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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 3 of 4)

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INDEX

(Volume 1)

Orders

Order of March 20, 2019 assigning case to business court.	4
Form 4 Order of June 14, 2019.	6
Memorandum Opinion and Order of July 2, 2019.....	10
Form 4 Order of Oct. 10, 2019.....	20
Order of Oct. 30, 2019.....	23
Order of Nov. 22, 2019 (filed Jan. 23, 2020).....	33
Form 4 Order of May 15, 2020.	40
Form 4 Order of Aug. 4, 2020.	43
Order of Sept. 22, 2020.	46
Order of Sept. 30, 2020.	55
Order of Nov. 9, 2020.	72

Pleadings

Summons and Complaint (Feb. 22, 2019).....	77
Verified Answer, Counterclaims, and Third-Party Complaint (Mar. 4, 2019).	83
Verified Amended Answer, Counterclaims, and Third-Party Complaint (July 30, 2019).....	119

Transcripts

Transcript of Motion to Dismiss Hearing (May 16, 2019).	168
Transcript of Motion to Dismiss Hearing (Sept. 10, 2019).....	225

(Volume 2)

Transcript of Motion to Quash and for Protective Order Hearing (Nov. 6, 2019).	261
Transcript of Summary Judgment Hearing (May 12, 2020).	308
Transcript of Reconsideration Hearing (Oct. 26, 2020).....	353
Joslin Depo. Excerpts.	409
Jacobs Depo. Excerpts.....	431
Myers Depo. Excerpts.	455
Love Depo. Excerpts.	499

(Volume 3)

Pitts Depo. Excerpts.....	555
Ballard Depo. Excerpts.	592

Motions and Memoranda

Plaintiff's Motion to Dismiss (Apr. 1, 2019).....	652
Plaintiff's Motion to Dismiss (Aug. 7, 2019).	664
Plaintiff's Memorandum in Support of Motion to Dismiss (Sept. 6, 2019).	666
Defendant's Memorandum in Opposition to Motion to Dismiss (Sept. 8, 2019).	679
Defendant's Renewed Motion for Disqualification of Plaintiff's Counsel (Oct. 24, 2019).....	688
Memorandum of Law in Support of Defendant's Renewed Motion for Disqualification of Plaintiff's Counsel (Dec. 11, 2019) (Exhibit B omitted, duplicate).	691
Plaintiff's Memorandum in Opposition to Motion for Disqualification (with Exhibits A-C).	719
Plaintiff's Motion for Protective Order (Dec. 11, 2019) (Exhibit B omitted, duplicate).	738
Plaintiff's and Third-Party Defendants' Motion for Summary Judgment (Feb. 21, 2020).....	748
Plaintiff's and Third-Party Defendants' Memorandum in Support of Motion for Summary Judgment (May 6, 2020) (Exhibits A, C, D, I, K, and part of Exhibit J omitted, duplicates).	751

(Volume 4)

Defendant's Memorandum of Law in Opposition to Plaintiff's and Third-Party Defendants' Motion for Summary Judgment (May 11, 2020).....	854
Plaintiff's and Third-Party Defendants' Supplemental Memorandum in Support of Motion for Summary Judgment (July 31, 2020).	947
Defendant's Supplemental Memorandum in Opposition to Motion for Summary Judgment (July 31, 2020).	958
Plaintiff's and Third-Party Defendants' Memorandum in Support of Award of Attorney's Fees (Aug. 21, 2020).	978
Defendant's Memorandum in Opposition to Award of Attorney's Fees (Aug. 24, 2020).	991
Defendant's Motion for Reconsideration or to Alter or Amend Judgment.	1008
Plaintiff's and Third-Party Defendants' Memorandum in Opposition to Motion to Alter or Amend (Oct. 22, 2020).	1013

Defendant’s Memorandum in Support of Motion to Alter or Amend (Oct. 23, 2020).	1023

Exhibits and Other Documents

Operating Agreement of McMillan Pazdan Smith, LLC (Sept. 25, 2009).	1041
Amended and Restated Operating Agreement of McMillan Pazdan Smith, LLC (Sept. 30, 2015) (not signed by D. Mattison) (duplicate).	769
Memo from MPS Management Committee to Donza Mattison (Nov. 14, 2017) (duplicate).	1100
Severance Agreement and General Release (Dec. 5, 2017) (duplicate).	147
Letter of Aug. 3, 2018 from Attorney T. Keim to Attorney D. Rothstein.	1086
Confidentiality and Non-Disclosure Agreement (Oct. 18, 2018) (duplicate).	1002
Letter of Jan. 14, 2019 From Attorney D. Rothstein to Attorney T. Keim (duplicate).	845
Email from C. Cousins to MPS Members, with attachments (Nov. 13, 2019) (duplicate).	942
Response to Donza H. Mattison’s November 4, 2019 Letter.	945
Signed Member Statements in Opposition to Derivative Action (duplicate).	816
Letter of Dec. 16, 2019 to Judge McIntosh memorializing rulings from telephone conference of Dec. 13, 2019 (duplicate).	917
Email of Dec. 17, 2019 from Judge McIntosh confirming letter summarizing ruling (duplicate).	917
Email and letter of January 3, 2020 from Judge McIntosh to counsel.	1087
Rule 56(f) Affidavit of Defendant’s Counsel, David E. Rothstein (duplicate).	875
Mattison Affidavit, with Exhibits 1-5 (May 14, 2020).	1090
Email of July 02, 2020, from Outten to Judge McIntosh with attached deposition transcripts of minority members Love, Pitts, and Ballard.	1125
Email string of July 20 and 21, 2020, from Outten to Judge McIntosh.	1127
Letter of Aug. 12, 2020 from Rothstein to Judge McIntosh objecting to proposed order.	1130
Certificate of Appellant’s Counsel.	1134

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF
COMMON PLEAS OF THE
THIRTEENTH JUDICIAL CIRCUIT

MCMILLAN PAZDAN SMITH, LLC,
Plaintiff-
Counterclaim Defendant,
vs.
DONZA H. MATTISON,
Defendant-
Counterclaimant.

CIVIL ACTION NO.
2019-CP-23-00998

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.

DEPOSITION OF RICHARD CULLEN PITTS

DATE TAKEN: June 22, 2020

TIME BEGAN: 1:12 p.m.

TIME ENDED: 6:06 p.m.

LOCATION: Nelson Mullins Riley & Scarborough,
LLP
2 West Washington Street
Suite 400
Greenville, South Carolina

REPORTED BY: Eileen Thompson, CCR
EveryWord, Inc.
P.O. Box 1459
Columbia, South Carolina 29202
803-212-0012

1 restroom, or stretch your legs, or get some more
2 water, just please let me know. I will be happy to
3 accommodate that, okay?

4 A. Okay.

5 Q. Since you have been put under oath, if we
6 do take a break, you can't discuss your testimony
7 with anyone else during the break, including Mr.
8 Outten. Do you understand that?

9 A. I do.

10 Q. Can you tell me what you did to prepare
11 for your deposition?

12 A. I read some materials that were sent to
13 me. It was -- I'm trying to remember the technical
14 terms. It was Ms. Mattison's protest letter, the
15 derivative, I guess, the official derivative lawsuit
16 information. Also in the package was Chad Cousins'
17 information to the principals outlining the position
18 of -- or his response to Donza's protest letter, and
19 then the document that we signed that we were not in
20 favor of the derivative lawsuit.

21 Q. And when did you receive those materials?

22 A. Different times. I received the protest
23 statement several months ago during the partners
24 meeting.

25 Q. All right.

1 A. And I don't know the exact date, but I
2 signed the -- I signed the paper -- the document
3 that says that I am not in favor of the lawsuit of
4 -- I can't remember exactly what date, but it was
5 several weeks or maybe several days after we had the
6 protest letter. And then the statement from Chad's
7 response was probably two weeks after -- or a week
8 or so after the protest letter. And I received the
9 derivative lawsuit information maybe two weeks ago,
10 right before, I think, the original scheduled
11 deposition.

12 Q. Other than these four documents that you
13 just mentioned; the protest letter, a copy of the
14 lawsuit, Mr. Cousins' rebuttal statement, and your
15 own statement not in favor of the derivative action,
16 any other documents you looked at?

17 A. I don't recall of any.

18 Q. Did you speak with anyone other than one
19 of the attorneys in the case?

20 A. No.

21 Q. Okay. Did you review any of the
22 deposition transcripts from other depositions in the
23 case?

24 A. I did not.

25 Q. Okay. Did you talk to any of your

1 coworkers about the case?

2 A. No, I don't recall.

3 Q. How about Mr. Love? Have you spoken with
4 Donnie Love about the deposition and the case since
5 his deposition?

6 A. I have not.

7 Q. Okay. What is your educational
8 background?

9 A. I am a licensed architect.

10 Q. Where did you go to college?

11 A. Clemson University.

12 Q. And what degrees do you hold at Clemson?

13 A. Bachelor of Science of Design and Master's
14 of Architecture.

15 Q. What year did you receive your bachelor's?

16 A. 1985.

17 Q. And what about your master's?

18 A. 1987.

19 Q. Did you go straight through from your
20 undergrad to the master's program?

21 A. I did.

22 Q. I understand that you and Ms. Mattison
23 were classmates at Clemson, is that right?

24 A. Yes, we were.

25 Q. Both undergrad and the master's program?

1 that you believe to be petty or vindictive?

2 MR. OUTTEN: Object to the form of the
3 question. It exceeds the scope of this
4 deposition.

5 EXAMINATION RESUMED BY MR. ROTHSTEIN:

6 Q. You can answer the question.

7 A. Well, there was an incident that I did not
8 witness, but I was part of it right after it
9 happened, is I was asked to draw up some floor plans
10 for the office. We were going to renovate the
11 office and one of the intern architects that was
12 helping me with that was -- I told him to keep it
13 private, we don't want to be spreading the drawings
14 around.

15 A few minutes later he came in my office
16 very upset. He said that Donza wanted to look at
17 the plans, and I told him no, and she made an
18 unfortunate comment, is what he told me. And he
19 says, "Well, she's a principal in the company. You
20 should let her look at the plans." I said, "If you
21 want to file a complaint, contact HR, you can file a
22 complaint, but you just probably need to stay away
23 from Donza, she's probably pretty upset about that."

24 Q. So this was the renovation of the
25 Spartanburg office?

1 A. Uh-huh.

2 Q. What year would this have been?

3 A. I don't know. We never did do the
4 renovation. It was about three years ago.

5 Q. So this wasn't the original renovation of
6 the firm? This was fairly recently?

7 A. Yes.

8 Q. And who was the intern architect that made
9 you aware of these comments?

10 A. His name is Adam Flynn.

11 Q. Is he still employed by MPS?

12 A. He is.

13 MR. OUTTEN: What's his name?

14 THE WITNESS: Adam Flynn.

15 MR. OUTTEN: Thank you.

16 EXAMINATION RESUMED BY MR. ROTHSTEIN:

17 Q. The work that you did for MPS, were you
18 compensated for that?

19 A. I don't understand the question.

20 Q. The drawings you did to renovate the
21 office, were you compensated for that?

22 A. I mean, I'm compensated. Like I'm salary,
23 so I don't understand.

24 Q. Were there any charges paid to the -- did
25 you charge MPS or --

1 A. No.

2 Q. -- C&P Associates or C&P of Spartanburg?
3 Okay. How much time would you have spent on that
4 project?

5 A. I mean, we didn't get very far in. It was
6 mostly floor planning. I can't remember. Probably
7 a month's worth of work.

8 Q. And what did you consider to be petty or
9 vindictive about how Ms. Mattison acted in that
10 regard?

11 A. I would rather not say the words, unless I
12 need to.

13 MR. OUTTEN: You don't need to say the
14 word.

15 EXAMINATION RESUMED BY MR. ROTHSTEIN:

16 Q. Okay. Was there -- would you --

17 A. It was profanity.

18 Q. Okay. Any other incidents you can recall
19 or you believe Ms. Mattison -- or observed Ms.
20 Mattison being petty or vindictive?

21 A. No.

22 Q. Okay. Have you personally observed
23 anything during your entire interaction with Ms.
24 Mattison that caused you to question her integrity?

25 A. Can you repeat the question?

1 Q. Yes. In your interactions with Ms.
2 Mattison over the years, have you ever personally
3 observed anything about her that you consider to
4 question her integrity?

5 A. No.

6 Q. What about her truthfulness? Have you
7 ever observed anything about Ms. Mattison or heard
8 anything about Ms. Mattison that caused you to
9 question her truthfulness?

10 A. No.

11 Q. Have you ever heard anyone at the firm
12 raise a question about her integrity or
13 truthfulness?

14 A. No.

15 Q. Okay. During the time that you've known
16 Ms. Mattison and the time that she's been affiliated
17 with McMillan Smith & Partners and then at McMillan
18 Smith & Pazdan, has she seemed to be outspoken about
19 issues with the firm?

20 A. Yes.

21 Q. Has she always taken an interest in how
22 the firm operates and the policies and procedures of
23 the firm?

24 A. Yes.

25 Q. Did you and Ms. Mattison frequently talk

1 about the operations of the firm, what decisions
2 were being made, and those types of things?

3 A. Yes, at McMillan Smith & Partners. Yes.

4 Q. And did that change after the merger?

5 A. No, I mean, it didn't change, but it was
6 just in a different structure.

7 Q. Did Ms. Mattison seem dedicated to the
8 successful operation of the firm?

9 A. As far as I'm aware, yes.

10 Q. Did you ever observe her do anything that
11 you thought was in an effort to sabotage the
12 successful operations of the firm?

13 A. I didn't witness anything.

14 Q. Since you've known Ms. Mattison, has she
15 ever been shy about expressing her opinions or
16 asking tough questions?

17 A. No.

18 Q. Do you recall her ever voicing an
19 objection to how things were being done or decisions
20 were being made within the firm?

21 A. Yes, but I can't specifically remember the
22 events or anything like that, but yeah.

23 Q. Can you recall Ms. Mattison ever refusing
24 to sign corporate documents on occasion?

25 A. I mean, I don't know if "refusing" is the

1 right word, whether she didn't sign -- I mean, there
2 was some documents she didn't sign. I don't know if
3 she refused to sign them or signed them in protest.
4 I mean, I don't know the reason behind her not
5 signing them.

6 Q. Okay. I understand that she was the only
7 member of the firm in November of 2019 who did not
8 vote in favor of the slate of board members, is that
9 right?

10 A. I think that's correct.

11 Q. Okay. Can you think of any person other
12 than the top -- the management committee who has
13 been -- a shareholder who has been more outspoken
14 than Ms. Mattison about the operations of the firm?

15 A. William Gray is pretty outspoken, K.J. is
16 pretty outspoken. I think most principals in the
17 firm voice their opinions.

18 Q. Can you recall any incidents where Ms.
19 Mattison specifically stuck her neck out on behalf
20 of the four -- when I talk about the four of you,
21 the sort of four contemporaries that became partners
22 at McMillan Smith & Partners at the same time. That
23 would be you, Ms. Mattison, Mr. Love, and Mr. Coker.
24 Do you recall her ever sort of serving as the
25 mouthpiece for the group in going to management?

1 A. She seemed to be the most outspoken
2 between the four of us.

3 Q. Okay. When did you actually become a
4 partner at McMillan Smith & Partners?

5 A. I can't remember. It was the same time as
6 Donza, and Donnie, and I.

7 Q. And I think you mentioned earlier that the
8 three equity partners prior to that were Mr. Ron
9 Smith, Mr. Brian Deichman, and Mr. Voso?

10 A. (Witness nodding head.)

11 Q. Do you know what the approximate
12 percentages of ownership that each of those three
13 initial partners held in the firm?

14 A. No, I can't remember. I mean, my buy in
15 was so small. I assume that Ron had the majority,
16 Chris Voso and Brian maybe split that, and we had a
17 little -- you know, just a fraction at the time, so
18 I don't know the exact number.

19 Q. When you first became a partner of the
20 firm, do you recall purchasing -- or you mentioned a
21 buy-in. Do you remember actually purchasing shares?

22 A. Yes.

23 Q. Do you remember about how much you -- I
24 assume you wrote a check to the firm or some other
25 type of payment to the firm?

1 (Whereupon, the court reporter marked Pitts Exhibit
2 Number 26 for identification.)

3 THE WITNESS: So we're not looking at 12?
4 EXAMINATION RESUMED BY MR. ROTHSTEIN:

5 Q. 12 and 26 are the same except that you've
6 highlighted in 26 your information in black, and on
7 12 Mr. Love's information is highlighted in black.

8 A. Okay.

9 Q. Do you see from 2010 to 2013, there was a
10 relatively stable difference between the managing
11 members' salaries and the architects' salaries in
12 terms of their growth rate?

13 MR. OUTTEN: Again, my objection is that
14 the witness has already said that he doesn't
15 know anything about the compensation of the
16 other members. And so in order to ask
17 questions about this exhibit, Mr. Rothstein,
18 I'm going to insist that you establish his
19 knowledge of this so we don't go through
20 another exhibit where all he does is affirm
21 what you've got written on Exhibit 26, which I
22 don't know whether it's accurate or not.

23 EXAMINATION RESUMED BY MR. ROTHSTEIN:

24 Q. Do you see the dramatic increase from 2013
25 to 2015 in the salaries of Mr. Pazdan, Mr. Brad

1 Smith, Ron Smith, and Chad Cousins?

2 A. I see their salary lines.

3 Q. Okay. Were you aware that the managing
4 members' total compensation increased over \$500,000
5 a year in 2015 and has remained over \$500,000 a year
6 except for a small dip in 2018?

7 MR. OUTTEN: I object to the form of the
8 question.

9 THE WITNESS: No, I'm not aware of
10 anybody's salaries other than my studio
11 group's.

12 EXAMINATION RESUMED BY MR. ROTHSTEIN:

13 Q. Do Mr. Pazdan, Mr. Smith -- Brad Smith,
14 and Mr. Ron Smith, do they perform architectural
15 services for clients?

16 A. They do.

17 Q. And has their level of architectural
18 services changed dramatically from 2013 to 2015, to
19 your knowledge?

20 A. I think so. I mean, the company is twice
21 as big.

22 Q. Okay. Is this because of their provision
23 of architectural services?

24 A. I mean, I'm not understanding your
25 question. Are you saying they work twice as hard as

1 they were ten years ago? Is that what your question
2 is, or what? I don't understand.

3 Q. I mean, is their contribution of the
4 firm's revenue as architects directly responsible
5 for that increase?

6 A. Absolutely.

7 Q. And why do you say that?

8 A. I mean, their contribution to the firm, I
9 think, is -- you know, is consistent with their
10 salary, in my opinion.

11 Q. Okay. Is that because of their
12 contributions as architects, or is it because of
13 their contributions as managing members of the firm?

14 A. As to the volume of work they bring in. I
15 mean, my billing binder is that thick. Ron has two
16 binders that are that thick that he sends out every
17 day, and those are clients that he brings in. I
18 mean, I worked with Brad Smith very close since he
19 does health care. And, you know, he's been -- you
20 mentioned Jim Langlois recently. Jim, we brought
21 him in as kind of the co-director of the health care
22 studio. He left and went to work with Grisham
23 Smith. And Brad has kind of stepped in as health
24 care and Brad has brought in some huge projects,
25 which we definitely need. And you talk about Karen

1 Calhoun, she is worth every penny of what that
2 amount is. I mean, she brings in a ton of work for
3 the company.

4 Q. So you're giving -- I mean, do you know
5 whether people are given some sort of origination
6 credit for --

7 A. I don't know compensation packages. I
8 don't know what incentives Chad had, if he had any,
9 you know, to grow the firm, I don't know that. I'm
10 sorry. I interrupted you. Finish your question.

11 Q. I was saying, do you know if there's
12 credit given -- some type of origination credit for
13 bringing in clients to the firm versus billing the
14 actual work for the firm?

15 A. I don't think so officially.

16 Q. Okay.

17 A. We try to recognize our employees, you
18 know. We'll do -- if they do a great job on a
19 project or bring in a great client, we will give
20 them a bonus that's not end year, but mid year, as a
21 pat of the back.

22 Q. Do you have any input into what Brad
23 Smith, Ron Smith, Joe Pazdan, and Chad Cousins pay
24 themselves or authorized to be paid?

25 A. No.

1 Q. Have you ever voted on their compensation
2 as managing members of the firm?

3 A. No.

4 Q. Have you ever compared their total
5 compensation package to any industry amounts, like
6 through the AIA reports or any type of salary
7 survey?

8 A. No, I don't trust those AIA reports.

9 Q. Why do you say you don't trust the AIA
10 reports?

11 A. I mean, compensation is all across the
12 boards -- and I'm sure you know that as well. You
13 might pay somebody different that you're recruiting
14 versus someone that just moved into town, like we
15 need somebody. So compensation is a wide range
16 versus what their skill level is, whether they're
17 business development or they're more project manager
18 or production. And, you know, it's just I've had
19 interns -- you know, or I've seen those reports
20 before in the past. I just -- you know, I don't
21 know what they're based, if they're based on
22 averages. To me, the compensation is just a wide
23 range of different reasons why someone is paid what
24 they are.

25 Q. Okay. In addition to the base salaries,

1 Q. Other than this issue with reputation,
2 small community, it's going to get out, I mean
3 however you want to characterize that, is there
4 anything else that you believe Ms. Mattison's
5 derivative action case is not aligned with the
6 interests of the other members of the firm?

7 MR. OUTTEN: And I object to that question
8 for the same reason. Go ahead.

9 THE WITNESS: Well, you call it PR, but
10 that will make or sink a firm, our reputation.
11 And I wouldn't use the term "PR." And I can't
12 speak for the other -- I mean, that's my
13 position. I can't speak for the other members.
14 I just thought it was interesting that 98 -- or
15 everybody seemed to have the same agreement,
16 that this was not in the best interests of the
17 firm.

18 EXAMINATION RESUMED BY MR. ROTHSTEIN:

19 Q. And I'm just asking why, other than what
20 you've already testified to. Any other reasons you
21 think it's not aligned with the best interests of
22 the firm?

23 A. I can't speak for the other members.

24 Q. The next sentence, Mr. Cousins says, "The
25 managers of MPS have always been transparent with

1 the other members, and her assertions that the
2 managers receive excessive compensation and benefits
3 are not true. In fact, the firm hired an
4 independent consultant to analyze our compensation
5 structure to ensure that managers' salaries were in
6 line with the market and a firm of our size and
7 structure." Have you ever seen this analysis that
8 this so-called independent consultant performed of
9 the firm's compensation structure?

10 A. I have not.

11 Q. Do you know who the independent consultant
12 is?

13 A. No. I think you said earlier it was Mr.
14 Mitchell, but I may have missed that.

15 Q. Were you aware that Mr. Mitchell's report
16 dealt primarily with Mr. Cousins' compensation?

17 A. No.

18 Q. Do you know what information the
19 consultant used to determine the market for a firm
20 of your size and structure?

21 A. No.

22 Q. When Mr. Cousins next states, "We have
23 always been more than forthcoming about the firm's
24 finances and are frankly insulted by Ms. Mattison's
25 unfounded accusations," to your knowledge -- well,

1 let's start with you. Did you ask to see any
2 information about the compensation or benefits paid
3 to the managing members?

4 A. No.

5 Q. Do you know of anyone else at the firm
6 that requested information about the compensation of
7 benefits paid to the managing members?

8 A. I don't know if anybody else requested
9 that information.

10 Q. Did you discuss that information with
11 anyone else in the firm?

12 A. No.

13 Q. Next page, Mr. Cousins in the first full
14 paragraph, second sentence says, "If the Court finds
15 that she" -- meaning Ms. Mattison -- "does not
16 represent our membership, then her derivative action
17 will be dismissed on the merits." What did you
18 understand Mr. Cousins to mean by that sentence?

19 MR. OUTTEN: I'll object to the form.

20 THE WITNESS: Where are we?

21 EXAMINATION RESUMED BY MR. ROTHSTEIN:

22 Q. The last page of this exhibit, it's
23 MPS-009498, the first full paragraph, second
24 sentence. "If the Court finds that Ms. Mattison
25 does not represent our membership, then her

1 derivative action will be dismissed on the merits."

2 Do you see that?

3 A. I do.

4 Q. What did you understand Mr. Cousins to
5 mean by that?

6 MR. OUTTEN: Object to the form.

7 THE WITNESS: I guess if the Court finds
8 -- well, other than what it says, if the Court
9 finds that she does not represent our
10 membership, the derivative action will be
11 dismissed. I don't know how to say that any
12 other way.

13 EXAMINATION RESUMED BY MR. ROTHSTEIN:

14 Q. Are you aware that if the Court rules
15 against Ms. Mattison, she would have the right to
16 appeal the case to the South Carolina Court of
17 Appeals?

18 A. No, I didn't know that.

19 Q. And I think Mr. Cousins goes on to say
20 that they have hired independent counsel, again
21 talking about Mr. Higgins, and he describes Mr.
22 Higgins as a neutral third party. What was your
23 understanding of why the firm would have attempted
24 to retain an independent third-party neutral
25 attorney?

1 A. Well, I didn't contact Mr. Higgins, but I
2 thought that was a pretty good idea, because as
3 architects, we don't get into this world. And I
4 don't want to speak for Chad and the managing
5 principals, but they sounded like if we have any
6 questions, don't come to them for questions, go to
7 this independent counsel in a confidentiality way
8 and ask your questions on the definition of the
9 lawsuit and things like that, that was my
10 understanding.

11 Q. Were you aware that Mr. Higgins has
12 already made an appearance in this case?

13 MR. OUTTEN: I'll object to the form of
14 the question. That's incorrect. He hasn't
15 made any appearance. Don't answer that
16 question. He hasn't made an appearance, Mr.
17 Rothstein. Appearance means you're a counsel
18 of record. He's made no appearance.

19 MR. ROTHSTEIN: I'm not using it in that
20 sense.

21 EXAMINATION RESUMED BY MR. ROTHSTEIN:

22 Q. Are you aware that Mr. Higgins has
23 submitted documents in this lawsuit?

24 MR. OUTTEN: I'll object to the form of
25 the question. Mr. Higgins signed an affidavit

1 on a conflict of interest issue.

2 EXAMINATION RESUMED BY MR. ROTHSTEIN:

3 Q. Were you aware that Mr. Higgins has
4 submitted a document in this lawsuit?

5 A. No.

6 Q. Are you aware that Mr. Higgins was hired
7 by the Nelson Mullins Law Firm to make -- to express
8 an opinion about whether Nelson Mullins had a
9 conflict of interest in representing both the
10 company and the individual Third-Party Defendants?

11 A. Well, there's a lot to that question
12 again. So on that specific -- on the third -- on
13 the conflict of interest issue, was that what you
14 were asking?

15 Q. Right.

16 A. I wasn't aware of that.

17 Q. Did anyone other than Mr. Cousins describe
18 Mr. Higgins to you as a neutral third party?

19 A. No.

20 Q. Were you somewhat comforted that Mr.
21 Cousins and the managing members were willing to
22 hire a neutral party to provide independent advice
23 to you?

24 A. Yes.

25 Q. If that third-party attorney was not truly

1 neutral, would that give you some concerns?

2 MR. OUTTEN: I'll object to the form of
3 the question. I instruct the witness not to
4 answer that question. There's no evidence of
5 that.

6 EXAMINATION RESUMED BY MR. ROTHSTEIN:

7 Q. The last paragraph says, "In closing, we
8 know the members of MPS are united." Who did you
9 understand Mr. Cousins to be referring to by the
10 pronoun "we"?

11 MR. OUTTEN: Object to the form.

12 THE WITNESS: I guess he's -- I don't know
13 who he's referring to. I think -- I don't -- I
14 think he's just saying that, you know, without
15 -- I don't know.

16 EXAMINATION RESUMED BY MR. ROTHSTEIN:

17 Q. It appears, to me, that's he's speaking on
18 behalf of himself and the three managing members of
19 the firm.

20 MR. OUTTEN: Are you testifying again, Mr.
21 Rothstein?

22 MR. ROTHSTEIN: No, I'm getting ready to
23 ask him a question.

24 EXAMINATION RESUMED BY MR. ROTHSTEIN:

25 Q. Is that not how you read it?

1 A. I don't know who "we" are.

2 Q. Do you understand that Mr. Cousins is an
3 individual Third-Party Defendant in the case, right?

4 A. Yes.

5 Q. Okay. And the other Third-Party
6 Defendants are the three managing members of the
7 firm; Mr. Ron Smith, Mr. Joe Pazdan, and Mr. Brad
8 Smith, right?

9 A. Yes.

10 Q. Who else could he be referring to when you
11 use the pronoun "we"?

12 MR. OUTTEN: I object to the form of the
13 question. You know what, I instruct the
14 witness not to answer the question. He's
15 already said he doesn't know.

16 EXAMINATION RESUMED BY MR. ROTHSTEIN:

17 Q. The next sentence says, "Ms. Mattison
18 however is not aligned with our mission." How did
19 you interpret that sentence with that phrase?

20 MR. OUTTEN: Object to the form.

21 THE WITNESS: I don't know. I guess with
22 our culture, our continued growth.

23 EXAMINATION RESUMED BY MR. ROTHSTEIN:

24 Q. How is Ms. Mattison's derivative lawsuit
25 inconsistent with the firm's mission or continued

1 growth?

2 A. I guess I would have to go back to my
3 answer earlier of reputation, relationships.

4 Q. Anything else beyond that?

5 A. No.

6 Q. To your knowledge, has anyone at the firm
7 publicized the fact that Ms. Mattison has filed this
8 derivative action lawsuit?

9 A. Not that I'm aware of.

10 Q. Let me show you Exhibit 8 in Mr. Love's
11 deposition.

12 MR. OUTTEN: I instruct the witness not to
13 answer any questions about Exhibit 8. We've
14 already gone through the Spartanburg lease.
15 And the sale was never consummated, which you
16 know, so that's a waste of time.

17 MR. ROTHSTEIN: Well, I'm going to ask a
18 question anyway.

19 EXAMINATION RESUMED BY MR. ROTHSTEIN:

20 Q. Were you aware that McMillan -- the office
21 at McMillan Pazdan & Smith was listed for sale back
22 in September of 2019?

23 MR. OUTTEN: I instruct the witness not to
24 answer the question.

25 EXAMINATION RESUMED BY MR. ROTHSTEIN:

1 deposition has been going for on for
2 approximately three and a half hours, and Mr.
3 Rothstein has not asked this witness one
4 question about his member statement, which he
5 signed opposing the derivative action. Thank
6 you.

7 (Whereupon, a recess was taken.)

8 (Whereupon, the court reporter marked Pitts Exhibit
9 Number 30 for identification.)

10 EXAMINATION RESUMED BY MR. ROTHSTEIN:

11 Q. Mr. Pitts, do you recognize Exhibit 30?

12 A. I do.

13 Q. Okay. And that's the statement that, I
14 guess, Mr. Cousins provided to you that you signed,
15 is that right?

16 A. I think it was really through K.J. I
17 don't know -- I don't think Chad actually drafted
18 this. I'm not sure who drafted it.

19 Q. It wasn't attached to the e-mail that we
20 looked at, Exhibit 5. If you look at the first
21 page, the e-mail says --

22 A. Here it is.

23 Q. -- "Please see the attached letter and
24 member statement for each member's consideration."

25 A. Okay. I just didn't remember. Yes.

1 Q. Does that refresh your memory about where
2 the statement came from?

3 A. Yes.

4 Q. And to your knowledge, everyone who
5 received Mr. Cousins' e-mail signed the same
6 statement?

7 A. I'm sorry?

8 Q. To your knowledge, everyone who received
9 Mr. Cousins' e-mail, that's Exhibit 5, signed the
10 same statement?

11 A. Yes.

12 Q. Who actually collected the statements?

13 A. I think I e-mailed them to K.J. I think
14 that's what we agreed to do.

15 Q. Did K.J. ever follow up with you and say,
16 "Hey, where is your statement?"

17 A. I can't remember. He may have, I don't
18 know.

19 Q. Okay. Do you think that would have been
20 through e-mail?

21 A. Probably e-mail.

22 Q. Okay. I notice some people signed the
23 statement within a day or two of receiving this, but
24 yours looks like it was almost two weeks later. Did
25 people have to follow up with you to get your

1 statement?

2 A. I was just doing a lot of traveling.

3 Q. Okay. Where were you traveling at that
4 time?

5 A. I've got -- I mean, I've got projects in
6 Cherokee, North Carolina. I mean they were active
7 and still active at the time. Charlotte,
8 Fayetteville.

9 Q. Do you recall where you were when you
10 signed the statement?

11 A. I think I was in the office.

12 Q. And did you e-mail that to Mr. Jacobs?

13 A. I did.

14 Q. On paragraph six of the statement, you and
15 everyone else says, "I have reviewed and have been
16 provided adequate information about the allegations
17 of Ms. Mattison's derivative action against the
18 Third-Party Defendants." What did you mean by
19 "adequate information"?

20 A. I interpreted that as the protest letter.

21 Q. Okay. And who provided that to you?

22 A. I think I mentioned earlier it was another
23 -- I don't know if it was a partners meeting or I
24 was with Brad and Chad. It was one of those guys
25 who gave it to me, but since I wasn't there, they

1 wanted to make sure I read it.

2 Q. What did you mean when you said "adequate
3 information"? Adequate for what purpose?

4 A. What did they mean? What this means?

5 Q. Yes. What does the word "adequate" mean?

6 A. That I'm comfortable enough to sign this,
7 for me.

8 Q. Comfortable with what?

9 A. With the protest letter.

10 Q. Okay. Did anyone provide you information
11 that contradicted the protest letter other than Mr.
12 Cousins' statement?

13 A. No.

14 Q. Paragraph eight states, "I know of no
15 facts which support Mattison's derivative action
16 against the Third-Party Defendants." I mean, saying
17 you're not aware of something doesn't mean it's not
18 true, right? Are you aware of anything that
19 directly contradicts Ms. Mattison's allegations?

20 MR. OUTTEN: I object to the form of the
21 question.

22 THE WITNESS: Anything that contradicts?

23 EXAMINATION RESUMED BY MR. ROTHSTEIN:

24 Q. Yes. When she's alleging that members --
25 managing members and the COO have received excessive

1 compensation and benefits, do you have any facts, or
2 evidence, or documents that directly contradict
3 that?

4 A. Other than, I guess, if, in my mind, when
5 I was reading the -- you know, that salary range in
6 the protest letter, to me, that wasn't enough for it
7 to be a derivative lawsuit. I didn't see any
8 evidence of -- you know, just because they had a
9 higher salary than me and not knowing really what
10 they're based on, whether it's -- I don't know
11 anybody's other than my team's salary, I didn't just
12 see that as enough for a derivative action, so --

13 Q. Okay. What about on the --

14 MR. OUTTEN: Go ahead and finish your
15 answer, Mr. Pitts.

16 THE WITNESS: Well, so to me, that wasn't
17 strong enough for a derivative action lawsuit.

18 EXAMINATION RESUMED BY MR. ROTHSTEIN:

19 Q. Okay. Now, what about her allegation with
20 regard to excessive benefits, you know, company cars
21 and country club dues, and all that kind of stuff?
22 Do you know of any fact or documents that directly
23 negate those allegations?

24 MR. OUTTEN: Object to the form of the
25 question.

1 THE WITNESS: All I can say, like I said
2 earlier, is it was based on the fact of working
3 with these guys, I know that they had lease
4 cars, I didn't know what the details were. And
5 I know that -- well, I don't know, but they
6 entertain clients at Clemson games, so I'm
7 assuming that, you know, the company is paying
8 for that. I don't know the details. So the
9 fringe benefits, I didn't see as excessive.
10 It's kind of -- I think that just didn't really
11 raise an alarm for me.

12 EXAMINATION RESUMED BY MR. ROTHSTEIN:

13 Q. Okay. What about the lease of the
14 Spartanburg office? Did you have any -- do you have
15 any evidence to contradict what Ms. Mattison said
16 about the lease in the Spartanburg office?

17 A. I guess what I was thinking is if there's
18 any wrongdoing, I mean that would be transparent.
19 Everyone would see what these payments were from
20 accounting and everyone else, so I didn't really
21 question it.

22 Q. Okay. I mean, the issue about whether --
23 I mean, the amount of rent that was paid should be
24 pretty easy to determine, right?

