resign her employment with Plaintiff in good standing, effective February 12, 2018.

50. The Severance Agreement also provides, in relevant part, that Defendant's Proper Dissociation from the company would be effectuated "in early 2018, following the close of YR2017, with [Plaintiff] providing access to all current and prior year financial reports, tax returns, and other financial information as requested by [Defendant's] Counsel."

51. In early January 2018, Defendant was diagnosed with breast cancer.

52. On February 12, 2018, Defendant submitted her written resignation of employment with Plaintiff, by letter to Cousins as Plaintiff's COO.

53. On or about April 12, 2018, Plaintiff's counsel provided to Defendant's counsel a copy of the purported valuation of Plaintiff's membership units as of December 31, 2017, which valuation was commissioned by Defendant's managing members and performed by a third-party appraisal firm, HDH.

54. On May 1, 2018, Defendant's counsel notified Plaintiff's counsel that Defendant had been undergoing difficult cancer treatments and would be required to focus on her health instead of on business-related matters.

55. On August 3, 2018, Defendant's counsel notified Plaintiff's counsel that Defendant was finished with her cancer treatments and that she was ready to get back to finalizing the terms of the buy-out of her membership interest from Plaintiff.

56. Also on August 3, 2018, Plaintiff's counsel conveyed to Defendant's counsel an offer (subject to formal approval by Plaintiff's members) for Plaintiff to purchase Defendant's

membership interests based on the HDH valuation report of MPS, discounted for lack of majority control and marketability.

57. Defendant rejected Plaintiff's preliminary offer later on August 3, 2018, and requested all information provided to HDH in connection with its latest valuation, as well as other financial information relating to MPS.

58. On August 16, 2018, Defendant's counsel submitted a written request to Plaintiff's counsel for various financial information and other data or records necessary to allow Defendant a full and fair opportunity to evaluate HDH's report and the fair market value of her membership shares of MPS.

59. To date, Plaintiff has provided some, but not nearly all, of the financial information requested by Defendant's counsel.

FOR A NINTH DEFENSE AND BY WAY OF
FIRST COUNTERCLAIM
(Breach of Contract)

60. Defendant repeats and realleges Paragraphs 35-59 as if restated verbatim.

61. Defendant's Severance Agreement with Plaintiff signed on or about December 5, 2017, is a valid and enforceable contract.

62. Defendant has fully performed all of her obligations under both the Severance Agreement and the MPS Operating Agreement.

63. Plaintiff breached the Severance Agreement with Plaintiff and the MPS Operating Agreement, including the implied covenant of good faith and fair dealing, in the following particulars:

1. by failing or refusing to provide to Defendant notice of Plaintiff's

membership meetings since November 15, 2017;

2. by failing or refusing to provide Defendant the opportunity to vote on matters presented to Plaintiff's membership regarding the operation of the company since November 15, 2017;
3. by failing or refusing to include Defendant in any and all distributions for members after the close of FY2017;
4. by failing or refusing to provide in a timely manner all material, financial information about Plaintiff's operations as requested by Defendant's Counsel;
5. by utilizing a valuation method that deliberately and systematically underestimates the true, fair market value of the company in several respects, including by failing to make normalizing adjustments to account for managing members' excessive compensation, benefits, and self-interested, related-party transactions; and
6. by failing to negotiate in good faith for the purchase of Defendant's membership units as a Proper Dissociation.

64. Defendant's breaches of contract as set forth herein have caused Plaintiff to suffer substantial damages.

65. Defendant is entitled to recover in this action actual damages from Plaintiff to compensate her for her actual losses and her foreseeable, consequential damages flowing from Plaintiff's breaches of contract as alleged herein.

66. Furthermore, some of the amounts due to Defendant are a sum certain or are an amount that is capable of being reduced to a certainty. Upon information and belief, Defendant is,

therefore, entitled to recover prejudgment interest on the amounts owed to her by Plaintiff, from the time each payment was demandable until the date of the judgment in this matter, at the statutory rate of 8.75% per annum.

67. Plaintiff is also entitled to an award of attorney's fees and costs incurred in bringing this action as provided for in Paragraph 17 of the Severance Agreement.

FOR A TENTH DEFENSE AND BY WAY OF
SECOND COUNTERCLAIM
(Judicial Determination of Fair Value of Distributional Interest)

68. Defendant repeats and realleges Paragraphs 35-67 as if restated verbatim.

69. Plaintiff is an at-will limited liability company.

70. Defendant, as a member of Plaintiff company, has agreed to Proper Dissociation from the company pursuant to the terms of the Severance Agreement and the MPS Operating Agreement.

71. Defendant's proposed dissociation from Plaintiff company will not result in a dissolution and winding up of the company's business.

72. On or about August 3, 2018, Plaintiff, through its counsel, made a preliminary offer (subject to formal vote by Plaintiff's membership) to purchase Defendant's membership interest for the discounted HDH value per share, to be paid according to the terms set forth in Section 11.4 of the September 30, 2015 Proposed Amendment.

73. Defendant has good and substantial reason to believe that Plaintiff's offer materially understates the true, fair value of Defendant's membership interest.

74. An agreement to purchase Defendant's distributional interest of Plaintiff company has not been made within 120 days after the effective date of Defendant's Proper Dissociation from Plaintiff company.

75. Defendant and Plaintiff company previously entered into a Tolling Agreement and Extension of Tolling Agreement to extend any statute of limitations through and until Monday, March 4, 2019, at 5:00 p.m. EST.

76. Pursuant to Section 33-44-701(d) of the South Carolina Code, Defendant brings this action to enforce the purchase of her membership interests in Plaintiff company for fair value.

77. Defendant requests that the Court independently determine the fair value of Defendant's distributional interest in Plaintiff company pursuant to Sections 33-44-701(e) and -702 of the South Carolina Code, after consideration of any additional value from the Derivative Action set forth herein below, and order Plaintiff to purchase Defendant's interests accordingly.

78. Defendant also request that Plaintiff, at its own expense, notify in writing all of the remaining members of Plaintiff company of the commencement of this proceeding.

79. Plaintiff has acted arbitrarily, vexatiously, or not in good faith in connection with this matter. Accordingly, Defendant is also entitled to an award of attorney's fees, expert appraisal fees, and other costs related to this matter, pursuant to S.C. Code Ann. § 33-44-702(d)

80. Defendant is also entitled to pre-judgment interest pursuant to S.C. Code Ann. § 33-44-702(e), from the effective date of Defendant's Proper Dissociation until the date of payment, at the statutory rate of 8.75% per annum.

**FOR AN ELEVENTH DEFENSE AND BY WAY OF
THIRD COUNTERCLAIM**

(Accounting and Order Compelling Production of Defendant's Financial Records)

81. Defendant repeats and realleges Paragraphs 35-80 as if restated verbatim.

82. Defendant, as a member of Plaintiff company, has a right pursuant to the Severance Agreement, the MPS Operating Agreement, and Section 33-44-408 of the South Carolina Code, to

obtain financial records and other information from Plaintiff necessary to determine the profits and losses of the company and Defendant's rights upon proper dissociation.

83. Pursuant to Section 33-44-408(b)(2) of the South Carolina Code, Defendant, as a member of Plaintiff company, is entitled to receive, "on demand, other information concerning the company's business or affairs, except to the extent the demand or the information demanded is unreasonable or otherwise improper under the circumstances."

84. Defendant, through her undersigned counsel, has repeatedly requested financial records and other documents from Plaintiff, specifically including in the preservation letter of November 17, 2017; letters of November 19, 2017 (2); letter of November 28, 2017; email of December 20, 2017; letter of August 16, 2018; letter of August 28, 2018; and emails of September 25, 2018, October 8, 2018, and November 5, 2018.

85. The information sought by Defendant is reasonable and is necessary to conduct a reasonable and thorough analysis of the purported valuation conducted by Plaintiff's third-party appraiser, HDH, as well as the offer Plaintiff made to purchase Defendant's ownership share of the company.

86. Plaintiff has failed or refused to provide all information requested.

87. Pursuant to Section 33-44-410(a) of the South Carolina Code, Defendant respectfully requests that the Court require Plaintiff to provide an equitable accounting as to the company's business, as well as injunctive relief to enforce Defendant's rights to receive information under the Severance Agreement, the MPS Operating Agreement, and the South Carolina Uniform Limited Liability Company Act.

FOR A TWELFTH DEFENSE AND BY WAY OF
FOURTH COUNTERCLAIM
(Declaratory Judgment)

88. Defendant repeats and realleges Paragraphs 35-87 as if restated verbatim.

89. Defendant has a case of actual controversy with Plaintiff regarding the Severance Agreement, the MPS Operating Agreement, and/or the September 30, 2015 Proposed Amendment.

90. Defendant seeks a Declaratory Judgment pursuant to Rule 57, SCRPC, and the South Carolina Uniform Declaratory Judgments Act, S.C. Code Ann. § 15-53-10 et seq., and requests the Court to declare the rights, status, and other legal relations between Defendant and Plaintiff. Specifically, Defendant requests the Court to address the following by way of Declaratory Judgment:

1. that the September 30, 2015 Proposed Amendment is not valid because it was not unanimously consented to, and signed by, all members of MPS at the time;
2. that the two previous proposed amendments to the MPS Operating Agreement are not valid because they were not unanimously consented to, and signed by, all members of MPS at the time;
3. that the MPS Operating Agreement controls Defendant's rights in MPS; and
4. that any act taken by the managing members of Plaintiff in violation of the MPS Operating Agreement or the South Carolina Uniform Limited Liability Company Act of 1996, S.C. Code Ann. § 33-44-101 et seq., is null and void, including the addition of new members without unanimous consent.

91. Defendant seeks further necessary and proper relief, including injunctive relief, based on the Court's declaratory judgment.

FOR A THIRTEENTH DEFENSE AND BY WAY OF
FIRST, THIRD-PARTY COMPLAINT
(Derivative Action–Breach of Fiduciary Duty and Breach of Operating Agreement)

92. Defendant repeats and realleges Paragraphs 35-91 as if restated verbatim.

93. Defendant is a member of Plaintiff LLC as of the time of the commencement of this action and was a member of the Plaintiff LLC at the time of the transactions or decisions at issue in this Derivative Action. Accordingly, Defendant has standing to bring this Derivative Action on behalf of MPS and its members.

94. Defendant can fairly and adequately represent the interests of the members of MPS who are similarly situated in enforcing the rights of MPS as alleged herein. Importantly, Defendant can represent the interests of other minority members of MPS without fear of retaliation by the Managing Members in the form of adverse employment actions such as job loss or reduction in pay, because Defendant is no longer an employee of Plaintiff.

95. Third-Party Defendant Ron Smith is member of Plaintiff LLC and has served as a Managing Member since the formation of MPS in September 2009.

96. Third-Party Defendant Pazdan is a member of Plaintiff LLC and has served as a Managing Member since the formation of MPS in September 2009.

97. Third-Party Defendant Brad Smith is a member of Plaintiff LLC and has served as a Managing Member since the formation of MPS in September 2009.

98. Third-Party Defendant Cousins is a member of Plaintiff LLC and has served on the Executive Committee of Plaintiff since his employment with MPS in mid-2013. Cousins is also an officer of MPS, serving as COO.

99. Third-Party Defendants each owe fiduciary duties to MPS by virtue of their positions

as Managing Members, participation on the firm's Executive Committee, and/or as an officer of the firm.

100. Third-Party Defendants have acted in their own self-interest by systematically overpaying themselves in the form of excessive compensation, bonuses, perquisites, and fringe benefits for themselves and their spouses or family members, at least since Cousins was hired as COO in 2013.

101. Specifically, in 2010, the first full year of MPS's existence, the three Managing Members' average total compensation was \$228,202.33, according to schedules on MPS's federal income tax returns. By 2017, the three Managing Members' average total compensation had increased to \$510,730.33, which represents a 123.81% increase over the 7-year period (average increase of 17.69% per year). During the same period, the average total compensation of the other architect-members of MPS increased from \$123,215.00 in 2010 to \$148,676.75 in 2017, which represents only a 20.66% increase over the same 7-year period (average increase of 2.95% per year).

102. Since 2013, when Third-Party Defendant Cousins was hired as the firm's COO, the disparity in total compensation has been even greater: the three Managing Members' average total compensation increased from \$272,576.00 in 2013 to \$510,730.33 in 2017, or a total increase of 87.37% (average increase of 21.84% per year); while the average total compensation of the other architect-members of MPS increased from \$141,534.25 in 2013 to \$148,676.75 in 2017, or a total increase of 5.05% (average increase of 1.26% per year).

103. With respect to the compensation of Third-Party Defendant Cousins, who also serves on the firm's Executive Committee, his total compensation in 2014, his first full year of work as a member of MPS, was \$181,120.00. In 2015, his total compensation increased to \$398,255.00, a

120% increase in a single year. Cousins' predecessor as COO earned an average total compensation of \$104,078.67 from 2010 through 2012, when she left the firm. From 2014 to 2017, Cousins's total compensation increased by 177.28%, or an average of 59.09% per year.

104. In summary, the total compensation of Third-Party Defendants has increased at a rate that is approximately six times higher than that of other members of MPS since the formation of MPS in September 2009. Since Cousins's employment in mid 2013, the disparity in the rate of increase of the Third-Party Defendants' compensation has been over seventeen times higher than that of the other members of MPS.

105. The total compensation of Third-Party Defendants is substantially higher than that reported for comparable positions as Managing Principal and COO in the annual Compensation Reports of the American Institute of Architects ("AIA") for both the South Atlantic Region (which includes DC, DE, FL, GA, MD, NC, PR/VI, SC, VA, and WV) and the relevant revenue category of firms with \$15 million or more in annual gross revenues. For example, in the 2017 AIA Compensation Report for the South Atlantic Region, the mean total compensation for Managing Principals was approximately \$244,000.00 for firms with \$15 million or more in revenues, and approximately \$204,000.00 for firms within the South Atlantic region. Average total compensation for the three Managing Members of MPS in 2017 was over \$510,000.00.

106. Third-Party Defendants have also authorized extensive fringe benefits for themselves and their spouses that are not available to other members of the firm, including leases of luxury automobiles, country club memberships, college alumni athletic club contributions, health savings accounts, disability insurance, life insurance, and long-term care insurance for themselves and their spouses, higher 401(k) retirement contributions, and expense accounts and company credit cards

used for personal entertainment, meals, and travel.

107. Pursuant to the MPS Operating Agreement, the compensation of the Management Committee was supposed to be subject to the approval of a Required Interest of the Members, which the Operating Agreement defines as more than seventy-five percent (75%) of the issued and outstanding membership units at the relevant time; however, Third-Party Defendants have not submitted issues of their compensation, bonuses, and fringe benefits to the full membership for approval.

108. In addition, Third-Party Defendant Ron Smith's spouse, Caroline B. Smith, is the principal owner of C & P of Spartanburg, LLC (hereinafter "C & P"), which owns the office building in Spartanburg, South Carolina where Plaintiff's offices are located. Upon information and belief, Mrs. Smith owns 85% of the membership of C & P. Upon further information and belief, Third-Party Defendant Ron Smith has acted as a manager of C & P and has gained self-enrichment through this related-party transaction, at the expense of MPS's interests.

109. Third-Party Defendants Ron Smith, Pazdan, and Brad Smith, as the Managing Members of MPS, have approved the related-party lease transaction of MPS's Spartanburg office for years, despite the fact that the rent paid is substantially in excess of fair market rental rates for similar office space in down-town Spartanburg. Defendant is informed and believes that the rental rate on the Spartanburg Office is listed in the lease at \$19.00 per square foot, but is actually being paid at \$24.00 per square foot, which is approximately double the fair market rental rate of comparable commercial properties in down-town Spartanburg. Upon further information and belief, the square footage of the Spartanburg office upon which the rent has been calculated included unimproved space or storage space that was not used by MPS as office space. Furthermore, upon

information and belief, after a large portion of the second floor of the Spartanburg office was sold to an attorney, the monthly rent MPS paid to C & P remained unchanged, rather than being reduced to reflect the lesser square footage actually leased by MPS.

110. In addition, upon information and belief, the Managing Members of MPS have repeatedly authorized the payment of annual inspection fees, minor and major repairs, upgrades, and capital improvements to the Spartanburg office through Plaintiff's operating account, instead of being paid through the appropriate account of C & P.

111. The financial details of the compensation, bonuses, perquisites, and fringe benefits of the Third-Party Defendants, as well as the lease transactions between Plaintiff and C & P, have been deliberately withheld from the other members of MPS, in violation of the duty of disclosure with complete candor. Accordingly, the Required Interest of the Members of MPS have never had an opportunity to vote to approve or disapprove of Third-Party Defendants' compensation and other benefits. Only after Defendant received some limited financial information upon her counsel's specific request as part of the valuation process for her membership units did Defendant become aware of the full nature and extent of self-dealing by Third-Party Defendants.

112. Third-Party Defendants have also controlled the financial information and assumptions provided to HDH to manipulate the prices of Plaintiff's membership units to enable Third-Party Defendants to re-purchase shares of the company from dissociating or departing members at substantially below true fair market value. For example, in 2014, Plaintiff hired HDH for the first time in order to establish a valuation of the membership units of Brian Deichman, one of the founding members of the firm and the owner of the second largest membership share at the time. According to HDH's report, Mr. Deichman's units were valued at \$63.01 per unit, including

discounts for lack of marketability and minority owner status. In early 2010, shortly after the merger that formed MPS, however, all members unanimously agreed that the purchase price for units would be \$108.00 per unit in accordance with the combined valuations reportedly conducted at the end of 2009 in connection with the merger. Although the firm's gross revenues had increased by over 16.8% since the merger from 2010 to 2014, HDH determined that the value of the membership units in the firm had purportedly declined by 41.67% during the same period.

113. In 2015, after Mr. Deichman had agreed to sell his interest in MPS backdated to December 31, 2014, the HDH's valuation increased to \$122.26 per unit, a 94% increase in a single year. Additionally, three members of the Executive Committee then purchased some of Mr. Deichman's units at the reduced 2014 price instead of the higher 2015 value by back-dating the agreements relating to Mr. Deichman's sale.

114. Since the formation of MPS towards the end of 2009, Third-Party Defendants have repeatedly attempted to amend the Operating Agreement of MPS to allow the value of the Managing Members' interests to be determined by themselves in the form of key-man life insurance policies for the benefit of their spouses and estates, which policies have substantially higher face values than the purported valuation of their units according to HDH Advisors for the same dates. For example, in 2014, the first year of HDH's purported valuation of the firm, Third-Party Defendant Ron Smith's ownership interest in the firm would have been worth approximately \$2.2 million; however, the firm had life insurance policies on him with a face value \$4 million. Upon information and belief, MPS also paid the annual premiums for an additional \$2 million of personal life insurance for Ron Smith, for a total at that time of \$6 million in life insurance coverage. Similarly, Third-Party Defendants Pazdan and Brad Smith's ownership interests in the firm were valued by HDH at approximately

\$931,000; however, the firm had life insurance policies on them with a face value of \$3.9 million.

115. Third-Party Defendants' actions as described herein, including breaches of fiduciary duties, the duty of loyalty, and the duty of care, were taken in a grossly negligent or reckless manner or constitute intentional misconduct or a knowing violation of the law.

116. On January 14, 2019, Defendant's counsel sent a letter to Plaintiff's counsel demanding that the firm take action against its Managing Members for breach of fiduciary duty based on the acts of misconduct described herein.