25 A. It depends on what's in it, you know.

1 absence"?

2 A. I can't remember the exact --

3 Q. You just assumed that that was Ms.
4 Mattison's decision, to be absent?

5 A. I didn't really think about it one way or
6 the other.

7 MR. ROTHSTEIN: I don't have any further
8 questions.

9 - - -

10 EXAMINATION

11 - - -

12 BY MR. OUTTEN:

13 Q. Mr. Pitts, I have a few questions for you,
14 sir. Do you want to bring a derivative action on
15 behalf of McMillan Pazdan Smith against Ron Smith,
16 Brad Smith, Joe Pazdan, and Chad Cousins?

17 A. No.

18 Q. Do you want Donza Mattison to represent
19 the members of McMillan Pazdan Smith in bringing an
20 derivative action against Ron Smith, Brad Smith, Joe
21 Pazdan, and Chad Cousins?

22 A. No.

23 Q. Do you believe that Donza Mattison fairly
24 and adequately represents you and the other members
25 of McMillan Pazdan Smith in bringing this derivative

1 action?

2 A. I do not.

3 Q. Do you believe that the derivative action
4 is in the best interest of the members of McMillan
5 Pazdan Smith?

6 A. No.

7 Q. Do you support the derivative action that
8 Donza Mattison has filed?

9 A. I do not.

10 Q. Do you oppose the derivative action that
11 Donza Mattison has filed?

12 A. I do.

13 Q. Do you recall being asked many questions
14 by Mr. Rothstein about the compensation of the --
15 we'll call it the management team?

16 A. Yes.

17 Q. Do you have any concerns, complaints, or
18 criticisms about the compensation being paid to Ron
19 Smith, Brad Smith, Joe Pazdan, and Chad Cousins?

20 A. I do not.

21 Q. Do you wish that or do you want there to
22 be a derivative action by the company against Ron
23 Smith, Brad Smith, Joe Pazdan, and Chad Cousins
24 because of excessive compensation or overpayment of
25 compensation?

1 A. I do not.

2 Q. Do you recall being asked lots of
3 questions about the Spartanburg lease --

4 A. Yes.

5 Q. -- by Mr. Rothstein?

6 A. Yes.

7 Q. Do you have any concerns, complaints,
8 criticisms about the lease that MPS -- McMillan
9 Pazdan Smith -- has in Spartanburg with C&P of
10 Spartanburg, LLC?

11 A. I do not.

12 Q. Do you recall being asked questions by Mr.
13 Rothstein about the benefits that Ron Smith, Brad
14 Smith, Joe Pazdan, and Chad Cousins have? Do you
15 remember being asked those questions?

16 A. Yes.

17 Q. Do you have any concerns or criticisms
18 about the benefits received by those four gentlemen?

19 A. I do not.

20 Q. Do you remember being asked questions
21 about your statement, which was marked as Exhibit
22 30?

23 A. Yes.

24 Q. Did you sign this statement voluntarily?

25 A. Yes.

1 Q. Did anyone force or coerce you to sign
2 this statement marked as Exhibit 30?

3 A. No.

4 Q. Is this statement complete and accurate,
5 to the best of your knowledge?

6 A. Yes.

7 Q. Do you understand that you are under oath
8 today?

9 A. Yes.

10 Q. And do you affirm the entirety of your
11 statement, marked as Exhibit 30, under oath?

12 A. Yes.

13 Q. You understand, Mr. Pitts, that a judge
14 presiding over this case may consider your statement
15 in deciding whether Donza Mattison is a fair and
16 adequate representative of the other members of MPS?

17 A. Can you ask the question again?

18 Q. Yes, sir. Do you understand that the
19 judge presiding over this case may consider your
20 statement in deciding whether Donza Mattison is a
21 fair and adequate representative of the other
22 members of MPS?

23 A. Yes.

24 Q. Do you know of any facts which support
25 Donza Mattison's allegations of self-dealing,

1 dishonesty, fraudulent conduct contained in her
2 derivative action?

3 A. No.

4 Q. Do you know of any dishonest, self-dealing
5 or fraudulent acts committed by Ron Smith, Brad
6 Smith, Joe Pazdan, or Chad Cousins at any time?

7 A. No.

8 Q. And how long have you been employed by
9 McMillan Pazdan Smith, including your time with the
10 predecessor firm?

11 A. 25 years.

12 Q. During that time, have you witnessed any
13 conduct by Ron Smith, Brad Smith, Joe Pazdan, or
14 Chad Cousins, like that alleged by Donza Mattison?

15 A. No.

16 Q. Do you have enough information to make an
17 informed decision on whether or not you support the
18 derivative action?

19 A. Ask the question again.

20 Q. Yes, sir. Do you have enough information
21 to make an informed decision on whether or not you
22 support the derivative action filed by Ms. Mattison?

23 A. Yes.

24 Q. Mr. Rothstein showed you a number of
25 documents today, correct?

1 A. Yes.

2 Q. Asked you many questions about 20 or so
3 different -- 25 or so different documents during the
4 deposition. Do you recall those questions?

5 A. Yes.

6 Q. And after seeing those documents, after
7 reviewing the portions of those documents that Mr.
8 Rothstein directed you to, and after hearing his
9 questions, does that change your mind about whether
10 or not you support the bringing of this derivative
11 action?

12 A. No.

13 Q. And after seeing all those documents,
14 after having portions of those documents read to
15 you, different portions pointed out to you by Mr.
16 Rothstein, hearing his questions, do you believe
17 that Donza Mattison adequately and fairly represents
18 the members of McMillan Pazdan & Smith?

19 A. No.

20 Q. As a member of McMillan Pazdan & Smith,
21 are you asking Judge McIntosh to dismiss the
22 derivative action?

23 A. Yes.

24 MR. OUTTEN: Those are all the questions I
25 have. Thank you, sir.

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF
COMMON PLEAS OF THE
THIRTEENTH JUDICIAL CIRCUIT

MCMILLAN PAZDAN SMITH, LLC,
Plaintiff-
Counterclaim Defendant,
vs.
DONZA H. MATTISON,
Defendant-
Counterclaimant.

CIVIL ACTION NO.
2019-CP-23-00998

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.

DEPOSITION OF HARRY D. BALLARD

DATE TAKEN: July 10, 2020

TIME BEGAN: 10:00 a.m.

TIME ENDED: 3:26 p.m.

LOCATION: Nelson Mullins Riley & Scarborough,
LLP
2 West Washington Street
Suite 400
Greenville, South Carolina

REPORTED BY: Eileen Thompson, CCR
EveryWord, Inc.
P.O. Box 1459
Columbia, South Carolina 29202
803-212-0012

1 A. Yes.

2 Q. Is there anything today, either health,
3 issues, or medications, or anything, that would
4 cause you difficulty in understanding my questions
5 and providing truthful testimony?

6 A. No.

7 Q. Can you tell me what you did to prepare
8 for the deposition?

9 A. I reviewed four documents and then --

10 Q. Can you tell me what those four documents
11 are?

12 A. The documents where the members signed it
13 that they were opposed to the derivative action; the
14 e-mail from Chad that contained the form of opposing
15 the derivative action; Donza's opposition to the
16 proxy vote; and then the copy of the court filing
17 for the derivative action.

18 Q. Now, when did you review those four
19 documents?

20 A. I looked at them Tuesday evening,
21 Wednesday evening, and last evening.

22 Q. Of those four documents, was this week the
23 first time you had seen any of these documents?

24 A. Well, the document that Donza presented
25 regarding the proxy vote, I saw that. And then, of

1 course, I signed my document of opposition to the
2 derivative action. I had not -- and then, of
3 course, Chad's e-mail that contained that form. I
4 had not seen the legal paper of yours. I had not
5 seen that before though.

6 Q. So this week Tuesday, Wednesday, or
7 Thursday was the first time you had seen the copy of
8 any of the court filings in the case?

9 A. Correct.

10 Q. Okay. Did you speak with anyone other
11 than Mr. Outten about the substance of any testimony
12 you might give?

13 A. No.

14 Q. Did you talk to any of the people that had
15 been deposed prior to your deposition, either Mr.
16 Joslin, Mr. Jacobs, Ms. Myers, Mr. Love, or Mr.
17 Pitts?

18 A. No.

19 Q. Did you speak with any of your other
20 coworkers about what you were going to testify about
21 today?

22 A. No.

23 Q. Just a couple of ground rules. I meant to
24 say this earlier. I don't think we're going to be
25 here past lunch today, I don't know exactly how long

1 A. I was requested to make that move.

2 Q. Was your salary or your compensation
3 affected by the move?

4 A. No.

5 Q. How long have you known Donza Mattison?

6 A. Since the merger.

7 Q. You guys didn't overlap at all at Clemson,
8 I don't think, is that right?

9 A. No.

10 Q. Okay. Have you ever worked with her on
11 any projects at McMillan Pazdan Smith?

12 A. Not specifically on a project, no.

13 Q. Did you or your family ever interact with
14 Ms. Mattison or her family on a social level?

15 A. No.

16 Q. Did you have an occasion to observe Ms.
17 Mattison's interaction with the other members of the
18 firm in like shareholder meetings or other types of
19 group settings?

20 A. Yes.

21 Q. How would you describe Ms. Mattison's
22 interactions with the other members of the firm?

23 A. I would say that Donza speaks her mind,
24 she's never been afraid to speak her mind, which I
25 respect. I come from a family of six sisters, and

1 my dad was one out of twelve kids, so all outspoken.
2 They all carried the monitor "Ballard women." So
3 I've always felt that she was similar to them in
4 that fact. She speaks her mind.

5 Q. Okay.

6 A. And so I respect that aspect of her.

7 Q. Give me some examples of things that you
8 can recall where she's been pretty outspoken about
9 something within the firm.

10 A. In, you know, several meetings, you know,
11 she would raise a question. And I can't recall
12 specifically what it was about, but it was, you
13 know, in most instances, a very reasonable,
14 well-crafted question about making a point, but I
15 can't give you a specific example of that.

16 Q. Okay. In your observations, would you
17 consider her to be a detail-oriented, thorough
18 person?

19 A. In my limited knowledge, yes.

20 Q. Okay. In these interactions you've had
21 with her during the member meetings and other
22 settings, do you believe that she's been firm in her
23 convictions or beliefs?

24 A. Yes.

25 Q. Has she been sort of an advocate for other

1 minority members of the firm on things like pay, and
2 benefits, and how the firm has been run?

3 A. I'm not sure that I would put it that
4 particular way. Like I said, she speaks her mind
5 and is clear about her position.

6 Q. Would you say that she's been professional
7 in those interactions, that you've observed?

8 A. I would say for the most part -- well,
9 yes, in that toward those last couple years -- some
10 of those questions were a little -- I mean, there
11 was some curiosity to the nature of the question.

12 Q. Can you recall any of the specifics?

13 A. I would say kind of a sense of some type
14 of dissatisfaction perhaps with where a motion or
15 something was headed.

16 Q. Okay. Did she seem to know what she was
17 doing in terms of like was she financially savvy
18 about what was going on within the firm?

19 A. Well, being -- well, for most of the part
20 of since the merger 2009-2010, the K-12 studio had
21 been the largest billing, grossing, profitable
22 division of the company. And so my understanding of
23 the people that led that studio; Donza, Donnie, and
24 Brian were -- they were all killing it. They were
25 doing a very good job and had tons of repeat

1 clients.

2 Q. And what was Ms. Mattison's questions or
3 comments about in connection with how the K-12
4 studio was treated compared to the other parts or
5 other segments of the business?

6 A. I don't know how to answer that question.
7 I would say in, you know -- a lot of the reasons for
8 the merger were there were areas where the two
9 separate groups competed with one another, and there
10 were areas where we didn't compete, because we
11 didn't have that segment. So when we brought the
12 two groups together to form the one company, we were
13 able to work off of what we brought to the table in
14 that we were much better well-rounded as far as
15 diversity of client types and project types that we
16 could go after, but acknowledging that the reason
17 why we do this work over here is so that we can do
18 this work over here.

19 For example, I mentioned earlier that we
20 used to do a lot of work with Hobby Lobby. Well, if
21 your gift is a great architectural designer, Hobby
22 Lobby would not be on the top of your list, okay,
23 but it was consistent, profitable work. And since
24 we did Hobby Lobby, it let us do projects like the
25 Greenville Children's Museum, which was not

1 profitable. So you do some work to help allow you
2 to do this other work, and everybody acknowledges
3 that that's a good thing. It's a good thing for the
4 communities that we're in that we have that
5 diversity portfolio. So everybody realized -- I
6 think everybody in the membership realized that,
7 you know, K-12's contribution allowed us to do XYZ.
8 It was a good thing.

9 Q. Do you recall whether Ms. Mattison ever
10 expressed any concerns or about how the K-12 studio
11 was treated at that time in terms of bonuses, and
12 compensation, and that kind of thing?

13 A. I don't recall any of that.

14 Q. Okay. Now, I think you testified that
15 right after the merger, around the time of the
16 merger, the K-12 studio was sort of killing it. And
17 I understand that was in late 2009, early -- or
18 September of 2009, I think is when the merger
19 occurred, is that right?

20 A. Yeah. Now, put that in perspective. You
21 know, we're coming out of that recession, so killing
22 it in 2009 versus killing it in 2013, you know, from
23 just a dollar-wise is different, but still the role
24 that that studio played and continues to play is
25 very, very helpful to the overall viability of the

1 moved out of the line of sight of the witness.

2 EXAMINATION RESUMED BY MR. ROTHSTEIN:

3 Q. My question, I think, before the
4 interruption was, "Has Ms. Mattison ever been shy
5 about expressing her opinions or asking tough
6 questions within the firm?" I know you testified
7 earlier that she was outspoken. This is a little
8 bit different question. Do you understand my
9 question?

10 A. I don't understand how it's different.

11 Q. The things that Ms. Mattison has been
12 outspoken about, are those things that management of
13 the firm has sort of dictated?

14 A. I still don't understand how the
15 management dictated that.

16 Q. Okay. Do you understand that McMillan
17 Pazdan Smith has a managing committee or management
18 committee?

19 A. Yes.

20 Q. And that's made up of the three highest
21 percentage owners of management in the company, is
22 that right?

23 A. Right.

24 Q. Well, at least Mr. Deichman -- after Mr.
25 Deichman left the firm, right?

1 A. Uh-huh.

2 Q. It's Ron Smith, Joe Pazdan, and Brad
3 Smith, is that right?

4 A. Correct.

5 Q. Okay. And you understand that until the
6 -- actually, I think even after the board was
7 adopted, those three individuals have been the
8 management committee of the firm, since the merger?

9 A. Yes.

10 Q. Okay. And has Ms. Mattison been outspoken
11 in expressing disagreement with some of the
12 decisions that the managing members of the firm have
13 made?

14 A. Yes.

15 Q. Okay. Can you think of any other minority
16 shareholder or minority member of McMillan Pazdan
17 Smith who has been more outspoken than Ms. Mattison?

18 A. No.

19 Q. Do you recall at one point McMillan Pazdan
20 Smith -- or several times since the merger -- has
21 attempted to change or amend the operating agreement
22 of the firm?

23 A. Yes.

24 Q. Do you recall Ms. Mattison refusing to
25 sign the amendments to the operating agreement?

1 A. And there was also a claim on the dispute
2 of Mr. Deichman's agreement as he left the firm, his
3 -- the amount that he was paid for redeeming his
4 shares.

5 Q. Okay.

6 A. I think there was a dispute about that
7 that was listed.

8 Q. Okay. Anything else, you can recall?

9 A. Those are the high points, that I recall.

10 Q. Okay. When you mentioned salaries, are
11 you also including bonuses and benefits in that?

12 A. Yes.

13 Q. And from a 30,000-foot level, what is your
14 understanding of what Ms. Mattison is complaining
15 about the salaries, bonuses, and benefits of the
16 four Third-Party Defendants?

17 A. My perception is that she's claiming that
18 they are not reflective of other similar firms,
19 that's her perception, and that they should have
20 been made known to the other partners.

21 Q. Okay. Prior to reading Ms. Mattison's
22 protest statement and her third-party derivative
23 claim, did you have any idea what the salaries of
24 the four managing members were?

25 A. Only proportionality, based on billing

1 rate, which is pretty -- to a certain extent is
2 purposely vague. But I mean, you know that there's
3 a -- there's a difference between what a managing
4 principal makes and an architect 1.

5 Q. What are the -- are you considered an
6 architect 1?

7 A. No.

8 Q. What is your billing level?

9 A. My billing level is as a member.

10 Q. Okay. So you know what the billing rates
11 are for --

12 A. Right.

13 Q. --various tiers, but you don't know what
14 the compensation has been?

15 A. No.

16 Q. Do you know who sets the salaries and
17 determines bonuses and benefits, for the members of
18 the firm?

19 A. I would only assume that until the
20 executive committee up until the transition to a
21 board, that one of those two groups, is my
22 assumption. I don't know who else would set it, but
23 that's my assumption.

24 Q. And what is that assumption based on?

25 A. It would be based upon they would be --

1 the people most likely to be in the position to set
2 that for everybody in the company.

3 Q. Okay. And do you understand one of Ms.
4 Mattison's claims to be that there's inherent
5 self-dealing in the people that are setting their
6 own salaries without any type of disclosure, or
7 transparency, or ability for the other members to
8 review it?

9 MR. OUTTEN: I object to the form of the
10 question.

11 THE WITNESS: I understand that that's her
12 perception, yes.

13 EXAMINATION RESUMED BY MR. ROTHSTEIN:

14 Q. Okay. And you don't agree with that
15 perception?

16 A. No.

17 Q. Why do you not agree with that perception?

18 A. My position on the salaries, which I'm now
19 made aware of because of all these documents, is
20 that they're still reflective of the value that that
21 person brings to the company.

22 Q. Okay. But you've never been privy to, or
23 asked to see, or been provided copies of any
24 compensation documents showing the bonuses or base
25 salaries of any of these managing members?

1 A. I have not asked to see the compensation
2 package of anybody in the firm ever. It's not my
3 business.

4 Q. Have you ever been requested to vote to
5 approve the managing members' compensation package?

6 A. No.

7 Q. Okay. To your knowledge, has any minority
8 shareholder ever been asked to approve the
9 compensation package of the minority -- or the
10 managing members of McMillan Pazdan Smith?

11 A. No.

12 Q. I mean, if you were curious about whether
13 Ms. Mattison's allegations were true or not in terms
14 of the amounts that she put in her Complaint, how
15 would you go about verifying those amounts?

16 A. Well, as I said earlier, I don't think
17 it's my business. I'm not curious of what they
18 make.

19 Q. Okay. Do you begrudge Ms. Mattison for
20 being curious about it?

21 A. I don't necessarily understand the point.

22 Q. Okay. Well, if the managers are
23 overpaying themselves systematically with no check
24 or balance, wouldn't that affect the value of the
25 firm as a whole?

1 MR. OUTTEN: I object to the form of the
2 question.

3 THE WITNESS: I understand the concept
4 that it could, but I don't agree that it has.

5 EXAMINATION RESUMED BY MR. ROTHSTEIN:

6 Q. How do you know that?

7 A. How do I know it?

8 Q. How do you know that it hasn't occurred,
9 as Ms. Mattison has suggested it has?

10 A. I haven't seen any reason in the 17 years
11 that I've been in the firm, or if you want to go
12 back to 2009, 10 slash 11 years into the new firm, I
13 haven't ever seen any reason to doubt my level of
14 trust in Joe, Brad, and Ron, and Chad, since he's
15 come on board.

16 Q. Okay. Have you ever had reason to doubt
17 Ms. Mattison's truthfulness, or to trust Ms.
18 Mattison, in your 17 years with the firm?

19 A. As I mentioned earlier, I think in those
20 last couple of years, some of her remarks at some of
21 the member meetings were a little bit of a head
22 scratcher, for me, to understand what point she was
23 trying to make. Other than that, no.

24 Q. Okay. Were you aware that the managing
25 members of the firm were trying to push Ms. Mattison

1 out of the firm?

2 MR. OUTTEN: I object to the form of the
3 question.

4 THE WITNESS: I knew nothing about that.

5 EXAMINATION RESUMED BY MR. ROTHSTEIN:

6 Q. Okay. Do you know if the managing members
7 of the firm ever attempted to push you out of the
8 firm?

9 A. Well, I'm still working there, so no, I
10 don't know that anybody has tried to push me out of
11 the firm.

12 Q. Okay.
13 (Whereupon, the court reporter marked Ballard
14 Exhibit Number 2 for identification.)

15 MR. OUTTEN: Mr. Rothstein, are you going
16 to start re-marking the exhibits, or are you
17 going to use the numbers we used for Donnie
18 Love and Cullen Pitts?

19 MR. ROTHSTEIN: Yes, I'm going to re-mark
20 them. So this will be Exhibit 2.

21 MR. OUTTEN: Okay.

22 EXAMINATION RESUMED BY MR. ROTHSTEIN:

23 Q. So let me make sure I got your testimony a
24 few minutes ago. Your reason for doubting Ms.
25 Mattison's -- or the validity of her derivative

1 action claim is that you've not seen anything, in
2 your 17 years, that would cause you to question the
3 truthfulness or cause you to distrust the four
4 managing members, is that right?

5 A. Right.

6 Q. Okay. But you've never seen the -- until
7 you reviewed the allegations in the Complaint, you
8 never had any idea of what they were paying
9 themselves, is that right?

10 A. No.

11 Q. If you'll look at Exhibit 2, do you
12 recognize that as the -- I think you called it the
13 court document that you reviewed -- one of the four
14 documents that you reviewed in preparation for your
15 deposition?

16 A. Yes, sir.

17 Q. And this is -- I guess earlier this week
18 was the first time you had actually seen this
19 document?

20 A. Yes.

21 Q. So when Ms. Mattison, in her protest
22 statement, requested or suggested, you know, for
23 everybody to look at the publicly filed -- or
24 actually take it upon themselves to look at the
25 document, you didn't bother to look at it at that

1 time?

2 MR. OUTTEN: I object to the form.

3 THE WITNESS: No, I did not look at it at
4 that time.

5 EXAMINATION RESUMED BY MR. ROTHSTEIN:

6 Q. Okay. So when you signed your statement
7 saying that you objected to Ms. Mattison's
8 derivative action form, you hadn't actually even
9 seen the document about what her derivative action
10 was, right?

11 A. That's correct, I had not seen this
12 document.

13 Q. So other than what she put in her protest
14 statement, you didn't know any of the specifics
15 about what she was alleging with regard to the
16 Third-Party Defendants?

17 MR. OUTTEN: I object to the form of the
18 question.

19 THE WITNESS: That's correct, I had not
20 seen this.

21 EXAMINATION RESUMED BY MR. ROTHSTEIN:

22 Q. All right. If you'll look on -- starting
23 on page 17, which is where we -- where Ms.
24 Mattison's derivative action starts, do you see the
25 top of the page it says, "For a Thirteenth defense

1 and by the way of first Third-Party Complaint"?

2 A. Yes, sir.

3 Q. "Derivative action-breach of the
4 fiduciary, duty and breach of operating agreement"?

5 A. Uh-huh.

6 Q. Do you understand what a fiduciary duty
7 is?

8 A. I understand in a -- I would say in a
9 layman's sense that it means a level of trust that
10 is placed in someone.

11 Q. Okay. And do you know whether the
12 operating agreement for McMillan Pazdan Smith lays
13 out what the fiduciary duties of the managing
14 members to the firm are?

15 A. I don't recall specifically, but yes, I
16 believe that it does.

17 Q. Okay. Is it your understanding that part
18 of a fiduciary duty is to put the interests of the
19 entity that you have the fiduciary duty towards
20 ahead of your own personal interests?

21 A. That's my understanding, yes.

22 Q. And if you'll look at the bottom of page
23 17, after the derivative action talks about the
24 Third-Party Defendants. In paragraph 99 it states,
25 "Third-Party Defendants each owe fiduciary duties to

1 McMillan Pazdan Smith" -- or MPS -- "by virtue of
2 their positions as managing members, participation
3 on the firm's executive committee and/or as an
4 officer of the firm." Do you see that?

5 A. Yes, sir.

6 Q. Do you agree with that statement?

7 A. Yes.

8 Q. Paragraph 100 alleges that, "Third-Party
9 Defendants have acted in their own self-interest by
10 systematically overpaying themselves in the form of
11 excessive compensation, bonuses, perquisites, and
12 fringe benefits for themselves and their spouses or
13 family members, at least since Mr. Cousins was hired
14 as COO in 2013." Do you see that?

15 A. I see it.

16 Q. Do you know what the perquisites and
17 fringe benefits the Third-Party Defendants receive?

18 A. No.

19 Q. Okay. Do you receive any perquisites and
20 benefits, as a member or an employee of McMillan
21 Pazdan Smith?

22 A. Do I?

23 Q. Yes.

24 A. Yes, I have a YMCA membership that's paid
25 by the company, and I have a life insurance policy

1 that's paid by the company.

2 Q. Are those the only benefits you have?

3 A. Those are the benefits in addition to,
4 you know -- above other employees.

5 Q. Okay. Does McMillan Pazdan Smith pay for
6 your transportation, like a company car?

7 A. I do not have a company car.

8 Q. Okay. Do you know any other members of
9 McMillan Pazdan Smith who have company cars?

10 A. I believe Joe and Brad have company cars,
11 and I assume Ron does, and I'm not sure about Chad.
12 They do a lot more driving for the company than I,
13 and I do very little, so I fall under the policy
14 with the lease company cars that people check out,
15 or a rental.

16 Q. Do they have some sort of fuel efficient
17 -- like a Honda CRV or something like that?

18 A. That the company leases, yes, for the use
19 of other employees for business travel. Yes.

20 Q. Do you know whether Mr. Pazdan and Brad
21 Smith have access to those vehicles?

22 A. I don't know what that policy is.

23 Q. Okay. Do you know what kind of vehicles
24 Mr. Pazdan and Mr. Smith drive -- Brad Smith drives?

25 A. He drives a Land Rover.

1 Q. "He" meaning?

2 A. Mr. Smith.

3 Q. Okay.

4 A. And Mr. Pazdan, I believe, still has a
5 BMW.

6 Q. Would you consider those luxury
7 automobiles?

8 A. I drive a 15-year-old truck. Most
9 everybody -- and so it might be a relative answer,
10 but I would not think that it's anything beyond what
11 I would expect them to drive. And especially
12 oftentimes, they have clients with them.

13 Q. Do you know --

14 A. I don't drive clients around in my truck.

15 Q. Do you know whether those are leased
16 vehicles or owned vehicles?

17 A. I do not know.

18 Q. Do you know what the lease amounts are on
19 those vehicles or the payments are on those
20 vehicles?

21 A. No.

22 Q. Does McMillan Pazdan Smith pay any type of
23 country club dues for you?

24 A. Not for me.

25 Q. Okay. Do you know how much your YMCA dues

1 are?

2 A. I'm thinking it's for me and my wife. And
3 I think -- so it's a family deal. And I think it's
4 about just under \$900 for the year.

5 Q. Okay. Do you know if any other members
6 have -- is it like a wellness benefit, where
7 employees can -- I mean, they may save on the health
8 insurance or something like that if they're
9 exercising?

10 A. I believe other members of the firm share
11 in that same benefit.

12 Q. Okay. What about --

13 A. And additionally, where I'm a member is a
14 client of ours, at the Anderson area YMCA.

15 Q. What about social clubs, like the Palmetto
16 Club, or the Poinsett Club, or any -- are you
17 familiar with any of those types of organizations?

18 A. As far as who or who may not have a
19 membership there?

20 Q. Does the firm provide a membership like
21 that for you or your family?

22 A. Not for me, no.

23 Q. Do you know whether McMillan Pazdan Smith
24 pays any of the membership dues of any of the
25 principals or the managing principals?

1 A. I don't know.

2 Q. I know you mentioned Clemson. Does
3 McMillan Pazdan Smith reimburse you or pay for any
4 type of contributions to Clemson, or football
5 tickets, or alumni association dues?

6 A. No.

7 Q. Do you know whether McMillan Pazdan Smith
8 pays any of the IPTAY, or alumni club membership
9 dues, or football tickets for any of the managing
10 members?

11 A. I don't know specifically. I know they
12 attend games, and I know they entertain clients at
13 games.

14 Q. Okay. Did McMillan Pazdan Smith ever pay
15 for you to go to the national championship -- any of
16 the national championship games of Clemson?

17 A. No.

18 Q. Do you know of any other members of the
19 firm who has paid for them to go to the national
20 championship games?

21 A. I don't know either way.

22 Q. So you don't know whether the firm has
23 paid the way for the four Third-Party Defendants or
24 any of them to go to the national championship
25 games?

1 A. I don't know that specifically, no. And
2 I'm not sure -- I don't have a problem if they have
3 or haven't.

4 Q. What about long-term care insurance? Does
5 the firm pay yours and your wife's long-term care
6 insurance?

7 A. Everybody, I believe, in the firm has some
8 short-term and long-term benefits.

9 Q. I'm not talking about long-term or
10 short-term disability, I'm talking about like if you
11 become -- like a nursing -- like chronic -- like if
12 you have to go to a nursing home or some sort of
13 care or living facility.

14 A. Right, the firm does not pay for that
15 benefit for me, no.

16 Q. Do you know if the firm pays that benefit
17 for any of the Third-Party Defendants?

18 A. I do not know that.

19 Q. Okay. What about the spouses of any
20 Third-Party Defendants? Do you know if the firm
21 pays for long-term care insurance on a family plan
22 for them?

23 A. I do not know that.

24 Q. Do you know of any other member of the
25 firm, besides the managing members, that receive

1 that type of benefit?

2 A. I do not know that.

3 Q. On the life insurance that you mentioned,
4 do you know what the policy amount on the life
5 insurance is that the firm pays for you?

6 A. For me, I think it's like -- it's either
7 like one and a half or two times my salary. I think
8 there's some formula.

9 Q. Do you know if the firm pays that type of
10 one and a half or two times salary for any other
11 members of the firm?

12 A. It's my understanding that the other
13 minority members receive the same benefit, but I
14 don't know that for a fact.

15 Q. Okay. What about the managing members and
16 Mr. Cousins? Do you know what the life insurance
17 amounts are that the firm has paid for?

18 A. I do not know.

19 Q. All right. If you'll look again at
20 Exhibit 2, starting on page 100 -- I'm sorry, page
21 18, paragraph 101, Ms. Mattison has some specifics
22 about the compensation of the managing members and
23 other members of the firm. Do you see that?

24 A. Yes, sir.

25 Q. Do you know whether the numbers that Ms.

1 A. Yes.

2 Q. Okay. And that's the same year that the
3 supermajority was reduced from 75 percent to 66-2/3
4 percent, do you see that?

5 MR. OUTTEN: I object to the form of the
6 question.

7 EXAMINATION RESUMED BY MR. ROTHSTEIN:

8 Q. Between 2014 and 2015, I think we just
9 looked at this September 2015 document that changed
10 the supermajority required interest of the members
11 from 75 percent to 66 2/3 percent, right?

12 A. Yes, this is dated 2015.

13 Q. Okay. So from 2014 to 2015, the average
14 managing member salary increased almost 40 percent,
15 do you see that, after the supermajority was
16 reduced?

17 MR. OUTTEN: Again, object to the form of
18 the question. The witness is being asked to
19 agree to Mr. Rothstein's exhibit.

20 EXAMINATION RESUMED BY MR. ROTHSTEIN:

21 Q. I mean, these are simple -- I mean,
22 they're simple math -- you want to verify my math?
23 You've got your phone there. You're welcome to pull
24 up your calculator.

25 A. I see the increase. I'm not sure that

1 there's a correlation between the two.

2 Q. Would you agree that that's the most
3 dramatic change in the salaries of the managing
4 members, between 2014 and 2015, on this chart?

5 A. Yes, sir.

6 MR. ROTHSTEIN: Okay. And just to put it
7 in visual terms, I'm going to show you another
8 document that was created from this chart.

9 (Whereupon, the court reporter marked Ballard
10 Exhibit Number 6 for identification.)

11 EXAMINATION RESUMED BY MR. ROTHSTEIN:

12 Q. This is Exhibit 6. And I'll represent to
13 you Exhibit 6 was a document that we created in this
14 particular spreadsheet that's Exhibit 5, it's just a
15 visual representation. Do you see in this chart
16 from 2014 and 2015, there's a dramatic spike in the
17 redlines there of Mr. Joe Pazdan, Brad Smith, and
18 Ron Smith's total compensation?

19 A. Yes, sir.

20 Q. Do you also see Mr. Chad Cousins' salary
21 went from less than \$200,000 in 2014 to close to
22 \$400,000 -- or for his total compensation in 2015?

23 A. Yes.

24 Q. So that jump from 2014 to 2015 corresponds
25 to the change to reducing the required member

1 interest of the members from 75 percent to 66 2/3
2 percent, right?

3 MR. OUTTEN: I object to the form of the
4 question.

5 THE WITNESS: Again, I understand they
6 both happened at the same time frame. I don't
7 necessarily agree that there's a correlation
8 between the two.

9 EXAMINATION RESUMED BY MR. ROTHSTEIN:

10 Q. Okay. If you look at the bottom half of
11 the chart -- and for ease of reference, Exhibit 5
12 shows -- has highlighted the people who were on the
13 executive committee of the firm. Is it your
14 understanding that the three managing members; K.J.
15 Jacobs, Karen Calhoun, and Chad Cousins, were the --
16 comprised the executive committee of the firm, prior
17 to the changeover to the board?

18 A. Yes.

19 Q. And I think you had earlier testified your
20 assumption was that the executive committee is the
21 one that makes the decisions on salary, and bonuses,
22 and benefits, and that type of thing, is that right?

23 A. Yes.

24 Q. On Exhibit 6, the chart, do you see the
25 heavy dark line in black there? That's your salary

1 history.

2 A. Okay.

3 Q. Does that look about accurate to you?

4 A. Yes.

5 Q. And the other lines on this chart, the
6 blue ones and the green ones, are the other
7 architect members of the firm. Do you see how
8 that's plotted on there?

9 A. Right.

10 Q. Okay. Was there anything that happened to
11 the firm between 2014 and 2015, to your knowledge,
12 that caused the dramatic spike in the increase of
13 compensation of Mr. Cousins and the three managing
14 members?

15 MR. OUTTEN: I'll object to the form of
16 the question.

17 THE WITNESS: The company experienced some
18 dramatic growth starting in 2013-2014 from,
19 there up through probably through 2017, so
20 there was exponential growth in those years.

21 EXAMINATION RESUMED BY MR. ROTHSTEIN:

22 Q. What was that growth attributable to?

23 A. Well, we opened more offices. We pursued
24 more work, we got more work. We hired additional
25 architects to produce that work. Some of them

1 brought, you know, some clients with them. There
2 were a lot of reasons. Plus, the general economy
3 was growing, because we're coming out of -- you
4 know, those first few years, we're still fighting
5 our way out of the recession.

6 Q. Okay. Was that growth in the company
7 attributed only to the four managing members and Mr.
8 Cousins?

9 MR. OUTTEN: Object to the form.

10 THE WITNESS: I would not agree with
11 "only." I would say that a lot of that growth
12 was due to the managing principals and where
13 they were leading the company to go.

14 EXAMINATION RESUMED BY MR. ROTHSTEIN:

15 Q. Okay. Were you aware that starting in
16 2015, the total compensation for each of the three
17 managing members exceeded \$500,000?

18 A. Not previous -- not previously, no, but
19 the proportionality of the value that that
20 represents, say compared to myself, seems very
21 reasonable to me. I mean, if you want to say is Ron
22 Smith two and a half times -- or slightly over two
23 times more valuable than Dave Ballard, yes. So I
24 think it's a reflection of the value that the
25 managing principals bring to the company.

1 Q. Okay. But you've never been asked to make
2 an assessment of what value they bring to the
3 company, right? That's something --

4 A. No, I've never been asked.

5 Q. So they're making their own assessment of
6 their own worth to the company?

7 MR. OUTTEN: Repeat that question, please.

8 EXAMINATION RESUMED BY MR. ROTHSTEIN:

9 Q. In setting their compensation, the three
10 managing members and Mr. Cousins are making their
11 own assessment of their own worth to the company?