117. In addition, on June 18, 2019, Defendant's counsel sent letters via Certified Mail, Return Receipt Requested, to Plaintiff's Managing Principals, Rondald G. Smith, Joseph M. Pazdan, II, and Brad B. Smith, notifying them of Defendant's demand that Plaintiff take legal action against its managing members and Chief Operating Officer, Chad C. Cousins, to recover the excessive compensation, bonuses, and fringe benefits that they authorized to be paid to themselves and their family members in violation of the Operating Agreement, the South Carolina Limited Liability Company Statute, and their common-law, fiduciary duties to Plaintiff. (True and accurate copies of the letters are attached hereto as Exhibits B, C, and D).

118. The June 18 letter established a deadline of Thursday, July 18, 2019, for Third-Party Defendants and/or Plaintiff to address this matter in a satisfactory manner. To date, no such action has been taken, nor has Defendant or Defendant's counsel been informed that any such action is forthcoming.

119. In any event, pre-suit demand to the managing members of MPS prior to the filing of a derivative action is clearly futile because the managing members of the firm almost certainly would not authorize the commencement of legal action by Plaintiff against themselves individually.

The Third-Party Defendants are all three Managing Principals of the firm plus the firm's COO, all of whom are on the Executive Committee of the firm and directly benefitted from the breaches of fiduciary duties as alleged herein. In addition, Third-Party Defendants have taken affirmative steps to conceal their acts of self-dealing from the other members of the firm, which further suggests that they have not been forthcoming in their dealings with the minority members of the firm.

120. As a direct and proximate result of Third-Party Defendants' numerous breaches of fiduciary duties, duty of loyalty, duty of care, gross negligence, recklessness, intentional misconduct and/or knowing violations of the law as alleged herein, MPS has been injured by significant reductions in its annual operating income and by substantial reductions in its value as a going concern.

121. Defendant is entitled to recover on behalf of MPS in this derivative action an award of actual damages against Third-Party Defendants, the proceeds of which are to be remitted to MPS.

122. Defendant is also entitled to an award of expenses, including reasonable attorney's fees, in connection with the prosecution of this derivative action.

123. In addition, Defendant is entitled to recover punitive damages against Third-Party Defendants in an amount to be determined by a jury sufficient to deter these Third-Party Defendants and others from engaging in such actions in the future.

124. Finally, Defendant seeks injunctive relief from the Court ordering Third-Party Defendants to cease and desist any continued violations of their duties towards the company, requiring any related-party transactions to be authorized by the Required Interest of Members, after full and complete disclosure of all financial information surrounding such transactions, and ordering Plaintiff and Third-Party Defendants not to spend any of the financial resources of MPS in defending

the individual, Third-Party Defendants against Defendant's derivative claims in this case.

WHEREFORE, having fully responded to the allegations in Plaintiff's Complaint, Defendant respectfully requests that the Court enter an order dismissing the Complaint, with prejudice, and requiring Plaintiff to pay the costs and attorneys' fees incurred by Defendant in responding to the Complaint. In addition, having fully set forth her allegations against Plaintiff and Third-Party Defendants by way of the foregoing Counterclaims and Third-Party Claims respectively, Defendant respectfully requests the following relief:

1. Actual, compensatory damages for economic and non-economic injuries;
2. Pre-judgment interest;
3. Judicial determination of the fair value of Defendant's ownership interests of Plaintiff and an order requiring Plaintiff to purchase Defendant's membership units for the fair value, after consideration of any proceeds from Defendant's Derivative Action against Third-Party Defendants;
4. Declaratory judgment as requested above;
5. Injunctive relief as requested above;
6. Damages to Plaintiff LLC caused by Third-Party Defendants' breaches of duties, gross misconduct, recklessness, intentional wrong-doing or knowing violations of the law;
7. Punitive damages against Third-Party Defendants; and
8. Such further relief as the Court deems just and appropriate.

* * *

DEFENDANT HEREBY DEMANDS A JURY TRIAL ON ALL LEGAL CAUSES OF ACTION, COUNTERCLAIMS, AND THIRD-PARTY CLAIMS.

Respectfully submitted,

s/ David E. Rothstein
David E. Rothstein
Rothstein Law Firm, PA
1312 Augusta Street
Greenville, SC 29605
(864) 232-5870 (Office)
(864) 241-1386 (Facsimile)
drothstein@rothsteinlawfirm.com

Attorney for Defendant, Donza H. Mattison,
Individually and in a Derivative Capacity on Behalf
of McMillan Pazdan Smith, LLC

July 30, 2019

Greenville, SC.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)

VERIFICATION

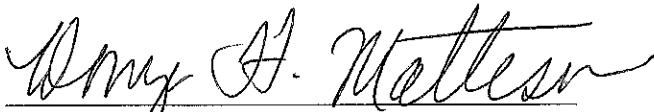
PERSONALLY appeared before me Donza H. Mattison, who, after first being duly sworn, deposes and states the following:

1. My name is Donza H. Mattison. I am older than 18 years of age and am otherwise competent to make this Verification.

2. I am the Defendant-Counterclaimant and Third-Party Plaintiff in the above-captioned matter.

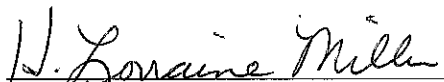
3. I have read the foregoing Amended Answer, Counterclaims, and Third-Party Complaint, and I know the contents thereof. All allegations in the Counterclaims and Third-Party Complaint are true of my own, personal knowledge; except that as to any matters alleged to be based upon information and belief, I reasonably believe such allegations to be true.

FURTHER AFFIANT SAYETH NOT.


 Donza H. Mattison

SWORN to and subscribed before me,

this 29th day of July, 2019

 (L.S.)
 Notary Public for South Carolina



My commission expires: 3/28/27

Exhibit A

SEVERANCE AGREEMENT AND GENERAL RELEASE

This Severance Agreement and General Release ("Agreement") is made by and between McMillan Pazdan Smith, LLC ("Company"), which term includes all affiliated companies and all Released Parties as defined below, where appropriate) and Donza H. Mattison ("Employee").

WHEREAS, Employee and Company mutually agree that Employee's employment with the Company will end effective February 12, 2018;

WHEREAS, 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;

THE PARTIES HEREBY AGREE, in consideration of the foregoing and the following terms, conditions, and obligations, as follows:

1. **Employment Ended.** The parties agree that Employee's employment with the Company (and any and all of its affiliates) will voluntarily end on February 12, 2018. Employee shall thereafter no longer be employed by Company in any capacity, and Employee shall not represent to any third party that Employee retains any employment or other relationship with Company.

2. **Membership and Severance Terms.**

- (a) Beginning November 20, 2017, and continuing through a maximum end date of February 12, 2018, Employee will be placed on Family Medical Leave Act ("FMLA") Leave provided Employee submits appropriate FMLA paperwork in a timely fashion.
- (b) During Employee's FMLA Leave, Employee will be paid 120 hours of Paid Time Off ("PTO"). In addition, Employee will receive pay for normal Company Holidays during the FMLA Leave period to include Thanksgiving Day, the Day after Thanksgiving, Christmas Eve, Christmas Day, and New Year's Day. In the event FMLA Leave is not approved for any period of time between November 20, 2017 and February 12, 2018, Employee will still receive PTO pay and Holiday pay as described above.
- (c) Employee shall receive a minimum of 23 weeks of Severance pay at her current salary. If Long Term Disability (LTD) benefits are not approved by the end of the 23rd week, Employee shall receive an additional seven (7) weeks of severance pay. Severance payments will begin upon expiration of the PTO pay described in Paragraph (b) above. Employee's receipt of LTD benefits will not otherwise affect the amount of Severance pay.

- (d) Employee will be paid a bonus of \$15,000 for 2017, plus Company-paid matching 401(k) contribution of 4% for year 2017. The bonus will be paid at the same time payments are made to similarly situated employees of Company.
- (e) Employee shall receive distributions as described in the September 30, 2015 Operating Agreement based on Employees distribution rights thereunder. The distribution will be paid in the regular course of Company's business, and at the time other Members receive a distribution.
- (f) With regard to Employee's application for disability benefits, the Company agrees to confirm Employee's job duties and responsibilities including on-site observations and inspections of large construction sites.
- (g) Company will transfer ownership of the life insurance policy Company currently holds on Employee's life according to the policy terms on or about February 12, 2018. The Company will have no premium payment or other responsibilities regarding the policy once ownership is transferred. Employee may designate whomever she chooses to be the beneficiary of such policy.
- (h) During Employee's FMLA Leave, Company will continue to provide Employee with insurance benefits at the same level as if Employee was actively at work. Upon the end of Employee's FMLA Leave or February 12, 2018, Company will provide Employee insurance continuation benefits as required by Federal law.
- (i) By executing this Agreement, Employee resigns Employee's employment voluntarily effective February 12, 2018. All Company documents will reflect that Employee voluntarily resigned in good standing. Employee agrees not to apply for employment with Company at any point in the future. Company agrees to positively announce Employee's resignation including thanking Employee for over 23 years of dedicated service to the Company.
- (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. The Proper Dissociation will be handled separately from this Agreement and will be done in accordance with the September 30, 2015 Operating Agreement.

3. **Cooperation.** Employee agrees to cooperate reasonably with the Company and all of its affiliates and/or the Released Parties, as defined below (including its and their outside counsel), in connection with the contemplation, prosecution, and defense of all phases of existing, past and future claims or litigation about which the Company believes the Employee may have knowledge or information. Employee further agrees to make herself available at mutually convenient times during and outside of regular business hours as reasonably deemed necessary by the Company's counsel. Employee agrees to appear without the necessity of a subpoena to testify truthfully in any legal proceedings in which the Company calls her as a witness. Employee will be compensated for any time spent in connection with any such claims or litigation, including any required travel, at an effective hourly rate based on her last regular base salary with the Company. Employee further agrees that she shall not voluntarily provide information to or otherwise cooperate with any individual or entity that is contemplating or pursuing litigation against any of the Released Parties or that is undertaking any investigation or review of any of the Released Parties' activities or practices; provided, however, that Employee may participate in or otherwise assist in any investigation or inquiry conducted by the Equal Employment Opportunity Commission or any analogous state agency.

4. **General Release of Claims.** Employee hereby releases and forever discharges the Company, its subsidiaries, business units, affiliates, and parent companies, past and present, , its predecessors and successors and its respective managers, officers, directors, employees, agents, legal counsel, and assigns, past and present (hereinafter referred to collectively as the "Released Parties") from any and all known and unknown claims of action that Employee may have against the Released Parties arising from or in connection with: (a) the terms and conditions of her employment with the Company; (b) the termination of her employment from the Company; and (c) any conduct, actions or omissions, known or unknown, by the Released Parties occurring on or before the date Employee executes this Agreement. This release, and the term "claim" or "claims" as used in this Agreement, include all benefits, grievances, proceedings, investigations, hearings, charges, complaints, claims, demands, actions, causes of action, and suits of whatever nature, whether known or unknown, fixed, absolute or contingent, matured or unmatured, asserted or unasserted, however arising, and whether legal, equitable or administrative. The released claims include Employee's attorney fees, court costs, wages, back pay, front pay, severance pay, compensatory damages, punitive damages, general damages, special damages, penalties, benefits of any sort, liquidated damages, costs and disbursements, expert fees, injunctive relief, equitable relief, declaratory relief, interest, reinstatement, future employment, and any other legally recoverable category of damages or relief that Employee has ever had, or now has, or may claim to have, against the Company. It is expressly intended, understood, and agreed that the claims released by Employee shall include, by way of example and without limitation, all claims arising under federal, state or local statute, ordinance, common law, regulation, equity or other sources, whether known or unknown, based upon:

- (a) Actual or alleged defamation, invasion of privacy, injury to credit, personal inconvenience, damage to Employee's personal reputation, outrage, distress, humiliation, loss of standing and prestige, personal injury, bodily injury, tort, loss of consortium, intentional or negligent infliction of

emotional distress, abuse of process, retaliation, negligence, fraud, extortion, or other common law causes of action or other compensation for bodily injury.

- (b) Failure to provide benefits or pay wages or commissions, including actual or alleged violations of the South Carolina Human Affairs Law, the South Carolina Payment of Wages Act, common law and any and all other applicable state, county or local codes, statutes, ordinances or regulations.
- (c) Actual or alleged violations of anti-discrimination laws, including, but not limited to, any and all claims of age, disability, race, color, sex, national origin, ancestry, religion, genetic information, or other discrimination, retaliation or harassment;
- (d) Actual or alleged violations of the federal Age Discrimination in Employment Act, as amended, the Civil Rights Acts of 1866, 1871, and 1964, Section 1981 of Title 42 of the U.S. Code, Title VII of the Civil Rights Act of 1964, as amended, the Civil Rights Act of 1991, all federal and state executive orders including Executive Order 11246, the Uniformed Services Employment and Reemployment Rights Act of 1994, the Equal Pay Act, the Americans with Disabilities Act of 1990, the Rehabilitation Act of 1973, the Family and Medical Leave Act, the Fair Labor Standards Act, the Genetic Information Nondiscrimination Act of 2008, the Worker Adjustment and Retraining Notification Act, the Pregnancy Discrimination Act, state and local wage-hour laws and regulations, and the federal Employee Retirement Income Security Act, including, but not limited to, claims under Company-sponsored severance and termination pay plans, if any (provided, however, that nothing in this Agreement affects any claims relating to Employee's pending or anticipated claims for short-term or long-term disability benefits or to any claims relating to coverage for any ERISA-governed plan for health, dental, or vision insurance);
- (e) Actual or alleged violations of any other federal or state codes, laws, ordinances, regulations or case law which prohibit employment discrimination, retaliatory termination of employment, wrongful discharge, and employment termination in violation of public policy;
- (f) Actual or alleged breach of express and implied contract, breach of contract accompanied by a fraudulent act, breach of implied covenant of good faith and fair dealing, interference with contract, promissory estoppel, and claims under the Operating Agreement or any other operating agreement, any employment agreement, handbook or policy relating to her employment or separation of employment; and

- (g) Actual or alleged violations of the National Labor Relations Act and the Labor Management Relations Act.

Employee agrees and understands that any claims she may have under the aforementioned statutes, or any other federal, state or local law ordinance, rule or regulation, are effectively waived and released by this Agreement. Employee represents that she knows of no claim that she has that has not been released by this paragraph. This release does not extend to claims which is a matter of law cannot be waived. Employee acknowledges and understands that this paragraph is intended to prevent her from making any claim against the Released Parties regarding any matter or incident relating to or arising from the Operating Agreement, other operating agreements, the employment relationship or its termination that occurs up to the date Employee executes this Agreement; provided, however, that nothing in this Agreement shall have any effect on Employee's rights and remedies relating to her dissociation from the Company.

5. **Covenant Not to Sue.** Employee hereby covenants and agrees not to file, commence or initiate any suit, grievance, demand or cause of action against the Released Parties based upon or relating to any of the claims released and forever discharged pursuant to this Agreement. If Employee breaches this covenant not to sue, she hereby agrees to pay all of the reasonable costs and attorney fees actually incurred by the Released Parties in defending against such breaching conduct, together with such other and further damages as may result, directly or indirectly, from that breach. Moreover, Employee agrees that she will not persuade or instruct any person to file a suit, claim or complaint on her behalf based on a claim released in this Agreement with any state or federal court or administrative agency against the Released Parties. Employee expressly agrees not to commence or file any class action, including any class arbitration against Company, or serve in any representative capacity in any class action, including class arbitration, against or involving the Company. In accordance with 29 C.F.R. § 1625.23(b), nothing in this covenant not to sue is intended to preclude Employee from challenging the validity of this Agreement under the Older Workers Benefit Protection Act, 29 U.S.C. § 626(f), with respect to claims under the Age Discrimination in Employment Act, and the Company shall not be entitled to recover any consideration paid under this Agreement, damages or its attorney fees and costs resulting from such challenge.

6. **Non-Interference.** Nothing in this Agreement shall interfere with Employee's right to file a charge, cooperate or participate in an investigation or proceeding conducted by the Equal Employment Opportunity Commission, or other federal or state regulatory or law enforcement agency. However, the consideration provided to Employee in this Agreement shall be the sole relief provided to Employee for the claims that are released by her herein. To the maximum extent permitted by law, Employee agrees that Employee will not seek and waives any right to accept any relief or award from any charge or action against the Released Parties before any federal, state or local administrative agency or federal, state or local court, whether filed by Employee or on Employee's behalf with respect to any claim or right released in this Agreement.

7. **No Admission of Wrongdoing or Liability.** Nothing contained in this Agreement shall constitute, or be construed as or is intended to be, an admission or an acknowledgment by the Company or the Released Parties of any wrongdoing or liability, all such wrongdoing and liability being expressly denied.

8. **Confidentiality and Nondisclosure Provisions.** Employee agrees to maintain absolute confidentiality and secrecy concerning the terms of this Agreement and will not reveal or disseminate by publication in any manner whatsoever this document or any matters pertaining to it to any other person except as required by legal process. This confidentiality provision does not apply to communications necessary between Employee's immediate family members or legal and financial planners or tax preparers who are also bound by this confidentiality provision. Employee also agrees to honor and remains obligated under any confidentiality agreement(s) that Employee entered into with the Company or the Released Parties, and nothing in this Agreement shall be deemed to limit, void, abrogate or lessen any otherwise existing obligation of the Employee to keep confidential any trade secret or confidential information belonging to the Company, including, but not limited to, any such contractual or common law confidentiality obligations Employee owes to the Company.

9. **Restrictive Covenants Obligations.** Nothing in this Agreement shall void, abrogate or lessen any otherwise existing obligation of Employee to refrain from solicitation of the Company's employees or customers, including, but not limited to, the obligations contained in statutory or common law, or those contained in the Confidentiality and Non-solicitation Agreement effective on September 30, 2009, with the Company or referenced in other written agreements with the Company.

10. **Non-Disparagement.**

- (a) Employee agrees not to make any statements, written or verbal, or cause or encourage others to make any statements, written or verbal, including, but not limited to, any statements made via social media, on websites or in blogs, that defame, disparage or in any way criticize the personal or business reputation, practices, products, management or conduct of the Company, or any of the Released Parties. Employee acknowledges and agrees that this prohibition extends to statements, written or verbal, made to anyone, including, but not limited to, the news media, competitors, vendors, employees (past and present), customers, clients, governmental agencies, educational institutions, and associated professional organizations. Employee further understands and agrees that this paragraph is a material provision of this Agreement and that any breach of this paragraph shall be a material breach of this Agreement, and that the Company would be irreparably harmed by violation of this provision.
- (b) The Company agrees that its officers, Managers, and members will not make any statements, written or verbal, or direct any third party to make



any statements, written or verbal, including, but not limited to, any statements made via social media, on websites or in blogs, that defame or disparage the personal or business reputation, practices or conduct of the Employee. Nothing herein prevents disclosure, in the sole discretion of the Company and its management, of this Agreement and discussion of Employee's employment with and separation of employment from the Company and the circumstances regarding such separation from the Company (i) by and among employees and agents of Company and the Released Parties or (ii) to or in response to any governmental entity or in response to material provision of this Agreement and that any breach of this paragraph shall be a material breach of this Agreement, and that the Employee would be irreparably harmed by violation of this provision.

11. **Disclosure.** Employee acknowledges and warrants that she is not aware of, or that she has fully disclosed to the Company, any matters for which Employee was responsible or which came to Employee's attention as an employee of the Company that might give rise to, evidence or support any claim of illegal conduct, regulatory violation, unlawful discrimination, or other cause of action against the Company.