12 MR. OUTTEN: I object to the form of the
13 question.

14 EXAMINATION RESUMED BY MR. ROTHSTEIN:

15 Q. Isn't that right?

16 MR. OUTTEN: I object to the form.

17 THE WITNESS: My -- I would say in -- I
18 would say that I feel that when they look at
19 the big picture and when it comes to
20 expenditures of the company, both salaries, and
21 benefits, and everything else, what the market
22 looked like, what would the market bear, all
23 right, setting how much income is likely to
24 come into the company, and then what's the
25 value and, you know, anything that we --

1 anything that we spend over here has an effect
2 somewhere else, but all that is being entered
3 into the decision-making process. And I trust
4 their ability to make a correct decision, based
5 on my experience with the company for these --
6 for 17 years, for me.

7 EXAMINATION RESUMED BY MR. ROTHSTEIN:

8 Q. Now, you used the phrase "what the market
9 will bear," okay. I want to kind of drill down on
10 that a little bit. Do you know whether Mr. Pazdan
11 Smith -- or the two Mr. Smiths and Mr. Cousins base
12 their compensation of themselves on market forces?

13 A. I would say that's part of the equation
14 that they would use to come to a decision.

15 Q. Okay. Well, in a market when you talk
16 about what the market will do, you're looking at an
17 arm's length transaction, where you have, you know,
18 two parties with even bargaining power can negotiate
19 for what seems to be a fair result, right?

20 A. Right.

21 Q. But the difference can --

22 MR. OUTTEN: Wait a minute. I object to
23 the form of the question, and I object to Mr.
24 Rothstein testifying.

25 EXAMINATION RESUMED BY MR. ROTHSTEIN:

1 raised?

2 A. We had discussions about what and how we
3 could express our objection and disagreement with
4 this process and that Donza wasn't speaking for each
5 of us individually or as a group.

6 Q. Sorry. When did those discussions occur?

7 MR. OUTTEN: Hold on. Did you finish your
8 answer, Mr. Ballard?

9 THE WITNESS: Yes. When were those
10 discussions? Well, some time between the 4th
11 and I think I signed it on the 13th.

12 (Whereupon, the court reporter marked Ballard
13 Exhibit Number 17 for identification.)

14 EXAMINATION RESUMED BY MR. ROTHSTEIN:

15 Q. Do you recall receiving Exhibit 17?

16 A. Yes.

17 Q. And this is an e-mail that Mr. Cousins
18 sent on Wednesday, November 13th, it looks like a
19 week after the shareholder meeting?

20 A. Yes.

21 Q. Okay. How did you understand that this
22 attached, sort of, template member statement came
23 about?

24 A. It was requested by some of the members.

25 Q. Okay. Do you recall who it was that

1 specifically requested it?

2 A. I'm thinking it was perhaps K.J. that
3 voiced that, but I'm not 100 percent certain.

4 Q. Okay. So were all of these documents
5 attached in the same e-mail, to your recollection,
6 that are in Exhibit 17?

7 A. I believe so.

8 Q. All right. And in the memo, page 2 of
9 Exhibit 17, Mr. Cousins writes in the second
10 paragraph, "At our most recent principals meeting, a
11 request was made by several of the members for a
12 statement to be provided by which they might express
13 their disagreement with the attempted derivative
14 action by Ms. Mattison."

15 A. Uh-huh.

16 Q. Do you recall -- I think you mentioned
17 K.J. possibly. Any other members, when he talks
18 about several members, do you know who those would
19 be?

20 A. I do not.

21 Q. Were any of those members any of the four
22 Third-Party Defendants, to your recollection,
23 meaning Mr. Cousins --

24 A. No, not to my recollection.

25 Q. Do you know whether the meeting on the 4th

1 was tape-recorded or recorded in any way?

2 A. Tape-recorded?

3 Q. On the 4th. Did I say on November 4th?

4 A. I would think -- because typically Jessie
5 was at our meetings.

6 Q. Who is Jessie?

7 A. One of our assistants that she made
8 minutes and documented all the meetings.

9 Q. Do you know her last name?

10 A. I'm having a senior moment on that. It
11 will come to me in a minute.

12 Q. Okay. Have you ever known her to
13 tape-record any of the meetings?

14 A. I don't recall ever tape-recording any
15 meeting.

16 Q. Did some people participate remotely by
17 some type of videoconference or phone conference?

18 A. I don't recall. Occasionally, in a
19 meeting, that will happen occasionally.

20 Q. In the last part of Mr. Cousins' memo, the
21 third paragraph says, "If you have any questions
22 regarding the derivative action, the firm has
23 retained Bill Higgins, a well-respected ethics
24 lawyer who practices in Columbia, South Carolina, as
25 independent counsel to answer such questions." What

1 was your understanding of what Mr. Higgins' role in
2 this was?

3 A. Is that he was available for any of us to
4 contact if we wanted further input and guidance on
5 this nature, on this business.

6 Q. Do you know who retained Mr. Higgins?

7 A. I do not.

8 Q. Okay. What was your understanding of the
9 word -- of the phrase "independent counsel"? What
10 did that mean to you?

11 A. That he's a third party. That his -- that
12 he would be available to counsel any of the members
13 for their benefit.

14 Q. Not the benefit of the four Third-Party
15 Defendants?

16 A. Correct.

17 Q. Did you think that was a significant item
18 that Mr. Cousins said, you know, we're willing to
19 hire an independent lawyer to look at this for you?

20 A. Yes.

21 Q. Did that give you some sense of comfort
22 that Mr. Cousins' position was accurate?

23 A. Yes.

24 Q. Did you ever speak with Mr. Higgins?

25 A. I did not.

1 Q. Do you know of any other minority members
2 who spoke with Mr. Higgins?

3 A. I have no knowledge.

4 Q. Did anyone ever tell you that Mr. Higgins
5 was actually retained by the Nelson Mullins law firm
6 to help defend against Ms. Mattison's allegation
7 that there was a conflict of interest?

8 MR. OUTTEN: I instruct the witness not to
9 answer that question. That is improperly
10 phrased, whether intentional or not.

11 EXAMINATION RESUMED BY MR. ROTHSTEIN:

12 Q. Let me rephrase it. Did anybody ever tell
13 you what Mr. Higgins' role was other than to be
14 independent counsel for you?

15 A. No.

16 Q. Were you aware that Mr. Higgins has filed
17 an affidavit in this case on behalf of the Nelson
18 Mullins law firm?

19 MR. OUTTEN: I instruct the witness not to
20 answer that question either. It's improperly
21 phrased, whether intentional or not.

22 EXAMINATION RESUMED BY MR. ROTHSTEIN:

23 Q. Were you aware that Mr. Higgins had
24 submitted an affidavit in this case?

25 A. No.

1 Q. You've never seen Mr. Higgins' affidavit?

2 A. No.

3 MR. OUTTEN: I'm going to instruct the
4 witness, Mr. Rothstein, not to answer any more
5 questions about a conflict of interest or Mr.
6 Higgins' affidavit. It is now almost two
7 o'clock and it's Friday afternoon, and you need
8 to stick to the scope of the deposition, as
9 instructed by Judge McIntosh, and it's going
10 far afield to start asking him conflicts
11 questions.

12 MR. ROTHSTEIN: I'm not asking him a
13 conflicts question.

14 MR. OUTTEN: Sure, you are. You're asking
15 him if he knows what the role of Mr. Higgins
16 was with regard to offering an opinion on the
17 conflicts, and that's got nothing to do with
18 this.

19 MR. ROTHSTEIN: Well, it does.

20 MR. OUTTEN: He's already said he hasn't
21 seen the affidavit. This is a second
22 instruction of Judge McIntosh that you're
23 violating. He said to you many times, "If the
24 witness says they don't know, then quit asking
25 them questions." Did you know -- you asked the

1 witness, "Did you know Mr. Higgins offered an
2 opinion" -- or "offered an affidavit?" "No."
3 "Have you seen the affidavit?" "No." And now,
4 you want to give him the affidavit and waste
5 time asking him what he knows about it, so I
6 instruct the witness not to answer the
7 question. I would please ask you to move on.

8 MR. ROTHSTEIN: Well, I think it's very
9 relevant, because it shows that Mr. Cousins was
10 misrepresenting the role of Mr. Higgins.

11 MR. OUTTEN: Absolutely not. You argue
12 that to the judge, Mr. Rothstein, but that is
13 absolutely inaccurate and it shows a
14 misunderstanding on your part of what occurred.
15 But you're free to argue it, but I'm not going
16 to let you ask this witness any more questions
17 about that.

18 (Whereupon, the court reporter marked Ballard
19 Exhibit Number 18 for identification.)

20 EXAMINATION RESUMED BY MR. ROTHSTEIN:

21 Q. Did you understand Mr. Cousins' offer to
22 have this reviewed by an independent counsel as
23 bolstering his argument that we're not hiding
24 anything, we've hired a lawyer, if you have any
25 questions, we're transparent, we want you to -- is

1 that how you understood his --

2 MR. OUTTEN: I instruct the witness not to
3 answer that question.

4 EXAMINATION RESUMED BY MR. ROTHSTEIN:

5 Q. -- offer or his offer to have Mr. Higgins
6 as independent counsel?

7 MR. OUTTEN: I instruct the witness not to
8 answer. Let me add, he's already testified
9 that he never did contact Mr. Higgins.

10 MR. ROTHSTEIN: I understand he testified
11 to that. I'm asking him about his
12 understanding.

13 MR. OUTTEN: You already asked him that,
14 Mr. Rothstein.

15 MR. ROTHSTEIN: Beg your pardon?

16 MR. OUTTEN: You've already asked him
17 that. You've already asked him a question
18 substantially similar to that. Let's move on,
19 please, sir.

20 MR. ROTHSTEIN: So are you instructing him
21 not to answer that one?

22 MR. OUTTEN: I am. Yes, sir.

23 EXAMINATION RESUMED BY MR. ROTHSTEIN:

24 Q. If you'll turn to the next page of Exhibit
25 17, it's entitled "Response to Donza Mattison's

1 In your estimation, have the managers of
2 MPS been transparent with the other members about
3 their bonuses, and benefits, and perks?

4 A. The managers have been transparent with
5 the members in general, in the dealings of the
6 company. As specific to compensation and benefits,
7 I don't believe that's been discussed.

8 Q. Well, the assertion says, "The managers
9 have always been transparent." Then it says, "Her
10 assertions that the managers receive excessive
11 compensation and benefits are not true," right? Do
12 you believe that the managers of MPS have always
13 been transparent about their compensation and
14 benefits --

15 MR. OUTTEN: Wait a minute, Mr. Rothstein.
16 That misstates what is on here. I instruct the
17 witness not to answer the question. That's an
18 intentional effort by Mr. Rothstein to misstate
19 what this says. What this says is, "The
20 managers of MPS have always been transparent
21 with the other members, and her assertions that
22 the managers receive excess benefits and
23 compensation are not true," so it's conflating
24 those two.

25 EXAMINATION RESUMED BY MR. ROTHSTEIN:

1 Q. Do you believe the managers of MPS have
2 been transparent with the other members about their
3 compensation and benefits?

4 A. I believe that the managers have been
5 transparent with other members.

6 Q. About what?

7 MR. OUTTEN: Let him finish his answer,
8 Mr. Rothstein.

9 THE WITNESS: They have been transparent
10 about the general workings of the organization.
11 We have not discussed specifically
12 compensation, and bonuses, and fringe benefits,
13 but the second part of that sentence is just
14 saying that we don't agree with Ms. Mattison's
15 assertions regarding compensation and benefits.

16 EXAMINATION RESUMED BY MR. ROTHSTEIN:

17 Q. Did they ever show you why Ms. Mattison's
18 assertions regarding excessive compensation and
19 benefits were not true? Did they ever show you the
20 financial documents that showed what their
21 compensation and benefits were?

22 A. No.

23 Q. So he's basically just asking you to
24 accept his word for it?

25 A. He's asking, based on our experience --

1 years of experience that where we have worked well
2 as an organization and trusted one another to
3 continue to rely upon that trust, which is -- I'm in
4 agreement with that, because I didn't ask for any
5 documentation after seeing this, because I didn't
6 have any reason to believe that that was true.

7 Q. Okay. So based on your experience with
8 Mr. Cousins and the other managers of the firm, you
9 didn't need to see documentary proof, you just took
10 their word for it?

11 MR. OUTTEN: I object to the form. It
12 misstates his testimony.

13 THE WITNESS: Based on 17 years of working
14 with Joe and Brad and almost ten years with
15 working with Ron and then seven or so years
16 with Chad, I saw no reason to ask for such
17 documents.

18 EXAMINATION RESUMED BY MR. ROTHSTEIN:

19 Q. The next sentence says, "In fact, the firm
20 hired an independent consultant to analyze our
21 compensation structure to ensure that managers'
22 salary were in line with the market and a firm of
23 our size and structure." Do you see that?

24 A. Yes, sir.

25 Q. Have you ever seen the independent

1 consultant's analysis?

2 A. No.

3 Q. So they hadn't been transparent --

4 A. I don't read policy.

5 Q. They hadn't been transparent with the
6 independent consultant's analysis, have they?

7 MR. OUTTEN: I object to the form.

8 THE WITNESS: I don't recall seeing that
9 before.

10 EXAMINATION RESUMED BY MR. ROTHSTEIN:

11 Q. Do you know the name of the independent
12 consultant?

13 A. I do not.

14 Q. Have you ever heard the name Todd
15 Mitchell?

16 A. Yes.

17 Q. Who is Todd Mitchell?

18 A. He's formerly with Elliott Davis. He's
19 now on our board.

20 Q. Do you know whether he's the so-called
21 independent consultant that Mr. Cousins was
22 referring to?

23 A. I do not.

24 Q. So you've never seen the report that Mr.
25 Mitchell created in 2016 to justify increases in Mr.

1 Cousins' compensation package?

2 MR. OUTTEN: I object to the form.

3 THE WITNESS: I don't recall seeing that,
4 no.

5 EXAMINATION RESUMED BY MR. ROTHSTEIN:

6 Q. Do you know who hired Mr. Mitchell?

7 A. No.

8 Q. Do you know who suggested that Mr.
9 Mitchell be on the board?

10 A. I'm pretty sure that all three of the
11 managing partners were unanimous on that.

12 Q. Okay. Do you know if Mr. Mitchell is
13 being paid for his time for serving on the board?

14 A. I would assume so.

15 Q. Do you know what he's being paid?

16 A. I do not.

17 Q. Do you know if any of the other board
18 members are being paid for serving on the board?

19 A. I don't know any particulars on that.

20 Q. The next sentence says, "We have always
21 been more than forthcoming about the firm's finances
22 and are frankly insulted by Ms. Mattison's unfounded
23 accusations." Did you interpret that statement as
24 disparagement of Ms. Mattison?

25 A. I would say it means that they don't

1 agree.

2 Q. After reading this response, did that
3 affect your view of Ms. Mattison's derivative
4 action?

5 A. I didn't -- I don't think I agreed with
6 the derivative action as soon as it was explained to
7 us, much less any additional one way or the other.

8 Q. Okay. You used the passive phrase there
9 "as soon as it was explained to us." Who explained
10 the derivative action to you?

11 A. I believe that would be Chad, as far as a
12 general explanation for what a derivative action was
13 and what it meant.

14 Q. Okay. And Mr. Cousins is one of the
15 Defendants in the derivative action, isn't that
16 right?

17 A. Yes.

18 Q. So he would have an interest in the
19 derivative action not going forward, wouldn't you
20 agree with that?

21 MR. OUTTEN: I object to the form.

22 THE WITNESS: The whole firm would have.

23 The firm would have an interest in it not going
24 forward.

25 EXAMINATION RESUMED BY MR. ROTHSTEIN:

1 Q. Why do you say that?

2 A. Because it's not in the best interest of
3 the firm.

4 Q. In whose best interest?

5 A. Well, seeing as how everybody other than
6 Ms. Mattison signed the document, then 16, or 17, or
7 whatever the exact number count is, that's whose
8 interest.

9 Q. Did Ms. Mattison's interest, as an owner
10 of the firm, not count?

11 MR. OUTTEN: I object to the form.

12 THE WITNESS: No, sir, it does count to
13 the -- to an extent, yes.

14 EXAMINATION RESUMED BY MR. ROTHSTEIN:

15 Q. Are you aware that if Ms. Mattison wins
16 her case, for every dollar the firm receives, she
17 only gets two cents of that -- or approximately two
18 cents?

19 A. I understand that the majority would be
20 retained by the firm.

21 Q. Okay. Do you know whether Ms. Mattison is
22 investing her own money to pursue this claim?

23 A. I do not know.

24 Q. Do you think Ms. Mattison's accusations in
25 the Third-Party Complaint are unfounded?

1 A. I have no reason to believe that they are
2 founded, which is why I signed the document.

3 Q. Well, couldn't you look at the financial
4 records and the other documents underlying Ms.
5 Mattison's claims regarding the compensation and
6 bonus and the Spartanburg lease to determine whether
7 they were founded or not?

8 MR. OUTTEN: I object to the form.

9 THE WITNESS: Yeah, I mean it would have
10 been possible. Yes.

11 EXAMINATION RESUMED BY MR. ROTHSTEIN:

12 Q. But to your knowledge, no other minority
13 member has done that?

14 A. To my knowledge, no one else has done
15 that.

16 Q. Let me ask you a question. You mentioned
17 earlier, I guess the pool cars, or fleet cars, or
18 whatever I think you said McMillan Pazdan Smith has,
19 do you know how many cars they have?

20 A. The Greenville office, I believe,
21 currently has one. We had up to three at one point
22 in time.

23 Q. What about firm wide? Do you know how
24 many cars they have?

25 A. I don't know office by office.

1 McMillan Pazdan Smith indicate that they thought Ms.
2 Mattison was bringing this claim just to embarrass
3 the firm?

4 A. No.

5 Q. In your dealings with Ms. Mattison, has
6 she ever acted unfairly toward you?

7 A. No.

8 Q. Has she ever been untruthful toward you?

9 A. Not that I'm aware of.

10 Q. Do you believe Ms. Mattison had some
11 ulterior motive in filing the derivative action,
12 other than recovering what she believes to be
13 self-dealing transactions?

14 A. I don't know what her purpose is.

15 MR. ROTHSTEIN: I don't have any further
16 questions. Thank you.

17 - - -

18 EXAMINATION

19 - - -

20 BY MR. OUTTEN:

21 Q. Mr. Ballard, I want to ask you a few
22 questions, okay?

23 A. Okay.

24 Q. Do you want to bring a derivative action
25 on behalf of McMillan Pazdan Smith against Ron

1 Smith, Brad Smith, Joe Pazdan, and Chad Cousins?

2 A. No.

3 Q. Do you want Donza Mattison to represent
4 the members of McMillan Pazdan & Smith in bringing a
5 derivative action against Ron Smith, Brad Smith, Joe
6 Pazdan, and Chad Cousins?

7 A. No.

8 Q. Do you believe that Donza Mattison fairly
9 and adequately represents you and the other minority
10 members of MPS in bringing this derivative action?

11 MR. ROTHSTEIN: I'm going to object to the
12 question. Every time I ask a question
13 involving some sort of legal standard, you
14 always say, "he's not a lawyer," so I'm going
15 to object to the extent that you're asking for
16 a legal conclusion.

17 MR. OUTTEN: I'll ask the question again.

18 EXAMINATION RESUMED BY MR. OUTTEN:

19 Q. Do you believe that Donza Mattison fairly
20 and adequately represents you and the other minority
21 members of MPS in bringing this derivative action?

22 A. I believe there's a potential for a
23 conflict of interest on her part.

24 Q. What is that conflict?

25 A. Well, there's the -- she's in the middle

1 of trying to bring to some conclusion her redemption
2 of her shares and her severance package, so I see
3 that as being a conflict to the derivative --
4 potential conflict with the derivative action.

5 Q. So do you believe that Donza Mattison
6 fairly and adequately represents you and the other
7 minority members of MPS in bringing this derivative
8 action?

9 A. No.

10 Q. Do you believe that the derivative action
11 is in the best interest of the members of McMillan
12 Pazdan Smith?

13 A. No.

14 Q. Do you support the derivative action that
15 Donza Mattison has filed?

16 A. No.

17 Q. Do you oppose the derivative action that
18 Donza Mattison has filed?

19 A. Yes.

20 Q. Look at your member statement, which is
21 Exhibit 19. Get that before you, please.

22 A. Yes.

23 Q. Is Exhibit 19 an accurate copy of the
24 member statement that you signed?

25 A. Yes.

1 Q. Did you sign this statement voluntarily?

2 A. Yes.

3 Q. Did anyone force or coerce you to sign
4 this statement?

5 A. No.

6 Q. Is this statement complete and accurate,
7 to the best of your knowledge?

8 A. Yes.

9 Q. Do you understand that you are under oath
10 today?

11 A. Yes.

12 Q. Do you affirm this statement, your
13 statement marked as Exhibit 19, under oath today?

14 A. Yes.

15 Q. Do you understand that the judge presiding
16 over this case may consider your statement in
17 deciding whether Donza Mattison is a fair and
18 adequate representative of the other minority
19 members of MPS?

20 A. Yes.

21 Q. Do you know of any facts which support
22 Donza Mattison's allegations in the derivative
23 action?

24 A. No.

25 Q. Do you know of any dishonest,

1 self-dealing, or fraudulent acts committed by Ron
2 Smith, Brad Smith, Joe Pazdan and/or Chad Cousins at
3 any time?

4 A. No.

5 Q. How long have you been employed by
6 McMillan Pazdan Smith?

7 A. I've been with Pazdan & Smith 17 years
8 ago, which became McMillan Pazdan & Smith roughly 10
9 years ago, so altogether 17 years.

10 Q. And during that time, have you had the
11 opportunity to witness the conduct of Ron Smith,
12 Brad Smith, Joe Pazdan, and Chad Cousins in several
13 different contexts?

14 A. Certainly with clients, with contractors,
15 with employees, with several different groups of
16 people.

17 Q. And you're speaking of your personal
18 experience with Ron Smith, Brad Smith, Joe Pazdan,
19 and Chad Cousins, correct?

20 A. Correct. And my personal experience with
21 Ron is obviously somewhat less, since he's in the
22 Spartanburg office and not in the health care
23 studio.

24 Q. Have you ever witnessed any conduct of Ron
25 Smith, Brad Smith, Joe Pazdan, or Chad Cousins like

1 that alleged by Donza Mattison in the derivative
2 action?

3 A. I have not.

4 Q. Do you have enough information to make an
5 informed decision on whether or not you support the
6 derivative action?

7 A. I feel that I do.

8 Q. Mr. Rothstein has shown you about 20
9 documents today, is that correct?

10 A. Yes, sir.

11 Q. And do you remember being asked questions
12 about all of these documents?

13 A. Yes.

14 Q. Do you remember being asked many questions
15 on many documents about the compensation of Ron
16 Smith, Brad Smith, Joe Pazdan, or Chad Cousins?

17 A. Yes.

18 Q. And in those documents, Mr. Rothstein
19 talked about the compensation of these managing
20 principals since about 2010. Do you recall that?

21 A. Yes.

22 Q. And so you have seen what their
23 compensation is for the last eight or ten years,
24 correct?

25 A. Right.

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

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

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

10 A. Yes.

11 Q. Do you remember being asked, by Mr.
12 Rothstein, about certain fringe benefits that Ron
13 Smith, Brad Smith, Joe Pazdan, and Chad Cousins
14 receive?

15 A. Yes.

16 Q. Do you have any concerns, as a member of
17 the firm, regarding the fringe benefits received by
18 these four managing principals?

19 A. I do not have direct knowledge of what
20 those fringe benefits may or may not be, but my
21 understanding, I don't think that any of those would
22 be out of the norm for people in their position and
23 in a firm of our size. I have no concerns about
24 them.

25 Q. And you were asked questions by Mr.

1 Rothstein about the Spartanburg lease arrangement.

2 Do you recall those questions?

3 A. Yes.

4 Q. And have you had experience with Ron Smith
5 over the last almost 10 years in business?

6 A. Yes.

7 Q. With MPS, correct?

8 A. Right.

9 Q. And do you believe that Ron Smith would be
10 involved in a self-dealing transaction wherein he
11 charges above-market rates for the building owned in
12 Spartanburg that MPS leases?

13 A. I wouldn't have any reason to believe
14 that.

15 Q. Has Ron Smith ever done anything to
16 suggest to you that he would do anything dishonest
17 or try to benefit from some insider deal or
18 self-dealing?

19 A. He has not.

20 Q. After being shown all of these documents
21 and being questioned by Mr. Rothstein for
22 approximately four and a half hours, do you stand by
23 the statements made in your statement marked as
24 Exhibit 19?

25 A. I do.

1 Q. Would you please look at Exhibit 19.

2 A. Yes, sir.

3 Q. After being questioned by Mr. Rothstein
4 for four and a half hours, after looking at 20 or so
5 exhibits, does anything in Exhibit 19 need to be
6 changed?

7 A. No.

8 Q. And after being shown these 20 exhibits by
9 Mr. Rothstein, being questioned by him for four and
10 a half hours, do you still oppose the derivative
11 action being brought by Donza Mattison?

12 A. I do.

13 Q. Do you still believe, after the 20
14 exhibits and four and a half hours of questioning,
15 that Donza Mattison does not represent the interests
16 of the minority members of MPS in bringing this
17 derivative action?

18 A. Repeat that again.

19 Q. I'll withdraw that question.

20 After being shown approximately 20
21 exhibits, after being questioned by Mr. Rothstein
22 for approximately four and a half hours, do you
23 believe that Donza Mattison fairly and adequately
24 represents you and the other minority members of MPS
25 in bringing this derivative action?

1 A. I do not.

2 Q. As a member of McMillan Pazdan & Smith,
3 are you asking Judge McIntosh to dismiss this
4 derivative action?

5 A. I am.

6 Q. Has this derivative action required a
7 significant amount of time and effort on behalf of
8 the members, including you?

9 A. Yes, for the members definitely.

10 Q. Did you have to spend time preparing for
11 this deposition?

12 A. Yes.

13 Q. Did you spend time meeting with me to
14 prepare for your deposition?

15 A. Yes.

16 Q. And you arrived here approximately 9:00
17 this morning -- 8:30 or 9:00?

18 A. 8:30.

19 Q. And now the time is 3:25 or so, right?

20 A. Right.

21 Q. So you've essentially missed an entire
22 day's work, right?

23 A. Yes.

24 Q. And do you have a full plate that is a
25 long to-do list in your office at work?

1 A. I do.

2 Q. And if you hadn't been here answering Mr.
3 Rothstein's questions, would you have been at
4 McMillan Pazdan Smith serving the firm's clients?

5 A. Yes.

6 MR. OUTTEN: Those are all the questions I
7 have. Thank you, sir.

8 MR. ROTHSTEIN: I just have a couple in
9 follow-up.

10 - - -

11 EXAMINATION

12 - - -

13 BY MR. ROTHSTEIN:

14 Q. Who do you understand Mr. Outten to be
15 representing in this case?

16 A. He's representing the firm and the
17 managing partners, who are the named Defendants.

18 Q. Is he representing you?

19 MR. OUTTEN: Yes, I am. Thank you, Mr.
20 Rothstein.

21 EXAMINATION RESUMED BY MR. ROTHSTEIN:

22 Q. In your individual capacity?

23 A. Yes, because I'm a member of the firm.

24 Q. To be fair, you don't know what's going on
25 behind the closed doors of the executive committee

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-Counterclaim Defendant,	)	
	)	
vs.	)	
	)	
Donza H. Mattison,	)	
	)	
Defendant-Counterclaimant.	)	
_____	)	<u>MOTION TO DISMISS</u>
	)	<u>DEFENDANT'S COUNTERCLAIMS</u>
	)	<u>AND THIRD-PARTY 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, Ronald G. Smith, Joseph M. Pazdan, Brad B. Smith, and Chad C. Cousins (collectively, "MPS") hereby move this Court, pursuant to Rule 12 of the South Carolina Rules of Civil Procedure, for an Order dismissing the Counterclaims and Third-Party Complaint of Defendant Donza H. Mattison ("Mattison"). The Court should grant MPS's Motion to Dismiss based upon the following grounds:

(1) Mattison's Counterclaims should be dismissed because they violate the Covenant Not to Sue in the Severance Agreement and General Release signed by Mattison upon cessation of her employment with MPS.

(2) Mattison's claims against MPS were released in the Severance Agreement and General Release.

(3) Mattison's derivative claim does not meet the heightened pleading requirements of Rule 23(b)(1) of the South Carolina Rules of Civil Procedure.

(a) Mattison has not made a demand on MPS, and she has failed to assert a valid reason for failure to make a demand.

(b) Mattison does not fairly and adequately represent the interests of MPS's other members who are similarly situated.

FACTUAL BACKGROUND

MPS is a regional, studio-based architecture, planning, and interior design firm with offices in South Carolina, North Carolina, and Georgia. (Compl. ¶¶ 5-6.) Mattison is a former employee and member of MPS, and worked as an architect in MPS's Spartanburg, South Carolina office. (*Id.* at ¶ 7.) Mattison's employment with MPS officially ended on February 12, 2018, although she was on FMLA leave from November 20, 2017 until February 12, 2018. (*Id.* at ¶ 8.)

The parties memorialized Mattison's cessation of employment in a Severance Agreement and General Release ("Severance Agreement") dated December 5, 2017. (*Id.* at ¶ 9; Third-Party Compl. ¶ 49.) 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. (Compl. ¶ 11.) The Severance Agreement provided that the parties would agree on the value of Mattison's 2,035.34 membership units in early 2018, following the close of fiscal year 2017, in accordance with MPS's September 30, 2015 Operating Agreement ("Operating Agreement"). (*Id.* at ¶¶ 12-13.)

MPS's Operating Agreement provides that a properly dissociating member will be paid "Fair Market Value" for their membership interest. (*Id.* at ¶ 15.) Fair Market Value is determined by the Management Committee, which has the power and authority to determine the per unit price of any membership interest on an annual basis. (*Id.* at ¶¶ 16-17.) For the last five years, MPS has retained HDH Advisors LLC ("HDH") to provide an annual business appraisal. (*Id.* at ¶ 18.) 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 at this amount. (*Id.* at ¶ 20; Third-Party Compl. ¶ 56.) Mattison, however, contested this valuation and demanded a much higher per unit price. (Compl. ¶ 21.)

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; Mattison's membership units are to be valued in accordance with the terms of the Operating Agreement; MPS followed the Operating Agreement's provisions regarding the annual valuation of the company; 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; and Mattison does not have the right to contest the 2017 valuation. (*Id.* at ¶ 25.)

Mattison filed an Answer, Counterclaims, and Third-Party Complaint on March 4, 2019. (*See* Third-Party Compl.) Mattison has 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. (*Id.*) Mattison has also asserted a derivative cause of action against Ronald Smith, Joseph Pazdan, Brad Smith, and Chad Cousins for breach of fiduciary duty and breach of the Operating Agreement. (*Id.*)

STANDARD OF REVIEW

Under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, “[a] claim may be dismissed when the defendant demonstrates that the plaintiff has failed to allege facts sufficient to establish a cause of action.” *Disabato v. South Carolina Ass’n of School Adm’rs*, 404 S.C. 433, 441, 746 S.E.2d 329, 333 (2013). “A ruling on a motion to dismiss pursuant to Rule 12(b)(6) must be based solely on the factual allegations set forth in the complaint, and the court must consider all well-pled allegations as true.” *Id.* (citing *Gressette v. S.C. Elec. & Gas Co.*, 370 S.C. 377, 378–79, 635 S.E.2d 538, 538 (2006)). However, “on a 12(b)(6) motion, the court is required to presume all well pled *facts*, not propositions of law, to be true.” *HHHunt Corp. v. Town of Lexington*, 389 S.C. 623, 635, 699 S.E.2d 699, 705 (Ct. App. 2010) (emphasis in original). A plaintiff “cannot transform an unsupported proposition of law into a statement of fact” in order to avoid dismissal under Rule 12(b)(6). *Id.* To survive a Rule 12(b)(6) motion, “[f]actual allegations must be enough to raise a right to relief above the speculative level” and have “enough facts to state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545, 570 (2007).

ARGUMENT

I. Mattison’s Counterclaims should be dismissed because they violate the Covenant Not to Sue in the Severance Agreement signed by Mattison upon cessation of her employment with MPS.

The parties memorialized the terms of Mattison’s cessation of employment with MPS in a Severance Agreement. Section 5 of the Severance Agreement provides:

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.

Mattison does not allege that the Severance Agreement is invalid for any reason. In fact, Mattison admits in her Answer, Counterclaims, and Third-Party Complaint that the Severance Agreement is a valid and enforceable contract. (Third-Party Compl. ¶¶ 49, 61.)

The counterclaims asserted by Mattison violate the Severance Agreement's Covenant Not to Sue. Therefore, Mattison breached the terms of the Severance Agreement, which she admits is a valid and binding contract, by filing counterclaims against MPS 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.

In accordance with the Severance Agreement's Covenant Not to Sue, Mattison's counterclaims against MPS should be dismissed. Pursuant to the terms of the Severance Agreement, MPS respectfully requests an award of reasonable costs and attorneys' fees incurred in defending against such breach of contract.

II. Mattison's claims against MPS were released in the Severance Agreement.

The Severance Agreement contains a general release of claims, whereby 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, her separation of employment, and any conduct by MPS, including all of MPS's officers and employees, occurring on or before December 5, 2018, the date of the Severance Agreement. (*See* Severance Agreement, § 4.)

The counterclaims asserted by Mattison were all released in the Severance Agreement, as they directly relate to Mattison's separation of employment and alleged wrongful conduct of MPS. The Severance Agreement resolved all of Mattison's claims against MPS except for the valuation

of her membership units. For this additional reason, Mattison's counterclaims should be dismissed.

III. Mattison's derivative claim does not meet the heightened pleading requirements of Rule 23(b)(1) of the South Carolina Rules of Civil Procedure.

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), SCRCP, which is mirrored after the corresponding federal rule, "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 Practice* ¶ 23.1.02[4] (3d ed. 2000) (citing *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 530 (1984)). These 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.* Rule 23 departs from the liberal pleading requirements of Rule 8, and requires particularized allegations. *Id.* at 188, 539 S.E.2d at 409. A derivative action that does not meet the pleading requirements of Rule 23 must be dismissed pursuant to Rule 12(b)(6). *Clearwater Tr. v. Bunting*, 367 S.C. 340, 351, 626 S.E.2d 334, 339 (2006) ("A derivative action that does not meet the pleading requirements of Rule 23(b)(1), SCRCP, is properly dismissed pursuant to Rule 12(b)(6).").

A. Mattison has not made a demand on MPS, and she has failed to assert a valid reason for failure to make a demand.

Rule 23(b)(1) of the South Carolina Rules of Civil Procedure provides:

The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort.

“The demand requirement of Rule 23 balances a shareholder’s right to assert a derivative claim against a board’s duty to decide whether to invest the resources of the corporation in pursuit of the shareholder’s claim of a corporate wrong.” *Whittle*, 343 S.C. at 187, 539 S.E.2d at 408. Thus, “the shareholder must either make a demand or plead with particularity the exceptional circumstances that demonstrate why a demand would be futile, i.e., why the Board of Directors should not be allowed to decide whether to institute litigation.” *Id.* at 188, 539 S.E.2d at 409 (internal citations omitted). 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.* (quoting *Latimer v. Richmond & D.R. Co.*, 39 S.C. 44, 52-53, 17 S.E. 258, 261 (1893)).

A review of the allegations in Mattison’s Third-Party Complaint clearly shows that she fails to meeting the pleading requirements of Rule 23 in multiple respects. First, Mattison failed to allege with sufficient particularity a pre-suit demand to the board of directors of MPS. Second, Mattison failed to allege a proper basis to excuse compliance with the demand requirement.

1. Mattison failed to make a pre-suit demand.

“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.” *Whittle*,

343 S.C. at 189, 539 S.E.2d at 409 (internal citations omitted). “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. Mattison’s Third-Party Complaint does not set forth particularized allegations of the efforts made to demand that the board or management committee take the action that she now seeks to compel.

Mattison’s Third-Party Complaint contains only one paragraph on the demand requirement. (See Third-Party Compl. ¶ 105.) Mattison states that “[o]n January 14, 2019, Mattison’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.” (*Id.*) This allegation does not state with sufficient particularity that a pre-suit demand was made on the board of directors of MPS. Counsel for Mattison “suggesting” to counsel for MPS that the firm should take action against its managing members for breach of fiduciary duty does not meet the heightened pleading requirements of Rule 23(b)(1). Mattison’s allegation fails to support an earnest, and not a simulated, effort with the managing body of MPS to induce the remedial action she now seeks. Therefore, Mattison’s Third-Party Complaint should be dismissed.

Furthermore, this January 14, 2019 letter does not constitute a valid demand. The letter was sent to counsel for MPS during negotiations regarding Mattison’s dissociation from the firm. The January 14, 2019 letter threatened that if the parties were unable to resolve the valuation of Mattison’s membership units, then Mattison would file a derivative action against the members of the management committee of MPS. Mattison does not allege that she ever sent a demand directly to the management committee. Clearly, a veiled threat in correspondence between counsel for the

parties regarding a matter unrelated to any alleged breaches of fiduciary duty does not meet the pleading requirements of Rule 23(b)(1).

2. Mattison failed to allege that a demand would be futile.

Mattison also fails to allege a proper basis to excuse compliance with the demand requirement. She states in a conclusory fashion that “the managing members of MPS are not likely to authorize the commencement of legal action by Plaintiff against themselves individually.” (Third-Party Compl. ¶ 105.) The argument that demand is futile because the majority of the board members are named as defendants and cannot be expected to sue themselves has been uniformly rejected by the South Carolina Court of Appeals and numerous courts across the country. *Whittle*, 343 S.C. at 194-95, 539 S.E.2d at 412 (citing *Lewis v. Graves*, 701 F.2d 245, 248-49 (2d Cir. 1983); *Lewis v. Curtis*, 671 F.2d 779, 785 (3d Cir. 1982); *Heit v. Baird*, 567 F.2d 1157, 1162 (1st Cir. 1977); *Kaufman v. Kansas Gas & Elec. Co.*, 634 F. Supp. 1573, 1580 (D. Kan. 1986); *Allison ex rel. Gen. Motors Corp. v. Gen. Motors Corp.*, 604 F. Supp. 1106, 1114-15 (D. Del. 1985)). The Court in *Kaufman* stated that “[t]his argument lacks logic. If the Court were to accept it, derivative plaintiffs could readily circumvent [Rule 23’s] demand requirements simply by naming all directors in the complaint.” 634 F. Supp. at 1580.

3. Carolina First Corp. v. Whittle.

The Court of Appeals’ decision in *Carolina First Corp. v. Whittle*, 343 S.C. 176, 539 S.E.2d 402 (Ct. App. 2000), is particularly helpful in analyzing whether Mattison’s Third-Party Complaint meets the demand requirements of Rule 23(b)(1). In *Whittle*, a group of shareholders brought a derivative suit against a bank’s parent corporation seeking rescission of bonuses paid to various bank officers in the form of stock in another company. 343 S.C. at 181, 539 S.E.2d at 405. The shareholders alleged the bonuses were devised as a method of self-dealing to the detriment of

the bank and its parent corporation. *Id.* at 182, 539 S.E.2d at 406. The circuit court granted the bank and other defendants’ motion to dismiss the action, finding the shareholders failed to allege particularized facts showing they complied with the demand requirements of Rule 23(b)(1) and the demand thereafter was wrongfully refused. *Id.* at 183, 539 S.E.2d at 406. In their complaint, the shareholders alleged they demanded “certain information” and “certain actions” and made a “supplemental demand.” *Id.* at 189, 539 S.E.2d at 409. Because the complaint did not contain allegations regarding precisely what the shareholders demanded and what the bank’s board of directors rejected, the court held the shareholders failed to comply with the demand requirements of Rule 23(b)(1) and affirmed the circuit court’s dismissal of the action. *Id.*

Mattison’s allegations are similarly deficient. Like the allegations deemed insufficient in *Whittle*, Mattison’s allegation that her attorney sent a letter to MPS’s counsel “suggesting” that MPS take action against its managing members, and that “[i]n any event, the managing members of MPS are not likely to authorize the commencement of legal action by [Mattison] against themselves individually,” is vague and fails to allege with particularity that the demand identified the alleged wrongdoers, described the factual basis of the wrongful acts and the harm caused to the corporation, and what specific remedial relief was requested. Because Mattison fails to satisfy the demand requirements of Rule 23(b)(1), her claims must be dismissed.

B. Mattison does not fairly and adequately represent the interests of MPS’s other members who are similarly situated.

In addition to the demand requirements, Rule 23(b)(1) of the South Carolina Rules of Civil Procedure also provides 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.” “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).

Here, Mattison is an inadequate representative of the members of MPS because she is the only member that is an ex-employee of the firm; all other members are currently employed by MPS. Therefore, the outcome that Mattison is trying to achieve in bringing this derivative action runs counter to what the current employee-members view to be in the best interest of the company.

Moreover, Mattison cannot adequately represent the members of MPS because she seeks to undo actions which were voted on and approved by a vast majority of the members, if not all of the other members. For example, Mattison seeks a declaration from the Court that the September 30, 2015 Operating Agreement is invalid. However, all other members of MPS approved the amendment to the Operating Agreement and have been acting pursuant to the provisions of this Operating Agreement for over three years.

Mattison does not adequately represent the other members of MPS due to her adverse interests and objectives in bringing this derivative action. Therefore, Mattison’s Third-Party Complaint should be dismissed because she does not fairly and adequately represent the interests of the members similarly situated in enforcing the right of the company.

CONCLUSION

Mattison’s Counterclaims should be dismissed because they are brought in violation of the Severance Agreement signed by Mattison upon termination of her employment with MPS. In addition, Mattison’s claims against MPS were released in the Severance Agreement.

Furthermore, Mattison’s derivative claim fails to meet the heightened pleading requirements of Rule 23(b)(1), SCRCp, because she did not make a demand upon the company

prior to bringing this action or assert a valid reason for failing to make a demand, and she does not fairly and adequately represent the interests of the members who are similarly situated in enforcing the right of the company.

For these reasons, MPS respectfully requests that the Court dismiss Mattison's Counterclaims and Third-Party Complaint.

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Greenville, South Carolina
April 1, 2019

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

McMillan Pazdan Smith, LLC,) Civil Action No. 2019-CP-23-00998
))
Plaintiff-Counterclaim Defendant,)
))
vs.)
))
Donza H. Mattison,)
))
Defendant-Counterclaimant.)

MOTION TO DISMISS
DEFENDANT'S AMENDED
THIRD-PARTY COMPLAINT

Donza H. Mattison, in a Derivative
Capacity on Behalf of McMillan Pazdan
Smith, LLC,)
))
Third-Party Plaintiff,)
))
vs.)
))
Rondald G. Smith, Joseph M. Pazdan,)
Brad B. Smith, and Chad C. Cousins,)
))
Third-Party Defendants.)
_____)

Ron G. Smith, Joseph M. Pazdan, Brad B. Smith, and Chad C. Cousins hereby move this Court, pursuant to Rule 12 of the South Carolina Rules of Civil Procedure, for an Order dismissing the Amended Third-Party Complaint of Defendant Donza H. Mattison ("Mattison"). The Court should grant this Motion to Dismiss based upon the following grounds:

- (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 interests of MPS's other members who are similarly situated.

This Motion is based on the Defendant's Amended Third-Party Complaint, a Memorandum of Law to be filed with this Court, and applicable common and statutory laws.

Pursuant to the Court's July 2, 2019 Memorandum Opinion and Order, Mattison was granted leave to amend her Third-Party Complaint only. Therefore, MPS is not required to file a response to the allegations contained in Mattison's Amended Answer, Counterclaims, and Third-Party Complaint not relevant to the Third-Party Complaint. To the extent a response is required, MPS incorporates its previous Reply filed on April 1, 2019, and denies the additional allegations contained in this pleading.

WHEREFORE, the Third-Party Defendants respectfully request that the Court issue an Order dismissing Defendant's Amended Third-Party Complaint with prejudice.

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Greenville, South Carolina
August 7, 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-23-00998
	)	
Plaintiff-Counterclaim Defendant,	)	
	)	
vs.	)	
	)	
Donza H. Mattison,	)	
	)	
Defendant-Counterclaimant.	)	<u>MEMORANDUM IN SUPPORT OF</u>
	)	<u>MOTION TO DISMISS</u>
	)	<u>DEFENDANT'S AMENDED</u>
	)	<u>THIRD-PARTY 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.	)	
	)	

Ron G. Smith, Joseph M. Pazdan, Brad B. Smith, and Chad C. Cousins hereby submit this Memorandum in Support of their Motion to Dismiss the Amended Third-Party Complaint of Defendant Donza H. Mattison (“Mattison”) pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. The Court should grant this Motion to Dismiss based upon the following grounds:

- (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; and

(4) Mattison does not fairly and adequately represent the interests of MPS's other members who are similarly situated.

BACKGROUND

MPS is a regional, studio-based architecture, planning, and interior design firm with offices in South Carolina, North Carolina, and Georgia. (Compl. ¶¶ 5-6.) Mattison is a former employee and member of MPS, and worked as an architect in MPS's Spartanburg, South Carolina office. (*Id.* at ¶ 7; Am. Third-Party Compl. ¶ 44.) Mattison's employment with MPS officially ended on February 12, 2018, although she was on FMLA leave from November 20, 2017 until February 12, 2018. (Compl. ¶ 8; Am. Third-Party Compl. ¶¶ 49, 52.)

The parties memorialized Mattison's cessation of employment in a Severance Agreement and General Release ("Severance Agreement") dated December 5, 2017. (Compl. ¶ 9; Am. Third-Party Compl. ¶ 49.) 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. (Compl. ¶ 11.) The Severance Agreement provided that the parties would agree on the value of Mattison's 2,035.34 membership units in early 2018, following the close of fiscal year 2017, in accordance with MPS's September 30, 2015 Operating Agreement ("Operating Agreement"). (*Id.* at ¶¶ 12-13.)

MPS's Operating Agreement provides that a properly dissociating member will be paid "Fair Market Value" for their membership interest. (*Id.* at ¶ 15.) Fair Market Value is determined by the Management Committee, which has the power and authority to determine the per unit price of any membership interest on an annual basis. (*Id.* at ¶¶ 16-17.) For the last five years, MPS has retained HDH Advisors LLC ("HDH") to provide an annual business appraisal. (*Id.* at ¶ 18.) 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 at this amount. (*Id.* at ¶ 20; Am. Third-Party Compl. ¶ 56.) Mattison, however, contested this valuation and demanded a much higher per unit price. (Compl. ¶ 21; Am. Third-Party Compl. ¶ 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; Mattison's membership units are to be valued in accordance with the terms of the Operating Agreement; MPS followed the Operating Agreement's provisions regarding the annual valuation of the company; 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; and Mattison does not have the right to contest the 2017 valuation. (Compl. ¶ 25.)

Mattison filed an Answer, Counterclaims, and Third-Party Complaint on March 4, 2019. (*See* Third-Party Compl.) 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. (*Id.*) 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.*)

MPS and the Third-Party Defendants filed a Motion to Dismiss Mattison's Counterclaims and Third-Party Complaint on April 1, 2019. A hearing was held before the Honorable R. Lawton McIntosh on May 16, 2019. By Form 4 Order dated June 14, 2019, the Court denied MPS's Motion to Dismiss Defendant's counterclaims. The Court granted the Motion to Dismiss Defendant's Third-Party Complaint without prejudice, and allowed Mattison thirty (30) days from

the date of the Formal Order to amend her pre-suit demand and the derivative cause of action only. A Memorandum Opinion and Order followed on July 2, 2019.

Mattison filed an Amended Third-Party Complaint on July 30, 2019. Mattison asserts that Ron Smith, Joseph Pazdan, Brad Smith, and Chad Cousins breached their fiduciary duties to MPS by receiving excessive compensation, bonuses, and fringe benefits for themselves and their spouses and/or family members. (*See, e.g.*, Am. Third-Party Compl. ¶ 100.)

STANDARD OF REVIEW

Under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, “[a] claim may be dismissed when the defendant demonstrates that the plaintiff has failed to allege facts sufficient to establish a cause of action.” *Disabato v. South Carolina Ass’n of School Adm’rs*, 404 S.C. 433, 441, 746 S.E.2d 329, 333 (2013). “A ruling on a motion to dismiss pursuant to Rule 12(b)(6) must be based solely on the factual allegations set forth in the complaint, and the court must consider all well-pled allegations as true.” *Id.* (citing *Gressette v. S.C. Elec. & Gas Co.*, 370 S.C. 377, 378–79, 635 S.E.2d 538, 538 (2006)). However, “on a 12(b)(6) motion, the court is required to presume all well pled *facts*, not propositions of law, to be true.” *HHHunt Corp. v. Town of Lexington*, 389 S.C. 623, 635, 699 S.E.2d 699, 705 (Ct. App. 2010) (emphasis in original). A plaintiff “cannot transform an unsupported proposition of law into a statement of fact” in order to avoid dismissal under Rule 12(b)(6). *Id.*

ARGUMENT

I. Mattison’s derivative claim does not meet the heightened pleading requirements of Rule 23(b)(1) of the South Carolina Rules of Civil Procedure.

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), SCRC, “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)). These 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.* Rule 23 departs from the liberal pleading requirements of Rule 8, and requires particularized allegations. *Id.* at 188, 539 S.E.2d at 409. A derivative action that does not meet the pleading requirements of Rule 23 must be dismissed pursuant to Rule 12(b)(6). *Clearwater Tr. v. Bunting*, 367 S.C. 340, 351, 626 S.E.2d 334, 339 (2006) (“A derivative action that does not meet the pleading requirements of Rule 23(b)(1), SCRCPP, is properly dismissed pursuant to Rule 12(b)(6).”).

A. Mattison has not made a valid pre-suit demand on MPS.

Rule 23(b)(1) of the South Carolina Rules of Civil Procedure provides:

The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort.

“The demand requirement of Rule 23 balances a shareholder’s right to assert a derivative claim against a board’s duty to decide whether to invest the resources of the corporation in pursuit of the shareholder’s claim of a corporate wrong.” *Whittle*, 343 S.C. at 187, 539 S.E.2d at 408. Thus, “the shareholder must either make a demand or plead with particularity the exceptional

circumstances that demonstrate why a demand would be futile, i.e., why the Board of Directors should not be allowed to decide whether to institute litigation.” *Id.* at 188, 539 S.E.2d at 409 (internal citations omitted). 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.* (quoting *Latimer v. Richmond & D.R. Co.*, 39 S.C. 44, 52-53, 17 S.E. 258, 261 (1893)).

“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.” *Id.* at 189, 539 S.E.2d at 409 (internal citations omitted). “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.

Mattison filed a derivate action against the Third-Party Defendants on March 4, 2019. Therefore, in order to satisfy the demand requirement of Rule 23(b)(1), Mattison must set forth particularized allegations of efforts made before March 4, 2019 to demand that the management committee of MPS take the actions she now seeks to compel. Mattison’s Amended Third-Party Complaint alleges that she made two demands upon the management committee: (1) in a letter dated January 14, 2019 from her counsel to counsel for MPS; and (2) in a letter dated June 18, 2019 to Ron Smith, Joseph Pazdan, and Brad Smith. For the reasons set forth below, these letters do not meet the demand requirement of Rule 23(b)(1).

1. The January 14, 2019 letter does not constitute a valid pre-suit demand.

Mattison’s Amended Third-Party Complaint contains only one allegation regarding a demand made upon MPS prior to the filing of her derivative action on March 4, 2019. The Amended Third-Party Complaint states that “[o]n 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." (Am. Third-Party Compl. ¶ 116.) Mattison makes no particularized allegations about the demand's identification of the alleged wrongdoers or the relief she requested in the January 14, 2019 letter. In fact, Mattison did not attach this letter to the Amended Third-Party Complaint.

As previously explained to the Court at the May 16, 2019 hearing on MPS's Motion to Dismiss, this January 14, 2019 letter was sent to counsel for MPS during negotiations regarding Mattison's dissociation from the firm. The January 14, 2019 letter threatened that if the parties were unable to resolve the valuation of Mattison's membership units, then Mattison would file a derivative action against the members of the management committee of MPS. Mattison does not allege that she sent this demand directly to the management committee. Nor does she allege that she requested specific remedial relief for the firm to take. Clearly, a veiled threat in correspondence between counsel for the parties regarding a matter unrelated to any alleged breaches of fiduciary duty does not meet the pleading requirement of Rule 23(b)(1).

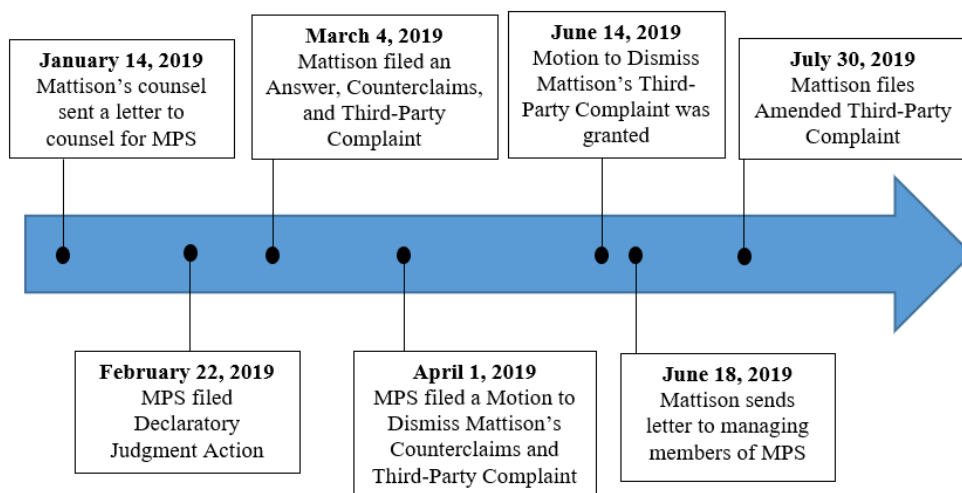
Mattison's single allegation regarding the January 14, 2019 letter fails to support an earnest, and not a simulated, effort with the managing body of MPS to induce the remedial action she now seeks in her Amended Third-Party Complaint.

2. Mattison's letter dated June 18, 2019 is an invalid post-suit demand.

This Court previously dismissed Mattison's Third-Party Complaint without prejudice, and allowed Mattison the opportunity to amend allegations regarding her pre-suit demand and her derivative cause of action only. As opposed to amending her Third-Party Complaint to contain more particularized allegations regarding her pre-suit demand—namely, the January 14, 2019 letter that Mattison asserted was a valid pre-suit demand—Mattison attempted to remedy the

failures in her Third-Party Complaint by sending a post-suit demand letter to Ron Smith, Joseph Pazdan, and Brad Smith. Mattison's attempt to make a post-suit demand on MPS after her derivative claim was dismissed without prejudice fails to meet the strict demand requirement of Rule 23(b)(1).

As an initial practical matter, the entire purpose of Rule 23(b)(1)'s demand requirement is to ensure that the board of directors or governing body of an organization is given the first opportunity to decide whether or not action should be taken against the company. A post-suit demand, by its very nature, cannot function as a pre-suit demand and must be ignored by the Court. As evidenced by the following timeline, Mattison's June 18, 2019 letter does not constitute a pre-suit demand:



The management committee of MPS was not given an opportunity to remedy the alleged wrongs that Mattison complains of before the derivative action was filed. Thus, permitting Mattison to make a post-suit demand would render the demand requirement meaningless and defeat the underlying policy considerations that the demand requirement is premised upon. Allowing Mattison leave to amend her derivative action to re-allege that she has in fact made a

sufficient pre-suit demand is one thing, but allowing her to make an entirely **new** demand upon the management committee in the interim and then allege that this new demand is sufficient goes against the underpinnings of Rule 23(b)(1).

In effect, the demand requirement “is analogous to the exhaustion of administrative remedies requirement in administrative law cases in that it requires the plaintiff to pursue all available avenues of extrajudicial remedies before filing suit.” *Smachlo v. Birkelo*, 576 F. Supp. 1439, 1443 (D. Del. 1983). “Therefore, the corporate management must be given the **first** opportunity to institute the litigation since, ‘[a]s a general principle, the responsibility for determining whether or not a corporation shall enforce in the courts a cause of action for damages is, like other business questions, ordinarily a matter of internal management left to the discretion of the directors.’” *Id.* (emphasis added) (citing *Landy v. Federal Deposit Ins. Co.*, 486 F.2d 139, 146 (3d Cir. 1973)). Due to this essential purpose of the demand requirement, “the failure to make a proper demand cannot be easily remedied by the Court granting the plaintiff leave to restart the process.” *Id.* at 1445. Demand after a complaint has been filed is impermissible since it would “reduce the demand requirement of the rule to a meaningless formality.” *Shlensky v. Dorsey*, 574 F.2d 131, 142 (3d Cir. 1978).

Case law is clear that a post-suit demand does not satisfy Rule 23’s demand requirement. For example, in *Grossman v. Johnson*, 674 F.2d 115 (1st Cir. 1982), the Court of Appeals analyzed whether a plaintiff’s post-litigation demand cured his failure to make one before beginning the action. The Court held that under Federal Rule of Civil Procedure 23.1, a demand must be made before the complaint is filed, and “there is no provision for thereafter remedying an omission in the same suit, especially after the defendants have moved to dismiss because of the absence of a

demand.” *Id.* at 125. Instead, “the role of demand is to alert the director ***before*** suit is instituted.” *Id.*

Similarly, in the more recent case of *In re Sapient Corp. Derivative Litigation*, 555 F. Supp. 2d 259 (D. Mass. 2008), the United States District Court for the District of Massachusetts found that the plaintiffs’ post-suit demand did not meet the pleading requirements of Rule 23.1. *Id.* at 263. The Court cited *Grossman v. Johnson*, and found that the plaintiffs’ mid-suit demand did not satisfy the Rule’s procedural prerequisite. *Id.* The Court held that “Plaintiffs cannot make the demand now to remedy their prior omission, especially because Defendants here seek dismissal based on Plaintiffs’ failure to make a pre-suit demand.” *Id.*

Mattison cannot make a post-suit demand in order to remedy her prior failure. While the Court allowed Mattison to amend her allegations regarding whether a pre-suit demand had in fact been made, the Court’s ruling did not permit Mattison to file a new, post-suit demand upon the management committee of MPS. Therefore, the June 18, 2019 letter does not meet the demand requirement of Rule 23(b)(1), and Mattison’s derivative action should be dismissed.

3. **Mattison has failed to assert a valid reason for failure to make a demand.**

Mattison also fails to allege a proper basis to excuse compliance with the demand requirement. She states in a conclusory fashion that “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.” (Am. Third-Party Compl. ¶ 119.)

The argument that demand is futile because the majority of the board members are named as defendants and cannot be expected to sue themselves has been uniformly rejected by the South Carolina Court of Appeals and numerous courts across the country. *Whittle*, 343 S.C. at 194-95,

539 S.E.2d at 412 (citing *Lewis v. Graves*, 701 F.2d 245, 248-49 (2d Cir. 1983); *Lewis v. Curtis*, 671 F.2d 779, 785 (3d Cir. 1982); *Heit v. Baird*, 567 F.2d 1157, 1162 (1st Cir. 1977); *Kaufman v. Kansas Gas & Elec. Co.*, 634 F. Supp. 1573, 1580 (D. Kan. 1986); *Allison ex rel. Gen. Motors Corp. v. Gen. Motors Corp.*, 604 F. Supp. 1106, 1114-15 (D. Del. 1985)). The Court in *Kaufman* stated that “[t]his argument lacks logic. If the Court were to accept it, derivative plaintiffs could readily circumvent [Rule 23’s] demand requirements simply by naming all directors in the complaint.” 634 F. Supp. at 1580.

The fact that the Third-Party Defendants are members of the executive committee and comprise the management committee of MPS does not excuse Mattison from complying with the demand requirement. Mattison has failed to sufficiently allege that making a demand upon the full executive committee of MPS would be futile. For this additional reason, Mattison’s Third-Party Complaint should be dismissed.

4. **Carolina First Corp. v. Whittle.**

The Court of Appeals’ decision in *Carolina First Corp. v. Whittle*, 343 S.C. 176, 539 S.E.2d 402 (Ct. App. 2000), is particularly helpful in analyzing whether Mattison’s Amended Third-Party Complaint meets the demand requirement of Rule 23(b)(1). In *Whittle*, a group of shareholders brought a derivative suit against a bank’s parent corporation seeking rescission of bonuses paid to various bank officers in the form of stock in another company. 343 S.C. at 181, 539 S.E.2d at 405. The shareholders alleged the bonuses were devised as a method of self-dealing to the detriment of the bank and its parent corporation. *Id.* at 182, 539 S.E.2d at 406. The circuit court granted the bank and other defendants’ motion to dismiss the action, finding the shareholders failed to allege particularized facts showing they complied with the demand requirement of Rule 23(b)(1) and the demand thereafter was wrongfully refused. *Id.* at 183, 539 S.E.2d at 406. In their

complaint, the shareholders alleged they demanded “certain information” and “certain actions.” *Id.* at 189, 539 S.E.2d at 409. However, because the complaint did not contain allegations regarding precisely what the shareholders demanded and what the bank’s board of directors rejected, the court held the shareholders failed to comply with the demand requirement of Rule 23(b)(1) and affirmed the circuit court’s dismissal of the action. *Id.*

Mattison’s allegations are similarly deficient. Like the allegations deemed insufficient in *Whittle*, Mattison’s allegations that her attorney sent a letter to MPS’s counsel demanding that MPS take action against its managing members, and that in any event, the managing members of MPS are not likely to authorize the commencement of legal action against themselves individually, are insufficient. These allegations are vague and fail to allege with particularity that the demand identified the alleged wrongdoers, described the factual basis of the wrongful acts and the harm caused to the corporation, and what specific remedial relief was requested. Therefore, MPS’s management committee did not have the opportunity to remedy the alleged wrongdoing, if any, before Mattison filed a derivative action. Mattison’s attempt to remedy this shortcoming by sending the June 18, 2019 letter to members of the management committee was improper, and such post-suit demand should not be considered by the Court. For these reasons, Mattison has failed to satisfy the demand requirement of Rule 23(b)(1), and her claims must be dismissed.

B. Mattison does not fairly and adequately represent the interests of MPS’s other members who are similarly situated.

In addition to the demand requirement, Rule 23(b)(1) of the South Carolina Rules of Civil Procedure also provides 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.”

The Third-Party Defendants reserve the right to argue that Mattison does not fairly and adequately represent the other members of MPS. However, based upon the Court's June 14, 2019 Order, the Third-Party Defendants understand that this issue has been held in abeyance for further discovery, if necessary.

CONCLUSION

Mattison's derivative claim fails to meet the heightened pleading requirements of Rule 23(b)(1), SCRCF, because she did not make a demand upon the company prior to bringing this action or assert a valid reason for failing to make a demand.

For the reasons stated herein, Ron Smith, Joseph Pazdan, Brad Smith, and Chad Cousins respectfully request that the Court dismiss Mattison's Amended Third-Party Complaint.

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Greenville, South Carolina
September 6, 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
	)	(Business Court–Judge McIntosh)
Plaintiff-Counterclaim	)	
Defendant,	)	
	)	
vs.	)	DEFENDANT’S MEMORANDUM OF
	)	LAW IN OPPOSITION TO
Donza H. Mattison,	)	MOTION TO 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.	)	
_____	)	

Defendant, Donza H. Mattison (hereinafter “Mattison”), by and through her undersigned counsel, hereby submits this Memorandum of Law in Opposition to Motion to Dismiss Defendant’s Amended Third-Party Complaint. For the reasons set forth herein, Third-Party Defendants’ Motion to Dismiss under Rule 12(b)(6), SCRCF, should be denied because Defendant has pleaded facts sufficient to state a viable claim for a derivative action on behalf of McMillan Pazdan Smith, LLC (hereinafter “MPS”) against Third-Party Defendants, who are the managing members and the Chief Operating Officer of the firm.

Pursuant to the Court's Memorandum Opinion and Order filed on July 2, 2019, Defendant filed her Amended Answer, Counterclaims, and Third-Party Complaint on July 30, 2019. As alleged in the amended pleading, the undersigned counsel sent a second demand letter to each of the three Managing Members of MPS on June 18, 2019. Copies of the three demand letters were attached to the Amended Answer as Exhibits B-D. The June 18 letters clearly and unequivocally demand 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 unmistakably convey 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 is undertaken to remedy the wrongful conduct alleged by Defendant. Defendant's Amended Third-Party Complaint pleads with sufficient particularity the pre-requisites to bringing the derivative claims, for purposes of satisfying Rule 23(b)(1), SCRCF 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 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). Third-Party Defendants cannot have any doubt about Defendant’s intentions, especially since some (if not all of them) had the benefit of being present for the Court’s arguments on May 16, 2019, on the first Motion to Dismiss Defendant’s Counterclaims and Third-Party Claims.

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, ill-gotten gains back to the firm. (Amended Answer, at 23-24, ¶ 119). Of course, the undersigned counsel for Defendant has not received any response to the demand letter of June 18, 2019, which conveyed a deadline of July 18, 2019; nor has Defendant’s counsel been made aware of any such action on behalf of MPS to remedy this situation against Third-Party Defendants to date.

As the Court is well aware, on a motion to dismiss under Rule 12(b)(6), SCRCP, all of the allegations in the challenged pleading must be accepted as true, and any inferences from those facts must be taken in the light most favorable to the non-moving party—here, Defendant. Dawkins v. Union Hosp. Dist., 408 S.C. 171, 176, 758 S.E.2d 501, 503 (2014). The Court’s review is limited solely to the allegations set forth in the challenged pleading, or else the motion to dismiss must be converted to a motion for summary judgment, which is generally not ripe until after a reasonable

time for discovery is allowed.. Id.; Rule 12(b)(6), SCRCPP.

Third-Party Defendants raise the same four attacks to Defendant's derivative claims that they raised in their previous motion: (1) that Ms. Mattison's derivative claims should be dismissed for failing to meet the heightened pleading requirement of Rule 23(b)(1), SCRCPP; (2) that Ms. Mattison has not made a valid pre-suit demand on MPS as a prerequisite to a derivative claim; (3) that Ms. Mattison has not sufficiently alleged futility of a pre-suit demand; and (4) that Ms. Mattison would not be a fair and adequate representative of the interests of the other members in enforcing the rights of the LLC.

Third-Party Defendants' Motion primarily rests on the fictional premise that neither they nor MPS have received sufficient notice of the nature of Ms. Mattison's complaints of self-dealing and breaches of fiduciary duty by the managing members of the firm, to give the firm the first opportunity to remedy this situation on its own. The purpose of the heightened pleading requirement of Rule 23(b)(1) is to provide sufficient notice to a party of the identity of the alleged wrongdoers, of the facts underlying the alleged wrong-doing, and of the harm to the corporation as a whole, so the entity itself has a chance to take action on its own behalf before a shareholder/owner seeks to file a derivative action for the entity. See Carolina First Corp. v. Whittle, 343 S.C. 176, 189, 539 S.E.2d 404, 408 (Ct. App. 2000).

Third-Party Defendants continue to assert that Ms. Mattison has not made sufficiently detailed allegations of a valid, pre-suit demand. If the original January 14, 2019 letter from the undersigned counsel for Ms. Mattison to MPS's counsel of record, Tom Keim, was not sufficient notice under Rule 23(b)(1) and S.C. Code Ann. § 33-44-1101 et seq., there can be no doubt that the June 18, 2019 letter cleared up any confusion and cured any defects identified in the Court's previous

order. The June 18 letter satisfied the Whittle standard for a pre-suit demand in a derivative action: it clearly identified the wrongdoers (the three managing members and the COO, who form the MPS management committee); it laid out the factual basis of the alleged wrongdoing (payment of excessive compensation, bonuses, fringe benefits, and related-party lease transactions and the concealment of the records from the other members); it specified the harm to the company as a whole (breach of fiduciary duty); and it requested specific relief (recoupment of the payments the managing members authorized to themselves through self-dealing). The June 18 letters were addressed to each of MPS's managing members, with copies to their counsel.

Third-Party Defendants now argue that the June 18 letters cannot be considered a “pre-suit” demand because the lawsuit had already been commenced at the time those letters were written. According to Third-Party Defendants, the Court should only consider the sufficiency of the initial letter of January 14, 2019, because the June 18 letters would be a “post-suit” or “mid-suit” demand, which they contend is not permissible. Third-Party Defendants’ arguments are specious and disregard the Court’s Order of July 2, 2019, which specifically stated, “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.” Order, at 2, 9 (first emphasis added). The Court’s Form 4 Order of June 14, 2019, similarly provides, “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.” Form 4 Order, at 1.

Third-Party Defendants’ arguments are based on a tortured reading of the Court’s Order, which they seem to interpret to mean that Defendant is stuck with her January 14, 2019 letter and could only amend the description of that letter in her derivative action to attempt to satisfy the

heightened pleading standard of Rule 23(b)(1), SCRCPP. Clearly, by dismissing the original Third-Party Complaint without prejudice and allowing Defendant to amend her Third-Party Complaint, the Court was permitting Defendant to start the derivative action process anew. This practice comports with the South Carolina Supreme Court's recent directive in Skydive Myrtle Beach, Inc. v. Horry County, 426 S.C. 175, 198, 826 S.E.2d 585, 592 (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."). The principle theme of the Skydive Myrtle Beach case has been recognized by other courts in the context of derivative actions. See McKane Family Limited Partnership v. Sacajawea Family Limited Partnership, 211 So. 3d 117, 121 (Fla. D. Ct. App. 2017) ("We find that . . . a party's failure to comply with a statute's pleading requirement that a pre-suit demand was made is not necessarily fatal and that the demand may be made post-suit and alleged in an amended complaint.").

Significantly, in Patterson v. Witter, 425 S.C. 213, 821 S.E.2d 677 (2018), the South Carolina Supreme Court approved a demand letter in a derivative action under Rule 23(b)(1), SCRCPP involving a self-insured workers' compensation, even though the demand was sent after the hearing on defendants' motion to dismiss, but before the circuit court issued a formal order dismissing the case without prejudice. The Patterson court held that the post-complaint demand letter satisfied Rule 23(b)(1)'s pleading requirements and the court of appeals's standard in 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 a dismissal without prejudice is analogous to what occurred here.

Third-Party Defendants’ citations to federal cases from federal courts in the First Circuit, Third Circuit, and the Districts of Massachusetts and Delaware, some of which are more than 35 or 40 years old, are not particularly persuasive of a case under the South Carolina Rules of Civil Procedure and the South Carolina Uniform Limited Liability Company Act of 1996.

Furthermore, Third-Party Defendants’ assertion that “MPS’s management committee did not have the opportunity to remedy the alleged wrongdoing, if any, before Mattison filed a derivative action,” (Motion to Dismiss, at 12), is disingenuous. Defendant’s Amended Third-Party Complaint contains approximately 15 additional paragraphs of detailed allegations of Third-Party Defendants’ breaches of fiduciary duty and violations of MPS’s Operating Agreement. A draft of the Amended Answer, Counterclaims, and Third-Party Complaint was actually provided to counsel for Plaintiff and Third-Party Defendants by email on July 26, 2019, in connection with Defendant’s counsel’s stated intention to file the document under seal. The Amended Answer, Counterclaims, and Third-Party Complaint was filed the following week on July 30, 2019. Third-Party Defendants had six weeks from the date of the second demand letter on June 18, 2019, until the filing of the Amended Answer, Counterclaims, and Third-Party Complaint, during which they had ample time to address Ms. Mattison’s concerns. Indeed, as of the date of the hearing on this motion, they will have had 12 weeks to undertake some type of remedial action, which is clearly not forthcoming.

Paragraph 119 of the Amended Answer again alternatively alleges that a pre-suit demand for MPS to sue its managing members would be a futile act because those in charge of the company would most certainly not decide to sue themselves individually. In addition, Defendant has pointed

out that the fact that Third-Party Defendants have taken affirmative steps to conceal the full financial picture of the firm from the minority shareholders strongly suggests that those in charge of managing the affairs of the firm have not been forthcoming with the minority members. Even if the Court were to reject the efficacy of the June 18, 2019 demand letter, Defendant's Third-Party Complaint presents a compelling case of demand futility.