12. **Company Property.**

- (a) All records, files, lists, including computer-generated lists, data, drawings, documents, equipment, keys, building access or parking passes, credit card, and similar items relating to the Company's business that Employee generated or received from the Company remain the Company's sole and exclusive property. Employee agrees to promptly return to the Company all property of the Company in her possession. Employee further represents that she has not copied or caused to be copied, printed out, or caused to be printed out any documents or other material originating with or belonging to the Company, except in the ordinary course of Employee's employment with the Company. Employee additionally represents that she will not retain in her possession any such documents or other material originating with or belonging to the Company. Employee agrees not to delete Company information or any other electronic information from Employee's computer or other devices belonging to the Company before or after the Effective Date. Employee further agrees not to access the Company's computer system or other electronic systems following the Effective Date. Employee may retain documents relating to her ownership or membership in the Company or her financial rights or interests in the Company for her own personal, tax, or business purposes.
- (b) Any and all social media and other online accounts and profiles created or used by Employee on behalf of Company or otherwise for the purpose of promoting or marketing Company or similar business purposes, including

such profiles and accounts featuring or displaying Company's name and trademarks ("Company Social Media Accounts") belong solely to Company. As of the Effective Date, Employee agrees to cease accessing, using, updating or modifying any and all Company Social Media Accounts.

- (c) Upon the separation of Employee's employment, Company will retain ownership and control of all Company Social Media Accounts created or used during the course of Employee's employment with the Company, including all related data and information. Prior to the Effective Date, Employee agrees to provide to Company the log-in information, including usernames and passwords, for each Company Social Media Account that Employee created, used or managed. Employee also agrees to assist Company, both prior to and after the Effective Date (as may be necessary), with the transition and maintenance of each Company Social Media Account created or used by Employee during the course of her employment with the Company, including providing information that may be necessary to ensure that Company is able to access the Company Social Media Accounts.

13. **No Other Compensation Due.** Employee acknowledges and agrees that neither the Company nor any of the Released Parties owes Employee any wages, salary, stock options, bonus, accrued vacation or sick leave, benefits, paid time off, notice pay, severance pay, commissions, equity or ownership, incentive pay, salary, reimbursement, expenses, deferred compensation, or other compensation in any amount whatsoever, including, but not limited to, any compensation pursuant to the Operating Agreement and any other agreement, other than as expressly agreed to herein. Employee agrees that to the extent that Employee is otherwise due any such amounts or compensation or expenses of any nature, the Company's obligation to pay these amounts is satisfied and subsumed in full by the Severance Pay. The parties shall each bear their own costs and their own attorney fees in connection with this Agreement. Nothing in this Agreement is intended to have any effect on Employee's ownership rights or interests upon dissociation.

14. **No Other Considerations.** Employee affirms that the only consideration for the signing of this Agreement is that set forth in this Agreement and that no other promises or assurances of any kind have been made to Employee by the Company, the Company's attorneys, or any other person, as an inducement to sign this Agreement relating to her employment with, or separation of Employment from, the Company. The consideration for this Agreement tendered and herewith accepted is solely by way of settlement, compromise, and final disposition of disputed claims, and it is therefore specifically agreed that this Agreement shall forever be a final and complete bar to and full satisfaction of Employee's claims and suits for injuries or damages of whatsoever nature resulting from the aforesaid matters.

15. **No Assignment.** Employee hereby represents and warrants that Employee has not assigned, transferred or conveyed to any individual or entity any alleged right, claim or cause of



action of any kind which is included within the above releases. Employee further represents and warrants that Employee is aware of no lien or other encumbrance on Employee's rights, claims, and causes of action, and that Employee is entitled to receive from the Company payment of the full amount of the proceeds due to Employee under this Agreement.

16. **No Reinstatement.** Employee agrees that she will not seek reinstatement or reemployment with Company or its affiliates. In the event that Employee violates this provision, Company shall have the right to reject Employee's application without recourse by Employee, and such rejection shall not constitute retaliation or violation under federal or state statutory or common law. If, in violation of this provision, Employee applies for and is inadvertently given employment by Company, Company has the right to terminate her employment without recourse.

17. **Breach of Agreement.** If either party brings a claim for breach of the terms of this Agreement, the prevailing party shall be entitled to its reasonable attorney fees and expenses incurred in prosecuting or defending such an action.

18. **Binding Effect.** This Agreement shall be binding upon and inure to the benefit of Employee and the Company, and their officers, directors, employees, agents, legal counsel, heirs, successors and assigns.

19. **Warranties/Representations.** Employee hereby warrants and represents that:

- (a) Throughout her employment, she was fully and appropriately compensated for all hours worked in accordance with the Fair Labor Standards Act and other applicable law, if any;
- (b) Employee has been provided with all leave to which she is entitled under the Company policy and applicable law including, but not limited to, the Family and Medical Leave Act;
- (c) Employee has carefully read and fully understands the comprehensive terms and conditions of this Agreement and the releases set forth herein;
- (d) Employee is executing this Agreement knowingly and voluntarily, without any duress, coercion or undue influence by the Company, its representatives or any other person;
- (e) Employee has consulted with legal counsel of her own choice before executing this Agreement;
- (f) Employee has no pending claim, complaint, grievance or any document with any federal or state agency or any court seeking money damages or relief against the Company;

- (g) The Severance Pay recited above constitutes good and valuable consideration;
- (h) Employee is fully satisfied with the terms and conditions of this Agreement including without limitation the consideration paid to her by the Company;
- (i) Employee has not made a claim for workers' compensation related to her employment with the Company, and that she is currently unaware of any injury or illness that would support such a claim; and
- (j) Employee is not waiving rights or claims that may arise after the date this Agreement is executed, nor is Employee waiving any rights or claims relating to her financial interests as a member or owner of the Company.

20. **Entire Agreement; Severability of Terms.** This Agreement contains the entire agreement and understanding of the parties with respect to the subject-matters addressed herein and supersedes and replaces all prior discussions or negotiations between the parties or their counsel. The terms of this Agreement are severable, such that if any provision of this Agreement is found to be invalid, unlawful, or unenforceable by any judge or arbitrator, the other provisions of this Agreement will remain in full force and effect. Any invalid, unlawful, or unenforceable term will be stricken from the Agreement, and the remainder of the Agreement will survive to the fullest extent possible.

21. **Compliance with the Older Workers Benefit Protection Act.** To comply with the Older Workers Benefit Protection Act of 1990, the Company has advised Employee of the legal requirements of that Act, and this Agreement fully incorporates those legal requirements by reference and as follows:

- (a) This Agreement is written in layman's terms, and Employee hereby represents to the Company that Employee understands and comprehends its terms;
- (b) Employee is hereby advised, and has had an opportunity, to consult with an attorney to review this Agreement prior to executing it.
- (c) This Agreement specifically refers to rights and claims arising under the Age Discrimination in Employment Act;
- (d) Employee does not waive any rights or claims that result from events occurring after the date this Agreement is executed by Employee;
- (e) Employee hereby acknowledges that Employee is receiving consideration beyond anything of value to which Employee already is entitled;

- (f) Employee has twenty-one (21) days from Employee's receipt hereof (the Offer Date) to consider this proposed Agreement. Employee's failure to accept this proposed Agreement by close of business on the twenty-first day following Employee's receipt of this Agreement may be deemed rejection off its terms; and
- (g) Employee has the right to revoke this Agreement for seven (7) days following Employee's signing of this Agreement, and after the expiration of that seven (7) days the executed Agreement shall be of full validity, force, and effect. To exercise this right, Employee is required to deliver written notice to the Company prior to expiration of this right to revoke, and such revocation is not valid or effective unless and until the written notice of same is received by the Company, at the address (physical or email) or facsimile number specified at the end of this Agreement, within the revocation period. Otherwise, such revocation shall be invalid and ineffective and this Agreement shall be deemed accepted.

22. **Neutral Reference.** Employee agrees to refer all requests for employment references from the Company directly and exclusively to the Company's HR Manager (currently Jamie Kemp). Employee further understands that, in accordance with the Company's policy on employment references, the Company will provide only the dates of Employee's employment, positions held, and the salary earned by Employee. Company will provide a letter of reference for Employee, on Company letterhead, addressed "To Whom it May Concern" in language mutually agreed to by the parties.

23. **Governing Law.** This Agreement shall be governed by and construed and enforced in accordance with the laws of the State of South Carolina, without regard to the choice of law principles. This Agreement may be enforced only in a court of competent jurisdiction in Greenville County, South Carolina, and the parties hereby consent and submit themselves to the exclusive venue and personal jurisdiction of said court with respect to all such disputes and controversies whether or not Employee is then residing in South Carolina.

24. **Counterparts.** This Agreement may be executed in any number of counterparts, each of which shall be an original, but all of which taken together shall constitute one and the same agreement. Delivery of an executed counterpart of this Agreement by facsimile or other electronic means shall have the same force and effect as the delivery of an original executed counterpart of this Agreement.

THIS IS A LEGALLY ENFORCEABLE AGREEMENT.

Dated:

H. Lorraine McEllen
Witness

Donza H. Mattison
EMPLOYEE - DONZA H. MATTISON

Dated: December 15, 2017

McMILLAN PAZDAN SMITH, LLC

By: [Signature]

Name: Chad C. Cousins

Title: COO / Principal

Address: Suite 200 400 Augusta St.
Greenville, SC 29601

E-mail: ccousins@mcmillanpazdan-smith.com

Facsimile: _____

WSACTIVELLP:9483873.1

Exhibit B



ROTHSTEIN LAW FIRM, PA

www.rothsteinlawfirm.com

David E. Rothstein
Certified Specialist in Employment and Labor Law (S.C.)
Also licensed in North Carolina
drothstein@rothsteinlawfirm.com

Jill C. Rothstein
Special Counsel
jrothstein@rothsteinlawfirm.com

June 18, 2019

VIA CERTIFIED MAIL, RETURN
RECEIPT REQUESTED

Rondald G. Smith
Managing Principal
McMillan Pazdan Smith, LLC
127 Dunbar Street
Spartanburg, SC 29306

Re: McMillan Pazdan Smith, LLC v. Donza H. Mattison,
Case No. 2019-CP-23-00998

Dear Mr. Smith:

As you know, I represent Donza H. Mattison in the above-referenced case, which is pending in the Greenville County Court of Common Pleas.

Based upon a review of the limited financial records previously provided to Ms. Mattison in connection with the valuation of her membership units in McMillan Pazdan Smith, LLC, it appears that the members of the management committee of the firm have authorized the payment of excessive compensation, bonuses, and fringe benefits to themselves for many years, without approval of a Required Interest of the Members as required by the firm's Operating Agreement. Since the firm's merger in Q4 of 2009, the total compensation of the managing members has increased at a rate that is three to five times greater than that of other members of the firm. In addition, the firm has paid for life insurance and disability insurance on spouses of the managing members, which spouses have nothing to do with the operations of the firm. Finally, MPS has engaged in one or more related-party lease transactions for years, specifically including the rental of the Spartanburg Office at substantially above fair market value from C & P of Spartanburg, LLC, which is owned in part by your wife, Caroline B. Smith. The managing members have also taken affirmative efforts to conceal these transactions and the full and complete financial records relating to such transactions from the other members of the firm. These actions were taken to enrich the managing members at the expense of the best interests of the firm as a whole, in violation of the Operating Agreement and the South Carolina Limited Liability Company Statute, as well as in breach of the managing members' fiduciary duties to co-owners of the firm and to the firm as a whole.

Mr. Smith
June 18, 2019
Page 2

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 for a complete accounting of all financial records relating to these transactions and to recover all excessive compensation and benefits provided to the managing members or their family members. If the firm has not addressed this matter to the satisfaction of Ms. Mattison before the close of business on Thursday, July 18, 2019, Ms. Mattison will pursue a derivative action on behalf of the firm against Rondald G. Smith, Joseph M. Pazdan, II, Brad B. Smith, and Chad C. Cousins (Chief Operating Officer).

I believe that this demand was previously conveyed to your attorney, Thomas H. Keim, Jr., in my letter of January 14, 2019; however, out of an abundance of caution, I am sending this letter directly to you so there will be no doubt about Ms. Mattison's position or intentions. I am sending a copy of this letter to Mr. Keim and attorney Sam Outten at the Nelson Mullins firm, since I have been informed that they are representing you in this matter as well as MPS. Ms. Mattison would object to your using MPS funds to defend yourself individually in any derivative action brought by Ms. Mattison on behalf of MPS.

Thank you for your attention to this matter. I will look forward to hearing from your attorneys soon.

Sincerely yours,


David E. Rothstein

cc: Thomas H. Keim, Jr., Esq.
Samuel W. Outten, Esq.

Exhibit C



ROTHSTEIN LAW FIRM, PA

www.rothsteinlawfirm.com

David E. Rothstein
Certified Specialist in Employment and Labor Law (S.C.)
Also licensed in North Carolina
drothstein@rothsteinlawfirm.com

Jill C. Rothstein
Special Counsel
jrothstein@rothsteinlawfirm.com

June 18, 2019

VIA CERTIFIED MAIL, RETURN
RECEIPT REQUESTED

Joseph M. Pazdan, II
Managing Principal
McMillan Pazdan Smith, LLC
400 Augusta Street, Suite 200
Greenville, SC 29601

Re: McMillan Pazdan Smith, LLC v. Donza H. Mattison,
Case No. 2019-CP-23-00998

Dear Mr. Pazdan:

As you know, I represent Donza H. Mattison in the above-referenced case, which is pending in the Greenville County Court of Common Pleas.

Based upon a review of the limited financial records previously provided to Ms. Mattison in connection with the valuation of her membership units in McMillan Pazdan Smith, LLC, it appears that the members of the management committee of the firm have authorized the payment of excessive compensation, bonuses, and fringe benefits to themselves for many years, without approval of a Required Interest of the Members as required by the firm's Operating Agreement. Since the firm's merger in Q4 of 2009, the total compensation of the managing members has increased at a rate that is three to five times greater than that of other members of the firm. In addition, the firm has paid for life insurance and disability insurance on spouses of the managing members, which spouses have nothing to do with the operations of the firm. Finally, MPS has engaged in one or more related-party lease transactions for years, specifically including the rental of the Spartanburg Office at substantially above fair market value from C & P of Spartanburg, LLC, which is owned in part by Ron Smith's wife, Caroline B. Smith. The managing members have also taken affirmative efforts to conceal these transactions and the full and complete financial records relating to such transactions from the other members of the firm. These actions were taken to enrich the managing members at the expense of the best interests of the firm as a whole, in violation of the Operating Agreement and the South Carolina Limited Liability Company Statute, as well as in breach of the managing members' fiduciary duties to co-owners of the firm and to the firm as a whole.

Mr. Pazdan
June 18, 2019
Page 2

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 for a complete accounting of all financial records relating to these transactions and to recover all excessive compensation and benefits provided to the managing members or their family members. If the firm has not addressed this matter to the satisfaction of Ms. Mattison before the close of business on Thursday, July 18, 2019, Ms. Mattison will pursue a derivative action on behalf of the firm against Rondald G. Smith, Joseph M. Pazdan, II, Brad B. Smith, and Chad C. Cousins (Chief Operating Officer).

I believe that this demand was previously conveyed to your attorney, Thomas H. Keim, Jr., in my letter of January 14, 2019; however, out of an abundance of caution, I am sending this letter directly to you so there will be no doubt about Ms. Mattison's position or intentions. I am sending a copy of this letter to Mr. Keim and attorney Sam Outten at the Nelson Mullins firm, since I have been informed that they are representing you in this matter as well as MPS. Ms. Mattison would object to your using MPS funds to defend yourself individually in any derivative action brought by Ms. Mattison on behalf of MPS.

Thank you for your attention to this matter. I will look forward to hearing from your attorneys soon.

Sincerely yours,



David E. Rothstein

cc: Thomas H. Keim, Jr., Esq.
Samuel W. Outten, Esq.

Exhibit D



ROTHSTEIN LAW FIRM, PA

www.rothsteinlawfirm.com

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Jill C. Rothstein
Special Counsel
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June 18, 2019

VIA CERTIFIED MAIL, RETURN
RECEIPT REQUESTED

Brad B. Smith
Managing Principal
McMillan Pazdan Smith, LLC
400 Augusta Street, Suite 200
Greenville, SC 29601

Re: McMillan Pazdan Smith, LLC v. Donza H. Mattison,
Case No. 2019-CP-23-00998

Dear Mr. Smith:

As you know, I represent Donza H. Mattison in the above-referenced case, which is pending in the Greenville County Court of Common Pleas.

Based upon a review of the limited financial records previously provided to Ms. Mattison in connection with the valuation of her membership units in McMillan Pazdan Smith, LLC, it appears that the members of the management committee of the firm have authorized the payment of excessive compensation, bonuses, and fringe benefits to themselves for many years, without approval of a Required Interest of the Members as required by the firm's Operating Agreement. Since the firm's merger in Q4 of 2009, the total compensation of the managing members has increased at a rate that is three to five times greater than that of other members of the firm. In addition, the firm has paid for life insurance and disability insurance on spouses of the managing members, which spouses have nothing to do with the operations of the firm. Finally, MPS has engaged in one or more related-party lease transactions for years, specifically including the rental of the Spartanburg Office at substantially above fair market value from C & P of Spartanburg, LLC, which is owned in part by Ron Smith's wife, Caroline B. Smith. The managing members have also taken affirmative efforts to conceal these transactions and the full and complete financial records relating to such transactions from the other members of the firm. These actions were taken to enrich the managing members at the expense of the best interests of the firm as a whole, in violation of the Operating Agreement and the South Carolina Limited Liability Company Statute, as well as in breach of the managing members' fiduciary duties to co-owners of the firm and to the firm as a whole.

Mr. Smith
June 18, 2019
Page 2

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Thank you for your attention to this matter. I will look forward to hearing from your attorneys soon.

Sincerely yours,



David E. Rothstein

cc: Thomas H. Keim, Jr., Esq.
Samuel W. Outten, Esq.

1 State of South Carolina
 2 County of Greenville In the Court of Common Pleas

3
 4 McMillan Pazdan Smith, LLC,)
 5 Plaintiff-Counterclaim Defendant,) 19-CP-23-998
 6 -vs-) May 16, 2019
 7 Donza H. Mattison,)
 8 Defendant-Counterclaimant,)
 9 Donza H. Mattison, in a Derivative) Transcript of
 10 Capacity on Behalf of McMillan) Record
 11 Pazdan Smith, LLC,)
 12 Third-party Plaintiff,)
 13 -vs-)
 14 Ronald G. Smith, Joseph M. Pazdan,)
 15 Brad B. Smith, and Chad C. Cousins,)
 16 Third-party Defendants.)
 17 -----)

17 B E F O R E:

18 The Honorable R. Lawton McIntosh, Judge

19 A P P E A R A N C E S:

20 David Eliot Rothstein, Esquire
 21 Attorney for Donza H. Mattison

22 Samuel W. Outten, Esquire
 23 Thomas H. Keim, Jr., Esquire
 24 Katie E. Towery, Esquire
 25 Attorneys for MPS

Diane L. Marcengill, RPR, CRR, CRC
 Circuit Court Reporter

1 (WHEREUPON, court convened with all parties
2 present and the following proceedings were had
3 commencing at 9:30 a.m.)

4 THE COURT: I know this is a motion to dismiss.
5 Is it yours, Mr. Outten?

6 MR. OUTTEN: Yes, your Honor.

7 THE COURT: Other than that, I saw a motion in my
8 book to disqualify counsel. I think that had been
9 withdrawn; is that correct?

10 MR. ROTHSTEIN: Yes, sir. We would agree to
11 withdraw that.

12 THE COURT: Any other motions we're dealing with
13 this morning?

14 MR. ROTHSTEIN: No, sir.

15 THE COURT: Okay.

16 Mr. Outten, be glad to hear from you.

17 MR. OUTTEN: May it please the Court, your Honor,
18 I'm Sam Outten. I represent McMillan Pazdan and Smith
19 in this lawsuit along with Katie Towery and Tom Keim of
20 Ford & Harrison.