As discussed previously in Defendant's initial brief in opposition to the first Motion to Dismiss and by Defendant's counsel during the oral argument on that motion, the case of Carolina First Corp. v. Whittle, 343 S.C. 176, 539 S.E.2d 402 (Ct. App. 2000), does not support Third-Party Defendants' Motion to Dismiss the derivative action here. A derivative action involving a large, publicly traded company is very different than what is at issue here. Third-Party Defendants' citation to S.C. Code Ann. § 33-8-101, which is part of the South Carolina Business Corporation Act of 1988, has no applicability to this case. Ms. Mattison's derivative claim is governed by the Uniform Limited Liability Company Act of 1996, and specifically S.C. Code Ann. § 33-44-1101 et seq.

Finally, with regard to the issue of whether Defendant could fairly and adequately represent the interests of the Plaintiff company and the minority shareholders, the Court has properly determined that this matter must be addressed only after an opportunity for discovery. Third-Party Defendants have acknowledged the Court's ruling in this regard and have reserved their arguments for later proceedings. Nevertheless, Defendant would like to make three points on this issue: (1) as expressly alleged in Defendant's Amended Third-Party Complaint, Defendant is uniquely situated to raise the issues of the managing members' self-dealing and breaches of fiduciary duty, because she is no longer subject to losing her job through potential retaliation by the managing members, since she is no longer employed by MPS; (2) the arguments raised by counsel for Plaintiff and Third-

Party Defendants during the previous hearing strayed beyond the allegations in the challenged pleadings and cannot be considered on a motion to dismiss under Rule 12(b)(6), SCRCPP; and (3) in the Patterson case cited above, the South Carolina Supreme Court expressly recognized that “Direct and derivative claims may be brought simultaneously.” 425 S.C. at 232, 821 S.E.2d at 688.

For all of the foregoing reasons, Third-Party Defendants’ Motion to Dismiss the Amended Third-Party Complaint should be denied.

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

September 8, 2019

Greenville, SC.

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	)	(Business Court Program–Judge McIntosh)
Defendant,	)	
	)	
vs.	)	DEFENDANT’S RENEWED MOTION
	)	FOR DISQUALIFICATION OF
Donza H. Mattison,	)	PLAINTIFF’S COUNSEL
	)	
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, hereby files this Renewed Motion for Disqualification of Plaintiff’s Counsel pursuant to Rules 1.7(a) and 1.13 of the South Carolina Rules of Professional Conduct, SCRCP 407, Rules 1.7(a), 1.13. The grounds for this motion are that attorneys from the law firms of Nelson Mullins Riley & Scarborough, LLP and Ford Harrison should be precluded from representing both Plaintiff, McMillan Pazdan Smith, LLC (hereinafter “MPS”), and the individual Third-Party Defendants, Rondald G. Smith, Joseph M. Pazdan, Brad B. Smith, and Chad C. Cousins, simultaneously in this action because there is an inherent, concurrent conflict of interest in connection with Defendant’s counterclaims and derivative

action. Defendant's Amended Answer, Counterclaims, and Third-Party Complaint raises serious allegations of breaches of fiduciary duties by the individual Third-Party Defendants, which, if established, would reflect an intractable conflict of interest between Plaintiff company and its individual managing members and chief operating officer.

Defendant, as a current member of the Plaintiff LLC, has standing to raise the conflict of interest and does not consent to the continued representation of Plaintiff and the individual Third-Party Defendants by the same law firms; nor does Defendant believe that appropriate, informed consent has been provided by all disinterested members of Plaintiff to the dual representation of the company and the individuals at issue in Defendant's counterclaims and Third-Party Claims by the same law firms. The Written Consent to Joint Representation previously provided by Plaintiff's counsel was dated April 30, 2019, approximately one week before the hearing on Plaintiff's and Third-Party Defendants' first Motion to Dismiss directed at Defendant's Counterclaims and Third-Party Complaint asserting a derivative action on behalf of the company against the managing members and COO individually. Now that the Court has ruled that Defendant's Third-Party Complaint survived Third-Party Defendants' Motion to Dismiss and has allowed that claim to proceed in a derivative capacity, the conflict of interest between MPS and its managing members and officer has become ripe.

In addition, Defendant suggests that no financial resources of MPS should be used to provide counsel to the individual Third-Party Defendants or otherwise to defend them from Defendant's allegations in this case.

Defendant respectfully requests that the Court disqualify Plaintiff's current counsel of record from continuing to represent MPS in this matter and that the Court directs a committee of non-

managerial, minority members of MPS to select independent counsel to represent the Company's interests in this matter. Defendant would not object to the attorneys from Nelson Mullins and Ford Harrison from continuing to represent the individual, Third-Party Defendants in this case, because those attorneys' representation thus far appears to have been more aligned with the individual interests of the individual Third-Party Defendants..

Defendant's counsel will submit a memorandum of law supporting this motion prior to any hearing on the motion further articulating the legal and factual bases for this motion.

Pursuant to Rule 11(a), SCRCF, the undersigned counsel for Defendant hereby affirms that prior to filing this motion, he has communicated with opposing counsel in a good-faith effort to resolve the matter contained herein, but that no resolution was reached.

Respectfully submitted,

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

October 24, 2019

Greenville, SC.

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	)	(Business Court Program–Judge McIntosh)
Defendant,	)	
	)	
vs.	)	MEMORANDUM OF LAW IN
	)	SUPPORT OF DEFENDANT’S
Donza H. Mattison,	)	RENEWED MOTION FOR
	)	DISQUALIFICATION OF
Defendant-Counterclaimant.	)	PLAINTIFF’S COUNSEL
	)	
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

Defendant, Donza H. Mattison, by and through her undersigned counsel, hereby files this Memorandum of Law in Support of Defendant’s Renewed Motion for Disqualification of Plaintiff’s Counsel pursuant to Rules 1.7(a) and 1.13 of the South Carolina Rules of Professional Conduct, Rule 407, SCRAP, Rules 1.7(a), 1.13. This motion is supported by the Affidavit of Professor John P. Freeman, which is attached hereto as Exhibit A. Professor Freeman is a noted authority and expert witness in the areas of legal ethics and corporate law, including derivative actions. After carefully reciting the factual background of the case and the applicable legal authorities, Professor Freeman

concludes “that disqualification of [Plaintiff’s] counsel as counsel is warranted, and new counsel for MPS is called for.” (Freeman Aff, at 7, ¶ 15). For the reasons set forth in detail below, the law firms of Nelson Mullins Riley & Scarborough, LLP and Ford Harrison should be precluded from representing both Plaintiff, McMillan Pazdan Smith, LLC (hereinafter “MPS”), and the individual Third-Party Defendants, Rondald G. Smith, Joseph M. Pazdan, Brad B. Smith, and Chad C. Cousins, simultaneously in this action because there is an inherent, concurrent conflict of interest in connection with Defendant’s counterclaims and derivative action. Defendant does not object to those law firms continuing to represent the individual, Third-Party Defendants; however, independent counsel should be retained by MPS, selected by a committee of minority shareholders without the influence of the managing members and COO of the firm, whose actions are the subject of the derivative action.

II. Procedural History

As the Court will recall, Plaintiff commenced this action on February 22, 2019, seeking a declaratory judgment to force Defendant (Ms. Mattison) to sell her membership interest in MPS for a certain price based on a summary valuation performed by a third-party appraisal firm specifically hired by MPS. Defendant filed an Answer, Counterclaims, and Third-Party Complaint on March 4, 2019.

By Order dated July 2, 2019, the Court dismissed the Third-Party Complaint, without prejudice, based on arguments that Ms. Mattison failed to meet the pre-requisite under Rule 23(b)(1), SCRCF of making a pre-suit demand on the managers of the LLC before she filed her derivative claims. The Court allowed Defendant to amend both her pre-suit demand and the derivative claims against Third-Party Defendants.

On July 30, 2019, Defendant filed a Verified, Amended Answer, Counterclaims and Third-Party Complaint pleading with more specificity her derivative action on behalf of MPS against Third-Party Defendants, who are the Managing Members and COO of MPS. The derivative action raised in the Third-Party Complaint accuses the individual Third-Party Defendants of serious instances of self-dealing in breaching their fiduciary duties towards MPS and breaching the Operating Agreement of MPS by paying themselves substantially above-market compensation and bonuses, taking excessive benefits for themselves and their family members, and engaging in related-party transactions, all to the detriment of MPS and its minority shareholders. The Third-Party Complaint also accuses the individual, Third-Party Defendants of denying the minority members access to critical financial information in an effort to hide their self-dealing from the other members of MPS.

By Order of October 30, 2019, the Court denied Third-Party Defendants' Motion to Dismiss the Amended Third-Party Complaint, ruling that Mattison had sufficiently pleaded allegations of pre-suit demand to satisfy Rule 23(b)(1) and, alternatively, that she had made sufficient allegations of demand futility. The Court specifically ruled that "[t]he 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." (Order of Oct. 30, 2019, at 10).

On October 24, 2019, following receipt of the Court's Form 4 Order of October 10, 2019 denying Third-Party Defendants' Rule 12(b)(6) Motion to Dismiss the Third-Party Claims, Defendant filed her Renewed Motion for Disqualification of Plaintiff's Counsel. Defendant had filed a similar motion on April 26, 2019, but agreed to withdraw the motion until after the Court ruled on the motion to dismiss and in light of a Written Consent to Joint Representation that

Plaintiff's counsel produced, which was signed by all members of MPS except for Ms. Mattison. (A copy of the Consent form is attached hereto as Exhibit B). The Consent form, which was signed and dated April 30, 2019, before the first hearing on the motion to dismiss Defendant's Counterclaims and Third-Party Complaint, provides "While neither the LLC, the undersigned members, nor the Law Firms are aware of any existing or potential conflict of interest that would prohibit such joint representation at this time, the parties recognize and understand that such a conflict of interest could arise." (Exhibit B). Defendant is not aware of any subsequent purported waiver of any conflict of interest by the other members of MPS, although as discussed in detail below, the serious, concurrent conflict at issue here cannot be resolved by such a waiver as a matter of law.

III. Discussion

The current situation falls squarely within the comments to Rule 1.13 of the South Carolina Rules of Professional Conduct, which is entitled "Organization as Client." Comments 13 and 14 to Rule 1.13, under the heading "Derivative Actions," provide as follows:

Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. . . . Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over the management of the organization.

The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve this issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

Rule 407, SCACR, Rule 1.13, cmts. [13]-[14] (emphasis added).

Rule 1.7 contains the standards for conflicts of interests involving current clients. According to Rule 1.7(a), “A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.” Rule 407, SCACR, Rule 1.7(a). Subsection (b) of Rule 1.7 addresses the circumstances where concurrent conflict can be waived, if at all: “Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against the other client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.” Rule 407, SCACR, Rule 1.7(b). The use of the conjunction “and” in Rule 1.7(b) indicates that all four factors must be present before a lawyer can continue the representation.

As Professor Freeman explains in his Affidavit, a concurrent conflict of interest clearly exists in this case because of Ms. Mattison’s assertion of derivative claims on behalf of MPS against the four individuals who have managed the affairs of the LLC:

Because Mattison’s third-party claims asserting breach of fiduciary duty and breach of MPS’s operating agreement are being prosecuted derivatively, there is the prospect that, if Mattison prevails and damages are awarded, one set of counsel’s clients, Third-Party Defendants may have to pay damages, including possibly punitive damages, to MPS, simultaneously represented by the same counsel, i.e., Plaintiff’s Counsel, in the same case. This circumstance finds Plaintiff’s Counsel potentially representing both the aggrieved entity, in this case MPS, and the parties responsible

for causing injury to the entity, Third-Party Defendants.

(Freeman Aff., at 4, ¶ 8).

Defendant's counsel has not found any precedent under South Carolina law that has addressed the issue of attorney disqualification in the context of a shareholder derivative action. Indeed, there are very few reported cases in South Carolina on attorney disqualification at all. Numerous other jurisdictions have addressed this issue in depth in cases with similar circumstances as those presented here—where a minority shareholder or member in a small corporation brings a derivative action on behalf of the corporation alleging that those in charge of the corporation have engaged in conduct that is harmful to the corporation as a whole. Whether one lawyer can represent both the corporation and the individual defendants in such derivative claims depends largely on whether the individual defendants have been accused of wrong-doing such as fraud, self-dealing or breaches of fiduciary duty; or whether the individual defendants have merely been accused of negligent applications of business judgment.

One of the leading cases on this issue is Forrest v. Baeza, 68 Cal. Rptr. 857 (Cal. Ct. App. 1997). The Forrest case involved a dispute between three equal shareholders of two small corporations: a husband and wife and the wife's brother. Although the procedural history of the Forrest case is somewhat convoluted, the wife's brother brought derivative claims against the other two share-holders accusing them of breach of fiduciary duty, embezzlement, and tax fraud, after they attempted to oust him from the company. The issue in the reported decision was whether an attorney named McKim could simultaneously represent the corporations and the individual defendants in the lawsuits. In a very thorough opinion, the court in Forrest held that "Current case law clearly forbids dual representation of a corporation and the directors in a shareholder derivative suit, at least where,

as here, the directors are alleged to have committed fraud.” Id. at 863. The Forrest court cited at least five cases and two law-review articles in support of its holding.

In the more recent case of Ontiveros v. Constable, 199 Cal. Rptr.3d 836 (Ca. Ct. App. 2016), the court relied on the Forrest holding to disqualify an attorney from representing a corporation and the defendant majority shareholder in a derivative action brought by the minority shareholder. The Ontiveros court determined that a non-waivable, concurrent conflict of interest existed between the corporation and the majority shareholder, who was accused of fraud, among other claims. Id. at 845. The California Court of Appeals recognized that “Disqualification motions involve a conflict between the clients’ right to counsel of their choice and the need to maintain ethical standards of professional responsibility. The paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar. The important right to counsel of one’s choice must yield to ethical considerations that affect the fundamental principles of our judicial process.” Id. at 842-43 (quoting People ex rel. Dept. of Corrections v. Speedee Oil Change Systems, Inc., 980 P.2d 371 (Cal. 1999)). The Ontiveros court concluded that the plaintiff’s derivative claims rendered the interest of the corporation and the majority shareholder adverse such that the majority shareholder’s purported consent to the concurrent representation was ineffective. Id. at 846.

Other jurisdictions have reached similar results. In Morris v. Morris, 763 N.Y.S.2d 622 (Sup. Ct. App. Div 2003), the court ordered the disqualification of counsel from representing a shareholder father and a corporation in a derivative action brought by his son (also a shareholder of the corporation) to recover damages for misappropriation of corporate funds for personal use. The court held that “One who has served as an attorney for a corporation may not represent an individual

shareholder in a case where his interests are adverse to other shareholders.” Id. at 624-25 (quoting Matter of Greenberg, 614 N.Y.S.2d 825 (Sup. Ct. App. Div. 1994)).

In Bell Atlantic Corp. v. Bolger, 2 F.3d 1304 (3d. Cir. 1993), the Court quoted from a noted authority on corporate law on this issue: “[T]he modern view is that it is generally improper due to a conflict of interest for counsel to attempt to represent the corporation, on whose behalf the [derivative] action has been instituted, while also representing the individuals charged with harming the corporation by their wrongful conduct.” Id. at 1316 (quoting William M. Fletcher, Fletcher Cyclopaedia of the Law of Private Corporations, § 6025, at 442 (1991)). The Bolger court actually denied the motion to disqualify at issue in that case because the derivative claim alleged only mismanagement in violation of the duty of care, not “self-dealing, stealing, fraud, intentional misconduct, conflicts of interest, or usurpation of corporate opportunities by defendant directors.” Id. at 1316. The court stated that “We have no hesitation in holding that—except in patently frivolous cases—allegations of directors’ fraud, intentional misconduct, or self-dealing require separate counsel.” Id. at 1317. The Bolger court also noted that “in cases where the line is blurred between duties of care and loyalty, the better practice is to obtain separate counsel for individual and corporate defendants.” Id.

Professor Freeman’s expert opinion is that Ms. Mattison’s derivative claims “have color, are non-frivolous, and have been brought in good faith.” (Exhibit A, at 5, ¶ 11). He states that the Third-Party Defendants “have chosen to enrich themselves at MPS’s expense (and, derivatively, at Mattison’s expense) in ways that are deceptive, oppressive, and unfairly prejudicial to MPS and Mattison as a minority owner. Fiduciaries, such as persons who control closely held entities like MPS, violate such duties at their peril.” (Id. at 7, ¶ 13). Accordingly, he concludes that “It is simply

an intolerable conflict for a lawyer to simultaneously represent parties on both sides of a lawsuit where serious, nonfrivolous claims have been raised. Hence, I conclude that disqualification of MPS's counsel as counsel for MPS is warranted, and new counsel for MPS is called for." (Id. at 7, ¶ 15).

Third-Party Defendants' counsels' apparent strategy at this stage of the case is to attack Ms. Mattison's ability to "fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association" under Rule 23(b)(1), SCRCF. Third-Party Defendants' counsel have recently produced copies of unsworn, boiler-plate statements signed by the other members of MPS purporting to disclaim Ms. Mattison's allegations against Third-Party Defendants. This Court has already determined that Defendant's fairness and adequacy of representation of the interests of MPS in this derivative action should be decided only after a reasonable opportunity for discovery. With all due respect, the perfunctory and conclusory statements obtained by opposing counsel appear to raise more questions than they attempt to answer. (See Exhibit A, at 5, n.1). One of the members actually hand-wrote on his statement that he has only "verbally" been provided information about Ms. Mattison's allegations, which raises significant concerns of double or triple hearsay.

Third-Party Defendants should not be allowed, in effect, to convert Defendant's Motion for Disqualification of Counsel into a Motion for Summary Judgment on the derivative claims. The purported statements from MPS's members clearly do not meet the affidavit requirement of Rule 56(e), SCRCF. Moreover, as this Court has repeatedly recognized, Defendant must be afforded an opportunity to conduct discovery relating to this issue.

In any event, courts have consistently ruled that the issue of disqualification of counsel in a

derivative action should not address the merits of the underlying claims. In Natomas Gardens Investment Group, LLC v. Sinadinos, No. CIV. S-09-2308 FCD/KJM, 2009 WL 3055213 (E.D. Cal. Sept. 14, 2009), the court determined that “whether the interests of the parties [in a shareholder derivative suit] are adverse should be determined on the face of the complaint rather than through an examination of the underlying merits of the derivative action.” Id. at *5. The Sinadinos court relied heavily on the landmark case of Lewis v. Shaffer Stores Co., 218 F. Supp. 238 (S.D.N.Y. 1963), which specifically held, “The interests of the officer, director, and majority shareholder defendants in this action are clearly adverse, on the face of the complaint, to the interests of the stockholders [of the company] other than defendants. I have no doubt that [the conflicted firm] believe[s] that there is no merit to this action. Plaintiff, of course, vigorously contents to the contrary. The court cannot and should not attempt to pass on the merits at this stage.” Sinadinos, 2009 WL 3055213, at *5 (quoting Lewis, 218 F. Supp. at 239-40) (emphasis in original); see also Forrest v. Baeza, 67 Ca. Rptr. 2d 857, 863 (Cal. Ct. App. 1997) (also citing Lewis for the proposition that “the merits of the action (which will determine whether there is in fact adversity between the corporation and the directors in a derivative suit) should not be determined in the context of a motion to disqualify counsel.”); Cannon v. U.S. Acoustics Corp., 398 F. Supp. 209, 219 (N.D. Ill. 1975) (“The Lewis approach is the most advisable. On the face of plaintiffs’ complaint there is a conflict of interest. It is unwise to assess the merits of the case now.”), aff’d in part and rev’d in part, 532 F.2d 1118 (7th Cir. 1976). Defendant’s Amended Answer, Counterclaims, and Third-Party Complaint was verified by Defendant under oath. The facts as alleged by Ms. Mattison should govern this Motion to Disqualify Counsel.

Defendant does not object to the attorneys from Nelson Mullins and Ford Harrison

continuing to represent the individual Third-Party Defendants; however, MPS should retain new counsel, selected by an independent committee of minority shareholders without influence by the managing members of the firm or the COO. This approach actually appears to be the preferred remedy for situations such as this. In Forrest, the court stated, “in the precise circumstance of attorney disqualification in shareholder derivative litigation, which holds that while dual representation of a corporation and its directors is impermissible (at least if the directors are charged with fraud), the attorney who formerly represented both clients may continue to represent the individual ones.” 67 Cal. Rptr. 2d at 867. The court quoted from two law review articles from the Yale Law Journal and the Harvard Law Review, which recommended this result primarily because of the potential residual bias in favor of the individual defendants who likely hired the counsel in the first place. Id.

Finally, the legal defense of the individual, Third-Party Defendants should not further deplete the assets of the LLC, which Defendant’s Third-Party claims are attempting to preserve and maximize. During the limited discovery in the case thus far, Plaintiff has produced a copy of a liability policy that appears to provide coverage for independent counsel in a derivative action. Defendant is not merely trying to make the litigation more expensive for any party; in fact, Defendant’s goal is to make the defense of the derivative action the sole, personal responsibility of the individual Third-Party Defendants, not to use company assets to defend against their own self-dealing.

Defendant fully understands and acknowledges that a motion to disqualify counsel is a weighty matter that should not be undertaken without substantial consideration. The facts of this case evidence a clear, unwaivable conflict of interest in one set of lawyers attempting to represent

both the LLC and the individuals accused of self-dealing at the expense of the LLC and its minority members. As Professor Freeman states, MPS should “be afforded the protection of unconflicted counsel, i.e., counsel not required simultaneously to serve the interests of two masters with competing financial interests.” (Exhibit A, at 8, ¶ 16).

Defendant’s motion is not intended to cast any aspersions on opposing counsel in this matter. To be clear, the undersigned is not aware of any intentional wrongdoing or deliberately unethical conduct on behalf of the lawyers in question; in fact, Defendant’s counsel believes that the individual lawyers and their firms enjoy outstanding reputations in the legal community. The absence of malicious intent in this case on the part of any lawyers plays a large part in the undersigned’s suggestion that counsel should not be completely disqualified from this case and can continue to represent the individual Third-Party Defendants in this case, if so desired. Unfortunately, this situation raises an intractable and concurrent conflict of interest that cannot be waived under Rule 1.7(b) of the Rules of Professional Conduct.

IV. Conclusion

For all of the foregoing reasons, Defendant respectfully requests that the law firms of Nelson Mullins and Ford Harrison be disqualified from continuing to represent Plaintiff MPS in this case and that independent counsel be retained by a suitable committee of minority members of the firm, without any influence by Third-Party Defendants.

* * *

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

December 11, 2019

Greenville, SC.

Exhibit A

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	)	(Business Court Program)
Defendant,	)	
	)	
vs.	)	
	)	AFFIDAVIT OF JOHN P. FREEMAN
Donza H. Mattison,	)	IN SUPPORT OF DONZA MATTISON'S
	)	MOTION FOR DISQUALIFICATION/
Defendant-Counterclaimant.	)	APPOINTMENT OF SEPARATE
	)	COUNSEL FOR McMILLAN PAZDAN
	)	SMITH, LLC
	)	
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.	)	
	)	

INTRODUCTION

Personally appeared before me, John Freeman, who first being duly sworn, deposes and states as follows:

1. The information contained herein is true and correct to the best of my knowledge, information, and belief. This affidavit relates to the Motion to Disqualify filed by Third-Party Plaintiff Donza Mattison ["Mattison"] seeking to disqualify counsel for Third-Party Defendants Rondald G. Smith, Joseph M. Pazdan, Brad B. Smith, and Chad C. Cousins, ["Third-Party Defendants"], from simultaneously representing in this derivative lawsuit Plaintiff-Counterclaim

Defendant McMillan Pazdan Smith, LLC ["MPS"]. Counsel who are targets of the disqualification motion are Nelson Mullins Riley & Scarborough, LLP and Ford Harrison ["Plaintiff's Counsel"]

2. I have been retained to assist Defendant/Third-Party Plaintiff Mattison as an expert witness in this case. I support the motion to disqualify. My reasons are set forth below, following a brief statement of my professional qualifications.

4. I have been retained many times to evaluate and assist in prosecuting claims involving legal ethics issues in litigation matters. This is such a case. In addition, I have extensive experience in dealing with issues concerning motions to disqualify counsel and corporate litigation, including prosecution of derivative suits.

5. Following my graduation from the University of Notre Dame Law School in 1970, I worked at the Jones Day law firm (then known as Jones, Day, Cockley and Reavis). I left Jones Day in 1972 to take a Fellowship at the University of Pennsylvania Law School's Center for Study of Financial Institutions. I subsequently received my LL.M. from Penn Law School. In 1973, I joined the faculty of the University of South Carolina Law School ("USC"). I retired in 2008 and am a Distinguished Professor of Law Emeritus at USC. Besides teaching law at USC for 35 years, I was a Visiting Professor in residence at both the University of Texas Law School and Loyola Law School in Chicago. I have also worked for the Securities and Exchange Commission as a special counsel. As a law school professor, I taught business-related courses, legal ethics, and a section related to legal malpractice. I have taught legal ethics at numerous CLE and JCLE programs. Among the topics I have taught about in the field of legal ethics and malpractice is the obligation of lawyers to properly handle conflicts of interest in litigation. Aspects of this obligation which I have taught about include the duty owed by lawyers to use

care in bringing lawsuits, including derivative lawsuits. Additionally, for 19 years, I wrote a bi-monthly column on legal ethics published in the South Carolina Bar's magazine

6. Though much of my professional life has been devoted to teaching, I also have substantial experience in practicing law. I have been admitted to practice as a lawyer for nearly 49 years. I am a member of the bars of the states of South Carolina, Ohio, and Washington. I have been admitted to practice in various federal courts, including the United States District Courts for the Northern District of Ohio, the District of South Carolina, the District of Colorado, the Western District of Washington, the United States Courts of Appeals for the Fourth, Fifth and Eleventh Circuits, and the United States Supreme Court. I have served as a member of the South Carolina Bar's Ethics Advisory Committee and have written various ethics opinions published by the Bar. I am familiar with lawyer disciplinary proceedings, having participated in the litigation of discipline cases as a defense lawyer, consultant to disciplinary counsel, and as an expert witness on various occasions. I have served as a lawyer, litigation consultant, or as a testifying expert in numerous legal malpractice cases. I have lectured on the standards applicable to lawyer conduct in handling litigation many times, and I have written about the topic. I have participated in disputes as to lawyers' handling of business matters for clients many times, and I have testified as an expert in such cases many times. I have frequently served as an expert witness in cases addressing questions involving lawyers' obligations in conducting litigation involving business clients. My curriculum vitae is attached as Exhibit 1, which further establishes my qualifications.

SCOPE OF ASSIGNMENT

7. This affidavit is written in support of Mattison's pending motion for disqualification of MPS's present counsel and appointment of new counsel in their place. The

Comment to SCACR 407, Rule 1.13, recognizes that problems may arise in the derivative suit setting when the same lawyer represents both the entity and persons accused of causing loss to their entity-client: “if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.” In my opinion, this case presents a situation where “serious charges” have been leveled at those in control, thereby creating a conflict of interest between counsel’s duties to MPS and Third-Party Defendants.

8. At present in this case, the same set of lawyers Plaintiff’s Counsel, jointly represent both Third-Party Defendants and MPS. Because Mattison’s third-party claims asserting breach of fiduciary duty and breach of MPS’s operating agreement are being prosecuted derivatively, there is the prospect that, if Mattison prevails and damages are awarded, one set of counsel’s clients, Third-Party Defendants may have to pay damages, including possibly punitive damages, to MPS, simultaneously represented by the same counsel, i.e., Plaintiff’s Counsel, in the same case. This circumstance finds Plaintiff’s Counsel potentially representing both the aggrieved entity, in this case MPS, and the parties responsible for causing injury to the entity, Third-Party Defendants.

9. As one federal district court has noted:

There is thought to be an “inherent conflict” between a corporation and its shareholders, officers, or directors in a derivative action, because, in essence, the plaintiff alleges that those shareholders, officers, or directors harmed the corporation, and thus the corporation's interests are directly opposed to its codefendants'. McAlinden v. Wiggins, 543 F. Supp. 1004, 1006 (S.D.N.Y.1982). In such a scenario, joint representation is “frowned upon.” Id.

Fox v. Idea Sphere, Inc., No. 12 CIV. 1342 CM, 2013 WL 1191743, at *22 (S.D.N.Y. Mar. 21, 2013). In my opinion, this case presents “such a scenario” calling for the entity to be represented

by separate counsel not under the control of, and serving the interests of, Third-Party Defendants, who have been charged with harming MPS's interests.

10. I note that it is axiomatic that lawyers are expected to give fair and adequate representation to those whose interests they serve in litigation. Indeed, Third-Party Defendants have attacked Mattison for being unable to "fairly and adequately represent the interest of MPS's other members who are similarly situated" in prosecuting her derivative suit claims. Order Filed October 30, 2019, at 3.¹ I view the ability of Third-Party Defendants' lawyers to "fairly and adequately" represent MPS's interests to be in subject to serious doubt for several reasons.

EXPERT FINDINGS

11. My investigation to date of the facts underlying Mattison's derivative claims against Third-Party Defendants convinces me that those claims have color, are nonfrivolous, and have been brought in good faith.

12. Specifically, my review of factual materials reveals evidence that MPS's control group, including its managing members sued as Third-Party Defendants, have wasted the entity's assets by engaging in self-dealing transactions involving payment of excessive compensation to themselves in the form of wages and bonuses that were much higher than market rates; handing

¹ I am aware of Mr. Outten's email dated December 2, 2019, where he claims to have "statements from every member of the LLC, except Ms. Mattison, expressing opposition to the continued pursuit of this derivative action" I question the significance of those purported statements for several reasons. First, derivative suits are not popularity contests. The essence of a derivative case is that the derivative suit plaintiff is suing because those in control of the company will not. The fact there is opposition to the suit is a given; derivative suits are always brought because there is opposition to the suit by those in control. Hence, opposition means very little. The same goes for the statement-signers' purported "refusal to support or join Ms. Mattison in her alleged claims." Again, derivative suits are not popularity contests. Second, Mr. Outten's follow-up email of December 3 attaches bare bones, unsworn statements of the cookie-cutter variety, which only raise more questions. For example, William Joslin's statement suggests no documents were provided to the statement-signers. This raises the strong possibility that facts have been omitted or shaded in the Third-Party Defendant's favor. Third, no conflict waivers executed by the non-party statement-signers have been produced, assuming the conflict at issue was waivable, and I believe it is not. In a case where claims are made that those in control have not been factually forthcoming, the origin and handling of the late-arriving conclusory, cookie-cutter style statements do not undercut Mattison's contentions. Rather, in my opinion, the Third-Party Defendants' secret behavior supports the need for full and open scrutiny (including discovery) of the objections to Ms. Mattison's derivative claim.

out benefits such as life and disability insurance to non-employee family members at MPS's expense; and causing the entity to pay excessive rent to related parties. Additionally, it appears that those in control have wrongfully kept other owners, including Mattison in the dark about their financial dealings. There is also evidence of deception practiced by Third-Party Defendants on Mattison and other minority owners, in that Third-Party Defendants represented that their pay would be in line with the other owners, whereas they secretly paid themselves grossly higher compensation, justifying the payouts on the ground that they were paying themselves not as "managers" (who would be subject to the represented limitation) but as "founders" who had no compensation limit. I note that the Operating Agreement nowhere confers special rights, such as to receive disproportionate compensation, on "founders." Indeed, the word "founders" is not found in the MPS Operating Agreement. Additionally, and relatedly, to prejudice Mattison's right to a fair buy-out right, Third-Party Defendants have resorted to using a self-serving entity valuation model that is flawed by its failure to make reasonable and necessary normalizing adjustments, resulting in a gross undervaluation of Mattison's interest, to Third-Party Defendants' material pecuniary benefit in the purchase of Mattison's membership units as a properly dissociating member.

13. In reaching my opinion that there are good grounds to believe that Mattison will succeed in her derivative suit against Third-Party Defendants, I have reviewed and relied upon a factual investigation and findings made by Charles Alford, Ph.D. Dr. Alford is known to me by reputation as a well-respected economist. His opinions have been accepted by South Carolina Courts. See, e.g., Ballard v. Roberson, 2015 WL 4275343 (Ct. App. July 15, 2015). Based on the facts available to me to date, it appears that Third-Party Defendants have engaged in behavior that falls below the standard conduct demanded of those who control South Carolina entities.

Specifically, in my opinion, they have chosen to enrich themselves at MPS's expense (and, derivatively, at Mattison's expense) in ways that are deceptive, oppressive, and unfairly prejudicial to MPS and Mattison as a minority owner. Fiduciaries, such as persons who control closely held entities like MPS, violate such duties at their peril.

14. A lawyer who simultaneously takes a position that favors one existing client at another client's expense in litigation risks engaging in unprofessional conduct. A leading conflict case is Grievance Committee of the Bar of Hartford County v. Rottner, 152 Conn. 59, 65-66, 203 A.2d 82, 84-85 (1964). In Rottner the court had this to say about the ethics of a lawyer taking an adverse position in litigation against someone he or she is currently representing: "When a client engages the services of a lawyer in a given piece of business he is entitled to feel that, until that business is finally disposed of in some manner, he has the undivided loyalty of the one upon whom he looks as his advocate and his champion." Rottner, 203 A.2d at 84. In this case, in light of the record facts, I conclude that the loyalty of MPS's counsel is necessarily divided.

15. I hold this opinion because, if Mattison proves at trial that MPS assets have been wrongfully diverted by Third-Party Defendants, MPS has suffered, and so has Mattison, derivatively, as a minority owner in the company. Under SCACR 407, Rule 1.7, serious, unreasonable conflicts of interest cannot be cured by waivers. Much less can they be cured by a vague, perfunctory, summary-style waiver of the type used by Plaintiff's counsel at the outset of this case, before Mattison's claims had survived a Rule 12(b)(6) motion to dismiss. It is simply an intolerable conflict for a lawyer to simultaneously represent parties on both sides of a lawsuit where serious, nonfrivolous claims have been raised. Hence, I conclude that disqualification of MPS's counsel as counsel for MPS is warranted, and new counsel for MPS is called for.

16. Finally, I note that this is not a case where a party has attacked the other side's counsel in some sort of bad-faith effort to disrupt or run up costs. Mattison's motion to disqualify states she "does not object to the attorneys from Nelson Mullins and Ford Harrison from continuing to represent the individual, Third-Party Defendants in this case." Here, no disruption is likely, since Third-Party Defendants will not be deprived of counsel of their choice. The only change, which I deem highly appropriate and, indeed, necessary, is that MPS will be afforded the protection of unconflicted counsel, i.e., counsel not required simultaneously to serve the interests of two masters with competing financial interests.

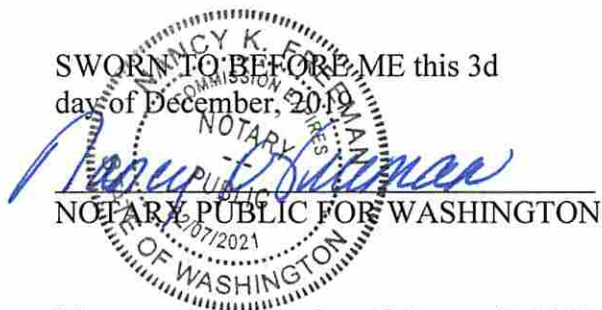
17. In reaching the foregoing opinions, I have reviewed the relevant court filings, spoken with Ms. Mattison and her counsel, reviewed Dr. Alford's financial findings, and I have conducted research. This investigation is of a sort common for experts in my field of expertise to consult and rely upon.

18. I reserve the right to amend or supplement my findings as additional material becomes available.

19. Further affiant sayeth not.


JOHN FREEMAN

SWORN TO BEFORE ME this 3d
day of December, 2019


NOTARY PUBLIC FOR WASHINGTON
My commission expires: February 7, 2021

RESUME
John P. Freeman
Professor of Law Emeritus

Address and phone numbers:

200 West Highland Drive
Unit 107
Seattle, Washington 98119
(803) 361-6934
jfremanusc@gmail.com

Education history:

LL.M., 1976, University of Pennsylvania
Law School; J.D., 1970, University of Notre
Dame Law School; B.B.A., 1967, University
of Notre Dame (Accounting)

Employment history:

1970-72, Attorney, Jones, Day Law
Firm, Cleveland, Ohio

1972-73, Fellow, University of Pennsylvania
Law School Center for the Study of
Financial Institutions

1973-75, Assistant Professor of Law,
University of South Carolina

1974 and 1975 (Summers), Special Counsel,
Division of Investment Management, SEC,
Washington, D.C.

1975-78, Associate Professor of Law,
University of South Carolina; Visiting
Associate Professor of Law at Loyola Law
School (Chicago) Spring 1977

1978-2008, Professor of Law, University of
South Carolina; Visiting Professor of Law at
University of Texas Law School, summer
1978

Present:

Distinguished Professor Emeritus and John
T. Campbell Chair in Business and
Professional Ethics Emeritus

Honors and Awards: Undergraduate:

Member Beta Alpha Psi (Honorary Accounting Fraternity)

Law School:

Executive Editor, Notre Dame Lawyer;
Distinguished Military Graduate

Professional:

At University of South Carolina Law School: Senior Class Annual Outstanding Faculty Award of 1975, 1976, 1977, 1984

Winston Churchill Award, South Carolina Jury Trial Foundation 1995; Distinguished Service Award, South Carolina Trial Lawyers Association 2000; Appointed Member, South Carolina Judicial Merit Selection Commission (presently serving) John Belton O'Neill Inn of Court McDonald/Rhodes Award 2010

Admitted to Practice:

Ohio; South Carolina; Washington

**Teaching History
Courses Taught:**

Professional Responsibility, Legal Accounting, Business Associations, Corporations, Agency-Partnership, Securities Regulation, Corporate Finance, Business Planning, Legal Research and Writing, Business Crime, Legal Malpractice Component of Advanced Legal Profession Seminar

Scholarly and Professional Publications

Author, 1989-2008, Regular Legal Ethics Column for the South Carolina Lawyer.

Article, Protecting Judicial Independence, 6 Charleston L. Rev. 511 (2012).

Article, Appearance of Impropriety, Recusal, and the *Segars-Andrews* Case, 62 S.C.L. Rev. 485 (2011).

Article (with Stewart Brown and Steve Pomerantz), Mutual Fund Advisory Fees: New Evidence and a Fair Fiduciary Duty Test, 61 Okla. L. Rev. 83 (2008).

Article, The Mutual Fund Distribution Fee Mess, 32 J. Corporation Law 739 (2007).

Viewpoint, Say No to Vending Machine Justice, S.C. Lawyer, July 2007, at 8.

Article, It's the Conflict of Interest, Stupid, Money Mgm't Exec., May 17, 2004, at 14.

Chapter on Legal Opinion Liability in Legal Opinion Letters A Comprehensive Guide to Opinion Letter Practice (M. John Sterba, Jr., ed. 2003) (plus annual updates).

Chapter in South Carolina Damages Treatise on Damages in Securities Cases (2004).

Article, The Ethics of Using Judges to Conceal Wrongdoing, 55 S.C.L. Rev. 829 (2004).

Article (with Stewart Brown), Mutual Fund Advisory Fees: The Cost of Conflicts of Interest, 26 J. Corporation Law 610 (2001).

Article, Liens, Fees and Taxes, South Carolina Trial Lawyer, Summer 2000, at 26.

Article, A Business Lawyer Looks at the Internet, 49 S.C.L. Rev. 903 (1998).

Article, Payments to Medical Care Providers: What Are the Lawyer's Obligations? South Carolina Lawyer, September-October 1994, at 39.

Article, Current Developments in Lawyer Liability: Coping with the Fraudulent Client, Delaware Lawyer, Winter 1993, at 27.

Article, Treble Damage Statutes Can Increase Trust Recoveries, 4 Probate Practice Reporter, June 1992, at 1.

Article (with Nathan Crystal), Scienter in Professional Liability Cases, 42 S.C.L. Rev. 783 (1991).

Article, How Computerized Databases Are Redefining Due Diligence, Carolina Lawyer (July-August 1991).

Article, When Are Lawyers' Gifts to Judges Improper? Carolina Lawyer (November-December 1990).

Article, Current Developments in Legal Opinion Liability, 1989 Col. J. Bus. L. 235.

Article, Understanding the Joint Client Exception to the Attorney-Client Privilege, Carolina Lawyer (July-August 1989).

Article, A RICO Primer, 1985 Small Business Counselor No. 4.

Article, The Use of Mutual Fund Assets to Pay Marketing Costs, 9 Loy. Chi. L.J. 553 (1978).

Article, Marketing Mutual Funds and Individual Life Insurance, 28 S.C.L. Rev. 1-124 (1976), reprinted in Nat'l Ins. L. Rev. Serv. (1977).

Article, Opinion Letters and Professionalism, 1973 Duke L.J. 371-439, reprinted in Securities Law Review 1974 (E. Folk, III, ed.).

Co-author, Multi student Survey, The Mutual Fund Industry: A Legal Survey, 44 Notre Dame Lawyer 732-983 (1969).

Case Comment, Escott v. BarChris Constr. Corp., 44 Notre Dame Lawyer, 122-40 (1968).

Other Scholarly Activities

Speeches (with accompanying outlines) presented at numerous CLE courses sponsored by various entities including the South Carolina Bar, University of South Carolina Law School and the South Carolina Supreme Court.

CLE Presentations 2004-16: Special Relationships and Legal Ethics, Oct. 14, 2016, S.C. Bar, Columbia, S.C.; Who's My Client? Understanding the Relationship Between In-House Attorneys, Members and Lobbyists, SC House of Representatives In-House CLE, Oct. 13, 2016, Columbia, S.C.; Incivility, Attempted Shaming and Other Ethics No-Nos, South Carolina Public Defender Ass'n, Sept. 28, 2016, Myrtle Beach, SC; Pascoe v. Wilson and other Ethics Lessons, Lexington County Bar Ass'n, August 4, 2016; Ethical Issues for South Carolina Environmental Practitioners, June 3, 2016, Columbia SC; Hot Ethics Issues for Environmental/Regulatory Practitioners, Jan. 22, 2016, S.C. Bar, Charleston, S.C.; S.C. Bar, Business Lawyer Horror Stories II, Oct. 3, 2014; Greenwood, S.C., S.C. Ass'n of Criminal Defense Lawyers, "Whose Theme and Theory is it Anyway?" July 11, 2014; Ft. Worth, Texas, Advice on Duties Owed by Members of the Board of Trustees, May 16, 2014; Charleston Bar Ass'n, 20 Ethics Tips for a Happier Professional Life, Feb. 7, 2014; 2004-13: Ass'n of S.C. Claimants Attorneys for Workers Compensation, Ethics Seminar March 22, 2013; SC Bar, Ethical Issues in Working with Vets and Their Families, Feb. 12, 2012; Expert Witness Participant, SC Bar-ABOTA, Masters in Trial Program, Feb. 1, 2013; SC Bar, Ethical Issues in Handling VA Appeals, Jan. 12, 2013; SC Bar, Ethical Issues in a Non-Adversarial System, Dec. 11, 2012; Richland County Bar Ass'n Ethics CLE, Nov. 9, 2012; University of South Carolina Law School, Alumni Reunion Ethics CLE, Nov. 3, 2012; General Assembly Legal Staff, Ethics for Government Lawyers, Oct. 3, 2012; Setzler Scott Law Firm (In-house CLE), West Columbia, SC, Ethics CLE, Feb. 14, 2012; Charleston Law School, Panel, Symposium on Lawyer and Judicial Fitness, Feb. 10, 2012; Charleston County Bar Ass'n, Ethics CLE, Feb. 3, 2012; SC Bar, Panel on Lawyer Confidentiality, Jan. 19, 2012; Nov. 15, 2011, SC Workers Comp. Comm., Legal Ethics; Richardson Patrick-Sponsored CLE, Charleston, SC, April 29, 2011; North American Securities Administrators Ass'n, Ethics in Securities Litigation, Charleston, Jan. 24, 2011; Richland County Legal Ethics Update, Nov. 5, 2010; S.C. Law Review Symposium, Judicial Recusal, Oct. 21, 2010; League of Women Voters, Lecture on Judicial Selection, Oct. 8, 2010, Charleston, S.C.; Kershaw Health Board of Directors, Advice on Your Duties as Board Members, July 15, 2010, Camden, SC; American Ass'n of Matrimonial Lawyers, Ethics in Marital Cases, March 19, 2010 (Aruba), John Belton O'Neill Inn of Court, Ethics Lessons Taught by Lawyers, Nov. 17, 2009; South Carolina Defense Trial Lawyer's Ass'n, Judicial Selection in South Carolina, Nov. 7, 2009; Richland County Bar Ass'n, Legal Ethics, Nov. 6, 2009; South Carolina Legislature

Employees, Legal Ethics Update, Oct. 21, 2009; Budget & Control Board, Ethics Lecture to SC State Employees, Oct. 2, 2009; South Carolina Bar, Family Law Ethics Update, Sept. 18, 2009; Motley Rice Law Firm, Legal Ethics Update, Sept. 11, 2009; South Carolina Judicial Selection Commission, Judicial Ethics, July 31, 2009; John Belton O'Neill Inn of Court, Ethics of Advertising Firms, Jan. 20, 2009; S.C. Bar, Ethics Presentation "Business Lawyer Horror Stories, Nov. 21, 2008; Participant, Mutual Fund Industry Regulation Roundtable, Chicago-Kent Law School, Nov. 7, 2008; SC Legislature, Ethical Duties of Legislative Employees, Oct. 2, 2008; SC Bar, Dealing with Ethical Duties When Dealing with Pro Se Parties, Oct. 10, 2008; Richardson Patrick Local Counsel CLE, Litigation Ethics, May 2, 2008 (Charleston, SC); Inst. of Public Utilities, 39th Ann. Reg. Policy Conf., Panel on Equity and Responsibility in the Public Utilities Sector (Charleston, SC), Dec. 3, 2007; S.C. Attorney General's Office; Litigation Ethics, Nov. 9, 2007; Richland County Bar, Ethics Update, Nov. 2, 2007; SC Bar, Litigation Ethics, Oct. 26, 2007; S.C. Children's Law Center, Ethical Problems in the Child Abuse Area, Oct. 19, 2007; National Ass'n of Medicaid Fraud Control Units, Ethics and the Government Lawyer (Savannah, Ga.), Oct. 1, 2007; SCACPA Litigation Conf., Litigation Ethics (Kiawah Island, SC), Sept. 21, 2007; S.C. Circuit Court Judges, May 17, 2007, Practice Tips in Civil Litigation; Energy & Mineral Law Foundation, May 15, 2007, Panel Member, Legal Ethics, 2 hr.; S.C. Government Investigators, Ethical Duties of Investigators, Feb. 23, 2007; S.C. Bar, Employment Law Section, Ethics Update, Jan. 26, 2007; S.C. Association of Counties, Ethics Update, Dec. 8, 2006; Lexington County Bar Ass'n, Ethics Update, Dec. 6, 2006; Richland County Bar, Ethics Update, Nov. 3, 2006; S.C. State Government Lawyers, Ethics Update, Nov. 3, 2006; S.C. Judicial Merit Selection Commission, Overview of Judicial Ethics, Sept. 14, 2006 (½ hr.); Federal Bar Ass'n, SC Bar, Ethics and Professionalism, Sept. 8, 2006; Commercial Law League of America, Avoiding Grievances and Malpractice Worries in Your Practice, July 6, 2006, Asheville, N.C. (2 hours); National Structured Settlement Trade Ass'n, Ethics in Litigation, Westin Rio Mar, Puerto Rico, May 9, 2006; S.C. Chamber of Commerce, Legal Ethics for the Employment Lawyer, Hilton Head, S.C., May 6, 2006; American Ass'n Matrimonial Lawyers, Ethic Lecture, Los Cabos, Mexico, March 11, 2006; SC Bar, Legal Ethics for Health Care Providers, Jan. 28, 2006; S.C. Association of Counties, Ethics Update, Dec. 9, 2005; SCTL, Making Money Out of Discovery Abuse, Dec. 2, 2005, Atlanta; Ass'n of S.C. Claimants Attorneys for Workers Compensation, Ethics Seminar, Nov. 4, 2005, Asheville; S.C. Bar, Ethics in Masters Court, Oct. 14, 2005; N.C. Bar-S.C. Bar Construction Law Ethics Program, Asheville, Oct. 1, 2005; S. C. Bar, Unauthorized Practice Problems in Probate Court, Sept. 16, 2005; Greenville County Solicitor's Office, Prosecutorial Ethics, May 9, 2005; Mass Tort Seminar, NYC, Discovery Abuse Issues, March 18, 2005; S.C. Ass'n of Counties, Legal Ethics, Dec. 10, 2004; Federal Bar Ass'n, S.C., Ethics CLE, Dec. 10, 2004 ½ hr.; S.C. Bar Construction Law Section, Ethics CLE on the new Oath; Dec. 3, 2004; NASAA, Salt Lake City, Legal Ethics for Securities Enforcement Lawyers, Dec. 4, 2004; DSS Ethics Training, Dec. 3, 2004; (2-hr. lecture); PIABA, Ethics for Securities Lawyers, and Comments on the Mutual Fund Mess, Oct. 20, 2004 (2 hrs.); Commercial Law League of America, Southern Region Members' Ass'n, Ethical Issues in Commercial Law, Oct. 1, 2004; S.C. Bar, Annual Probate Bench/Bar, Ethics in Probate Court, Sept. 17, 2004; Charleston Bar Ass'n, Lawyer's Oath Seminar, August 27, 2004; S.C. Government Lawyers, Legal Ethics for Government Attorneys, August 20, 2004; S.C. Judiciary, Judicial Ethics Lecture, August 19, 2004; S.C. Bar, Accounting for Non-tax Lawyers, May 2, 2004; Palmetto Land Title Ass'n, Ethics for Closing Attorneys, April, 24, 2004; Richardson, Patrick Law Firm, CLE on Legal Issues Concerning the Mutual Fund Mess, March 26, 2004;

S.C. Bar, An Update on Ethical Considerations for the Guardian, March 5, 2004; S.C. Prof. Society on the Abuse of Children, Ethics and Child Abuse, Feb. 26, 2004; National Ass'n of State Boards of Accountancy, Professionalism, Accountability and the Accounting Profession, Feb. 9, 2004; Fidelity Nat'l Title, Ethical Duties of Closing Attorneys, Feb. 5, 2004; S.C. Bar, Annual Convention, Ethical Issues in Handling the Appeal, Jan. 22, 2004 (co-presenter).

Member, ABA Section of Business Law Task Force on Legal Opinions
Participant in Conference on Legal Opinions at Silverado, California, May 31-June 3 (1989).

University and Community Service
Author, Report on Tax Sheltered Annuities to USC Faculty and Staff (1976).
Faculty Senate (1996-98)

University Committees
Promotion and Tenure
Faculty Welfare

Annuities and Insurance
Budget Committee

Law School Committees
Faculty Selection
Academic Standing
Minority Student Affairs
Executive Committee
Dean Evaluation Committee
Dean Search Committee
Chairman, Supreme Court Commission on CLE and Specialization(1980-83)
President, Leaphart Elementary School PTO (1983)
Chairman, Irmo Middle School School Improvement Council (1985)
Member, Irmo Middle School School Improvement Council (1985-89),
President, Irmo High School Parent, Teacher, Student Association (1988-89, 1992-93) Member
Executive Board (1988-93)
Member, Irmo High School-School Improvement Council (1988-93)
Founder and Past-president, University of Notre Dame Club of South Carolina
Lexington District Five and South Carolina State School Volunteer of the Year 1993

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>MEMORANDUM IN OPPOSITION</u>
	)	<u>TO MOTION FOR</u>
	)	<u>DISQUALIFICATION</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 (the “Third-Party Defendants”) submit this Memorandum in Opposition to Defendant Donza H. Mattison’s (“Mattison”) Motion for Disqualification of the undersigned counsel from representing both MPS and the Third-Party Defendants in this matter.

PROCEDURAL BACKGROUND

Mattison is a former employee and member of MPS. The parties memorialized her cessation of employment in a Severance Agreement and General Release (“Severance Agreement”) dated December 5, 2017. The Severance Agreement provided that the parties would agree on the value of Mattison’s 2,035.24 membership units in early 2018, following the close of

fiscal year 2017, in accordance with MPS's September 30, 2015 Operating Agreement. MPS used the 2017 valuation conducted by an outside firm to determine the per unit price of its membership units, and made an offer to Mattison on August 3, 2018 to purchase her units for that amount. Mattison, however, contested this valuation and demanded a much higher per unit price.

MPS filed a Declaratory Judgment action on February 22, 2019, asking the Court to determine that MPS followed the Operating Agreement's provisions in determining the value of Mattison's membership units. In response, Mattison filed counterclaims and a derivative action against the Third-Party Defendants on March 4, 2019. The Third-Party Defendants filed a Motion to Dismiss Mattison's derivative action, which the Court denied on October 30, 2019. The Court held in abeyance pending further discovery the issue of whether Mattison fairly and adequately represents the interests of the other members.

Mattison originally filed a Motion for Disqualification of the undersigned counsel on April 26, 2019. Mattison argued that Nelson Mullins Riley & Scarborough, LLP and Ford Harrison should be precluded from representing both MPS and the Third-Party Defendants because there is an inherent, concurrent conflict of interest in connection with Mattison's counterclaims against MPS and the derivative action against the Third-Party Defendants. In response to this motion, MPS obtained a Written Consent to Joint Representation from the members of MPS, a copy of which is attached hereto as **Exhibit A**. Following the obtainment of the Written Consent, Mattison withdrew her Motion for Disqualification.

Mattison filed a Renewed Motion for Disqualification on October 24, 2019, raising the same alleged conflict of interest as stated in her prior motion. On December 2, 2019, counsel for MPS and the Third-Party Defendants notified counsel for Mattison that statements had been obtained from every member of the LLC, except Mattison, expressing opposition to the continued

pursuit of the derivative action and refusing to support or join Mattison in her alleged claims against the Third-Party Defendants. A copy of the December 2, 2019 email is attached hereto as **Exhibit B**. The statements were marked as confidential and forwarded to counsel for Mattison on December 3, 2019. These statements will be submitted to the Court for review prior to the December 13, 2019 hearing set for this motion.

In light of this evidence and pursuant to Rule 11, SCRCPP, counsel for MPS and the Third-Party Defendants requested that Mattison withdraw the Motion for Disqualification and notify the Court of the dismissal of Mattison's derivative action. Counsel for Mattison refused to take either of those actions.

ARGUMENT

Mattison cites Rules 1.7(a) and 1.13 of the South Carolina Rules of Professional Conduct in support of her Motion for Disqualification. In opposition to Mattison's allegations, attached hereto as **Exhibit C** is an Affidavit from William ("Bill") Higgins, Esquire.

Mattison's Motion to Disqualification is premised on the notion that she brought a valid derivative action in compliance with Rule 23 of the South Carolina Rules of Civil Procedure, and as a result, a conflict exists between the interests of the Third-Party Defendants and MPS. Rule 23(b)(1), SCRCPP, states that a "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." In this case, every member of MPS, aside from Mattison, opposes this derivative action. Stated differently, 98% of the membership interests in MPS do not believe Mattison's derivative action has merit. Mattison, who owns approximately 2% of the total outstanding units of MPS, is the only member that wishes to pursue claims against the Third-Party Defendants.

Pursuant to Rule 23(b)(1), Mattison's derivative action may not be maintained because she does not represent the interests of the other members. This requirement of Rule 23(b)(1) is to prevent situations exactly like this, where a member's claim is individual in nature, but the member purports to bring a claim on behalf of the entity's other members. In effect, Ms. Mattison has misrepresented this derivative claim from the date of filing.

Mattison has received no support from the other members she purports to represent. In fact, Mattison has received the exact opposite—the other members of MPS have stated that they do not support the derivative action and do not wish to join Mattison in pursuing claims against the Third-Party Defendants.

The true conflict lies with counsel for Mattison, David E. Rothstein, asserting that he represents the interests of both Mattison and the other members in the derivative action. Despite knowledge that 98% of the membership interests of the LLC do not support the derivative action, Mr. Rothstein refused to withdraw the derivative action or the Motion for Disqualification.

CONCLUSION

Pursuant to the reasons set forth above and the attached Exhibits, MPS and the Third-Party Defendants respectfully request that the Court deny Mattison's Motion to Disqualify, and dismiss Mattison's derivative action with prejudice.

[signature page follows]

By: s/ Samuel W. Outten
Samuel W. Outten
SC Bar No. 4295
E-Mail: sam.outten@nelsonmullins.com
NELSON MULLINS RILEY & SCARBOROUGH LLP
2 W. Washington Street / Suite 400
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Thomas H. Keim, Jr.
SC Bar No. 10244
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FORD HARRISON
100 Dunbar Street / Suite 300
Spartanburg, SC 29306
(864) 699-1100

*Attorneys for McMillan Pazdan Smith, LLC, Ron G. Smith,
Joseph M. Pazdan, Brad B. Smith, and Chad C. Cousins*

Greenville, South Carolina
December 11, 2019

EXHIBIT A

WRITTEN CONSENT TO JOINT REPRESENTATION

The undersigned members of McMillan Pazdan Smith, LLC hereby acknowledge and confirm their informed consent to the joint representation of McMillan Pazdan Smith, LLC (the "LLC") and Ronald G. Smith, Joseph M. Pazdan, Brad B. Smith, and Chad C. Cousins (the "Third-Party Defendants") by FordHarrison LLP and Nelson Mullins Riley & Scarborough LLP (the "Law Firms") in connection with the matter captioned *McMillan Pazdan Smith, LLC vs. Donza H. Mattison / Donza H. Mattison, in a Derivative Capacity on Behalf of McMillan Pazdan Smith, LLC vs. Ronald G. Smith, Joseph M. Pazdan, Brad B. Smith, and Chad C. Cousins*, C.A. No. 2019-CP-23-00998.

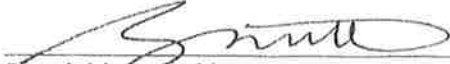
While neither the LLC, the undersigned members, nor the Law Firms are aware of any existing or potential conflict of interest that would prohibit such joint representation at this time, the parties recognize and understand that such a conflict of interest could arise. Nevertheless, the undersigned members have determined that it is in their individual and mutual interests for the Law Firms to jointly represent them and the LLC. Therefore, the undersigned members have given their informed consent to this joint representation. In this context, "informed consent" denotes the agreement by the undersigned to this joint representation after the Law Firms have communicated reasonably adequate information and explanation about the material risks of, and reasonably available alternatives to, the joint representation.

If a conflict of interest develops such that the Law Firms no longer reasonably believe that they can provide competent and diligent representation to both McMillan Pazdan Smith, LLC and the individual Third-Party Defendants, then the undersigned hereby agree that the Law Firms will continue to represent McMillan Pazdan Smith, LLC, and the Third-Party Defendants will retain other representation.

IN WITNESS WHEREOF, the undersigned, being members of McMillan Pazdan Smith, LLC, after being given a reasonable time to consult with independent counsel, have executed this Written Consent to Joint Representation to be effective as of the 30th day of April, 2019.

[SIGNATURE PAGE FOLLOWS]

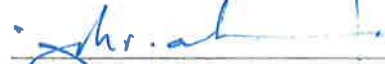
On behalf of McMillan Pazdan Smith, LLC:


Rondald G. Smith

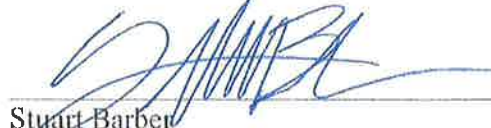

Joseph M. Pazdan, II


Brad B. Smith

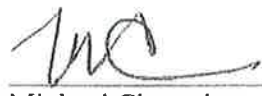

Chad C. Cousins

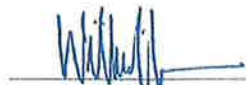

Joseph Alcock

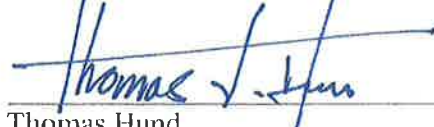

Harry D. Ballard


Stuart Barber


Karen Calhoun


Michael Chewning


William Gray


Thomas Hund


Keith Jacobs


Aaron Jeffers


William Joslin

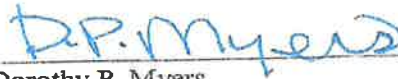

Lisa Lanni



Donald Love



David Moore



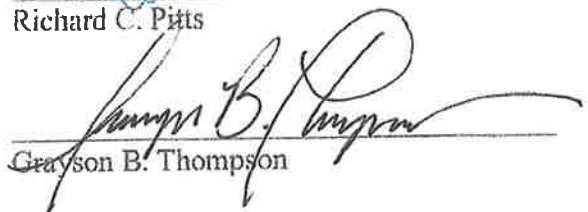
Dorothy P. Myers



Caroline Perkins



Richard C. Pitts



Grayson B. Thompson

EXHIBIT B

From: Bobbie Schilder on behalf of Sam Outten
Sent: Monday, December 2, 2019 10:26 AM
To: David Rothstein
Cc: 'Tom Keim'; Sam Outten; Katie Towery
Subject: McMillan Pazdan Smith, LLC v. Donza H. Mattison; C.A. No. 2019-CP-23-00998

David,

Please consider this email my Rule 11 consultation with you regarding your Motion to Disqualify, as well as your client's continued pursuit of a derivative action against Chad Cousins, Joe Pazdan, Brad Smith, and Ron Smith.

The Motion to Disqualify alleges that there is a conflict in Nelson Mullins and Ford Harrison representing McMillan Pazdan & Smith, LLC and the Third-Party Defendants. According to your Motion, the basis for this contention is that a conflict exists between the interests of the LLC and the Third-Party Defendants.

Your Motion to Disqualify is premised on the notion that the derivative action is properly pled and brought. That is not the case. SCRCP 23(b)(1) provides in relevant part that:

“The 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.”

Ms. Mattison cannot meet this requirement of SCRCP 23(b)(1).

There have been several hearings in which we advised the court that this derivative action was not proper because Ms. Mattison did not represent the interests of the other members of the LLC. Each time, you have disputed that that is the case.

Since our last hearing, we have obtained statements from every member of the LLC, except Ms. Mattison, expressing opposition to the continued pursuit of this derivative action. These statements include a refusal to support or join Ms. Mattison in her alleged claims against the Third-Party Defendants.

I will be happy to forward those statements to you if we can agree that they are subject to confidentiality.

I respectfully request that, in light of this evidence, you withdraw the Motion to Disqualify and notify the court of the dismissal of Ms. Mattison's derivative action.

Thank you.

Sam Outten



SAMUEL W. OUTTEN PARTNER

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EXHIBIT C

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS
FOR THE THIRTEENTH JUDICIAL CIRCUIT

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

Case No.: 2019-CP-23-00998

(Business Court Program–Judge McIntosh)

vs.)

Donza H. Mattison,)
Defendant-Counterclaimant.)

**AFFIDAVIT OF
WILLIAM O. HIGGINS**

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.)

Personally appeared before me William O. Higgins who, first being duly sworn, deposes and states as follows:

1. I, the undersigned, William O. Higgins, being first duly sworn, give this Affidavit to the Court and hereby state that the information contained herein is true and correct to the best of my knowledge and belief.

2. I practice law in Columbia, South Carolina, with the law firm of Graybill, Lansche & Vinzani, LLC. I have been engaged in the private practice of law in Columbia since 1985. I devote significant professional time to legal ethics and lawyer conduct matters, including conflicts of interest. I currently serve on the South Carolina Bar's Ethics Advisory Committee and Professional Responsibility Committee, and I am a former Chairman of both. I chaired the South Carolina Bar's Professional

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Responsibility Committee's "Ethics 2000" subcommittee, which developed the Bar's proposal with respect to the Rules of Professional Conduct for lawyers in South Carolina. I have been a frequent lecturer and presenter at various continuing legal education programs dealing with legal ethics. I serve as a faculty member for the South Carolina Legal Ethics and Practice Program "Ethics School" jointly sponsored by the South Carolina Supreme Court's Office of Disciplinary Counsel and the South Carolina Bar's Professional Responsibility Committee, and I teach the conflicts of interest portion of that program. I am an adjunct professor at the University of South Carolina School of Law, teaching the Real Estate Transactions I course.

3. I have served as an expert witness or consultant on multiple prior occasions on legal malpractice cases and other matters involving the application of the South Carolina Rules of Professional Conduct ("SCRPC"), Rule 407 SCACR, and specifically the issue of conflicts of interest and disqualification of lawyers.

4. I hold a BS degree in business from Presbyterian College, a JD degree from the University of South Carolina School of Law, and an LL.M. degree in taxation from New York University School of Law. I hold an "AV" rating from Martindale Hubbell, and I am included in the Best Lawyers in America for both real estate and ethics and professional responsibility.

5. As a result of my education, training, and experience as a practicing lawyer, I am familiar with (i) the degree of skill, care, knowledge, and judgment usually possessed and exercised by practicing lawyers in South Carolina in representing clients, i.e., the "standard of care," and (ii) the application of the SCRPC, and specifically, the rules related to conflicts of interest.

6. This Affidavit is being given in connection with Defendant's Renewed Motion for Disqualification of Plaintiff's Counsel (the "Motion to Disqualify") filed by counsel for the Defendant-Counterclaimant, Donza H. Mattison, seeking to disqualify Nelson Mullins Riley & Scarborough, LLP ("Nelson Mullins") and FordHarrison LLP ("FordHarrison") as counsel for McMillan Pazdan Smith, LLC ("MPS") on the basis of a conflict of interest pursuant to Rule 1.7(a) and Rule 1.13, SCRPC 407.

7. I have been engaged by Nelson Mullins on behalf of MPS, and I have reviewed copies of documents provided to me by Nelson Mullins, including:

- a. Verified, Amended Answer, Counterclaims, and Third-Party Complaint of Defendant-Counterclaimant, Donza H. Mattison, dated July 30, 2019;
- b. Defendant's Renewed Motion for Disqualification of Plaintiff's Counsel, dated October 24, 2019 (the "Renewed Motion to Disqualify");
- c. A list of all the current members of MPS and their respective percentages of ownership;
- d. Written Consent To Joint Representation dated to be effective as of April 30, 2019, and executed by all of the members of MPS other than Donza H. Mattison (the "Members' Consent");
- e. A "McMillan Pazdan Smith, LLC Member Statement in Opposition To Derivative Action" separately executed in November of 2019 by each of the members of MPS other than Donza H. Mattison;

[collectively, the "Documents"].

8. I have also discussed this matter with lawyers at Nelson Mullins.

9. Based on the foregoing, I offer the following observations and opinions:

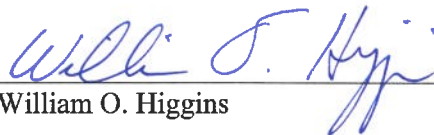
- a. Rule 1.13(g) of the SCRPC specifically addresses the issue of a lawyer's common representation of both an organization (such as MPS) and one or more of its constituents (such as the Third-Party Defendants), and Comment 14 to Rule 1.13 specifically addresses potential conflicts of interest in the context of derivative actions.
- b. Comment 14 to Rule 1.13 does not attempt to resolve the issue of a potential conflict of interest between an organization and its "controlling" constituents in the context of a derivative action, but rather, it serves simply to direct the affected lawyer's attention to the need to analyze the potential conflict pursuant to Rule 1.7.

- c. In fact, Comment 14 to Rule 1.13 is simply a specific reference (in the context of a derivative action) to the substance of Rule 1.13(g), which expressly acknowledges that a lawyer can represent both an organization and one or more of its constituents, “subject to the provisions of Rule 1.7.”
- d. In this case, the analysis under Rule 1.7 is the same as with all concurrent conflicts – once a concurrent conflict of interest is identified, the next step from the lawyer’s perspective is to analyze whether the lawyer can provide competent and diligent representation to each affected client. If the lawyer “reasonably believes” so, and assuming the representation is (i) not prohibited by law, and (ii) does not involve client-versus-client claims in the same litigation, then the lawyer may represent each of the affected clients, provided those clients each give informed consent, confirmed in writing. See Rule 1.7(b).
- e. The Members’ Consent appears to satisfy the informed consent requirements of Rule 1.7(b)(4), and the fact that it predates this Court’s ruling denying the Third-Party Defendants’ Motion to Dismiss the Third-Party Plaintiff’s Complaint (the “Motion to Dismiss”) is irrelevant, in my opinion.
- f. The suggestion in the Renewed Motion to Disqualify that the Court’s subsequent denial of the Motion to Dismiss caused the conflict of interest between MPS and the Third-Party Defendants to “become ripe” and thereby render the Members’ Consent ineffective is hard to fathom. The conflict which the MPS members consented to as evidenced by the Members’ Consent was clearly “ripe” as of April 30, 2019, since by that time the allegations of wrongdoing by the Third-Party Defendants had been made. This Court’s denial of the Motion to Dismiss did not change the basic nature of those allegations, nor did it make those allegations any more or less significant from a conflicts-of-interest perspective.

- g. The Members' Consent, given that it is executed by all of the MPS members other than Donza H. Mattison, serves to meet both the requirements of Rule 1.7(b)(4) and the requirements of the last sentence of Rule 1.13(g), which reads, "If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders." In this instance, the members of MPS other than the Third-Party Defendants are clearly the "shareholders" referred to in the quoted language, and those "shareholders," other than Donza H. Mattison, have so consented.
 - h. The fact that Donza H. Mattison does not consent to the joint representation of MPS and the Third-Party Defendants is of no consequence whatsoever, given that all of the other MPS members who are not Third-Party Defendants have given their consent.
 - i. The Renewed Motion to Disqualify refers to "an intractable conflict of interest" between MPS and the Third-Party Defendants. Regardless of whether a Rule 1.7(a) conflict of interest is "intractable," the appropriate inquiry is whether such a conflict can be addressed as required by Rule 1.7(b). In my opinion, in this case, the requirements of Rule 1.7(b) have been met such that the Renewed Motion to Disqualify should not be granted.
- 10. In summary, I am of the opinion that:
 - a. To the extent a conflict of interest exists pursuant to Rule 1.7(a) between MPS and the Third-Party Defendants, that conflict is "consentable" pursuant to Rule 1.7(b), and it seems clear that each affected client has given informed consent as required by Rule 1.7(b)(4), and in accordance with the last sentence of Rule 1.13(g). Additionally, there is absolutely nothing in Rule 1.13 or its Comments which would suggest that Nelson Mullins or FordHarrison should be disqualified.

- b. The requirements of Rule 1.7(b) have been met such that there is no violation of Rule 1.7(a). Additionally, the requirements of the last sentence of Rule 1.13(g) have been met.
- c. The Renewed Motion to Disqualify should not be granted.

11. The opinions set forth herein are given to a reasonable degree of certainty and are based on the Documents and otherwise as specified above. I reserve the right to supplement, amend, or modify the opinions set forth herein based on additional information which may come to my attention.


William O. Higgins

SWORN to before me this
10th day of December, 2019.

 (L.S.)
Notary Public of South Carolina
Print Notary Name: Donna G. Nickle
My Commission Expires: September 17, 2020



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>MOTION FOR A PROTECTIVE</u>
	)	<u>ORDER FROM NOTICE OF</u>
	)	<u>DEPOSITIONS TO MEMBERS OF</u>
	)	<u>MCMILLAN PAZDAN SMITH, LLC</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.	)	
	)	

Pursuant to Rule 26(c) of the South Carolina Rules of Civil Procedure, McMillan Pazdan Smith, LLC, Ron G. Smith, Joseph M. Pazdan, Brad B. Smith, and Chad C. Cousins (collectively, “MPS”) respectfully move this Court for a Protective Order from Defendant Donza H. Mattison’s (“Mattison”) Notice of Depositions to the following members of MPS: (1) William R. Joslin; (2) D. Paulette Myers; (3) K.J. Jacobs; (4) Harry D. Ballard; (5) Donald L. Love, Jr.; and (6) R. Cullen Pitts. The Notice of Depositions is attached hereto as **Exhibit A**.