21 I'll refer to McMillan Pazdan and Smith as MPS.
22 MPS is a local architectural firm based here in
23 Greenville. Donza Mattison is a former employee of
24 MPS, and, your Honor, we're here today because the
25 counterclaims asserted by Ms. Mattison and her

1 third-party derivative action should be dismissed, and
2 I'm going to explain why.

3 Ms. Mattison and MPS negotiated and entered into
4 an agreement which bars Ms. Mattison's counterclaims.
5 On December 5, 2017, the parties entered into a
6 severance agreement and general release which was
7 heavily negotiated with both sides represented by
8 counsel. In fact, Mr. Rothstein represented
9 Ms. Mattison; Mr. Keim represented MPS. Their
10 negotiations over the terms of this severance agreement
11 went over several months.

12 In exchange for receiving a generous severance
13 package, Ms. Mattison agreed to a covenant not to sue
14 and a general release, and we're here today asking the
15 Court to enforce the terms of the severance agreement.
16 Pursuant to the covenant not to sue and the general
17 release contained in that agreement, Ms. Mattison has
18 agreed not to assert these claims.

19 Second, your Honor, we request that you dismiss
20 Ms. Mattison's derivative action because it lacks
21 merit. She brought this claim in order to gain
22 leverage against MPS in her negotiations with them over
23 the value of her membership units. However, as your
24 Honor knows, there are strict pleading requirements
25 under the South Carolina Rule of Civil Procedure

1 23(b)(1) for a derivative action. Ms. Mattison has not
2 met those requirements and, therefore, her third-party
3 derivative claim must be dismissed.

4 Your Honor, I think some background facts would be
5 helpful to the Court as you consider these issues. As
6 I stated previously, MPS is a local architectural firm
7 based in Greenville. We have offices in South
8 Carolina, North Carolina, and Georgia.

9 Ms. Mattison is a former employee of MPS. She
10 worked for many years as an architect in the
11 Spartanburg office and worked a variety of projects.

12 Ms. Mattison's employment with MPS ended in
13 February of 2018. MPS and Ms. Mattison entered into a
14 severance agreement and general release on December 5,
15 2017, that laid out the terms of Ms. Mattison's
16 cessation of employment.

17 We submitted a hearing materials notebook to your
18 Honor. Did you get it?

19 THE COURT: I did, and I read it.

20 MR. OUTTEN: I'm glad, your Honor.

21 This severance agreement is Tab 6 of the notebook.
22 And as I stated earlier, this agreement was heavily
23 negotiated over a long period of time. And in this
24 agreement, if you have a chance to look at it, your
25 Honor, Ms. Mattison received FMLA leave, continued

1 insurance benefits provided by MPS during FMLA leave,
2 120 hours of paid time off during her leave, 23 weeks
3 of severance pay at her then-current salary, and a
4 bonus of \$15,000 for fiscal year 2017. And
5 Ms. Mattison has received these benefits under the
6 severance agreement. Further, your Honor, Ms. Mattison
7 does not dispute that the agreement is a valid and
8 binding contract between the parties.

9 Now, one issue that was resolved in the severance
10 agreement but was the primary reason why MPS brought
11 this declaratory judgment action was the method by
12 which Ms. Mattison's membership units in MPS would be
13 valued, how we would arrive at a value for her
14 membership units. Ms. Mattison owns 2035.34 units
15 which is approximately two percent interest in the
16 firm.

17 And, your Honor, here is the part of that
18 agreement, our severance agreement, which is important.
19 And it says -- this discusses Ms. Mattison's
20 disassociation from the firm. It says "will be handled
21 separately from this agreement," and the operative
22 language is "will be done in accordance with the
23 September 30, 2015, operating agreement." This is a
24 paragraph in the severance agreement.

25 So what we know is that Ms. Mattison agreed that

1 her units would be valued according to the terms of the
2 operating agreement. And the severance agreement
3 provides that the membership units are to be determined
4 according to the operating agreement, and pursuant to
5 that agreement, for the last five years, the management
6 committee of MPS has retained a third-party firm to
7 provide an annual business appraisal.

8 MPS used the valuation from 2017 to determine the
9 per-unit price of her membership interest and made an
10 offer to Ms. Mattison to purchase her units for this
11 amount on August 3, 2018.

12 It's important for the Court to know, your Honor,
13 that this is the same valuation method that has been
14 used for the last five years. In other words, there
15 was no change in the valuation method that was used to
16 value Ms. Mattison's shares. We used the same method
17 we had been using for the last five years, and how the
18 membership units are valued is set forth in the
19 operating agreement.

20 And, again, Ms. Mattison agreed that this would be
21 the methodology by which her shares would be valued.
22 And it's clear in the severance agreement.

23 And to be clear, your Honor, MPS remains ready,
24 willing and able to pay that amount to Ms. Mattison for
25 her units. We have offered it to her. If she says she

1 wants it, we'll pay them to her in the next several
2 days.

3 However, Ms. Mattison would not agree to accept
4 this amount for her shares. She refused the amount
5 calculated according to the severance agreement and the
6 2015 operating agreement, even though that's what the
7 parties agreed to in the severance agreement.

8 I want to spend a couple minutes talking about the
9 procedural background, where we are. We filed a
10 declaratory judgment action on February 25, 2019,
11 asking this Court to declare that MPS followed the
12 provisions of the severance agreement and followed the
13 provisions of the operating agreement in valuing
14 Ms. Mattison's membership units. In other words, MPS
15 filed the DJ action asking this Court to enforce the
16 severance agreement.

17 In response, Ms. Mattison filed an answer,
18 counterclaims and third-party complaint on March 4,
19 2019. She asserted counterclaims for breach of
20 contract, judicial determination of the fair value of
21 her membership units, an accounting, an order
22 compelling production of MPS's financial records and a
23 declaratory judgment.

24 Ms. Mattison also asserted a third-party
25 derivative cause of action against Ronald Smith, Joseph

1 Pazdan, and Brad Smith, who are the founding members of
2 the firm, and against Chad Cousins, MPS's chief
3 operating officer. The derivative action asserts
4 claims for breach of fiduciary duty and breach of the
5 operating agreement.

6 Now, let's first talk, your Honor, about the
7 counterclaims. Ms. Mattison's counterclaims should be
8 dismissed because they violate the covenant not to sue
9 in the severance agreement signed by Ms. Mattison.

10 Your Honor, at this point I think it's important
11 for the Court to understand that this severance
12 agreement, if you look at it, was intended to resolve
13 all claims related to Ms. Mattison's employment with
14 the firm. It's clear. It's a long, detailed,
15 well-drafted document. And the only conclusion you can
16 come to, if you review this severance agreement, is
17 these parties through counsel got together and said,
18 any and all claims that Ms. Mattison has or the firm
19 has will be resolved through the execution of this
20 agreement. There's no other reasonable conclusion to
21 reach. And part of that was the covenant not to sue.

22 And I have the covenant not to sue here, your
23 Honor, and it has fairly standard language, but the
24 point is, your Honor, it's very straightforward.
25 There's no ambiguity in it. "Employee hereby covenants

1 and agrees not to file, commence or initiate, any suit
2 grievance, demands, or cause of action against the
3 released parties based upon or relating to any of the
4 claims released and forever discharges pursuant to the
5 agreement." So that's a part of the negotiated
6 agreement we have with Ms. Mattison. That is,
7 Ms. Mattison agreed that she wouldn't do exactly what
8 she's done in this case, that is, file claims against
9 us for claims that I just went through.

10 And we need to keep in mind, your Honor, that we
11 reached this bargain with Ms. Mattison and she's
12 received considerable benefits -- again, the paid time
13 off, health benefits, generous severance pay, a bonus.
14 And so in exchange for all that, she agrees she's not
15 going to bring any claims against the firm. She's
16 agreed to that. In spite of that, she brought these
17 counterclaims which are now before the Court.

18 And if you look at the counterclaims, your Honor,
19 it is clear that all of the claims relate to her
20 employment and all of the claims are released in the
21 severance agreement.

22 Now, another reason to dismiss the -- well, MPS
23 respectfully requests that your Honor dismiss the
24 counterclaims because they violate the covenant not to
25 sue. It's clear. Couldn't be clearer.

1 And, your Honor, we're asking you to enforce this
2 business agreement. That's one purpose of the courts
3 is to, if there are unambiguous agreements reached
4 between two sophisticated parties, they should be
5 enforced by the Court.

6 You're not going to hear any factual or legal
7 reason to avoid or ignore the terms of the agreement
8 this morning from Mr. Rothstein. He's a fine lawyer,
9 but there's no reason why the Court should not enforce
10 the agreement, and that's what we're asking you to do.

11 Now, again with regard to the counterclaims, there
12 is a release. And, your Honor, I'm not going to, in
13 the interest of time, I know you have got a very busy
14 morning ahead of you, so in the interest of time, I'm
15 not going to read the release, but I'm asking the Court
16 to please look at the language of the release in the
17 severance agreement that you have.

18 And the release goes on and on, and it is clear
19 and unambiguous. And this is one of the most
20 comprehensive releases I've seen, and as you know, I've
21 been at this a long time, your Honor.

22 But if you look at it, it's clear that what
23 happened is the parties negotiated a release as a part
24 of a severance agreement, and what they agreed to is
25 very straightforward. We're going to pay you a

1 severance package and other benefits. In return for
2 that payment, you're going to release all claims that
3 you have against MPS.

4 Again, despite that, we have counterclaims
5 asserted against us in the face of the general release
6 and the covenant not to sue. Again, the counterclaims
7 were released in the severance agreement in this
8 paragraph and, as a result, should be dismissed.

9 Now, let me talk about the derivative action.
10 Ms. Mattison filed a derivative action against the
11 founding members of MPS and its COO. And she makes two
12 claims. One, that the founding members acted in their
13 own self-interest by receiving excessive compensation,
14 and two, that MPS pays above market rent for its office
15 building in Spartanburg in which my client's wife has
16 an ownership interest. Those are two claims that are
17 made in the derivative action.

18 The derivative action must be dismissed because
19 she does not meet the pleading requirements of
20 23(b)(1). And as your Honor knows, 23(b)(1) in
21 derivative actions are very different from a complaint
22 for negligence arising from an automobile accident.
23 This is not the same. There are a lot of policy
24 reasons for that. Again, I won't go through those
25 because in the interest of time.

1 But if you file a derivative complaint, your
2 Honor, you have to do one of two things, as you know.
3 You have to allege with particularity either the
4 efforts made by the plaintiff to obtain the action he
5 or she desires from the directors of the
6 organization -- for us it would be our management
7 committee -- or you have to allege the reason for the
8 failure to make a demand upon the directors, sometimes
9 referred to as demand futility. One of these must be
10 pled with particularity. And if you look at the case
11 law, both in South Carolina and elsewhere, you will see
12 that a big percentage of these cases are dismissed
13 because of the failure to meet the pleading
14 requirements in 23(b)(1). And as I said, your Honor,
15 these are heightened pleading requirements.

16 And if you think about it, your Honor, the purpose
17 of the demand requirement is to allow the board of
18 directors, or for MPS the management committee, the
19 opportunity to address the misconduct complained of and
20 avoid litigation. That's the purpose of the demand.

21 And in order to do that, your Honor, the demand
22 has to have sufficient particularity and to discuss
23 what the complaining party, what remedial action
24 they're asking the management committee to take.
25 Without that, the demand does not meet the requirements

1 of 23(b)(1), and that's what we have here.

2 Your Honor, I know you're familiar with the
3 Carolina First Corporation against Whittle case. We
4 would respectfully request that the Court consider that
5 case in deciding the issues that we have raised before
6 the Court this morning.

7 You may remember that a group of shareholders
8 brought a derivative action against the bank seeking
9 rescission of bonuses paid to some bank officers.
10 Shareholders alleged that the bonuses were a form of
11 self-dealing. The Court granted the banks's motion to
12 dismiss the action, finding that the shareholders
13 failed to allege particularized facts showing that they
14 complied with the demand requirements of 23(b)(1).

15 I'll talk about the Court's holding in more
16 detail, but Ms. Mattison's derivative action suffers
17 from the same problem. It should be dismissed for the
18 reasons discussed in the Carolina First case.

19 Now, Donza Mattison's derivative complaint
20 contains only one paragraph of the demand requirements,
21 and we invite the Court's attention to Paragraph 105 of
22 her third-party complaint. Says: On January 14, 2019,
23 Mattison's counsel sent a letter to MPS's counsel
24 suggesting that the firm should take action against its
25 managing members for breach of fiduciary duty based on

1 the acts of misconduct described herein. To date,
2 plaintiff's counsel has refused to commence such an
3 action.

4 In any event, the managing members of MPS are not
5 likely to authorize the commencement of legal action by
6 plaintiff against themselves individually. Now, that's
7 the only allegation in her third-party claim related to
8 the demand requirement. So let's look at it and
9 compare it to what is required.

10 First, they reference a letter of January 14,
11 2019, by Mr. Rothstein to Mr. Keim, but, your Honor,
12 that letter does not constitute a presuit demand upon
13 the managing members.

14 I have a copy of that letter, if your Honor would
15 like me to hand it up.

16 THE COURT: Let me ask you, is it attached to the
17 pleadings? This is a 12(b)(6), right?

18 MR. OUTTEN: It's referenced in the pleadings,
19 your Honor, and I believe since it's referenced in the
20 pleadings, then it's permissible for you to consider.

21 THE COURT: Okay, sir. I'll be glad to look at
22 it.

23 MR. OUTTEN: Your Honor, the demands stated in the
24 letter that I just handed to the Court, again on the
25 January 14, 2019, letter from Mr. Rothstein to

1 Mr. Keim, on the second or, excuse me, the third page
2 in the last paragraph that begins "if we are unable."

3 THE COURT: Where am I looking, please?

4 MR. OUTTEN: It's the third page of the letter.
5 It's the last or second-to-last full paragraph. It
6 starts "if we are unable."

7 Are you with me, your Honor?

8 THE COURT: Yes, sir.

9 MR. OUTTEN: Okay. It says: If we are unable to
10 resolve this matter before the tolling agreement
11 expires on February 4, 2019, Ms. Mattison intends to
12 file not only an action for judicial valuation of her
13 shares but also a shareholder derivative action on
14 behalf of MPS against the members of the management
15 committee for systematically overpaying themselves in
16 the form of excessive compensation, bonuses, fringe
17 benefits, and related party lease transactions for
18 years at the expense of the best interest of the firm
19 as a whole while taking affirmative efforts to conceal
20 the actual financial records of the company relating to
21 their compensation and benefits.

22 So what you're looking at in this letter is the
23 only presuit demand that was made. And here is what
24 Carolina First says about a presuit demand: At a
25 minimum, a demand must identify the alleged wrongdoers,

1 describe the factual basis of the wrongful acts and the
2 harm caused to the corporation and requests remedial
3 relief. And that's not in there. In other words, you
4 have to do more than a generalized allegation of
5 wrongdoing. In other words, "I think the founding
6 members are receiving excessive compensation and perks;
7 I think that the lease transaction in Spartanburg needs
8 to be looked at," that's not enough. If you look at
9 Carolina First, it becomes clear.

10 Carolina First case says: Such a presuit demand
11 must be alleged not in a conclusory fashion but through
12 particularized allegations. These particularized
13 allegations must support an earnest and not a simulated
14 effort with the managing body of the corporation to
15 induce remedial action on their part.

16 And the court of appeals held in Carolina First,
17 because the complaint did not contain allegations
18 regarding precisely what the shareholders demanded and
19 what the bank's board of directors refused to do, the
20 shareholders failed to comply with the demand
21 requirements of 23(b)(1). And like the complaint in
22 Carolina First, your Honor, Ms. Mattison's complaint
23 falls far short of the demand requirements of 23(b)(1).
24 She does not state in her complaint what specific
25 actions she demanded the management committee take in

1 order to remedy the alleged improper actions.

2 In other words, we have nothing more than
3 generalized allegations of misconduct, but 23(b)(1)
4 requires more, your Honor. She did not give the
5 management committee a true and earnest opportunity to
6 assess her allegations and analyze whether they should
7 implement her suggested action.

8 Let me give you an example. She claims that the
9 third-party defendants have received excessive
10 compensation. Does she want them to pay a certain
11 amount of money back to the firm? Does she want them
12 to decrease their salaries going forward? What exactly
13 is she suggesting? There's no remedial action
14 described by Ms. Mattison, and that is required.

15 And, your Honor, in getting ready for this motion,
16 I thought it might be helpful to the Court to see a
17 case where the court has actually approved a demand so
18 you can contrast that with what we have here. And we
19 found the case of Patterson against Witter, which is --

20 THE COURT: What's that cite, please, sir?

21 MR. OUTTEN: Sir?

22 THE COURT: What's the citation on that case?

23 MR. OUTTEN: It is 425 S.C. 213, 821 S.E. 2d 677.

24 I have a copy for your Honor. May I approach?

25 THE COURT: Absolutely.

1 MR. OUTTEN: So, your Honor, in the Patterson
2 case, our supreme court talks about a demand that was
3 approved, and it appears -- it appears on Page 4 of the
4 decision, and the paragraph starts "on September the
5 4th."

6 At the bottom of the paragraph, your Honor, it
7 says: Petitioner sent a written demand letter to
8 respondent's counsel itemizing specific requests. And
9 that paragraph starts: In particular, our clients
10 believe the following actions are necessary and should
11 be taken on behalf of the fund. And again, your Honor,
12 in the interest of time, I'm not going to read through
13 those because it would take a while.

14 But suffice it to say that there are five
15 separate, particularized, detailed demands, and
16 remedial action is suggested in each one of those. In
17 other words, again, we go back to when we started
18 talking about this, the purpose of the demand is to
19 give the management committee or the board of directors
20 the opportunity to take remedial action to avoid
21 litigation; otherwise, the demand doesn't meet
22 23(b)(1).

23 Here in Patterson, we have one that met the
24 requirements of 23(b)(1). And if you look at it, your
25 Honor, you will see again specific demands and specific

1 remedial actions that the plaintiffs are suggesting.

2 And we would ask the Court to contrast what you
3 see in Patterson to what we have here in the letter and
4 Paragraph 105 of the complaint. And when you compare
5 those, your Honor, it becomes obvious that the demand
6 falls far short of what is required.

7 And the letter was to Mr. Keim. It wasn't to MPS.
8 That's the first thing. Next thing, in the letter,
9 Ms. Mattison said that she was suggesting to counsel
10 for MPS that the firm should take action against its
11 managing members. That doesn't meet the demand
12 requirements. It doesn't say how the managing members
13 breached the fiduciary duty. Again, it doesn't say:
14 What can the company do to remedy the actions
15 complained of or how the members within the firm have
16 been harmed? There's nothing about that. These are
17 all necessary components of a proper demand. And, your
18 Honor, we ask you to keep in mind that this letter was
19 sent during negotiations over the value of
20 Ms. Mattison's membership units.

21 And if you look at that paragraph, the letter
22 essentially threatens that if the parties are unable to
23 resolve the valuation issue with regard to her
24 membership units, then she would file a derivative
25 action. A veiled threat in correspondence between

1 counsel for the parties regarding a matter unrelated to
2 any breaches of fiduciary duty just does not meet the
3 requirements of 23(b)(1).

4 Your Honor, the failure to meet the pleading
5 requirements of 23(b)(1) result from the fact that this
6 was used as a threat rather than as a legitimate
7 procedural mechanism to address corporate misconduct.

8 Now, the next issue I want to address is demand
9 futility.

10 THE COURT: What is the next thing, please, sir?
11 I didn't hear the last thing you said.

12 MR. OUTTEN: Demand futility is the next issue I
13 would like to address.

14 And demand futility means that the party bringing
15 the claim alleges that it would have been futile or
16 pointless to make a demand.

17 But, your Honor, as the cases say, if the board of
18 directors is not going to be given an opportunity to
19 address the alleged misconduct or the impropriety, then
20 serious and specific allegations of wrongdoing or fraud
21 must be alleged with particularity, and we don't have
22 that.

23 Again, we have to go back to the only paragraph in
24 the derivative claim addressing this issue, 105, and
25 she says, "The managing members of MPS are not likely

1 to authorize the commencement of legal action by
2 plaintiff against themselves individually." Well, that
3 specific issue was addressed in Carolina First.

4 In that case, one of the allegations made on
5 behalf of the shareholder plaintiffs was, well, making
6 a demand against the board of directors would be
7 pointless, would be futile, because they're not going
8 to authorize an action against themselves. But the
9 court of appeals said, "Shareholders argue that demand
10 is futile because the majority of the board members are
11 named as defendants and cannot be expected to sue
12 themselves."

13 And here is the important part of that case and
14 demand futility. This reasoning has been uniformly
15 rejected by courts which have considered this argument.
16 And Judge Howard goes on to explain why. He says this
17 argument lacks logic. If the Court were to accept it,
18 derivative plaintiffs could readily circumvent Rule
19 23's demand requirements simply by naming all directors
20 in the complaint. For these reasons, your Honor,
21 Ms. Mattison has failed to meet the demand requirements
22 in 23(b)(1), and her derivative action should be
23 dismissed.

24 The last issue is, if you bring a derivative
25 action, as you know, your Honor, the plaintiff, the

1 person bringing the derivative action, must fairly and
2 adequately represent the interests of the firm. And
3 23(b)(1) requires the plaintiff fairly and adequately
4 represent the interests of members similarly situated
5 in enforcing the right of the company.

6 And we looked, your Honor, to find the case that
7 gives us guidance on this, and we found a Sixth Circuit
8 case, but it has been cited with approval by the Fourth
9 Circuit. It's Davis against Comed. May I approach?

10 THE COURT: Yes, sir.

11 MR. OUTTEN: So in Davis against Comed, your
12 Honor, we have guidance about, what do you look at if
13 you're evaluating the issue of whether or not the
14 plaintiff fairly and adequately represents the interest
15 of the company? And I'm not going to read all of them,
16 but I'll read a couple of them. Economic antagonism
17 between the representative and the class. We have that
18 here because Ms. Mattison has personal claims against
19 MPS.

20 The remedy sought by the plaintiff in the
21 derivative action. Some of the remedies sought by
22 Ms. Mattison in this case are contrary to what
23 98 percent of the members in the firm want.

24 Whether other litigation is pending between the
25 plaintiff and defendants. Again, we've got other

1 litigation. I've talked about the counterclaims.

2 So I'm not going to go through them all, but if
3 you look at this case, your Honor, it's clear that
4 Ms. Mattison does not and cannot fairly and adequately
5 represent the other members of MPS. No other members
6 have joined this derivative action. Ms. Mattison is
7 the only member of MPS who is a former employee.
8 Ms. Mattison has other litigation pending between her
9 and the firm. She's the only member with personal
10 claims against the firm. She's the only member with a
11 severance agreement.

12 Now, since her employment with MPS has ended, she
13 has some level of animosity against the third-party
14 defendants as evidenced in the negotiations and
15 communications that have followed. All the other
16 members are currently employed by MPS. Ms. Mattison is
17 asking for relief in contravention to what the other
18 members want.

19 We had the motion to disqualify. Thankfully
20 that's been resolved, but we know, your Honor, that the
21 reason it was resolved is because every member of MPS
22 consented to our representation of the founding members
23 and the firm. And that's in the record in this case
24 for your Honor to look at.

25 In her derivative action, Ms. Mattison asked the

1 Court to undo actions that have been voted and approved
2 on by the firm. One of the things that she asks is
3 that the operating agreement be declared invalid.
4 Well, that's the operating agreement the firm has been
5 using for more than three years. Many actions have
6 been taken pursuant to that operating agreement. All
7 the other members of MPS approved the amendment to the
8 operating agreement.

9 Again, the firm has been acting pursuant to its
10 provisions for over three years, but a two-percent
11 former employee is asking the Court to void or declare
12 invalid the operating agreement that we use to run our
13 company.

14 Her derivative action is seeking to achieve things
15 that other members do not want. And also, your Honor,
16 the derivative claim is requiring the firm to incur
17 litigation costs. Here we are this morning arguing
18 this motion to dismiss before you because of this
19 derivative action, a derivative action that no other
20 member supports.

21 So, your Honor, Ms. Mattison cannot satisfy the
22 requirements of 23(b)(1), and her derivative action
23 must be dismissed. In sum, the counterclaim should be
24 dismissed because Ms. Mattison agreed to a covenant not
25 to sue and a release in the severance agreement she

1 negotiated with MPS. The derivative action must be
2 dismissed because no proper demand was made on the
3 management committee of MPS. There was a failure to
4 make such a demand, has not been properly pled, and
5 Donza Mattison does not fairly and adequately represent
6 the interest of the other members of MPS.

7 Can I answer any questions your Honor has?

8 THE COURT: Yes, sir, you can. Quite frankly, I
9 think that the derivative action is probably not going
10 to survive, but I want to go back to what you
11 referenced earlier as to the severance agreement and
12 covenant.

13 There was an agreement that the shares would be
14 valued pursuant to some operating agreement in this
15 October 25th of some year. You had a slide up here,
16 your poster board where you showed me earlier.

17 MR. OUTTEN: I think this is what you're referring
18 to, your Honor. The part that talks about the
19 valuation being done according to the operating
20 agreement; is this what you're referring to, your
21 Honor?

22 THE COURT: I am.

23 MR. OUTTEN: Okay. Yes, sir.

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

25 MR. OUTTEN: Thank you, your Honor.

1 THE COURT: Mr. Rothstein.

2 MR. ROTHSTEIN: May it please the Court, your
3 Honor?

4 THE COURT: Yes, sir.

5 MR. ROTHSTEIN: I'm David Rothstein from
6 Greenville. I represent Ms. Donza Mattison in this
7 case.

8 Ms. Mattison is actually one of the founding
9 partners of MPS. She was -- she's actually the eighth
10 highest ranking partner in the firm. She's been there
11 since 1994. She made partner in 1996. She's had a
12 very successful career as an architect. Fortunately,
13 she didn't have anything to do with the design of this
14 courthouse. I'll put that on the record.

15 But she was actually the director of the firm's K
16 through 12 public education program. She basically
17 designed a lot of the public schools in the Upstate of
18 South Carolina.

19 What's made her very good as an architect is also
20 what brought her here today. She's been a very
21 conscientious and outspoken member of the firm. The
22 reason that's made her successful as an architect is
23 because if a contractor tried to cut corners or use
24 cheaper materials than what the specs called for, she
25 was always right on it. She is the one that stands up

1 for the people for what she thinks is right and does
2 not shy away from a fight. So that's why we're here
3 today, your Honor.

4 Now, Mr. Outten's argument would make a fine
5 closing argument at the end of a trial, your Honor, but
6 we're here today, your Honor, as you mentioned, on a
7 Rule 12(b)(6) motion.

8 THE COURT: Let me ask you this, Mr. Rothstein.
9 Looking at your pleadings, looking at this letter,
10 January 14, 2009, is there any real argument -- real
11 argument -- that you didn't make a proper presuit
12 particularized demand for any legal relief under
13 23(b)(1)?

14 MR. ROTHSTEIN: Well, your Honor, the letter is
15 attached to my pleading, as you mentioned. It's
16 Exhibit A. And the purpose of the pleading requirement
17 under 23(b)(1) is to provide notice to the party as to
18 why there is a derivative action. And this letter is a
19 three-page letter that goes through in depth why we
20 believe that the managing shareholders and the COO have
21 engaged in self-dealing over the years that
22 Ms. Mattison just found out as we were winding up her
23 participation.

24 THE COURT: Can you point out in the letter the
25 remedial relief that you were seeking other than the

1 payment of monies to her pursuant to her termination or
2 her leaving the company? Because it appears to me, as
3 Mr. Outten said, this is just a letter between lawyers
4 saying, "If you don't give me this, I'm going to do
5 that." And it's not meeting the requirements under
6 23(b)(1) in any form or fashion that I can see.

7 MR. ROTHSTEIN: Well, your Honor, the requirements
8 of the rule are you have to identify the wrongdoer.
9 She's done that. You have to identify what they did
10 wrong --

11 THE COURT: And what relief you are seeking, and
12 what relief are you seeking other than a payment of a
13 higher valuation of her shares?

14 MR. ROTHSTEIN: Well, the relief is obvious.
15 Mr. Outten just says, what are we supposed to do, pay
16 the money back to the firm? That's exactly what we've
17 asked them to do.

18 THE COURT: Show me where in the letter.

19 MR. ROTHSTEIN: On the last paragraph of the
20 letter, says: Ms. Mattison believes this to be a
21 breach of the managing members' fiduciary duties as to
22 the co-owners of the firm and to the firm as a whole.

23 And this is what Mr. Outten did not read: Please
24 accept this letter as notice that MPS, pursuant to the
25 statute, that's the section of the Uniform Limited

1 Liability Companies Act that authorizes derivative
2 action, and Ms. Mattison believes the firm should take
3 legal action against its managing members whose
4 compensation has increased at the rate of three to five
5 times greater than other people in the firm.

6 I mean, it's very clearly implied that the action
7 they would take would be to recoup the excess payments
8 and the above market rent payments that were made.

9 THE COURT: Let me ask you this, Mr. Rothstein.
10 Assuming for the sake of argument -- and I don't think
11 it's there, quite frankly -- but assuming for the sake
12 of argument that you meet the requirements of 23(b)(1),
13 there was a severance agreement that was entered into
14 by your client and the plaintiff after apparently some
15 period of intensive negotiations where she said: I'm
16 not going to sue you. I want my money, and that's what
17 I want to get. We're going to value it pursuant to the
18 operating agreement dated September 30, 2015.

19 So why is she allowed now --

20 MR. ROTHSTEIN: I'm happy to address that. I
21 agree with Mr. Outten that the settlement agreement was
22 contentiously negotiated. And Mr. Outten wasn't part
23 of the negotiations, so I'll cut him some slack on
24 that.

25 But the agreement was to put the employment claims

1 on one side and her financial interest as a member of
2 the firm on another side. And if you look at the
3 agreement, it very clearly lays that out, your Honor.

4 THE COURT: Where am I looking, Mr. Rothstein?

5 MR. ROTHSTEIN: We'll start with Page -- this is
6 on Mr. Outten's exhibit book, Tab 6, which is the
7 severance agreement and general release.

8 THE COURT: You know, I said I had Tab 6. I don't
9 have that. I have 1 through 5, but I don't have one
10 that has six exhibits to it.

11 MR. ROTHSTEIN: This is Mr. Outten's notebook.

12 THE COURT: Do you mind if he passes that forward,
13 Mr. Rothstein?

14 MR. ROTHSTEIN: Your Honor, there is actually
15 three separate places in the agreement that aren't on
16 Mr. Outten's fancy blowups here. And there is a reason
17 he didn't put them in there.

18 If you look at Page 5, general release. Page 5 of
19 Tab 6. This is the very last portion in italics there
20 of the general release language, your Honor.

21 THE COURT: Okay. At the top of the page?

22 MR. ROTHSTEIN: First paragraph, where they indent
23 where the italics language is. Look at the last
24 phrase. Says: Provided, however, that nothing in this
25 agreement shall have any effect on employee's rights

1 and remedies relating to her disassociation from the
2 company. That's the first place.

3 Second place --

4 THE COURT: Wouldn't that language suggest that
5 her remedies would be solely related to the
6 compensation that she would receive?

7 MR. ROTHSTEIN: It has to do with the valuation of
8 her shares. And the derivative action is all about the
9 valuation of the company, because we're trying to bring
10 more money from the self-dealers back into the company,
11 that would increase the number of the size of the
12 assets she would get a share of.

13 It's even more clear, your Honor, if you look at
14 Page 8, Paragraph 13. It's titled "No Other
15 Compensation Due." Last sentence of that paragraph
16 says: Nothing in this agreement is intended to have
17 any effect on employee's ownership rights -- and one of
18 her ownership rights is the right to bring a derivative
19 action under the claim -- and says or interest upon
20 disassociation. That's very clear.

21 And then Page 10, it's even clearer. These are
22 the -- this is the statement of Ms. Mattison's
23 representations and warranties in the firm. And it's
24 Paragraph 19(j). Says: Nor is employee waiving any
25 rights or claims relating to her financial interests as

1 a member or owner of the company.

2 THE COURT: Arising after this date of the
3 agreement.

4 MR. ROTHSTEIN: No, no. That's separate. Says
5 she's not waiving any claims that may arise after this
6 date, comma, and then there is an independent clause,
7 says, "nor is she waiving any rights relating to her
8 financial interest as a member or owner of the
9 company."

10 THE COURT: I gotcha. You're right.

11 MR. ROTHSTEIN: It couldn't be more clear. I
12 mean, I didn't submit the e-mail correspondence back
13 and forth between Mr. Keim and I, but it was -- we
14 said, all right. We're going to put the employment
15 issues -- discrimination, FMLA, long-term disability,
16 severance, all that's going to be on one side of the
17 equation. The other side is everything dealing with
18 her financial rights as a member of the firm. If
19 you're a member or partner of a firm, you're both an
20 employee and an owner. We dealt with the employee part
21 of the agreement through this severance, and we agreed
22 to reserve her financial interests as a member of the
23 firm, and it's very clear in the settlement agreement
24 that's what we did.

25 And if there's any doubt or dispute about what the

1 agreement means, on a 12(b)(6) motion or summary
2 judgment motion, you have got to give that benefit of
3 the doubt to us. I mean, we're the nonmoving party
4 here, your Honor. So it's very clear that she hasn't
5 waived this claim.

6 Now, on the covenant not to sue, says: Employee
7 hereby covenants and agrees not to file, commence or
8 initiate any suit. She didn't commence or initiate
9 this suit. It was initiated against her. She's filing
10 counterclaims that are mandatory counterclaims. And
11 there's not a period here. Says "related against the
12 released parties." It doesn't say period. It says
13 "based upon or relating to any of the claims that she
14 released." The only claims that she released are the
15 employment claims, your Honor. The claims relating to
16 her ownership of the firm are clearly reserved, so
17 they're not covered by the covenant not to sue.

18 Any more questions about the issue about the
19 release, your Honor?

20 THE COURT: No, sir.

21 I need to go back and read this, quite frankly.
22 So right now I don't have enough information to ask an
23 intelligent question.

24 MR. ROTHSTEIN: Your Honor, to the extent that you
25 have any doubt at all, there is a very important case

1 that was decided recently by the South Carolina Supreme
2 Court, and it's cited in our materials, but I would
3 like to hand up a copy, your Honor. It's called
4 *Skydive Myrtle Beach vs. Horry County*. I'll hand up a
5 copy for you and your law clerk.

6 THE COURT: Thank you, sir. Appreciate it.

7 MR. ROTHSTEIN: And this case basically says, your
8 Honor, that if you're considering tossing out a case on
9 a 12(b)(6) motion, you first have to consider whether
10 amendment to the pleadings is appropriate.

11 And on the -- I knew you expressed some doubt
12 about the derivative claims, but if the derivative
13 claims are insufficient, the remedy is not to throw the
14 whole case out. If you look at that Whittle case --

15 THE COURT: I know. I'm familiar with it.

16 MR. ROTHSTEIN: -- they were on the third amended
17 complaint at that time with the Whittle case. So if we
18 need to make it more clear instead of just referring to
19 the letter that I wrote in January laying out all the
20 things, if I need to either attach that letter -- and
21 Mr. Outten said he thought it was sufficient for me to
22 refer back to the letter.

23 That letter was written to Mr. Keim, who is a
24 counsel in this case. He knew what my theories of the
25 case, of the potential derivative claims were, so it's

1 not like they're being surprised by the derivative
2 action.

3 So I do think we've made a presuit demand, first
4 of all. But to the extent you say, well, maybe you
5 didn't make a presuit demand, that raises the issue of
6 futility, whether a demand to bring these guys to sue
7 themselves would be a futile act.

8 And I think that Whittle case is very important,
9 that Carolina First case, because in that case, you had
10 one of the biggest banks in South Carolina, and there
11 were two guys in that bank, Matt Whittle and one of the
12 other top board members, that got a sweetheart deal,
13 looked like an insider deal. Two guys that received a
14 benefit. There were 17 members of the board. Only ten
15 of the members of the board were named as defendants in
16 the derivative action. And it only related to benefits
17 that two people on that board received.

18 Here, where we have sued everyone, there's three
19 manager members of the firm and the COO, and we have
20 alleged they have all taken excessive distributions out
21 of the firm to the detriment of the minority
22 shareholders.

23 So we have, number one, we have sued all the board
24 members, and it's not just an effort to get around the
25 rule of futility. I mean, this is truly a futile act.

1 When we said to the attorney for the company, these
2 guys have taken out the money, that's excessive, and
3 the company needs to try to recover it back, I mean,
4 that's -- I can't imagine a more futile act situation
5 than that. We're saying all the managing directors of
6 the firm and the COO acted together for self-dealing to
7 prefer themselves over the firm as a whole.

8 I mean, I can't imagine the Court saying, We're
9 going to expect them to bring an action first. I made
10 that demand a month before this lawsuit was filed.

11 And, your Honor, another thing about this case is
12 we have a tolling agreement in place. You know, we
13 were going to try to work this out. We had a
14 mediation, and a week before the tolling agreement
15 expired, they filed this lawsuit two days after the
16 mediation. And, actually, while the mediator had
17 recommended that we wait until Monday, they filed the
18 lawsuit on Friday at 5:02. The suit was actually filed
19 February 22nd, not February 25th. So they threw the
20 first punch here. Now they're complaining that
21 Ms. Mattison is fighting back, and I think that's -- I
22 know this wasn't directly raised in the motion that
23 they filed, but I would like to point out the issue
24 about the value, the method for valuing the firm.

25 THE COURT: Let me ask you that, because, quite

1 frankly, that was what I was looking at. And if you
2 look at the September 30th, 2015, operating agreement,
3 and, quite frankly, Mr. Rothstein, I haven't looked at
4 it in this regard, does it have a formula for
5 determining the valuation of her ownership interest in
6 this company in that agreement?

7 MR. ROTHSTEIN: It does not. What it says is --
8 and, first of all, I will point out that the 2015
9 amended and restated agreement is null and void. It's
10 of no force and effect.

11 THE COURT: Well, you know, I don't know if I buy
12 that. You or whoever entered into this agreement, this
13 is what we're going to do, this is how we're going to
14 value it after extensive negotiations, and then you
15 come back and say it's invalid, I think that's fairly
16 specious, quite frankly.

17 MR. ROTHSTEIN: Your Honor, I think if you look at
18 the agreement, the agreement says "the operating
19 agreement." It doesn't say "the 2015 operating
20 agreement."

21 THE COURT: It says "September 30th, 2015,
22 operating agreement." That couldn't be any more clear,
23 that language.

24 MR. ROTHSTEIN: It doesn't say the valuation of
25 the shares will be determined by that. It says that

1 the proper disassociation would be handled that way.