MPS requests that the Court order the depositions not be taken because Mattison and her counsel’s sole purpose in noticing the depositions was to subject the members of MPS to annoyance, embarrassment, oppression, and undue burden and expense.

BACKGROUND

Mattison is a former employee and member of MPS. The parties memorialized her cessation of employment in a Severance Agreement and General Release (“Severance Agreement”) dated December 5, 2017. The Severance Agreement provided that the parties would agree on the value of Mattison’s 2,035.24 membership units in early 2018, following the close of fiscal year 2017, in accordance with MPS’s September 30, 2015 Operating Agreement. MPS used the 2017 valuation conducted by an outside firm to determine the per unit price of its membership units, and made an offer to Mattison on August 3, 2018 to purchase her units for that amount. Mattison, however, contested this valuation and demanded a much higher per unit price.

MPS filed a Declaratory Judgment action on February 22, 2019, asking the Court to determine that MPS followed the Operating Agreement’s provisions in determining the value of Mattison’s membership units. In response, Mattison filed counterclaims and a derivative action against the Third-Party Defendants on March 4, 2019. The Third-Party Defendants filed a Motion to Dismiss Mattison’s derivative action, which the Court denied on October 30, 2019. The Court held in abeyance pending further discovery the issue of whether Mattison meets Rule 23(b)(1)’s requirement that she fairly and adequately represent the interests of the other members.

THE NOTICE OF DEPOSITIONS

On December 2, 2019, counsel for MPS notified counsel for Mattison that statements had been obtained from every member of the LLC, except Mattison, expressing opposition to the continued pursuit of the derivative action and refusing to support or join Mattison in her alleged claims against the Third-Party Defendants. A copy of the December 2, 2019 email is attached hereto as **Exhibit B**. The statements were marked as confidential and forwarded to counsel for Mattison on December 3, 2019.

In light of this evidence and pursuant to Rule 11, SCRCPP, counsel for MPS requested that Mattison notify the Court of the dismissal of Mattison's derivative action. Counsel for Mattison refused to do so, and instead noticed the depositions of six members of MPS on December 3, 2019.

Upon receiving the Notice of Depositions, counsel for MPS immediately contacted Mattison's counsel and stated objection to the taking of these depositions in light of the member statements. Despite this objection, Mattison's counsel was unwilling to withdraw the Notice of Depositions. Thus, MPS respectfully moves this Court for a Protective Order.

ARGUMENT

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." Here, MPS is entitled to a Protective Order because Mattison and her counsel's sole purpose in noticing the depositions was to subject the members of MPS to annoyance, embarrassment, oppression, and undue burden and expense.

Upon receiving the member statements in opposition to Mattison's derivative lawsuit, counsel for Mattison should have withdrawn the derivative action due to Mattison's certain failure to meet the requirement of Rule 23(b)(1) that she fairly and adequately represent the interests of the other members of the LLC. The submission of statements from 98% of the membership of MPS that they will not support Mattison's derivative action is conclusive on this issue. Instead, counsel for Mattison noticed the depositions of six of its members, in an apparent and desperate attempt to continue Mattison's improper derivative action and somehow persuade the members to change their unambiguous statements by subjecting them to annoyance, embarrassment, oppression, and undue burden and expense.

MPS respectfully requests that the Court protect it and its members from Mattison's improper discovery tactics by disallowing the noticed depositions from going forward. No purpose is served by the taking of these depositions when Mattison's derivative action is clearly unsupported by the evidence.

Allowing the noticed depositions to go forward would impose an undue burden on the other members of MPS, who have stated their clear objection to Mattison's derivative action. Accordingly, MPS respectfully requests that the Court issue a Protective Order pursuant to Rule 26(c).

CONCLUSION

Based on the foregoing, MPS objects to the issuance of the Notice of Depositions, and respectfully requests that this Court protect MPS's members from having to appear for these depositions. Furthermore, MPS asks that this Court award an appropriate sanction which may include, but is not limited to, MPS's reasonable attorney's fees in bringing this Motion.

[signature page follows]

Respectfully submitted,

By: *s/ Samuel W. Outten*

Samuel W. Outten

SC Bar No. 4295

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Katie E. Towery

SC Bar No. 103219

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Spartanburg, SC 29306

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*Attorneys for McMillan Pazdan Smith, LLC, Ron G. Smith, Joseph
M. Pazdan, Brad B. Smith, and Chad C. Cousins*

Greenville, South Carolina
December 11, 2019

EXHIBIT A

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.)

Donza H. Mattison,)

Defendant-Counterclaimant.)

**DEFENDANT'S NOTICE OF
 DEPOSITIONS OF MPS MEMBERS
 JOSLIN, MYERS, JACOBS, BALLARD,
 LOVE, AND PITTS**

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.)

**TO: SAMUEL W. OUTTEN, ESQ., KATIE E. TOWERY, ESQ., AND THOMAS H.
 KEIM, JR., ESQ., COUNSEL FOR PLAINTIFF:**

YOU WILL PLEASE TAKE NOTICE that Defendant/Third-Party Plaintiff, Donza H. Mattison, by and through her undersigned attorney, will take the deposition of the following witnesses upon oral examination and recorded by stenographic means, pursuant to Rule 30 of the South Carolina Rules of Civil Procedure, before a Notary Public or before any other officer duly authorized by law to administer oaths, at the office of **Rothstein Law Firm, PA, 1312 Augusta Street, Greenville, SC 29605**, commencing at the dates and times indicated below and continuing

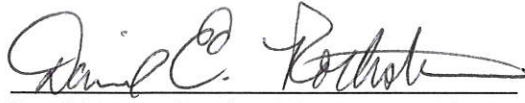
thereafter until completed:

- (1) William R. Joslin, an employee and member of Plaintiff, McMillan Pazdan Smith, LLC (hereinafter "MPS"), Tuesday, December 17, 2019, at 10:00 a.m.;
- (2) D. Paulette Myers, an employee and member of MPS, Tuesday, December 17, 2019, at 2:00 p.m., or immediately following the previous deposition, whichever is later;
- (3) K. J. Jacobs, an employee and member of MPS, Wednesday, December 18, 2019, at 10:00 a.m.;
- (4) Harry D. Ballard, an employee and member of MPS, Wednesday, December 18, 2019, at 2:00 p.m., or immediately following the previous deposition, whichever is later;
- (5) Donald L. Love, Jr., an employee and member of MPS, Thursday, December 19, 2019, at 10:00 a.m.; and
- (6) R. Cullen Pitts, an employee and member of MPS, Thursday, December 19, 2019, at 2:00 p.m., or immediately following the previous deposition, whichever is later.

These depositions are being taken for pre-trial discovery, for use at trial, and for such other purposes as may be permitted by law. You are invited to attend and take such part as is fit and proper.

* * *

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David E. Rothstein", written over a horizontal line.

David E. Rothstein, SC Bar No. 66295
ROTHSTEIN LAW FIRM, PA
1312 Augusta Street
Greenville, SC 29605
(864) 232-5870 (Office)
(864) 241-1386 (Facsimile)
drothstein@rothsteinlawfirm.com

Attorney for Defendant/Third-Party Plaintiff,
Donza H. Mattison

December 3, 2019

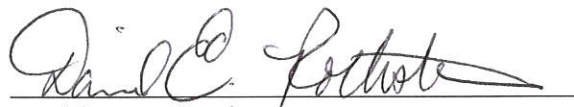
Greenville, SC.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the foregoing **DEFENDANT'S NOTICE OF DEPOSITIONS OF MPS MEMBERS JOSLIN, MYERS, JACOBS, BALLARD, LOVE, AND PITTS** in the above-captioned case upon Plaintiff and Third-Party Defendants by email and by depositing a copy of the same in the United States Mail, proper first-class postage pre-paid, this 3rd day of December, 2019, addressed as follows:

Samuel W. Outten, Esq. (sam.outten@nelsonmullins.com)
Katie E. Towery, Esq. (katie.towery@nelsonmullins.com)
NELSON MULLINS RILEY & SCARBOROUGH LLP
Greenville One Building
2 W. Washington St., Suite 400
Greenville, SC 29601

Thomas H. Keim, Jr., Esq. (tkeim@fordharrison.com)
(via email only)
FORD HARRISON
100 Dunbar St., Suite 300
Spartanburg, SC 29306


David E. Rothstein

Greenville, SC

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-Counterclaim Defendant,	)	
	)	
vs.	)	
	)	
Donza H. Mattison,	)	
	)	
Defendant-Counterclaimant.	)	
_____	)	<u>MOTION FOR SUMMARY</u>
	)	<u>JUDGMENT AS TO DEFENDANT'S</u>
	)	<u>AMENDED THIRD-PARTY</u>
Donza H. Mattison, in a Derivative	)	<u>COMPLAINT AND MOTION FOR</u>
Capacity on Behalf of McMillan Pazdan	)	<u>ATTORNEYS' FEES AND COSTS</u>
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, Ron G. Smith, Joseph M. Pazdan, Brad B. Smith, and Chad C. Cousins (collectively, "MPS"), hereby move for summary judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure as to Defendant Donza H. Mattison's ("Mattison") Third-Party Complaint. The Court should grant this Motion based upon the following grounds:

(1) Mattison does not fairly and adequately represent the interests of the other members of MPS similarly situated in enforcing the rights of the LLC. A derivative action "**may not** be maintained if it appears that the plaintiff does not" meet this representational requirement. Rule 23(b)(1), SCRCF (emphasis added). The undisputed evidence shows that the other members of

MPS oppose this derivative action and the allegations made by Mattison. Therefore, Mattison's derivative action must be dismissed.

(2) MPS is entitled to an award of attorneys' fees and costs in defending against Mattison's derivative action pursuant to Rule 37(b) of the South Carolina Rules of Civil Procedure. On December 2, 2019, Counsel for MPS advised counsel for Mattison that they had obtained statements from every member of the LLC, except Mattison, expressing opposition to the continued pursuit of the derivative action. Following this Rule 11 consultation, instead of dismissing the derivative action for failure to meet Rule 23(b)(1)'s representational requirement, counsel for Mattison noticed depositions of MPS's members. Mattison alleged, without any factual basis, that the Member Statements were not given voluntarily and were coerced by MPS or its counsel. Primarily on that basis, despite MPS's objection, counsel for Mattison was permitted to depose three minority members of MPS. During a telephone status conference with the parties, the Honorable R. Lawton McIntosh cautioned that the Court could award attorneys' fees and costs for conducting needless discovery. Each of the members deposed affirmed the declarations made in their Member Statements, and further testified that they did not support Mattison's derivative action. Therefore, MPS seeks an award of its reasonable attorneys' fees and costs following its December 2, 2019 Rule 11 consultation with opposing counsel regarding the Member Statements.

This Motion is based on the allegations in Defendant's Amended Third-Party Complaint, the undisputed facts of this case, a Memorandum of Law and Affidavit of Attorneys' Fees to be filed with this Court, and applicable common and statutory laws.

WHEREFORE, MPS respectfully requests that the Court issue an Order granting summary judgment as to Defendants' Amended Third-Party Complaint, and awarding MPS's reasonable attorneys' fees and costs incurred in defending against Mattison's derivative action.

Respectfully submitted,

By: *s/ Samuel W. Outten*

Samuel W. Outten

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Katie E. Towery

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*Attorneys for McMillan Pazdan Smith, LLC, Ron G. Smith, Joseph
M. Pazdan, Brad B. Smith, and Chad C. Cousins*

Greenville, South Carolina
February 21, 2020

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>MEMORANDUM IN SUPPORT OF</u>
	)	<u>MOTION FOR SUMMARY</u>
	)	<u>JUDGMENT AS TO MATTISON’S</u>
	)	<u>AMENDED THIRD-PARTY</u>
Donza H. Mattison, in a Derivative	)	<u>COMPLAINT AND MOTION FOR</u>
Capacity on Behalf of McMillan Pazdan	)	<u>ATTORNEYS’ FEES AND COSTS</u>
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”), submit this Memorandum in Support of their Motion for Summary Judgment as to Defendant Donza H. Mattison’s (“Mattison”) Amended Third-Party Complaint.

I. SUMMARY OF ARGUMENT

MPS and Third-Party Defendants’ Motion for Summary Judgment should be granted because Mattison does not fairly and adequately represent the interests of the other members of MPS. Pursuant to Rule 23(b)(1), SCRCP, a derivative action “***may not*** be maintained if it appears

that the plaintiff does not” meet this representative requirement. The evidence in this case is that no other members of MPS support this derivative action or the allegations made by Mattison.

MPS and Third-Party Defendants further request an award of attorneys’ fees and costs in defending against Mattison’s derivative claims. Despite receiving statements from every member of MPS (except Mattison) expressing opposition to this derivative action, Mattison continued to pursue it, and noticed the depositions of other members. The stated purpose for taking these depositions was to challenge the validity of the members’ statements, even though there was no evidence that the statements were coerced or involuntarily given. Testimony given at these depositions confirmed that Mattison is acting contrary to the interests of the members of MPS.

Therefore, MPS and Third-Party Defendants seek an award of attorneys’ fees and costs in defending against Mattison’s derivative claims. Specifically, an award of fees and costs is sought for defending the member depositions, which confirmed the accuracy of what MPS has been representing to this Court from the beginning of this case—Mattison does not fairly and adequately represent the interests of the other members of MPS.

II. 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 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. (*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, a copy of which is attached as **Exhibit A**. 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. (Ex. A at 2.) The Severance Agreement provides that the parties would agree on the value of Mattison’s 2,035.34 membership units in early 2018, following the close of fiscal year 2017, in accordance with MPS’s September 30, 2015 Operating Agreement (“Operating Agreement”), a copy of which is attached as **Exhibit B**. (*Id.*)

MPS’s Operating Agreement provides that a properly dissociating member will be paid “Fair Market Value” for their membership interest. (Ex. B at Articles X, XI.) Fair Market Value is determined by the Management Committee, which has the power and authority to determine the per unit price of any membership interest on an annual basis. (*Id.* at Article V.) For the last five years, MPS has retained HDH Advisors LLC (“HDH”) to provide an annual business appraisal. 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. By Form 4 Order dated October 10, 2019, Judge McIntosh 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.

After the discovery process began, a dispute arose regarding the proper scope of discovery, and specifically Mattison's issuance of subpoenas to numerous third parties. Judge McIntosh entered an Order dated November 22, 2019, attached as **Exhibit C**, in which the Court found that there were two relevant matters for discovery at this stage of the case: (1) with respect to the individual dispute between MPS and Mattison, the parties' claims and defenses which relate to the valuation of her membership units; and (2) with respect to the derivative action brought by Mattison, the issue of whether she fairly and adequately represents the interests of the other members. (Ex. C. at 4-5.)

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. (Dec. 2, 2019 Email, attached as **Exhibit D**.) In light of this evidence, and pursuant to Rule 11 of the South

Carolina Rules of Civil Procedure, counsel for MPS and the Third-Party Defendants requested that Mattison dismiss her derivative action. (*Id.*) A copy of the statements was provided to counsel for Mattison by email dated December 3, 2019. (Dec. 3, 2019 Email, attached as **Exhibit E.**)

The Member Statements in Opposition to Derivative Action (“Member Statements”), which are attached as **Exhibit F**, 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* Ex. F at ¶¶ 6-7.) Every other member of MPS stated that they do not join, or in any way support, Mattison’s derivative action. (*Id.* at ¶ 9.)

Upon receiving the Member Statements, counsel for Mattison should have withdrawn the derivative action due to Mattison’s certain failure to meet the requirement of Rule 23(b)(1) that she fairly and adequately represent the interests of the other members of MPS. The submission of statements from 98% of the membership of MPS that they oppose Mattison’s derivative action is conclusive on this issue. Instead, Mattison noticed the depositions of six of MPS’s members, in a desperate attempt to somehow persuade the members to recant their unambiguous statements by subjecting them to lengthy and burdensome depositions. MPS and the Third-Party Defendants therefore moved for a Protective Order, asking the Court to protect it and its members by ordering that the noticed depositions not go forward.

Judge McIntosh held a telephone status conference with the parties to discuss the pending depositions and Motion for Protective Order, during which counsel for Mattison represented, without any factual basis, that the Member Statements were not given voluntarily and were coerced by the Third-Party Defendants or their counsel. Primarily on that basis, the 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. Counsel for Mattison represented to the Court that the purpose of these depositions was to ascertain the circumstances surrounding their signing of the Member Statements. However, a review of these deposition transcripts reveals that Mattison’s counsel asked few, if any, questions about the signing of the Member Statements and, contrary to what he represented to the Court, used these depositions as an improper attempt to convince the members to join Mattison’s derivative action. Each of these minority members affirmed the statements made in the Member Statements under oath, and further testified that they opposed Mattison’s derivative action.

III. 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), SCRCP. “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).

IV. ARGUMENT

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), SCRCP, “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)). 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 strict 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 a determination of whether the 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.

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).

For the reasons set forth below, Mattison's Amended Third-Party Complaint should be dismissed pursuant to Rule 23(b)(1), SCRCF, because she does not fairly and adequately represent the interests of the other members of MPS.

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

Mattison's personal interests in bringing the derivative action, as compared to her interests in the derivative action itself, reveal that she is not a proper derivative plaintiff. Namely, the

¹ South Carolina adopted 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).

remedies that Mattison is seeking in her Amended Third-Party Complaint contradict what the other members of MPS believe is in the best interests of the company.

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 Mattison did not consent to or 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.) All other members of MPS have been acting pursuant to the provisions of this Operating Agreement for years.

Mattison further 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 undo resolutions of MPS in which membership units were issued to Grayson Bennett Thompson and William Gray. (Resolutions of MPS dated March 31, 2018 and June 30, 2018, attached as **Exhibit G**.) Every member of MPS except Mattison signed and consented to the issuance of membership units to these two current employees of the company. (*Id.*) Therefore, Mattison seeks to undo actions which were voted on and approved by every member of MPS except herself.

Mattison is the only member of MPS who is not currently employed by the company, and the outcome that she is trying to achieve in bringing this derivative action runs counter to what all other employee-members view to be in the best interests of the company.

Therefore, Mattison does not 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.

Mattison's motivation in bringing the derivative action is to gain leverage in her dispute with MPS regarding the valuation of her membership units, not for the benefit of the other members of MPS. In determining whether a derivative plaintiff is a fair and adequate representative of the other members or shareholders, courts have routinely analyzed whether the derivative plaintiff is using the lawsuit as a means of gaining leverage in other pending litigation. *See 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").

In other words, a plaintiff in a derivative action "owes the corporation his undivided loyalty," and "must not have ulterior motives and ... be pursuing an external personal agenda." *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); *see also 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").

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 involuntarily 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.*

Like the plaintiff in *Recchion v. Kirby*, Mattison has vindictive feelings towards MPS—specifically the Third-Party Defendants—due to the circumstances surrounding her resignation from the firm. Mattison has attempted to use the derivative action as leverage to obtain a favorable settlement of her dispute with MPS regarding the valuation of her membership units. In fact,

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 of \$131.50 per share as determined by HDH's 2017 valuation. (Jan. 14, 2019 Letter, attached as **Exhibit H.**) Mattison declined MPS's offer of \$267,647.21, and instead demanded \$829,000 for her units. (*Id.* at 3.)

In the last paragraph of the letter, Mattison's counsel threatened:

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. Mattison is pursuing this derivative action for her own interests, and not in order to vindicate the interests of the other members of MPS. Courts have consistently dismissed derivative actions under these circumstances.

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 claims made in Mattison's derivative action are not for the benefit of the other members, but are instead driven by her self-interest. Therefore, Mattison does not fairly and adequately represent the interests of the other members of MPS, and pursuant to Rule 23(b)(1), SCRCF, her claims must be dismissed.

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

An additional 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. Specifically, every member of MPS 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. (*See Ex. F.*)

William Joslin, KJ Jacobs, and Paulette Myers—three minority members of MPS—were deposed and affirmed their Member Statements and opposition to Mattison's derivative claims. (*See Jan. 17, 2020 Joslin Depo., cited portions of which are attached as **Exhibit I**; Jan. 29, 2020 Jacobs Depo., cited portions of which are attached as **Exhibit J**; Feb. 19, 2020 Myers Depo., cited portions of which are attached as **Exhibit K**.*)

Namely, the deposed minority members 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.) 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.)

The deposed minority members further testified that they had no complaint or concern about the rent paid for the Spartanburg office to C&P of Spartanburg. (Joslin Depo. at 171:16-19;

Myers Depo. at 168:3-5.) Instead, the members testified that they support, trust, and are pleased with the leadership and way the Third-Party Defendants have run the firm. (See Joslin Depo. at 170:7-10, 173:4-6; Myers Depo. at 170:23-171:2.) KJ Jacobs stated:

A: I've worked for this organization for just rounded to 25 years. I've never seen anything remotely approaching unethical in any form.

...

Q: Do all of these men exercise leadership for the benefit of the firm?

A: Yes.

Q: Do you have any questions about their honesty in their roles as leaders of this firm?

A: No.

Q: Any at all?

A: No, sir.

Q: Over 20 years?

A: No, sir.

Q: Do you support the leadership provided to the firm by Ron Smith, Brad Smith, Joe Pazdan, and Chad Cousins?

A: I do.

(Jacobs Depo. at 78:21-23, 168:4-17.)

The members further testified that the Third-Party Defendants are honest and ethical in how they conduct business, and that they believe the allegations made in Mattison's derivative action are false. (See Joslin Depo. at 170:11-15; Jacobs Depo. at 78:21-23, 165:22-166:3, 167:4-168:3; Myers Depo. at 41:14-19.) Paulette Myers testified as follows:

Q: Do you support the bringing of this derivative action by Ms. Mattison?

A: No, I do not support the bringing of the action. No.

Q: Ms. Myers, do you oppose the bringing of this derivative action by Ms. Mattison?

A: I do oppose.

Q: And you have been working for MPS since 2013 or '14, right?

A: Yes.

Q: And in that time, have you witnessed any conduct on the part of Ron Smith, Brad Smith, Joe Pazdan, or Chad Cousins which caused you any concern?

A: No.

Q: Have you witnessed any dishonest or self-dealing acts at all by Ron Smith, Brad Smith, Joe Pazdan, and Chad Cousins during your time with the firm?

A: No.

(Myers Depo. at 169:3-22.)

The depositions of MPS's members also confirmed that Mattison's allegation that the Member Statements were forced or coerced was completely unfounded. (See Jacobs Depo. at 164:7-15; Myers Depo. at 165:12-14.) Instead, the deposed members testified that the Member Statements were signed voluntarily, and of their own will and volition. (See Jacobs Depo. at 164:14-15; Myers Depo. at 165:8-11.) William Joslin testified as follows:

Q: Mr. Joslin, did anyone force you to sign this statement dated November 18, 2019?

A: No, sir, they did not.

Q: Did anyone coerce you, try to force you or pressure you into signing [the member statement]?

A: No, they did not.

Q: Did you sign [the member statement] voluntarily?

A: I did.

Q: Did you have the choice or option not to sign [the member statement]?

A: I did.

Q: And you chose to sign [the member statement] voluntarily, of your own accord, right?

A: That's correct.

(Joslin Depo. at 168:22-169:10.)

As affirmed in the depositions of three of MPS's minority members, every other member of MPS opposes Mattison's derivative action. (See Ex. F; Joslin Depo. at 169:20-170:6; Jacobs Depo. at 165:13-21; Myers Depo. at 169:3-9.) KJ Jacobs testified that the other members of MPS

are angered and frustrated by Mattison's derivative action. They, much like him, believe that Mattison's "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.) In short, Mattison has received no support from the other members of MPS whom she purports to represent.

For the reasons set forth above, Mattison's Amended Third-Party Complaint should be dismissed because she does not fairly and adequately represent the interests of the other members of MPS.

D. MPS and Third-Party Defendants Are Entitled to Reasonable Attorneys' Fees and Costs.

During a telephone status conference with the parties, Judge McIntosh permitted counsel for Mattison to take the depositions of MPS's minority members in order to determine if the Member Statements were given voluntarily, and cautioned that the Court could award attorneys' fees and costs for conducting needless discovery. Despite the Court's clear instruction, during the depositions of Mr. Joslin, Mr. Jacobs, and Ms. Myers, counsel for Mattison asked few, if any, questions about their signing of the Member Statements. Instead, counsel for Mattison improperly used these depositions as an opportunity to badger and try to convince the members to join Mattison's derivative action. Despite these inappropriate tactics, each of the deposed members affirmed the declarations made in their Member Statements, and further testified that they did not support Mattison's derivative action.

Despite being put on clear notice on December 2, 2019 that Mattison's derivative claim lacked merit (*see* Ex. D), Mattison and her counsel continued to pursue the derivative action without any factual or legal basis to support such claims. This resulted in MPS and Third-Party Defendants unnecessarily incurring attorneys' fees and costs in preparing for and defending the depositions of the minority members, filing Motions for Protective Order regarding improper

questions asked and tactics used during such depositions, and in the filing of this Motion for Summary Judgment. Therefore, MPS and Third-Party Defendants seek an award of their reasonable attorneys' fees and costs following the December 2, 2019 Rule 11 consultation with opposing counsel regarding the Members Statements.

V. CONCLUSION

For the reasons set forth above, MPS and Third-Party Defendants respectfully request that the Court grant their Motion for Summary Judgment as to Mattison's Amended Third-Party Complaint, and award their costs and expenses in having to defend against Mattison's derivative claims.

Respectfully submitted,

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Attorneys for McMillan Pazdan Smith, LLC, Ron G. Smith, Joseph M. Pazdan, Brad B. Smith, and Chad C. Cousins

Greenville, South Carolina
May 7, 2020

EXHIBIT B

**WRITTEN CONSENT IN LIEU OF A SPECIAL MEETING OF
THE MEMBERS OF
MCMILLAN PAZDAN SMITH, LLC**

The undersigned, being all of the members of McMillan Pazdan Smith, LLC, a South Carolina limited liability company (the "Company"), hereby approve and adopt the following resolutions by this written consent in accordance with the provisions of South Carolina law, said resolutions to have the same force and effect as if they had been unanimously adopted at a duly convened meeting of the Members of the Company.

WHEREAS, in order to incorporate the terms of that certain First Amendment to the Operating Agreement of the Company adopted on July 11, 2012, the terms of the Second Amendment to the Operating Agreement of the Company adopted on January 1, 2014, and to adjust certain other provisions related to distributions and governance, the Members of the Company desire to amend and restate the Operating Agreement of the Company in its entirety;

NOW, THEREFORE, BE IT RESOLVED, that the Management Committee has recommended to the Members and the Members hereby adopt the Amended and Restated Operating Agreement of McMillan Pazdan Smith, LLC, attached hereto as Exhibit A (the "Operating Agreement").

FURTHER RESOLVED, that this written consent shall be placed in the record book of the Company.

[Signature Page to Follow]

IN WITNESS WHEREOF, the undersigned, being the members of McMillan Pazdan Smith, LLC, have executed this Written Consent to be effective as of the 30th day of November, 2015.

MEMBERS:



Ron G. Smith



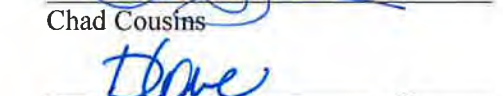
Joseph M. Pazdan



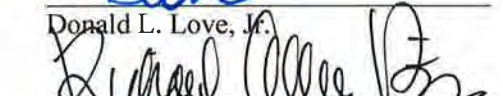
Brad B. Smith



Chad Cousins



Donald L. Love, Jr.

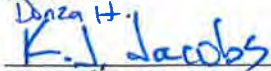


Richard Cullen Pitts

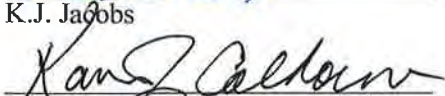


Lisa Marie Lanni

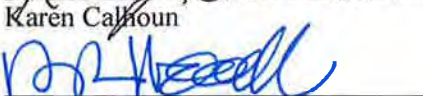
~~Donna L. Mattison~~



K.J. Jacobs

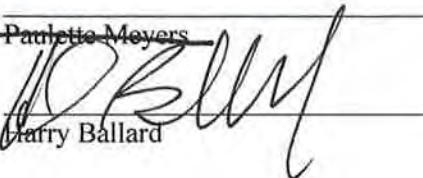


Karen Calhoun



David Moore

~~Paulette Meyers~~



Harry Ballard

EXHIBIT A

AMENDED AND RESTATED OPERATING AGREEMENT

Attached hereto.

McMillan Pazdan Smith, LLC

(a South Carolina limited liability company)

AMENDED AND RESTATED OPERATING AGREEMENT

September 30, 2015

NOTICE

THE MEMBERSHIP UNITS OF MCMILLAN PAZDAN SMITH, LLC (THE "UNITS") HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED (THE "SECURITIES ACT"), THE SECURITIES LAWS OF ANY STATE, OR ANY OTHER APPLICABLE SECURITIES LAWS IN RELIANCE UPON EXEMPTIONS FROM THE REGISTRATION REQUIREMENTS OF THE SECURITIES ACT AND SUCH LAWS. THE UNITS MAY BE ACQUIRED FOR INVESTMENT ONLY, AND SUCH UNITS MAY NOT BE OFFERED FOR SALE, PLEDGED, HYPOTHECATED, SOLD, ASSIGNED OR TRANSFERRED AT ANY TIME EXCEPT IN COMPLIANCE WITH (1) THE SECURITIES ACT, ANY APPLICABLE STATE SECURITIES LAWS, AND ANY OTHER APPLICABLE SECURITIES LAWS, AND (2) THE TERMS AND CONDITIONS OF THIS AMENDED AND RESTATED OPERATING AGREEMENT. THE UNITS WILL NOT BE TRANSFERRED OF RECORD EXCEPT IN COMPLIANCE WITH SUCH LAWS AND THIS AMENDED AND RESTATED OPERATING AGREEMENT. PURCHASERS OF THE UNITS WILL BE REQUIRED TO BEAR THE RISK OF THEIR INVESTMENT FOR AN INDEFINITE PERIOD OF TIME.

TABLE OF CONTENTS

ARTICLE I - DEFINITIONS	4
ARTICLE II - FORMATION, PURPOSES AND POWERS	7
2.1 Formation	7
2.2 Name	7
2.3 Compliance with Act	7
2.4 Principal Office	7
2.5 Designated Office	7
2.6 Registered Agent and Address	7
2.7 At-Will Company	7
2.8 Filings and Fees	7
2.9 Income Tax Election	7
2.10 Purposes	8
2.11 Powers	8
2.12 Bank Accounts	8
2.13 Title to Property	8
2.14 Expenses	8
2.15 Foreign Qualification	8
2.16 Insurance	8
ARTICLE III - MEMBERSHIP AND CAPITALIZATION	8
3.1 Member Information	8
3.2 Admission of New Members	8
3.3 Effect of Transfer of Units - Transferee Admitted as a Member	9
3.4 Effect of Transfer of Units - Transferee not Admitted as a Member	9
3.5 Redemption of Member's Financial Rights Subjected to Charging Order	9
3.6 Ceasing to be a Member	10
3.7 Power of Attorney	10
3.8 Additional Capital Contributions	10
3.9 No Right to Interest on Capital Contribution; Return of Capital Contribution	10
3.10 Loans to the Company	10
3.11 Units	10
ARTICLE IV - MEMBERS	10
4.1 No Right of Control	10
4.2 Member Approval Required for Certain Decisions	10
4.3 Limitation of Liability	11
4.4 Meetings of the Members	12
4.5 Place of Meetings	12
4.6 Notice of Meetings	12
4.7 Quorum and Voting Requirements	13
4.8 Proxies	13
4.9 Action by Members Without a Meeting	13
4.10 Member's Rights to Inspect Company Records	13
4.11 Audits	13
4.12 Tax Returns and Information	13
4.13 Representations and Warranties of Members	14
ARTICLE V - BOARD OF MANAGERS	14
5.1 General Authority	15
5.3 Liability for Certain Acts	16

5.4	Compensation.....	16
5.5	Board of Managers Meetings - Place, Time and Notice	16
5.6	Waiver of Notice	17
5.7	Action without Meeting.....	17
5.8	Managers: Number, Election, Tenure and Qualifications	17
5.9	Removal of Managers.....	17
5.10	Resignation of Managers.....	17
5.11	No Authority of Members	17
5.12	Ratification	17
5.13	Delegation of Powers.....	17
5.14	Board of Managers Certificates	17
ARTICLE VI - FIDUCIARY DUTIES; RIGHT TO RELY; INDEMNIFICATION		18
6.1	Duties of Members	18
6.2	Duty of Loyalty	18
6.3	Duty of Care.....	18
6.4	Fiduciary Duties	18
6.5	Right to Rely	18
6.6	Indemnification of Managers	19
6.7	Remedies.....	19
6.8	Scope of Duties	19
ARTICLE VII - CAPITAL ACCOUNTS AND ACCOUNTING		19
7.1	Accounting Decisions	19
7.2	Taxable Year and Tax Accounting Methods.....	19
7.3	Tax Returns	19
7.4	Tax Elections	19
ARTICLE VIII - INTERIM DISTRIBUTIONS AND ALLOCATIONS		20
8.1	Distributions.....	20
8.2	Calculation of Profits and Losses	20
8.3	Allocation of Profits and Losses.....	20
8.4	Tax Item Allocation	20
ARTICLE IX - DISSOLUTION, WINDING UP, AND TERMINATION		21
9.1	Dissolution.....	21
9.2	Waiver of Right to Wind Up	21
9.3	Winding Up: Powers and Duties of Liquidator	22
9.4	Sale of Company Property.....	22
9.5	Distribution In Kind.....	22
9.6	Final Liquidating Distributions	22
9.7	Final and Complete Distribution	23
ARTICLE X Dissociation		23
10.1	Events of Proper Dissociation.....	23
10.2	Effect of Member's Proper Dissociation	23
10.3	Events of Wrongful Dissociation.....	23
10.4	Effect of Member's Wrongful Dissociation.....	24
10.5	Statement of Dissociation.....	24
ARTICLE XI Restrictions on Transfer and Buy-Sell Provisions		24
11.1	Restrictions on Transfer	24
11.2	Right to Buy.	25
11.3	Purchase Price	26

11.4	Payment of Purchase Price	27
10.6	Drag-Along Rights	28
10.7	Tag-Along Rights	28
ARTICLE XII - MISCELLANEOUS PROVISIONS		28
12.1	Notices	28
12.2	Time of Essence	28
12.3	Governing Law	29
12.4	Consent to Jurisdiction	29
12.5	Waiver	29
12.6	Severability	29
12.7	Counterparts	29
12.8	Captions	29
12.9	Entire Agreement	29
12.10	Remedies Cumulative	29
12.11	Binding Effect	30
12.12	Use of Terms	30
12.13	Further Assurances	30
12.14	Equitable Remedies	30
12.15	Schedules	30
12.16	Effective Date	30
12.17	Construction	30

SCHEDULE A – MEMBER INFORMATION

**AMENDED AND RESTATED
OPERATING AGREEMENT
OF
MCMILLAN PAZDAN SMITH, LLC**

THIS AMENDED AND RESTATED OPERATING AGREEMENT (this "Agreement") of McMillan Pazdan Smith, LLC, a South Carolina limited liability company (the "Company"), is made and entered into and shall be effective as of the 30th day of September, 2015, by and among the undersigned parties.

W I T N E S S E T H:

WHEREAS, the Company was formed on August 19, 2009 by the filing of a Articles of Organization with the South Carolina Secretary of State and the then members entered into the McMillan Pazdan Smith, LLC Operating Agreement on September 25, 2009 (the "Original Agreement"); and

WHEREAS, the undersigned Members desire to amend certain provisions of the Original Agreement to revise certain distribution rights and, in connection therewith, the parties hereto desire to amend and restate the Original Agreement in its entirety.

NOW, THEREFORE, for and in consideration of the mutual promises and agreements herein made and intending to be legally bound hereby, the parties hereto agree as follows:

ARTICLE I
Definitions

Whenever used in this Agreement, or any amendment hereof, the following terms shall have the meanings set forth below and shall include the plural as well as the singular:

"Act" shall mean the South Carolina Uniform Limited Liability Company Act of 1996, Sections 33-44-101 et. seq. of the Code of Laws of South Carolina (1976), as amended, and any corresponding provisions of future laws.