2 THE COURT: Well, what other proper disassociation
3 would there be other than valuation of her shares?

4 MR. ROTHSTEIN: Well, if you improperly
5 disassociate, there is a penalty. And there is a
6 formula that's laid out for how the proper
7 disassociation is paid. This doesn't say the valuation
8 is determined by the 2015 agreement. It says the
9 proper disassociation is handled by the agreement.

10 THE COURT: Well, let me ask you again: In the
11 September 30, 2015, operating agreement, is there, in
12 fact, a formula for the valuation of her shares?

13 MR. ROTHSTEIN: There is not.

14 THE COURT: I see Mr. Outten is disagreeing with
15 you, and it may be there's not.

16 MR. ROTHSTEIN: What it says is, it says that the
17 management committee can establish a valuation of the
18 firm on an annual basis. Okay? After Ms. Mattison
19 left, her resignation became effective in February of
20 2018. February 12th, I believe, of 2018.

21 In March, they hired a firm called HDH Advisors to
22 do a valuation. Mr. Outten used the term "business
23 appraisal." This was not a business appraisal. This
24 is their own evaluator saying what they think the value
25 of the firm is.

1 And, your Honor, every contract, as you know, has
2 a duty of good faith and fair dealing in it. And the
3 statute says that you can't contract away the duty of
4 good faith and fair dealing in connection with a
5 limited liability company.

6 So if you look in my exhibits, your Honor, the
7 very last exhibit in there is Tab 5, is the engagement
8 letter that HDH Advisors provided for this particular
9 task. It was dated January 4, 2018, which was
10 substantially earlier than they have ever done one of
11 these things in the past.

12 But they don't call this a business appraisal.
13 They call it a "Calculation of Value Summary Report."
14 And it says under the Project Objective, it says: This
15 report will be used in connection with internal
16 management planning purposes. It doesn't say "this is
17 to establish the value of the company." This is sort
18 of, you know, what are our projections? What are our
19 budgets going to be? This is internal management
20 planning purposes.

21 They charge \$4,000 as a cap for the entire, what
22 they were, you know, assigned to do. And if you look
23 at the second page of the engagement letter, it says:
24 If it is later determined that you want to engage us to
25 perform a complete business appraisal -- and that's the

1 phrase that Mr. Outten uses, this was a business
2 appraisal. This was not a business appraisal. HDH is
3 saying, "If you want us to do a business appraisal, we
4 agree to supplement the calculation to be compliant
5 with the standards of a complete business appraisal.

6 And if you look at the last paragraph, it says
7 that the company is primarily responsible for the
8 accuracy and fair statements of the information and use
9 of this in performing our calculations.

10 THE COURT: Say that again, please, sir.

11 MR. ROTHSTEIN: The last -- it says the company,
12 meaning MPS, is primarily responsible for the accuracy
13 and fair statement of the information provided for use
14 in performing the calculation of value.

15 So this gets to what they call garbage in, garbage
16 out principle. They're taking whatever the management
17 committee tells HDH in coming up with the value of the
18 firm, and that's what they're using now to say that's
19 the only number we're going to use for Ms. Mattison's
20 offer.

21 And I can show you clearly that that's not what
22 was intended by the parties, because this valuation was
23 done in March of 2018. They knew what the per-share
24 price, according to HDH Advisors, was in March of 2018.

25 Your Honor, if you look at Tab 3, seven months

1 later, in October of 2018, under the recitals, this is
2 a confidentiality agreement where I had requested the
3 financial information from the firm. They said, under
4 A: The parties wish to value Ms. Mattison's units in
5 accordance with the operating agreement. That doesn't
6 say "the September 2015 operating agreement." That
7 says "the operating agreement," and our position is
8 there's only one operating agreement that's valid in
9 this firm, and it's the very original one. And I can
10 get to that in a minute.

11 If the valuation was already done, why is Mr. Keim
12 saying "the parties wish to value the shares"? And
13 then he says, as part of the evaluation, they're going
14 to provide us confidential, proprietary information
15 about the firm, which she had never gotten before.

16 If the HDH report that was done in March, seven
17 months earlier or six months earlier, was conclusive,
18 why is he saying that we're going to continue to
19 discuss valuation? They would have said, All right.
20 This is how we do it. This is your offer. Take it or
21 leave it. That's what they would have said.

22 In the tolling agreement, which is Tab 4, this was
23 entered to prevent -- I think there's -- under the
24 statute there's like a 120-day deadline for us to file
25 a request for judicial valuation. So when they made

1 the offer in August, the initial offer in August, we
2 didn't want the time to run out, so we entered into
3 this tolling agreement that says, getting back to that
4 issue on the first issue we talked about, specifically
5 reserving any issues relating to her disassociation of
6 the firm. Then the third whereas clause, says:
7 Whereas, a dispute has arisen between the parties
8 hereto with regard to the valuation of Ms. Mattison's
9 membership units in MPS. If HDH was the number that
10 they were going to provide, they wouldn't have
11 acknowledged that there's a dispute about the
12 valuation.

13 This issue of HDH's numbers conclusive only came
14 up when Mr. Outten got involved in the case right
15 before the mediation, your Honor. So I know that
16 wasn't directly raised in their motion, but I think it
17 is important to point out that the way the valuation
18 agreement -- I mean the way the valuation of her shares
19 is to be determined is not set by a formula.

20 The reason I said that the original operating
21 agreement is the only one that controls, your Honor, is
22 if you look at our Tab 1, this is the actual operating
23 agreement that was entered when the firm was formed in
24 2009. And I've got it tabbed and highlighted on Page
25 8. And it talks about how to go about amending the

1 operating agreement.

2 THE COURT: Let me ask you this. I see that. I
3 hear what you're saying, that the September 30th is
4 invalid.

5 In Tab 1, operating agreement, is there a place in
6 there that has a formulation for valuation?

7 MR. ROTHSTEIN: It's not --

8 THE COURT: If not, then why would we have this
9 argument?

10 MR. ROTHSTEIN: It's not real clear. Basically
11 says that the parties are trying to get together --

12 THE COURT: There's not a whole lot that's real
13 clear to this right now.

14 MR. ROTHSTEIN: That's right. And it's a 12(b)(6)
15 motion, your Honor --

16 THE COURT: I understand that --

17 MR. ROTHSTEIN: -- so we get the benefit of the
18 doubt.

19 THE COURT: Yes, sir.

20 MR. ROTHSTEIN: If you look at Section or Article
21 11, talks about disassociation of the members and the
22 valuation. But it's not terribly clear. But I'll tell
23 you what is clear, your Honor. If you look at our Tab
24 2 --

25 THE COURT: In other words, going back to my

1 original question about this, there's nothing in this
2 agreement that you can say with any kind of
3 particularized certainty that says, This is how we're
4 going to value her ownership interest in this?

5 MR. ROTHSTEIN: It says, We'll kind of work out --

6 THE COURT: Fair enough.

7 MR. ROTHSTEIN: But this is important. On Tab 2,
8 we have submitted discovery in this case. We haven't
9 gotten any responses other than a set of requests for
10 admissions that we submitted, and they did respond to
11 those. And this is the very end of Tab 2, your Honor,
12 the last two substantive pages before the --

13 THE COURT: That's --

14 MR. ROTHSTEIN: This is the memo they gave to
15 Ms. Mattison when they were telling her, You're being
16 terminated from the firm. This is dated November 14,
17 2017. This is two days probably before she came into
18 my office.

19 And it's from the management committee, which is
20 the defendants in this case, the three managing members
21 and the COO, and it says: I have attempted to provide
22 you with a summary of some key provisions of our
23 operating agreement. Okay? And if you look down, this
24 talks about how the fair market value is determined.

25 It says at Paragraph 7: Fair market value is

1 defined in Article 1, says -- four lines down says:
2 First, the seller and the management committee shall
3 attempt to agree upon the value of the units, which we
4 attempted to do and have had no success. Then it says:
5 The seller --

6 THE COURT: When you refer -- let me ask you this.
7 When you refer to Article 1, does that Article 1
8 correlate with Tab 1 you just gave me?

9 MR. ROTHSTEIN: It does. That's the definition
10 section of the firm. It says: First, the seller and
11 the management committee shall attempt to reach
12 agreement on the value, which is what we did here.
13 Says: The parties agree that the value shall be
14 mutually determined in early 2018 following the close
15 of the year.

16 And then it says: If the seller and management
17 committee are unable to reach an agreement within
18 30 days, the value of the units shall be determined as
19 of the end of the fiscal year immediately preceding
20 that date by a qualified appraiser selected by the
21 management committee. It says: The seller and the
22 company shall pay half of the fees and expenses of the
23 qualified appraisal.

24 So if there's no ability to meet on the value,
25 then they have to get, you know, a full-valuation

1 appraisal done, and that's not what HDH did here. They
2 only charged -- I think less than 12 hours time.

3 THE COURT: I see that, but let me ask you this:
4 Then wouldn't that language not prevent you from asking
5 for judicial valuation because you have already agreed
6 to a different method of valuation?

7 MR. ROTHSTEIN: I think if we can't agree on a
8 value and they're not willing to budge off of their
9 number --

10 THE COURT: Well, you have agreed on a value.
11 Says: It will be determined by a qualified person
12 selected by the management committee. Not by her, but
13 the management committee.

14 MR. ROTHSTEIN: And we both pay half, and, you
15 know, we're entitled to copies of the data.

16 THE COURT: So again my question is: So why does
17 your client feel that she has a right to have a
18 judicial valuation of her shares when she's agreed to
19 have the management committee have an appraisal? Maybe
20 that's not been done, but it seems that she's limited
21 to that.

22 MR. ROTHSTEIN: Well, they filed the lawsuit in
23 this case --

24 THE COURT: I understand that.

25 MR. ROTHSTEIN: -- asking the Court to declare

1 that the only valuation that's at issue is the HDH
2 number that was done in March. And that's not a
3 complete valuation. So our counterclaim to that is,
4 you know, we want you to enforce the agreement and,
5 first of all, declare that the operating agreement that
6 they're trying to, you know, foist on her from 2015 is
7 not valid. That's the declaratory judgment claim.

8 And then we've asked for a judicial valuation of
9 her shares. And I think that's the default position of
10 the LLC. I mean, you can't, I think, eliminate a
11 party's right to go in and ask for a judicial valuation
12 of the shares if there is a dispute.

13 THE COURT: I think the parties can do that. I
14 think they can agree to opt out of the statute. They
15 can do that if they want to. You have sophisticated
16 people involved in this case.

17 MR. ROTHSTEIN: But they're not doing that. They
18 filed a lawsuit to ask you to force the number that HDH
19 came up with down her throat.

20 THE COURT: In that, you very well may be right on
21 that, that they haven't followed their own agreement
22 either. But to go over to a judicial valuation, it's a
23 whole different animal.

24 MR. ROTHSTEIN: The other thing, your Honor, it
25 says in this agreement that's not highlighted, it says

1 that they will provide all of the access to current and
2 prior year financial reports --

3 THE COURT: Say that again, please.

4 MR. ROTHSTEIN: The part that's not highlighted
5 right here between says: The company, MPS, will
6 provide access to all current and prior year financial
7 reports, tax returns and other financial information as
8 requested by employee's counsel. They have never done
9 that. I mean, they have given us a very limited amount
10 of information. And that's another thing we've asked
11 for in terms of their breaching the contract. We asked
12 the Court for them to provide us that information.

13 Now, on the final point that Mr. Outten made that
14 Ms. Mattison is not a fair and adequate representative
15 of the firm, he's conflating the two different claims
16 we have here. We have an individual capacity claim
17 that's asking for breach of contract, declaratory
18 judgment, that kind of thing. That's on one side of
19 the equation. Then she's also suing on behalf of the
20 company itself to try to recoup these excessive
21 payments and benefits to the management, to bring that
22 money back into the firm before that valuation is
23 actually done.

24 Her interests are exactly aligned with all the
25 minority shareholders as to the second capacity that

1 she's bringing the case in. Ms. Mattison is not going
2 to get all this money herself. This is going to go
3 back into the company, and she's going to get two
4 percent or 2.8 percent of it, and that's why she
5 brought the claim.

6 Again, she's the eighth highest ranking or equity
7 partner in the firm. And the fact that she's been
8 fired or the fact that she's, you know, has agreed to
9 settle her employment case has nothing to do with her
10 capacity to bring a lawsuit as a member of the firm.

11 THE COURT: Thank you.

12 MR. ROTHSTEIN: Thank you, your Honor. Sorry I
13 took so long.

14 THE COURT: That's fine.

15 Mr. Outten, where in the release or the severance
16 agreement does the language show that she is waiving
17 any claim as a member of this entity as opposed to
18 being simply an employee? Those are two different.

19 MR. OUTTEN: Well, your Honor, the language that
20 Mr. Rothstein is referring to --

21 THE COURT: The question is: Where in the
22 severance agreement does it say that, I'm waiving any
23 claim I may have as a member as opposed to being simply
24 an employee? And if there is, then I'm agreeing with
25 you. If not, then it may be something we need to

1 explore further.

2 I know I'm asking -- this is a lot of documents.

3 If you want to get that to me, that's fine.

4 MR. OUTTEN: Well, your Honor, the general release
5 of claims is Paragraph 4. And if you look at the --

6 THE COURT: That's under what tab again, please?

7 MR. OUTTEN: Tab 6, I think. I'm sorry, your
8 Honor. I handed you my notebook.

9 THE COURT: Severance agreement tab. I gotcha.
10 Okay. Employee is not defined. Just says employee.

11 MR. OUTTEN: Right, your Honor. And what I was
12 trying to explain to your Honor is the reason for that
13 is that it needed to be made clear, and the several
14 paragraphs he cited to were 5, 8 and 19, I believe.
15 But the reason for that, your Honor, is because she had
16 not been paid for her membership units. That's the
17 only issue that was open, that we signed this
18 agreement, executed this agreement with Ms. Mattison in
19 December of 2017, and we still had to value her units.

20 THE COURT: Right. But still, when she signs this
21 general release, she's doing so in the capacity as an
22 employee. That seems to me, and that's what
23 Mr. Rothstein is pointing out, she didn't do so as a
24 member of this entity. If so, I just wanted to look at
25 the language that says, I'm waiving any and all claims

1 as a member or an employee.

2 MR. OUTTEN: Well, your Honor, she waived all
3 claims that she had except the membership claim that
4 you're talking about is we hadn't paid her for her
5 member units. That's the entire reason for that
6 language that your Honor is referencing, that is, if
7 she had signed an agreement that said "I waive all of
8 my claims as a member," that would have precluded her
9 being paid for her membership units and all of the time
10 that -- the issue of payment for membership units was
11 resolved by the severance agreement, but the payment
12 could not be made until the business was appraised and
13 they went through the process called for in the
14 operating agreement, and that's why that language says
15 it, to avoid any confusion. The only claim that she
16 has as a member is to her membership units. That's it.
17 All other claims were released.

18 THE COURT: All right. Let me ask you a question,
19 Mr. Outten. Under the September 30th operating
20 agreement, 2015, is there language that says "this is
21 how we're going to value your ownership interest in
22 this entity"?

23 MR. OUTTEN: Yes, sir, there is.

24 THE COURT: Where is it?

25 MR. OUTTEN: Do you have a copy of the amended and

1 restated operating agreement?

2 THE COURT: I may.

3 MR. OUTTEN: May I approach, your Honor?

4 THE COURT: Yes, sir.

5 MR. OUTTEN: If you would, your Honor, if you look
6 at Page 5, there is a paragraph that says "fair market
7 value." The paragraph says: Fair market value shall
8 mean, with respect to a member's units, the value of
9 the units as determined by the management committee in
10 accordance with the procedures set forth in 5.1(s) of
11 this agreement, and then it goes on.

12 So we have a definition of fair market value. And
13 then, your Honor, if you would turn over to Page 16,
14 and it's Paragraph S.

15 THE COURT: Subject to Section 11.2(b).

16 MR. OUTTEN: It says -- it's the section that
17 says, it starts: Subject to Section 11.2(b), determine
18 the per-unit price of any membership interest or units
19 for purposes of Section 11.3 to be sold under Section
20 11.2 at least annual, and it goes on. So, yes, there
21 is absolutely a method of valuation which is --

22 THE COURT: Let me ask you this, changing gears on
23 you. Mr. Rothstein points out that the recent case
24 says that the proper procedure on granting of a
25 12(b)(6) is to give them time to amend so they can

1 assert or clarify their claims. I mean, in this case,
2 it shouldn't be any different, should it?

3 MR. OUTTEN: Well, your Honor, with respect to --
4 I heard that argument. With respect to the amendment,
5 with regard to the derivative claim, we would
6 respectfully suggest that the proper ruling is a
7 dismissal with prejudice, and here is why.

8 No amount of pleading can correct the fact that
9 they failed to make a presuit demand. That's not going
10 to change. There are not going to be any additional
11 facts with regard to the presuit demand and the lack of
12 doing that properly.

13 There's also going to be no change in the demand
14 futility. And I heard Mr. Rothstein make the argument
15 that he thinks it's logical to say, Well, they're not
16 going to sue themselves. But I would respectfully
17 request that the Court look at the Carolina First case.

18 And Judge Howard says in that case, this argument
19 of demand futility, that the directors won't bring an
20 action against themselves has been uniformly rejected
21 by this Court and across the country.

22 And so with regard to the derivative action, your
23 Honor, I don't believe that Ms. Mattison should have a
24 right to amend because the amendment is not going to
25 change anything, change any of the facts. The same

1 defects in the pleading which exist this morning will
2 exist in 15 days, if he amends.

3 And the same with the counterclaims, your Honor.
4 If you look at the severance agreement, your Honor,
5 respectfully, I think that you will conclude that what
6 this is, is two fine lawyers negotiating over several
7 months for a complete and final resolution to all
8 employment claims. It resolved all claims related to
9 her employment. Counterclaims are related to her
10 employment. Mr. Rothstein said, Well, you fired the
11 first shot, but there's no requirement that they file
12 the counterclaim. In fact, the counterclaim should
13 have never been filed because of the covenant not to
14 execute and the release.

15 But my point is this, your Honor: The inescapable
16 conclusion from reviewing this severance agreement is
17 that these parties got together and decided, We're
18 going to enter into an agreement which resolves all
19 claims that we have against one another. There can be
20 no doubt about it. Reading it any other way, your
21 Honor, doesn't make sense.

22 With respect to the valuation of her shares, your
23 Honor asked Mr. Rothstein about that sentence, and it's
24 clear -- two things are clear. One, that Ms. Mattison
25 agreed that the methodology called for in the 2015

1 operating agreement would be how her units were valued.

2 And as you just saw from the two sections I
3 pointed out -- and I didn't read the entire section,
4 and there are other parts of the amended and restated
5 operating agreement that speak to the methodology, but
6 there's no question there is a methodology in there.

7 So my point is this, your Honor: We would
8 respectfully request that your Honor look at and
9 consider the fact that this severance agreement was
10 meant to fully and finally resolve all issues with
11 regard to Mr. Mattison's employment with MPS, any
12 claims MPS may have had against Ms. Mattison. To read
13 it any other way doesn't make sense.

14 With regard to the derivative claims, your Honor,
15 these are pleading problems that can't be cured.
16 Mr. Rothstein is a fine lawyer, but if you gave him a
17 year, he couldn't cure those problems because it's so
18 clear that the presuit demand is inadequate. If you
19 look at the Patterson case, you will see a dramatic
20 difference between what the plaintiffs did there and
21 what was done here. Thank you, your Honor.

22 THE COURT: I'm not ruling, but I'm going to go
23 back and look at it. Quite frankly, my impression is
24 the derivative suit is out. It seems to me the
25 question in this case is just whether the parties have

1 followed their internal agreement and procedures for
2 valuation of her shares.

3 But I'm not ruling that, but that's my impression
4 right now. So I will let you know when I get through
5 reading all the information. Y'all take care. Thank
6 you.

7 (WHEREUPON, the proceedings concluded at
8 10:21 a.m.)

9 ***END OF REQUESTED TRANSCRIPT OF RECORD***
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Certificate of Reporter

I, Diane L. Marcengill, Official Court Reporter
for the Tenth Judicial Circuit of the State of South
Carolina, do hereby certify that the foregoing is a
true, accurate, and complete transcript of record of a
portion of the proceedings had and evidence introduced
in the trial of the captioned case, relative to appeal,
in the Circuit Court for Greenville County, South
Carolina, on the 16th day of May 2019.

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I do further certify that I am neither of kin, counsel,
nor interest to any party hereto.

June 13, 2019

Diane L. Marcengill, RPR, CRR, CRC
Circuit Court Reporter

1 State of South Carolina
 2 County of Greenville In the Court of Common Pleas

3
 4 McMillan Pazdan Smith, LLC,)
 5 Plaintiff-Counterclaim Defendant,) 19-CP-23-998
 6 -vs-) September 10, 2019
 7 Donza H. Mattison,)
 8 Defendant-Counterclaimant,)
 9 Donza H. Mattison, in a Derivative) Transcript of
 10 Capacity on Behalf of McMillan) Record
 11 Pazdan Smith, LLC,)
 12 Third-party Plaintiff,)
 13 -vs-)
 14 Ronald G. Smith, Joseph M. Pazdan,)
 15 Brad B. Smith, and Chad C. Cousins,)
 Third-party Defendants.)
 -----)

16
 17 B E F O R E:

18 The Honorable R. Lawton McIntosh, Judge

19 A P P E A R A N C E S:

20 David Eliot Rothstein, Esquire
 21 Attorney for Donza H. Mattison

22 Samuel W. Outten, Esquire
 23 Thomas H. Keim, Jr., Esquire
 Katie E. Towery, Esquire
 Attorneys for MPS

24

25 Diane L. Marcengill, RPR, CRR, CRC
 Circuit Court Reporter

1 (WHEREUPON, court convened with all parties
2 present and the following proceedings were had
3 commencing at 3:53 p.m.)

4 THE COURT: Guys, I appreciate you coming up here
5 to Ocone County.

6 This is a motion to dismiss the third-party
7 complaint; is that correct, Mr. Outten?

8 MR. OUTTEN: Yes, your Honor. It's a motion to
9 dismiss the derivative action, which is a third-party
10 complaint, yes, sir.

11 THE COURT: All right, sir. Be glad to hear from
12 you.

13 MR. OUTTEN: May it please the Court?

14 THE COURT: Yes, sir.

15 MR. OUTTEN: Your Honor, before I begin my
16 argument, Chad Cousins and Brad Smith from McMillan
17 Pazdan and Smith are here with us this afternoon.

18 Your Honor, I'm representing McMillan Pazdan and
19 Smith, as well as the individuals which are named in
20 the third-party derivative action: Ron Smith, Joe
21 Pazdan, Brad Smith, and Chad Cousins, and we filed a
22 motion to dismiss Ms. Mattison's derivative action.

23 And here is an issue before the Court this
24 afternoon. In order for Ms. Mattison to continue with
25 the derivative action under Rule 23(b)(1), she must do

1 one of two things: First, she must make a valid
2 presuit demand; or second, she must properly allege in
3 her amended complaint why such a demand would be
4 futile.

5 So, your Honor, we know from the rule and the case
6 law that one of those things must be present in order
7 for Ms. Mattison to continue with the derivative
8 action. And, your Honor, as I will explain to the
9 Court, because Ms. Mattison has not met either of these
10 requirements, the derivative claim must be dismissed.

11 Your Honor, I want to provide a brief background
12 of the case. I invite your Honor to cut me short if
13 you would like, but I know that you have been in a
14 trial, so I thought --

15 THE COURT: I have read your memorandum.

16 MR. OUTTEN: Okay. Well, your Honor, I'll go
17 through this quickly.

18 THE COURT: Okay.

19 MR. OUTTEN: Donza Mattison is a former employee
20 of MPS, and the parties entered into a severance
21 agreement and general release on December 5, 2017, that
22 laid out the terms of her cessation of employment.

23 And one issue that we believe was resolved by the
24 severance agreement was the method by which
25 Ms. Mattison's membership units or equity interest in

1 the firm would be valued. Ms. Mattison owns about two
2 percent of the firm.

3 And MPS made an offer to Ms. Mattison for her
4 units, which was done pursuant to the provisions of the
5 severance agreement and the operating agreement of MPS.
6 Ms. Mattison refused to accept this offer, and now she
7 somehow contends in this lawsuit that she's not bound
8 by the severance agreement, which she agreed to on
9 December 5, 2017.

10 I'll point out that this was an agreement
11 negotiated over several weeks and one where she was
12 represented by counsel.

13 MPS filed a declaratory judgment action, which
14 began this lawsuit, asking the court to enforce the
15 terms of the severance agreement regarding the
16 valuation of Ms. Mattison's membership units.

17 In response, Ms. Mattison filed an answer and
18 counterclaim, and she also filed a derivative action
19 allegedly on behalf of the firm against the founding
20 members and the COO of MPS.

21 We previously appeared before your Honor on
22 May 16, 2019, on our motion to dismiss the
23 counterclaims and the derivative action. And by order
24 dated June 14, 2019, you denied our motion to dismiss
25 the counterclaims.

1 Now, relevant to the issue before the Court this
2 afternoon, you granted our motion to dismiss the
3 derivative action without prejudice, and I believe the
4 order states that Ms. Mattison shall have 30 days from
5 the filing of the formal order to amend both her
6 presuit demand and this cause of action only.

7 Ms. Mattison filed the amended third-party
8 complaint on July 30, 2019. We filed our motion to
9 dismiss on August the 7th, 2019.

10 So let's first talk about the presuit demand. One
11 issue before the Court this afternoon is, is there a
12 valid presuit demand? Has she met the requirements of
13 23(b)(1) and the cases which construe that rule. She
14 must prove that prior to March 4, 2019, she made a
15 proper presuit demand on MPS.

16 Now --

17 THE COURT: Why would it be -- why is that date
18 the hallmark date?

19 MR. OUTTEN: Well, your Honor, that's a great
20 question, and here's the reason. The reason for a
21 presuit demand is so that you can call to the attention
22 of the management committee or the board of directors
23 or whatever the governing body is, allege wrongdoing,
24 allege wrongful conduct, you can explain what damages
25 you believe have resulted from that wrongful conduct,

1 and then you can ask for certain remedial actions.

2 And if you read the cases, if you read Whittle and
3 cases in Delaware and other jurisdictions, what they
4 say is this: The purpose of a presuit demand is to
5 allow the governing body of the LLC or the corporation
6 the option to take the remedial action suggested in the
7 presuit demand so that litigation can be avoided.

8 So the question you ask is the most important
9 question, I believe, for this afternoon's hearing; that
10 is: Why is it important? It's important because the
11 whole purpose behind the presuit demand, your Honor,
12 again, is to give the governing body, the board of
13 directors, the ability to say, well, we have these
14 allegations. Let's investigate these allegations.
15 They might be true. That's happened many times. These
16 allegations might be credible. There might be damages
17 from the wrongful conduct that they allege, so we'll do
18 an investigation, and we'll accept remedial action
19 either identical to or close to what is contained in
20 the presuit demand.

21 And the reason why we're doing that is because we
22 want to avoid litigation. We don't want to devote the
23 LLC or the corporation's assets, resources to
24 litigation. We want to avoid it. That's why it's so
25 critical that it be done before the lawsuit is filed.

1 And, your Honor, it's in the Whittle case and lots
2 of other cases that that date is critical. Here the
3 date is March 4th.

4 If you look at a timeline, January 14, 2019, was
5 the letter that Ms. Mattison's counsel sent to counsel
6 for MPS. And I'll talk about that letter in a minute.
7 And March 4th is the date that the third-party
8 complaint, the derivative action, was filed.

9 So, your Honor, we believe that it comes down this
10 afternoon to whether or not -- your ruling on whether
11 or not this letter constitutes a valid presuit demand.
12 And I'll talk about that a little later, but there was
13 a June 14, 2019, letter which they said was after your
14 order and before --

15 THE COURT: Wouldn't my order granting your motion
16 have the effect of making this suit nonexistent as to
17 the derivative action so if they chose not to file any
18 answer or amendment within 30 days, that's gone, but if
19 their presuit demand is filed during this period,
20 there's no action pending, right?

21 No?

22 MR. OUTTEN: No. I think you're right, your
23 Honor, except that, again, the whole purpose is to
24 avoid litigation. We're already in litigation. But
25 we've already been sued in a derivative action. We've

1 already had --

2 THE COURT: Well, you're in litigation over your
3 severance agreement, but you're not in litigation over
4 the derivative claims that have been before the court
5 and alleged by this -- Ms. Mattison, excuse me.

6 I'm sorry. Okay?

7 Do you disagree with that?

8 MR. OUTTEN: Well, what -- the way we view it is
9 this: A derivative action was filed against us, and we
10 moved to dismiss it. That motion was granted without
11 prejudice to refile.

12 THE COURT: Right.

13 MR. OUTTEN: So I'm not sure I totally agree that
14 we're not in litigation. It's true that for the period
15 between the time you issued your order and they
16 refiled, I guess technically there was no derivative
17 action on file.

18 But, again, that's not the test. This is the
19 test. We have already been sued. In other words, the
20 presuit demand is not there to protect against a
21 subsequent refiled pleading after you go to a motion
22 and hear what the defects were and learn about the
23 defects and then file another or send a letter which
24 may or may not constitute a proper presuit demand. The
25 test is whether the letter before there was any

1 litigation allowed us the opportunity to review it and
2 avoid litigation.

3 In other words, just because you dismissed it
4 without prejudice doesn't mean there was no obligation.
5 Of course there was litigation right here and we're
6 back here. And the same allegations with regard to
7 wrongdoing of the founding members and related party
8 transactions have been made which were originally made
9 on March 4th.

10 And, again, Judge, if you look at the case law,
11 all the cases say that again and again. They say you
12 have to do the presuit demand before litigation because
13 of the purpose of the presuit demand.

14 And the way that I have sort of looked at it in
15 getting ready for the hearing was a post-suit demand
16 can never be a presuit demand. I mean, just common
17 sense. You never can file or send a document after the
18 lawsuit is already filed which would constitute a
19 presuit demand.

20 Your Honor, I'll try to move through this
21 quickly --

22 THE COURT: Let me ask you a question, Mr. Outten.

23 MR. OUTTEN: Yes, sir.

24 THE COURT: If what was subsequently sent in June,
25 I think, or whenever --

1 MR. OUTTEN: There was a second letter, your
2 Honor. I'm sorry if you can't see this. It's
3 June 18th, your Honor.

4 THE COURT: If the plaintiff in this case, when
5 they got that letter had said, you know what, there's
6 some potential credible claims, let us take some action
7 with regard to that, so it seems to me -- I'm not
8 formulating my question right, to be honest with you.
9 But it seems to me that you would be proceeding only on
10 the severance claims, and we don't have any derivative
11 issues before the Court?

12 MR. OUTTEN: Right. Here is how I understand your
13 Honor's question, and that is after you got the
14 June 18th letter, you had the opportunity to address
15 the wrongdoing and the damages alleged in this
16 letter --

17 THE COURT: Right.

18 MR. OUTTEN: -- and satisfy the demands contained
19 in this letter, and then there would be no derivative
20 action.

21 Did I understand your Honor's question?

22 THE COURT: Yes.

23 MR. OUTTEN: And, your Honor, I understand your
24 question, but again, what the cases say and what the
25 rule says is you've got to look at -- the operative

1 date is the date the derivative action was filed.

2 THE COURT: So they only had one chance to file --
3 if they file a defective presuit demand under Rule 23
4 or whatever the rule is --

5 MR. OUTTEN: It's 23(b)(1), yes, sir.

6 THE COURT: -- 23(b)(1), and then they
7 subsequently have that claim dismissed by a 12(b)(6),
8 that acts more of a summary judgment, they can't do it
9 again; they don't have a right to amend and try it at a
10 later date; is that your position?

11 MR. OUTTEN: Well, that's what the cases say.

12 THE COURT: Do they?

13 MR. OUTTEN: They do. The cases say --

14 THE COURT: The Whittle case says that? I'll have
15 to reread it. I didn't know it did.

16 MR. OUTTEN: Let me make sure that I'm not
17 misrepresenting anything.

18 The Whittle case doesn't address post-suit
19 demands. I'm making that argument by what they say
20 about a presuit demand and what must be included in it.

21 To my knowledge, there is no finding or holding in
22 the Whittle case about an attempted presuit demand
23 after the lawsuit was filed.

24 THE COURT: Okay.

25 MR. OUTTEN: I don't know about that. But the way

1 we get to this result is just by looking at what the
2 purpose is of the presuit demand.

3 When we have been sued on March the 4th in this
4 derivative action, we now lost the opportunity to
5 resolve these issues as of March the 4th. And, again,
6 there are two ways to get into court on a derivative
7 action. One is to do a presuit demand, and the other
8 is to properly allege demand futility.

9 And so here what happened was the January 14th
10 letter is not a proper presuit demand, and we were
11 sued. So at that point, as of the point in time we're
12 served with a derivative action, there is no
13 opportunity for a presuit demand. There's no
14 opportunity that follows that.

15 And, your Honor, I don't want to spend too much
16 time talking about the January letter. We talked about
17 it last time a little bit, but if you look at this
18 letter -- I know you're probably not going to be able
19 to see this, but if you look at this letter, and I can
20 hand you up a copy if you like.

21 THE COURT: That's when you had the settlement
22 demand?

23 MR. OUTTEN: Right. And what this letter is, if
24 you read it, is Mr. Rothstein and Mr. Keim are arguing
25 back and forth about the value of Ms. Mattison's equity

1 interest, how should it be valued. Our position was at
2 that time and is today that it should be valued
3 according to the severance agreement, and they're
4 arguing about it, how it should be valued, et cetera.

5 And then at the end of the letter, basically what
6 they say is this: If you won't pay us what we want for
7 our equity interest, we're going to bring a derivative
8 action against you. That's what this is.

9 I won't read the whole thing, but that's what this
10 is. It's basically a threat. This is we're going back
11 and forth about the value of my equity interest. I
12 want X; if you won't pay me X, then I'm going to bring
13 a derivative action. And so that's really what this
14 is.

15 And what you have to have, your Honor, for a valid
16 presuit demand is four things. You must identify the
17 alleged wrongdoers. You must describe the factual
18 basis of the wrongful acts. You must describe the harm
19 caused to the company, and you must state the requested
20 remedial relief. And those all come from Whittle.

21 And Whittle is the case, your Honor, as you know,
22 that we always use when we're talking about derivative
23 actions in South Carolina because it's a lengthy
24 opinion and covers many issues. But that's what you
25 have to have. And that's not in this letter.

1 I'm not going to spend too much time on this, but
2 there are general allegations of wrongdoing, of
3 excessive compensation, of related party transactions,
4 breach of fiduciary duty. But, your Honor, there's
5 just no question that if you look at this January 14th,
6 2019, letter, it's not a presuit demand.

7 And, again, I understand your Honor's questions
8 about once I dismissed it, can they file a presuit
9 demand then? I believe the cases say no. I believe
10 they say there's one opportunity to do this.

11 Your Honor, I'll try to move quickly. I know you
12 have had a long day --

13 THE COURT: No. No.

14 MR. OUTTEN: The Patterson against Witter case
15 contains a valid presuit demand. That's a South
16 Carolina case. And they say in that case, they asked
17 for specific actions being taken on behalf of the fund.
18 That was the Home Builders Association case where the
19 home builders formed a trust to pay workers' comp
20 claims.

21 And after they had been going for a while, they
22 decided that they were going to form a mutual insurance
23 company. So they announced that to their members, and
24 a lawsuit was filed to prevent that.

25 And in the Patterson against Witter case, there

1 are specific requests. They say the five million,
2 which was taken out of the fund as excess funds to
3 establish a competing mutual fund, should be
4 distributed immediately to the beneficiaries. They
5 asked that elections be held as required by the trust
6 documents. They requested that all assets contemplated
7 for use by the mutual fund and purchased with that
8 intent be sold and the proceeds distributed to the
9 beneficiaries of the trust.

10 Again, what we have in the Patterson against
11 Witter case are: Identifying the wrongdoers,
12 identifying the harm caused, and specific remedial
13 action. We don't have that in the January case. And,
14 again, your Honor, we think that's fatal to their
15 derivative action.

16 Again, I'm not going to go through the June 18th
17 letter, but you can't have a post-suit demand somehow
18 substituted for a presuit demand. That's not how it
19 works. That's not what the cases say.

20 Now, in Ms. Mattison's brief, I have to say
21 Mr. Rothstein found a Florida opinion which said that.
22 It said that a party's failure to comply with the
23 pleading requirement that presuit demand be made is not
24 necessarily fatal, and that a demand may be post-suit
25 and alleged in an amended complaint. So he did find a

1 case that said that.

2 Fortunately for MPS, that opinion is not binding
3 on this Court. And we did a lot of research or my
4 office did a lot of research following reading
5 Mr. Rothstein's brief in that Florida case. It's an
6 outlier, Judge. We couldn't find any other case that
7 said that.

8 In fact, in that Florida case, they cite Grossman
9 against Johnson in this Florida case that said a
10 post-suit demand was okay. And in Grossman against
11 Johnson, they say a post-suit demand is not allowed
12 under Federal Rule 23.1, which is the corresponding
13 federal rule.

14 And the court observed in that case that the
15 purpose of the demand requirement is to alert the
16 directors of the company before suit is instituted.

17 And in that Florida case, they also cited Shlensky
18 against Dorsey. And in that case, the court found that
19 demand letters sent after suit was filed could not be
20 considered by the court. They found that such a
21 post-suit demand would not have afforded the directors
22 the opportunity to make the judgment in the first
23 instance.

24 Now, we have copies of those cases. I can hand
25 them up to your Honor before we finish this afternoon.

1 Those are two cases cited within this Florida case, and
2 both of them reject this notion of a post-suit demand.

3 And we have not been able to find any other
4 cases -- maybe they're out there, but we haven't been
5 able to find any other cases supporting this
6 proposition that a post-suit demand meets the
7 requirements. There are no South Carolina cases that
8 hold that.

9 Now, Ms. Mattison argues that Patterson against
10 Witter supports the notion that a post-suit demand can
11 serve to satisfy 23(b)(1). But that's a very
12 interesting case. I do not believe --

13 THE COURT: It's my case.

14 MR. OUTTEN: Oh, it is?

15 THE COURT: Yeah.

16 MR. OUTTEN: So you know all about it.

17 THE COURT: No, I don't pretend to know all about
18 anything.

19 MR. OUTTEN: Well, let's talk about Patterson for
20 a minute because it has an interesting procedural
21 history.

22 What happened is, again, this is a home builders
23 association. They formed this trust to pay comp
24 benefits for the members. And the plaintiffs' original
25 complaint was not a derivative action. In fact,

1 throughout, the plaintiffs denied that they were
2 bringing a derivative action. They argued they were
3 bringing a direct action all the way through.

4 But in the complaint that was filed, they allege,
5 plaintiffs, for breach of fiduciary duty, breach of
6 contract, breach of contract accompanied by a
7 fraudulent act, and then I think there was one other
8 claim. And the defendants moved to dismiss for lack of
9 jurisdiction because the complaint involved the
10 internal affairs of a trust, and they argued this was
11 under the exclusive jurisdiction of the probate court.

12 Now, the defendants also made the argument that
13 the action was derivative in nature and that they
14 hadn't met the pleading requirements of 23(b)(1). And
15 I believe Judge Tommy Cooper was the judge, and Judge
16 Cooper dismissed the original complaint without
17 prejudice, finding lack of jurisdiction and allowing
18 the plaintiffs to refile their complaint in probate
19 court.

20 Now, before the plaintiffs refiled their suit,
21 they sent a demand letter. Now, at first blush, it
22 sounds like, isn't that similar to this, and I'll
23 explain there are two critical reasons why it's not.

24 The first is, in the court of appeals decision,
25 they make a finding that the defendants agreed to

1 accept this letter as a presuit demand. There is a
2 finding in the court of appeals case that they say
3 that.

4 But let's look at our timeline and contrast it
5 with what happened in Patterson. In our case, the
6 derivative action was filed on March 4th. And it was a
7 derivative action. I think even Mr. Rothstein and I
8 can agree that he filed or tried to file a third-party
9 derivative action on March the 4th.

10 But that's not what happened in Patterson, your
11 Honor. What happened in Patterson is, if you look at
12 this timeline just to sort of make reference to the
13 Patterson case, this was just breach of contract,
14 breach of fiduciary duty. So at the time that the
15 presuit demand was submitted in the Patterson case,
16 there had been no derivative action.

17 Here, MPS lost the ability to avoid getting sued
18 for a derivative action because of the failure of the
19 presuit demand, which we have discussed. That didn't
20 happen in Patterson.

21 In Patterson, what happened is they were sued --
22 again, breach of fiduciary duty, breach of contract,
23 breach of contract accompanied by a fraudulent act.

24 Now, the supreme court ultimately found that this
25 demand letter satisfied the presuit demand requirements

1 of 23(b)(1). And that's true. But, again, it's
2 different because the initial action was not a
3 derivative action.

4 Now, couple things for us to think about. There's
5 no holding in Patterson against Witter that a
6 presuit -- or, excuse me, that a post-suit demand meets
7 the 23(b)(1) requirements. The Patterson court never
8 holds that. There's no language that says that.

9 I think Mr. Rothstein in his brief used words to
10 the effect that you could argue by inference that they
11 approved this process. In other words, if you look at
12 the case, it somehow approves a post-suit demand
13 because there had been an earlier lawsuit that Judge
14 Cooper sent to probate court, and I think that's what
15 his argument is, but I'm sure he's going to tell you in
16 a minute.

17 But the problem with that is, again, there was no
18 derivative action originally filed, and there was a
19 presuit demand letter which the defendant agreed to
20 accept before there was ever a derivative action.

21 The other thing is that if we were going to make
22 at least what we view as a dramatic change in what
23 23(b)(1) requires, I think the supreme court would have
24 told us that. If our state is going to start accepting
25 post-suit demands, in other words, letters like this,

1 like the June 14th letter, I think our supreme court
2 would have told us that. But they didn't tell us that.
3 What they did was they cited with approval the Whittle
4 case. And they essentially say, like many cases, you
5 know, the seminal case on this issue is Carolina First
6 against Whittle.

7 And, again, back to the Carolina First case, they
8 stress the importance of strict compliance with
9 23(b)(1). And you can see it in the notes where they
10 say that, we understand that corporations and LLCs are
11 run by the board of directors of the management
12 committee, and we're not going to disturb that; we're
13 not going to change that, and that's why you have
14 heightened pleading requirements. These are special
15 cases.

16 If you go and look in Delaware, it's interesting,
17 your Honor. You go and look in Delaware, and some high
18 percentage -- Ms. Towery would know better than I, but
19 if you look in Delaware, something like 70 percent or
20 75 percent of the cases are dismissed because they
21 don't meet the pleading requirement. So this is not a
22 unique issue that we're presenting before your Honor.

23 You may remember in the Carolina First case that
24 Mr. Hagins and Mr. Stern were wrestling with that
25 procedural issue before our supreme court for a while.

1 But, your Honor, we're requesting that your Honor
2 uphold the presuit requirement of 23(b)(1), that we
3 believe it will be a change in the law to allow us to
4 be sued in a derivative action and then you dismiss it
5 after we point out the deficiencies, and now they can
6 correct their mistakes, so to speak, and file a
7 post-suit demand.

8 I want to address the demand futility for a
9 moment. In paragraph 119 of her amended complaint,
10 Ms. Mattison alleges that the presuit demand to the
11 managing members of MPS prior to the filing of a
12 derivative action is clearly futile because the
13 managing members of the firm almost certainly would not
14 authorize the commencement of legal action by plaintiff
15 against themselves individually.

16 Now, I know that appeals to our common sense, that
17 when you say, I'm not going to make a demand against
18 the very people that I have alleged have committed
19 wrongdoing and damaged the corporation because that
20 would be futile, it appeals to common sense. But, your
21 Honor, that argument has been rejected all across the
22 country.

23 The vast majority of the cases where this argument
24 has been made -- and it was made in the original
25 derivative pleading and made again in this -- say that

1 you can't -- that argument fails.

2 In Whittle, the court of appeals said,
3 "Shareholders argue that demand is futile because the
4 majority of the board members are named as defendants
5 and cannot be expected to sue themselves. Again, this
6 reasoning has been uniformly rejected by courts which
7 have considered this argument."

8 And the court went on to say this: "This argument
9 lacks logic. If the court were to accept it,
10 derivative plaintiffs could readily circumvent Rule
11 23's demand requirements simply by naming all the
12 directors in the complaint."

13 And that's true, if you think about it. You can
14 get around the demand futility threshold by naming all
15 the directors and then making an allegation, well, it
16 would do no good, because the directors are defendants,
17 to make demand against them.

18 There are lots of different ways that corporations
19 have responded to these types of demands. Special
20 committees have been appointed to respond to it, et
21 cetera. And there are lots of different ways it can be
22 handled.

23 But at the end of the day, courts have uniformly
24 held that you can't get past the demand futility
25 threshold simply by alleging that, well, we are

1 alleging wrongdoing against these defendants, and so
2 making demands against them would be futile.

3 So, your Honor, we think it's clear that
4 Ms. Mattison has failed to meet the demand requirements
5 of 23(b)(1), and her derivative action should be
6 dismissed.

7 In conclusion, your Honor, I want to start -- or,
8 excuse me, to end where I started, and that is there
9 are two ways for Ms. Mattison to continue this
10 derivative action. The Court has to find either that
11 she made a proper presuit demand. The cases are clear
12 that it must be before the derivative action is filed
13 and not after. And a review of the January 14th, 2019,
14 letter makes it clear that it lacks the necessary
15 elements of a presuit demand.

16 I've just talked about demand futility. The cases
17 are clear that it's not enough to simply allege: We
18 didn't make these demands upon the directors because
19 they are the ones we were alleging wrongdoing against
20 and, therefore, it would have been futile. That
21 argument has been rejected.

22 So, your Honor, we respectfully request that you
23 dismiss Ms. Mattison's derivative claim with prejudice.

24 THE COURT: Are you arguing any other basis?
25 Let's take out the January presuit demand and look at

1 the June 18th demand.

2 Does that demand letter meet the four factors that
3 you cited to me as being a proper presuit demand? I
4 know you're alleging it's post-suit, but just standing
5 alone, does it meet the four factors test?

6 MR. OUTTEN: Yes, sir, I think it does.

7 THE COURT: All right.

8 MR. OUTTEN: I'm not going to argue that it
9 doesn't. There may be an argument I could come up
10 with, but yes, your Honor --

11 THE COURT: I'm certain you could come up with an
12 argument.

13 MR. OUTTEN: I know, but to be candid with the
14 Court, I do think that the June 18th letter contains
15 the necessary elements.

16 THE COURT: So the question is just basically a
17 procedural prospect, that if you file a defective
18 presuit demand and then file suit, even if the case
19 dismisses it, you're barred from bringing another
20 presuit demand because the case has been filed?

21 MR. OUTTEN: Yes, sir. And I think that's what
22 the cases say. You get one shot at a proper presuit
23 demand, and if it's not effective, if it's not proper
24 according to 23(b)(1), then you're subject to dismissal
25 unless you can properly allege demand futility.

1 Now, one thing, just for the record, your Honor.
2 I think that your order, you reserved ruling on whether
3 or not Ms. Mattison could adequately represent the
4 interests of the other members.

5 THE COURT: I felt like there needs to be some
6 discovery went through in this case to determine
7 whether or not she would be maybe an appropriate
8 representative, myself.

9 MR. OUTTEN: Yes, sir. And I just wanted to be
10 clear, we're not conceding that, but I did not think
11 that was one of the issues your Honor wanted us to
12 cover this afternoon.

13 THE COURT: It's not. And, quite frankly, I'm not
14 sure of the merits of any kind of derivative claim in
15 this case. I'm just looking at it from a procedural
16 perspective under 12(b)(6) and 23 of Rules of Civil
17 Procedure to determine whether or not it's a properly
18 stated claim.

19 And the new wrinkle that you have added to it, and
20 that is even with an order dismissing the case, you
21 cannot then file a presuit amendment because it's a
22 post-suit amendment for presuit demand.

23 MR. OUTTEN: Yes, sir. And the only thing we
24 would ask on behalf of MPS is to look at what the cases
25 have said about this. Forget my argument. Look at

1 what the cases have said when plaintiffs have tried a
2 post-suit demand. Those efforts have been rejected by
3 courts that have considered it.

4 THE COURT: Very well. Thank you.

5 MR. OUTTEN: Thank you, your Honor.

6 THE COURT: Mr. Rothstein.

7 MR. ROTHSTEIN: May it please the Court, your
8 Honor?

9 THE COURT: Yes, sir.

10 Let me ask you a question. Do you concede the
11 futility claim is defective?

12 MR. ROTHSTEIN: The futility claim, I do not. I
13 think that futility speaks for itself.

14 THE COURT: Well, according to the allegations,
15 and I don't have that -- what paragraph number was
16 that, Mr. Outten, 119?

17 MR. OUTTEN: Yes, sir, I think that that's right.

18 THE COURT: Do you have that in front of you?

19 MR. ROTHSTEIN: I actually left it in the car.

20 THE COURT: Does anybody have it?

21 MR. ROTHSTEIN: I think I quoted from it in the
22 brief.

23 THE COURT: My law clerk can get it.

24 MR. OUTTEN: Your Honor, I have a copy.

25 THE COURT: Sure. Would you pass it forward?

1 Don't you believe what you say is what Mr. Outten
2 says, the courts have universally rejected it because
3 they use three of the managing partners of this firm,
4 that they wouldn't bring an action against themselves?

5 MR. ROTHSTEIN: If that were true, there would
6 never be a futility argument, your Honor. The case
7 that Mr. Outten --

8 THE COURT: That's not my question. My question
9 is -- let me ask it another way. Do you disagree that
10 the courts have uniformly held that allegations that
11 merely say they would not bring an action against
12 themselves is rejected?

13 MR. ROTHSTEIN: I disagree with that.

14 THE COURT: Do you have any cases that hold
15 otherwise?

16 MR. ROTHSTEIN: Well, I think I can distinguish
17 the Whittle case. In the Whittle case, they said you
18 can just sue a majority of the board of directors.

19 In this case, I mean, Whittle was a publicly
20 traded company. I think it had 17 or so members of the
21 board, and only ten of them were named as defendants in
22 that case. Here we have a very small managing group.

23 THE COURT: So there is a size component? I'm not
24 aware of any size opponent.

25 MR. ROTHSTEIN: Well, this is a member-managed

1 firm, your Honor. All three of the managers are
2 defendants in the case, and we added the C00 as a
3 defendant in the case as well because he was on some
4 executive committee. I mean, I can't imagine -- if
5 this case doesn't meet futility, I can't imagine a case
6 that would ever meet futility.

7 I think the procedure in this case speaks for
8 itself. If you step back and look, Mr. Outten is
9 saying, you can't file a derivative claim. We haven't
10 had a chance to fix it internally ourselves.

11 Well, most of the board members were here in May
12 when we had the argument in Anderson County, and they
13 heard what our allegations were, they knew who the
14 defendants were, they knew what the claims were. They
15 knew this wasn't just in the context of puffing during
16 a settlement discussion. So they haven't taken any
17 action to date since then.

18 So I think the fact that they haven't acted in,
19 you know, from May to June, July -- I mean, we're now
20 into four months, that they would have had a chance to
21 fix this issue, and they haven't taken any action or
22 informed us that they intend to take any action.

23 And, basically, what the action would require
24 would be for them to give up the pay, the excessive
25 bonuses and self-dealing transactions they have been

1 involved in for the past -- really since this firm was
2 started in late 2009.

3 And the other part of the futility that matters
4 here is they have taken affirmative steps to conceal
5 the true financial picture from the other members of
6 the firm.

7 So I think that the fact that they're the bad
8 actors themselves, and in the Whittle case you had two
9 people that accepted, you know, a sweetheart deal, so
10 to speak. And, you know, they were the top two people
11 in the bank.

12 But in that case, I think the court said, you
13 can't just, you know, artificially name the majority of
14 the members as defendants to get around the futility
15 argument. But here all of them are involved in the
16 wrongdoing. This isn't a case where one or two people
17 on the board benefitted from it. This is everybody on
18 the board benefitted from it. So, you know, I do not
19 concede that futility is a thing.

20 On the, I guess -- I don't know that you need to
21 get to futility. This is not a case where you need to
22 go to Delaware or other jurisdictions to find case law.
23 And I was surprised that Mr. Outten, who has apparently
24 now read the Patterson case, but that wasn't cited in
25 his initial brief. And I would like to hand up the

1 Patterson case. I have a copy for you and your law
2 clerk, your Honor.

3 But I think Patterson is very important here, your
4 Honor. That lawsuit was filed in February of 2012.
5 The case -- there was a hearing in September of 2012 on
6 a motion to dismiss. And after the hearing, when there
7 was argument about, well, this is really a derivative
8 claim, in January of 2013 is when the first presuit
9 demand was filed. That was 11 months after the
10 litigation was instituted, was when the presuit demand
11 was filed. That's the same sort of procedure you have
12 here.

13 THE COURT: When did the parties agree to in that
14 case -- and I don't know the answer to this question --
15 did the parties agree to accept that demand?

16 MR. ROTHSTEIN: I haven't seen that. If
17 Mr. Outten has gone back to the court of appeals and
18 looked at that, I haven't seen the transcript of the
19 argument.

20 If that was the issue, the court would not have
21 approved this presuit demand as a valid presuit demand
22 under Rule 23, which the South Carolina Supreme Court
23 admittedly did.

24 So I think the procedural posture of the case is
25 quite helpful. It's analogous, but I will concede that

1 issue was not directly raised to the South Carolina
2 Supreme Court as far as I know. But that would have
3 been an easy way for the supreme court to dismiss that
4 case, you can't bring a derivative claim here.

5 And I think the notion that you only get one shot
6 at a presuit demand would be contrary to the 2019 case
7 that I cited earlier, your Honor, that Skydive Myrtle
8 Beach case, which says before you throw out a case
9 under 12(b)(6), you need to look at whether an
10 amendment under Rule 15 is proper.

11 And here your Honor has ordered, both your Form 4
12 order, which was entered on June 14th, and your formal
13 order was issued on July 12th. So between our receipt
14 of your Form 4 order that said, I'm dismissing without
15 prejudice, allowing the parties to amend both their
16 presuit demand and the allegations in the derivative
17 case. And that's exactly what we did here, your Honor.

18 I think if you look back at, well, what is the
19 purpose of the presuit demand? Again, it's to inform
20 the entity, the corporation or the LLC what the
21 allegations are against it and give them a chance to
22 fix the problem internally.

23 Here I think it's just a disingenuous argument for
24 Mr. Outten to say, we haven't had a chance to
25 internally fix this problem. Litigation is

1 inappropriate at this point.

2 I mean, Ms. Mattison's claim, the derivative
3 claim, affects the value of her shares going forward.
4 It's integrally tied to the claim that we brought for
5 judicial valuation of her shares. So it's an important
6 component of this case.

7 I mean, if they want to fix the problem, they can
8 fix it tomorrow and have those things, you know,
9 disgorge all the excessive payments they made, and
10 we'll withdraw the derivative claim if they fix it, but
11 I don't think that's really what they intend to do
12 here, your Honor. I think this is just they're trying
13 to deplete Ms. Mattison's resources and her resolve to
14 pursue this case, and that's why they filed this
15 motion.

16 So I think this is a pretty straightforward issue
17 here. I think this is just smoke and mirrors on
18 Mr. Outten's part to say this is all about the
19 January 14th letter. This is really about the
20 June 18th letter.

21 THE COURT: Thank you, Mr. Rothstein.

22 Any brief reply, Mr. Outten?

23 MR. OUTTEN: Briefly, your Honor.

24 First, it sounded like Mr. Rothstein said the
25 court of appeals didn't find that the respondents

1 agreed. Let me read from the decision. "The circuit
2 court, however, recognized respondents had agreed to
3 accept a January 20th, 2013, letter from appellants as
4 a demand letter under Rule 23."

5 So if I could hand this up.

6 THE COURT: I believe you. If you tell me that's
7 what it says, that's what it says. I know.

8 MR. OUTTEN: The other two cases I want to hand
9 up, your Honor, is Grossman against Johnson and
10 Shlensky against Dorsey.

11 The reason why I want to hand those up is those
12 are cases where this issue of a post-suit demand was
13 addressed, and we would respectfully request that the
14 Court consider those in making this decision.

15 THE COURT: All right.

16 MR. OUTTEN: And, finally, Patterson against
17 Witter. I'm not going to belabor this. But in the
18 Patterson case, they never filed a derivative action
19 until after the presuit demand was made.

20 If you look at the decision, the first claim was
21 the breach-of-contract-type claims. And, in fact, if
22 you study it carefully, what happened was, in that
23 case, the plaintiffs were trying to avoid dismissal
24 because if the court viewed it as a derivative action,
25 they wanted to include the 23(b)(1) allegations. And

1 so they added a paragraph that said something like --
2 and I can find it in the opinion if you want to see it,
3 your Honor, but it said something like, to the extent
4 that the court construes these allegations by the
5 plaintiff as a derivative action under 23(b)(1), we
6 filed a presuit demand on this, and this is what it
7 said.

8 So they contended it was a direct action all
9 along. But the point is the presuit demand, even in
10 Patterson, preceded the derivative action. And, your
11 Honor, just common sense, there would be no reason to
12 call it a presuit demand if you could do it post-suit.
13 I mean, that just doesn't make any sense.

14 So, again, we'd ask your Honor to please take a
15 look at those cases where I think this issue was
16 squarely addressed. We know of no case, other than
17 this Florida case, which is not binding on the court,
18 that where a court said, we will permit a post-suit
19 demand to substitute for a presuit demand. Thank you.

20 THE COURT: Thank you to all the lawyers. I will
21 read through my memoranda again in all the cases, and I
22 will issue an opinion.

23 (WHEREUPON, proceedings concluded at 4:38 p.m.)

24 ***END OF REQUESTED TRANSCRIPT OF RECORD***
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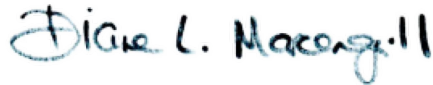
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October 8, 2019



Diane L. Marcengill, RPR, CRR, CRC
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