"Agreement" shall mean this Amended and Restated Operating Agreement of McMillan Pazdan Smith, LLC and any amendments made thereto from time to time.

"Articles of Organization" shall mean the Articles of Organization filed with the South Carolina Secretary of State by which the Company was organized as a South Carolina limited liability company pursuant to the Act, as amended or restated from time to time in accordance with this Agreement.

"Capital Account" shall mean the account established and maintained for each Member on the books of the Company pursuant to ARTICLES VII and VIII hereof.

"Capital Contribution" or "Contribution to Capital" shall mean the amount of cash and net fair market value (at the time of the contribution) of any property contributed to the Company by or on behalf of each Member.

"Code" shall mean the Internal Revenue Code of 1986, as amended, and any corresponding provisions of future laws.

"Company" shall mean McMillan Pazdan Smith, LLC, a South Carolina limited liability company.

"Company Liability" shall mean any enforceable debt or obligation for which the Company is liable or which is secured by any Company Property.

"Company Property" shall mean any and all property, real, personal, tangible and intangible, either contributed by a Member as capital, transferred to, or otherwise acquired by the Company.

"Disability" shall mean any infirmity or physical or mental impairment of a Member, which, in the opinion of a physician, approved by the Company, prevents the Member from performing the usual duties of the Member's normal employment for a period exceeding ninety (90) days.

"Disinterested" shall mean, with respect to any Member or Manager, a Member or Manager who (a) is not a party to a particular transaction or other undertaking and (b) has no material financial interest in any organization that is a party to that undertaking.

"Distribution" or "Distributions" shall mean any cash or other Company Property distributed to a Member by the Company on account of such Member's Financial Rights as provided in ARTICLE IX and Section 10.6 and does not include payments to a Member: (a) pursuant to a loan by such Member to the Company or other transaction in which such Member is acting other than in his capacity as a Member within the meaning of Section 707(a) of the Code; (b) which are guaranteed payments within the meaning of Section 707(c) of the Code; (c) which are made to reimburse a Member for amounts paid for or on behalf of the Company; or (d) which are made to indemnify a Member as permitted under this Agreement.

"Fair Market Value" shall mean, with respect to a Member's Units, 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; provided, however, in the event that the Management Committee does not make such determination of the value of the Units for two (2) consecutive years, then, the Fair Market Value of the Units shall thereafter be determined in accordance with the procedure set forth in this paragraph unless or until such time the Management Committee makes a new determination of the value of the Units in accordance with Section 5.1(s). First, the seller and the Management Committee shall attempt to agree upon the value of the Units as soon as practical after the occurrence of the event giving rise to a purchase and sale under ARTICLE XI. If the seller and the Management Committee are unable to reach an agreement within the first thirty (30) days of the Company's Purchase Period (the "Agreement Period"), the value of the Units shall be determined as of the end of the fiscal year immediately preceding the date of the underlying event which triggered the sale by a Qualified Appraiser selected by the Management Committee. The appraisal shall take into account the particular characteristics of the Units to be sold, including, but not limited to, their minority status. The seller and the Company shall each pay half the fees and expenses of the Qualified Appraiser. The Company shall provide such data and other information as any Qualified Appraiser may reasonably request upon receipt of such Qualified Appraiser's written agreement to maintain the confidentiality of such data and information.

"Financial Rights" shall mean the right of a Member, or any other Person, to share in the Profits and Losses of the Company and the right to share in Distributions, both in accordance with the provisions of this Agreement. Any reference herein to a Member's Financial Rights shall mean that fraction, expressed as a percentage, having as its numerator the number of Units owned by such Member, and having as its denominator the total number of outstanding Units owned by all the Members. Except as otherwise modified by the provisions of this Agreement, the phrase "Financial Rights" shall have the same meaning, and describe the same rights, as the phrase "Distributional Interest" as used in the Act.

"Fiscal Year" shall mean the annual accounting period of the Company, which shall be the calendar year; provided, however, that the Fiscal Year for the first year of the Company shall be that year (even though less than twelve (12) months) commencing on the date the Company is organized and ending on December 31 of such year; and, provided further, that the Fiscal Year for the final year of the Company shall be that year (even if less than twelve (12) months) commencing on January 1 of such year and ending on the date final liquidating Distributions are made in accordance with Section 9.6 hereof.

"Losses" shall mean the losses of the Company as determined under ARTICLE VIII hereof.

"Majority in Interest of the Members" shall mean, at any particular time, the Member or Members holding at such time more than fifty percent (50%) of all the Units issued and outstanding at such time.

"Management Committee" shall mean the individuals or entities elected from time to time as Managers of the Company to manage its business and affairs.

"Manager" shall mean any individual or entity elected to the Management Committee from time to time pursuant to ARTICLE V.

"Maximum Effective Tax Rate" shall mean the combination of the highest applicable individual federal and South Carolina tax rate (taking into consideration the character of the income with a proper adjustment for (a) the deductibility of state income taxes on federal income tax returns, and (b) tax credits, capital gains and losses, and other specially allocated items which pass through to the Members based on their respective Membership Interests).

"Members" shall mean the members of the Company from time to time as listed on Exhibit A.

"Membership Interest" of any Member at any time shall mean the entire ownership interest of such Member in the Company at such time, including any benefits to which the holder of such a Membership Interest is entitled as provided in this Agreement and under applicable law, together with all obligations of such Member to comply with the terms and provisions of this Agreement. Except as otherwise expressly provided herein, each Member's Membership Interest in the Company shall be represented by the Units held by such Member.

"Person" shall mean an individual, general partnership, limited liability company, limited liability partnership, limited partnership, trust, estate, corporation, custodian, trustee, executor, personal representative, legal representative, administrator, nominee or any other entity or person, and any individual or entity acting in a representative capacity.

"Qualified Appraiser" shall mean a professional appraiser or certified public accountant who is qualified by experience and ability to appraise the Fair Market Value of the Units to be sold.

"Required Interest of the Members" shall mean, at any particular time, the Members holding at such time more than sixty-six and two-thirds percent (66.667%) of all of the Units issued and outstanding at such time.

"S.C. Code" shall mean the South Carolina Code of Laws of 1976, as amended, and any corresponding provisions of future laws.

"Units" shall mean the shares into which Membership Interests are divided, as provided in Section 3.11.

"Voluntary Bankruptcy" shall mean, with respect to the Company or any other Person: (a) instituting proceedings or filing an answer to be adjudicated a bankrupt or insolvent or seeking any reorganization, arrangement, composition, readjustment, liquidation, dissolution or other similar relief, or consenting to the institution of bankruptcy or insolvency proceedings against such Person; (b) filing or consenting to a petition, answer or other pleading seeking for such Person any liquidation, winding up, reorganization, arrangement, adjustment, protection, relief, or composition of the Person or the Person's debts under any law relating to bankruptcy, insolvency or reorganization or relief of debtors; or (c) seeking, consenting to, or acquiescing in any entry of an order for relief or the appointment of a receiver, trustee, liquidator, custodian or other similar official for such Person or any substantial part of the Person's property.

ARTICLE II

Formation, Purposes and Powers

2.1 **Formation.** The Company was formed as a South Carolina limited liability company on August 19, 2009, by filing Articles of Organization with the South Carolina Secretary of State. The rights and obligations of the Members, and the administration and termination of the Company, shall be governed by the Articles of Organization, this Agreement, the Act, and other applicable law. The Company shall exist only for the purposes specified in this Agreement and shall not be deemed to create a partnership, joint venture, or any other relationship between the Members.

2.2 **Name.** The name of the Company shall be McMillan Pazdan Smith, LLC. All business of the Company shall be conducted in such name or such other name or names that comply with the Act or other applicable laws as may be proposed by the Management Committee and adopted by the Members from time to time in accordance with the terms of this Agreement.

2.3 **Compliance with Act.** The Company shall remain in compliance with all applicable provisions of the Act necessary to maintain its existence as a South Carolina limited liability company.

2.4 **Principal Office.** The principal office of the Company shall be located at such address as the Management Committee may designate from time to time. The Management Committee may at any time and from time to time establish and close other offices and places of business and change the principal office of the Company to any other place within or without the State of South Carolina.

2.5 **Designated Office.** The Company shall maintain a designated office in South Carolina in accordance with Section 33-44-108(a) of the Act. The designated office of the Company shall be located at such address as the Management Committee may designate from time to time. The Management Committee may from time to time change the location of the Company's designated office.

2.6 **Registered Agent and Address.** The registered agent for service of process on the Company shall be Richard L. Few, Jr. The street address of the registered agent for service of process on the Company shall be 2 West Washington Street, Suite 1100, Greenville, South Carolina. The Management Committee may change the registered agent's street address or designate a new agent for service of process by filing with the Secretary of State a Statement of Change, in compliance with Section 33-44-109 of the Act.

2.7 **At Will Company.** The Company shall be an at will company within the meaning of the Act. The Company's term of existence and business shall commence on the date Articles of Organization are filed with the South Carolina Secretary of State, unless a later effective date is specified in said Articles of Organization, and the existence of the Company shall terminate in accordance with the provisions of this Agreement, unless extended or sooner terminated by law.

2.8 **Filings and Fees.** The Management Committee shall cause the Company to execute and file for recordation in the office of the appropriate authorities such reports, disclosures, certificates, and other forms, schedules, instruments or documents as are required by applicable law or regulation, or which otherwise may be necessary or appropriate, with respect to the formation of, and conduct of business by, the Company. The Management Committee shall also cause the Company to pay all fees, taxes, and other charges, including professional fees, incurred in connection with the preparation and filing of such reports, disclosures, certificates, forms, schedules, instruments or other documents.

2.9 **Income Tax Election.** The Company shall be taxed as a Subchapter S corporation for state and federal income tax purposes, and the Company shall make all elections necessary and file all documents and forms required to obtain and maintain such income tax treatment for the Company.

2.10 Purposes. The purposes of the Company shall be to engage in the practice of architecture and all related business, including, but not limited to, managing, operating, leasing, mortgaging, refinancing, pledging, selling or otherwise dealing with the Company Property and engaging in such other lawful activities as the Management Committee deems necessary or appropriate to the foregoing purposes.

2.11 Powers. The Company shall have the full power and authority to do all acts and things necessary, advisable, convenient, expedient or useful to carry out, or which are incidental to, the Company's business and affairs and the accomplishment of its purposes to the extent the same may be legally exercised by limited liability companies under the Act or other applicable law. Subject to the provisions of this Agreement, such power and authority of the Company shall be vested in the Management Committee.

2.12 Bank Accounts. The Company shall maintain such separate bank accounts as are appropriate for the conduct of the Company's business. Any such bank accounts shall be maintained in the name of the Company and at such bank or banks as may be designated by the Management Committee from time to time.

2.13 Title to Property. All Company Property shall be owned by the Company as an entity and no Member shall have any ownership interest in the Company Property in such Member's individual name or right. Except as otherwise provided in this Agreement, the Company shall hold all Company Property in the name of the Company and not in the name of any Member. Each Member's Units shall be personal property for all purposes.

2.14 Expenses. Subject to the approval of the Management Committee, the Company shall pay all costs and expenses arising from or related to the organization of the Company and the commencement of its operations, including all fees of legal counsel, accountants, and other professionals. The Company shall also be required to reimburse its Management Committee for reasonable and necessary out-of-pocket expenses incurred by them in conducting the business operations of the Company.

2.15 Foreign Qualification. Prior to the Company conducting business in any jurisdiction other than South Carolina, the Management Committee shall cause the Company to comply (to the extent procedures are available and compliance therewith is reasonably within the control of the Management Committee) with all requirements necessary to qualify the Company as a foreign limited liability company in such jurisdiction. At the request of the Management Committee, each Member shall execute, acknowledge, swear to, and deliver all certificates and other instruments that are necessary or proper to qualify, continue, or terminate the Company as a foreign limited liability company in all such jurisdictions in which the Company may conduct business.

2.16 Insurance. The Management Committee shall cause to be provided, or cause the Company to carry and maintain, such insurance as is customary in the architecture business. All such insurance shall be effected under policies issued by insurers and be in forms and for amounts approved by the Management Committee.

ARTICLE III

Membership and Capitalization

3.1 Member Information. The name and number of Units and Financial Rights held by each Member shall be set forth on Schedule A hereto, which schedule may be amended from time to time to reflect changes in the membership of the Company.

3.2 Admission of New Members. Except in the case of transferees of all or any portion of a Member's Units, who shall be subject to Section 3.3, additional Members may be admitted to the

Company only with the prior written consent of the Management Committee and a Majority-in-Interest of the Members. In addition, no Person shall become a Member unless such Person:

(a) Agrees in writing to assume and to be bound by all the obligations and subject to all the restrictions of this Agreement and any further agreement with respect to the Company; and

(b) Notifies the Company of his current address and provides his federal and state tax identification numbers, if applicable, and such other information as the Management Committee may deem appropriate.

3.3 Effect of Transfer of Units - Transferee Admitted as a Member.

(a) Except as otherwise expressly provided in ARTICLE XI, a transferee of all or any portion of a Member's Units who is not already a Member, may only become a Member if (i) the Management Committee and a Required Interest of the Members consents to the transferee's admission as a Member and (ii) such transferee meets all the qualification requirements for Members contained in this Agreement, including, but not limited to, all requirements of Sections 3.2(a) and (b). If the transferee becomes a Member, he shall be entitled to all rights and powers and subject to all restrictions and liabilities of a Member.

(b) Notwithstanding anything herein to the contrary, no creditor of a Member who obtains any portion of a Member's Units by charging order pursuant to Section 33-44-504 of the Act, or otherwise, or any person or entity, including any creditor, receiver, or bankruptcy estate that obtains any rights in the Company by reason of a security interest, pledge or the filing of an action for foreclosure, bankruptcy, receivership, divorce, or any similar proceeding may become a full Member in the Company without the unanimous written consent of the Members, obtained after the transfer.

3.4 Effect of Transfer of Units - Transferee not Admitted as a Member.

(a) A transferee who is not admitted as a Member shall be entitled only to allocations of Profits and Losses and Distributions in accordance with this Agreement with respect to the Financial Rights Transferred to such transferee; provided, however, that a transferee who is not admitted as a Member takes all Financial Rights of the transferor subject to any claims or offsets the Company has against the transferor, regardless of whether those claims or offsets exist at the time of the Transfer or arise afterwards.

(b) A transferee who is not admitted as a Member shall (i) not have any voting rights, (ii) not be entitled to participate in the management of the Company's business and affairs or transact any business for or on behalf of the Company, (iii) have no power to sign for or on behalf of, or to bind, the Company, and (iv) not have any of the other rights of a Member under the Act or this Agreement other than those set forth in Section 3.4(a). In addition, a transferee who is not admitted as a Member shall not have the right to seek a judicial determination that it is equitable to dissolve and wind up the Company's business under Section 33-44-801(b)(6) of the Act.

(c) Notwithstanding anything herein to the contrary, a transferee who is not admitted as a Member shall not be entitled to receive any Distributions from the Company until such transferee delivers to the Company written notice of the Transfer, proof of the Transfer deemed sufficient by the Company, the transferee's federal and state tax identification numbers, current legal address and telephone number, and such other information as the Company may reasonably require.

3.5 Redemption of Member's Financial Rights Subjected to Charging Order. In the event a Member's Financial Rights are subjected to a charging order under Section 33-44-504 of the Act, the Company may redeem the Member's Financial Rights so charged, with Company Property, at any time prior to foreclosure of said Financial Rights in accordance with Section 33-44-504(c) of the Act. Nothing in

this Section 3.5 shall be construed as affecting or limiting the rights of the judgment debtor and the other Members to redeem any Financial Rights subjected to a charging order with their own property in accordance with Section 33-44-504(c) of the Act.

3.6 Ceasing to be a Member. A Member shall cease to be a Member and shall have no power to exercise any rights of a Member if such Member: (a) Transfers all of his Units in accordance with the terms of this Agreement; or (b) is expelled from the Company by judicial determination under Section 33-44-601(6) of the Act.

3.7 Power of Attorney. Any Member may give another Member power of attorney to act for or to execute documents in the name of such Member and any action taken pursuant to such power of attorney shall be valid for all purposes as if done or executed by the Member giving such a power of attorney, provided the Member giving such power of attorney delivers a copy of the power of attorney to the Company. Any such power of attorney may be general or may be limited to certain acts or instruments, may contain conditions and restrictions, and may be changed or revoked at any time by the Member who gave such power giving notice of its change or revocation to the Company.

3.8 Additional Capital Contributions. Unless otherwise agreed by the Management Committee and a Required Interest of the Members, no Member shall be required to make additional Capital Contributions to the Company.

3.9 No Right to Interest on Capital Contribution; Return of Capital Contribution. Except as otherwise provided herein, without the written consent of the Management Committee, no Member shall (a) be paid interest on any Capital Contribution, (b) withdraw or be prepaid all or any part of such Member's Capital Contribution or (c) have a right to receive, as a Distribution or return of capital, Company Property other than cash.

3.10 Loans to the Company. Nothing in this Agreement shall prevent a Member or Manager from making secured or unsecured loans to the Company by agreement with the Company if the terms of such loan are approved as provided in Section 4.2. If any Member or Manager shall make a loan or loans to the Company or advance money on its behalf, the amount of such loan or advance shall not be treated as a Capital Contribution, but shall be a debt due from the Company.

3.11 Units. The Company is authorized to issue one (1) class of Units. Each Member's Membership Interest in the Company shall be represented by the Units held by such Member.

ARTICLE IV

Members

4.1 No Right of Control. Except as otherwise expressly provided in this 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.

4.2 Member Approval Required for Certain Decisions.

(a) Except as otherwise expressly provided in this Section 4.2, all decisions which require Member approval under this Agreement or the Act shall require the affirmative vote of the Management Committee and approval of a Required Interest of the Members.

(b) Notwithstanding anything herein to the contrary, the following decisions shall require the affirmative vote of the Management Committee and approval by a Majority-in-Interest of the Members:

- (i) purchase or sale of real estate;
- (ii) entering into a contract with a Member or a Manager;
- (iii) admission of a new member who is employed by the Company;
- (iv) purchase of life insurance on Members for Company purposes, except for the purchase of or increase in the life insurance on the Insured Members (as defined in Section 11.4(d)) which shall be determined solely by the Management Committee pursuant to Section 5.1(d) hereof;
- (v) loans or contributions to or from a Member or Manager; and
- (vi) establishing a liquidating trust following the dissolution of Company.

(c) Notwithstanding anything herein to the contrary, the following decisions shall require the affirmative vote of the Management Committee and the approval of a Required Interest of the Members:

- (i) revocation or reinstatement of the Subchapter S election;
- (ii) change in tax status from a corporation;
- (iii) change in organizational status;
- (iv) any amendment of Articles of Organization or this Agreement;
- (v) merger or sale of business of the Company or any sale, lease, exchange or other disposition of all or substantially all of the Company Property;
- (vi) dissolution of the Company, or change of principal office of the Company
- (vii) filing on behalf of the Company a voluntary petition for bankruptcy, or to bring an action on behalf of the Company for receivership, insolvency or other similar relief in any court of competent jurisdiction, and to defend, answer, respond and otherwise represent the Company in any such action or proceeding;
- (viii) any assignment or transfer of a Membership Interest to an existing Member or non-member;
- (ix) the decision to terminate the employment of a Member; and
- (x) any reduction in the purchase price penalty incurred by a Withdrawing Member who is Wrongfully Dissociating, as defined and provided in ARTICLE XI.

(d) Notwithstanding anything herein to the contrary, the following decisions shall require the approval of all of the Members:

- (i) any amendment of the Articles of Organization or this Agreement which affect the financial or voting rights of a Member; or
- (ii) any act in contravention of this Agreement or Articles of Organization.

4.3 Limitation of Liability.

(a) Except as otherwise expressly provided in this Agreement or by applicable law, no Member, as such, without the prior written consent of such Member, shall be (i) bound by, or be personally liable for, the expenses, liabilities or obligations of the Company or other Members, (ii) required to make Capital Contributions in excess of the amounts contributed, or required to be contributed, pursuant to Sections 3.8, or (iii) required to lend any funds to, or provide any guarantees on behalf of, the Company or to pay assessments or make any contributions for payments to the Company.

(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.

(c) Notwithstanding anything herein to the contrary, if a Member receives a "wrongful distribution" within the meaning of Section 33-44-407 of the Act, such Member shall be liable to the Company (or, if the Company has dissolved and been wound up, to the successor in interest of such claim by the Company) for the return thereof in accordance with, and for the periods provided by, Section 33-44-407 of the Act.

4.4 Meetings of the Members. The Management Committee shall call for meetings of the Members at such times as it determines to be necessary or appropriate or at the request of the holders of not less than ten percent (10%) of all outstanding Units of the Company.

4.5 Place of Meetings. All meetings of the Members shall be held at the principal office of the Company, or at such other place, either within or without the State of South Carolina, as shall be designated by the Management Committee.

4.6 Notice of Meetings.

(a) Required notice. Written notice stating the place, day and hour of any meeting of the Members shall be delivered not less than five (5) nor more than sixty (60) days before the date of the meeting, either personally or by mail, by or at the direction of the Management Committee or other persons calling the meeting, to each Member of record entitled to vote at such meeting. Notice shall be deemed to be effective at the earlier of: (i) when deposited in the United States mail, addressed to the Member at his address as it appears on the Unit transfer books of the Company, with postage thereon prepaid, (ii) on the date shown on the return receipt if sent by registered or certified mail, return receipt requested, and the receipt is signed by or on behalf of the addressee, (iii) when received, or (iv) five (5) days after deposit in the United States mail, if mailed postpaid and correctly addressed to an address other than that shown in the Company's current record of Members.

(b) Adjourned Meeting. If any meeting of the Members is adjourned to a different date, time, or place, notice need not be given of the new date, time or place, if the new date, time and place are announced at the meeting before adjournment. If a new record date for the adjourned meeting is or must be fixed, then notice must be given pursuant to the requirements of Section 4.6(a) to those Persons who are Members as of the new record date.

(c) Waiver of Notice. A Member may waive notice of the meeting (or any other notice required by the Act or this Agreement) by a writing signed by the Member entitled to the notice, which is delivered to the Company (either before or after the date and time stated in the notice) for inclusion in the minutes or filing with the corporate records. A Member's attendance at a meeting: (i) waives objection to lack of notice or defective notice of the meeting, unless the Member at the beginning of the meeting objects to holding the meeting or transacting business at the meeting; and (ii) waives objection to consideration of a particular matter at the meeting that is not within the purpose or purposes described in the meeting notice, unless the Member objects to considering the matter when it is presented.

(d) Contents of Notice. The notice of each meeting of the Members shall include a description of the purpose or purposes for which the meeting is called. If a purpose of any Member meeting is to consider either: (i) a proposed amendment to the Articles of Organization or this Agreement; (ii) the sale, lease, exchange or other disposition of all or substantially all the Company Property; (iii) any adoption, amendment or repeal of a provision of this Agreement; or (iv) dissolution of the Company, the notice must so state and be accompanied by respectively a copy or summary of the: (i) proposed

amendment(s) to the Articles of Organization; (ii) transaction for disposition of all or substantially all the Company Property; or (iii) proposed amendment(s) to this Agreement.

4.7 Quorum and Voting Requirements.

(a) A Required Interest of the Members, present in person or represented by proxy, shall constitute a quorum at all meetings of the Members.

(b) If there is no quorum at the opening of a meeting of the Members, such meeting shall be adjourned by a majority of the votes cast on the motion to adjourn; and at any adjourned meeting at which a quorum is present, any business may be transacted which might have been transacted at the original meeting. Once a Member is represented at a meeting of the Members, such Member is deemed present for purposes of providing a quorum for the remainder of the meeting and for any adjournment thereof unless a new record date is or must be set for that adjourned meeting.

(c) Each Member shall be entitled to one vote for each Unit owned by such Member. A Member may vote in person or by proxy. Voting on all matters by the Members shall require the approval of a Majority in Interest of the Members or a Required Interest of the Members, as set forth in this Agreement, without regard to the number of Units represented at the meeting. No Member shall be permitted to split his or her Units in any vote of the Members.

4.8 Proxies. At all meetings of the Members, a Member may vote in person or by proxy executed in writing by the Member or by his duly authorized representative. Such proxy shall be filed with the Management Committee before or at the time of the meeting. No proxy shall be valid after eleven (11) months from the date of its execution, unless otherwise validly provided in the proxy.

4.9 Action by Members Without a Meeting. Any action required or permitted to be taken at a meeting of the Members may be taken without notice and a meeting if one or more written consents, setting forth the action so taken, is (a) signed by the Member or Members entitled to vote on such action and holding at such time the percentage of Units sufficient for approval of such action had the action been submitted to a vote of the Members at a meeting of the Members and (b) delivered to the Management Committee to be included in the Company's records. Action taken under this Section 4.9 is effective when all of such Members have signed the written consent, unless the consent specifies that it is effective as of an earlier or later date. The written consent of the Members as set forth in this Section 4.9 has the same force and effect as the vote of such Members at a meeting of the Members and may be described as such in any document or instrument. Prompt written notice of the taking of an action by the Members under this Section 4.9 without a meeting shall be given to any Members who have not consented in writing to the action.

4.10 Books and Records. The Company shall maintain at its principal place of business separate books of accounts for the Company which shall show a complete and accurate record of the assets, liabilities, operations, transactions and financial condition of the Company, including the costs and expenses incurred, all charges made, all credits made and received, and all income derived in connection with the conduct of the Company and the operation of its business and affairs in accordance with federal income tax accounting rules as provided in this Agreement or such other method of accounting as the Management Committee may select from time to time.

4.11 Audits. No independent audit of the books of accounts and financial reports and statements of the Company shall be required to be undertaken at the expense of the Company unless determined otherwise by the Management Committee or a written request therefore is made by all the Members.

4.12 Tax Returns and Information. Within ninety (90) days after the end of each Fiscal Year (or by such other time as may be approved by all the Members), the Management Committee shall cause

to be delivered to each Member information pertaining to the Company and its operations for the previous Fiscal Year that is necessary for the Members to accurately prepare their respective federal and state income tax returns for said Fiscal Year. Such necessary tax information shall include the following:

(a) Schedule K-1. A conformed copy of Internal Revenue Service Schedule K-1 to the Company's federal Form 1120S for such Member and similar state tax schedules or forms, each reporting such Member's allocable share of the Company's taxable income, loss and other tax items; and

(b) Other Information. Such other relevant information as the Management Committee deems necessary to enable the Members to complete and file their federal and state tax returns.

4.13 Representations and Warranties of Members. Each Member, for the benefit of the other Members and the Company, hereby makes the following representations, warranties and covenants, which representations, warranties and covenants shall survive the execution of this Agreement by the parties hereto:

(a) Such Member (i) is financially able to bear all the risks of holding the Units acquired by such Member for an indefinite period of time; (ii) has such knowledge and experience in financial and business matters to be able to evaluate the merits and risks of the acquisition of such Units and of making an informed investment decision with respect thereto; (iii) has been provided (or has had access to) all information such Member has requested of the Company and its Management Committees and promoters in connection with the acquisition of such Units; (iv) has been afforded the opportunity to ask questions of, and receive answers from, the Management Committees and promoters of the Company concerning the terms and conditions of this Agreement and the purchase of such Units; (v) has been given the opportunity to obtain any additional information necessary to verify the accuracy of the information furnished by, or on behalf of, the Company; (vi) is acquiring such Units based upon such Member's own investigation of such relevant information (including the foregoing) that such Member deems to be necessary or desirable and in connection therewith has received the full cooperation of and assistance from the Company and its agents; (vii) has adequate means for providing for his current needs and personal contingencies and has no need for liquidity in his investment in the Company; and (viii) acknowledges that such Member's investment in the Company is otherwise suitable for such Member in light of his other securities holdings and his financial situation and needs. The exercise by such Member of rights and the performance of obligations under this Agreement is based upon that Member's own investigation, analysis and expertise.

(b) Such Member's acquisition of his Units is being made for that Member's own account for investment, and not with a view to the sale or distribution thereof. Such Member acknowledges that his Units have not been registered under the Securities Act of 1933, as amended, or any state or other federal securities laws, and, in addition to the other restrictions contained herein, any Transfer or offer to Transfer thereof may require appropriate registration or the availability of an exemption from such registration under said laws and the regulations issued thereunder and, therefore, is aware that the Member will be required to bear the financial risks of such investment for an indefinite period of time.

(c) If and to the extent the representations, warranties, and covenants made by a Member under this Section 4.13 conflict with those made by such Member in a written subscription agreement or other agreement executed by such Member in connection with his purchase of Units, the representations, warranties, and covenants made by such Member in such subscription agreement or other agreement shall control.

ARTICLE V

Management Committee

5.1 General Authority. Except as otherwise expressly provided by this Agreement or required by any non-waivable provisions of applicable law, the business and affairs of the Company shall be managed by the Management Committee. The Management Committee shall have full and complete authority, power and discretion to manage and control the business, affairs and properties of the Company, to make all decisions regarding those matters and to perform any and all other acts or activities customary or incident to the management of the Company's business. Without limiting the generality of the foregoing, the Management Committee shall have the power and authority on behalf of the Company to:

(a) Employ, and terminate the employment of, Persons in the operation, administration and management of the Company, including employees, agents and contract labor, on such terms and for such compensation as the Management Committee shall reasonably determine.

(b) Acquire property, real, personal, tangible and intangible;

(c) Borrow money for the Company from banks, other lending institutions, and other persons on such terms as the Company deems appropriate and to hypothecate, encumber and grant security interests in the assets of the Company to secure payment of the borrowed sums;

(d) Purchase liability and other insurance (except as provided in Section 4.2(b)) to protect the Company and business and to maintain sufficient levels of life insurance on the Insured Members (as defined in Section 11.4(d)) to enable the Company to perform its obligation under Section 11.2(d); provided that the Management Committee shall not decrease the level of life insurance on any Insured Member without the prior written consent of such Insured Member;

(e) Hold and own any property, real, personal, tangible and intangible, in the name of the Company, including, but not limited to, deeds, mortgages, leasehold interests, interests in general partnerships, limited partnerships, limited liability companies, common trust funds, mutual funds, stocks, options, warrants, rights, puts, calls, contracts, futures, bonds, debentures, securities (public and private), and other debt and equity interests of any kind or nature, except for the purchase or sale of real property as provided in Section 4.2(b);

(f) Invest and reinvest any Company funds in time deposits, short-term governmental obligations, commercial paper or other investments including real estate, stocks, options, general and limited partnerships, limited liability companies, common trust funds, mutual funds, futures, rights, warrants, puts, calls, contracts, public and private bonds, debentures, securities, and other debt and equity interests and to actively trade, speculate on and manage the same;

(g) Enter into, make, and perform contracts, agreements, and other undertakings binding on the Company that may be necessary, appropriate, or advisable in furtherance of the purposes of the Company and make all decisions and waivers thereunder;

(h) Employ accountants, legal counsel, managing agents, money managers, property managers, investment advisors and other advisors to perform services for the Company and to compensate them from Company funds;

(i) Screen, interview, and examine staff and personnel to be employed by the Company;

(j) Open and maintain bank and investment accounts and arrangements, draw checks, letters of credit, and other orders for payment of money and designate individuals with authority to sign or give instructions with respect to those accounts and arrangements;

(k) Maintain the assets of the Company in good order;

- (l) Collect sums due the Company;
- (m) Pay debts and obligations of the Company to the extent that Company funds are available;
- (n) Sell, purchase, lease, loan, borrow, rent, repair, partition, mortgage, pledge, encumber develop, improve, subdivide or otherwise deal with any property, including Company Property, except for the purchase or sale of real property as provided in Section 4.2(b);
- (o) Bring suit on the Company's behalf or defend the Company in any such action, and compromise, settle, collect, and otherwise represent, prosecute and defend the legal rights and interests of the Company;
- (p) Invest and reinvest in any kind of property, real, personal, tangible and intangible, including, but not limited to, common trust funds, stocks, bonds, notes, mortgages, general or limited partnerships, limited liability companies, savings accounts and certificates of deposit, mutual funds, and real estate;
- (q) Perform all other acts as may be necessary or appropriate to the conduct of the Company's business, and to execute, acknowledge, verify and deliver any or all instruments desirable to effectuate any of the foregoing; and
- (r) Determine and authorize Distributions to Members from time to time; and
- (s) Subject to Section 11.2(b), determine the per unit price of any Membership Interest or Units for purposes of Section 11.3 to be sold under Section 11.2 at least annually. The initial price per Unit as determined by the Management Committee for 2015 is shown on Schedule B and all changes to said price shall be noted from time to time on the same Schedule B, it being understood that the most recent price per Unit shown on Schedule B shall control in the event the parties fail to set the price annually as required herein; provided, however, that if two (2) years have elapsed since the determination of a price per Unit, then the price of any Membership Interest or Unit to be sold under Section 11.2 shall be the Fair Market Value of such Membership Interest or Unit.

5.3 Liability for Certain Acts. A Manager who performs his duties 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 Manager of the Company. A Manager 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 Manager's fraud, deceit, gross negligence, willful misconduct, breach of this Agreement or a knowing violation of the law.

5.4 Compensation. The Management Committee shall be entitled to reasonable compensation for the performance of their duties. The amount of such compensation shall be determined by the Management Committee, subject to the approval of a Required Interest of the Members.

5.5 Management Committee Meetings - Place, Time and Notice. All meetings of the Management Committee shall be held at the Company's principal place of business, or at such other place as shall be agreed upon by more than fifty percent (50%) of the Managers. Meetings of the Management Committee may be called at any time by any Manager of the Company, by delivery to all Managers of written notice at least three (3) days in advance of the proposed meeting date. The notice shall contain the time, date and place of the meeting. Each Manager shall be entitled to one (1) vote. More than fifty percent (50%) of the Managers constitutes a quorum. Except as provided in Section 5.7, in order for any vote of the Managers to be valid and constitute an action of the Management Committee, a quorum must be represented at the meeting either in person or by proxy. Once a quorum is established,

the affirmative vote of more than fifty percent (50%) of the Managers represented at the meeting shall constitute a valid decision of the Management Committee.

5.6 Waiver of Notice. A Manager may waive notice of any meeting by a signed writing. In addition, a Manager who attends a meeting waives his right to assert any lack of notice, or defect in notice, of the meeting unless he states such objection at the outset of the meeting.

5.7 Action without Meeting. The Management Committee may take action without notice and a meeting if all of the Managers consent to such action by signing a Written Consent of the Management Committee which sets forth the action to be taken and contains the signature of each Manager.

5.8 Managers: Number, Election, Tenure and Qualifications. The Company shall have three (3) Managers. Managers shall be elected by the affirmative vote of a Required Interest of the Members. The Managers need not be Members in the Company. The Managers shall agree to be bound by the provisions of this Agreement as they relate to Managers. The number of Managers on the Management Committee may be changed from time to time by the affirmative vote of a Required Interest of the Members. Following his election or appointment, each Manager will serve until (a) his removal, (b) his resignation, (c) his death, or (d) the election of a successor, whichever occurs first.

5.9 Removal of Managers. A Manager may be removed at any time, with or without cause, upon the affirmative vote of a Required Interest of the Members.

5.10 Resignation of Managers. Any Manager may resign at any time by giving written notice to the Members. The resignation shall be effective upon receipt of such written notice by the Members. The resignation of a Manager who is also a Member shall not affect the Manager's rights as a Member and shall not constitute a withdrawal from the Company by the Member.

5.11 No Authority of Members. Except as otherwise provided in this Agreement, or as authorized by the Management Committee, no Member is an agent of the Company or has the authority to make any contracts, enter into any transactions, or make any commitments on behalf of the Company.

5.12 Ratification. The Management Committee may ratify and adopt any and all acts of a Member or Manager done on behalf of the Company.

5.13 Delegation of Powers. From time to time, the Management Committee may authorize, or delegate any or all of its authority to a subcommittee of persons, or a single person, whom it shall name, to act on its behalf regarding any matter over which the Management Committee has authority. In connection therewith, the Management Committee may appoint such officers of the Company (including, without limitation, a president, vice president, secretary, and treasurer) as the Management Committee may deem appropriate, and unless the Management Committee decides otherwise, if the title is one commonly used for officers of a business corporation, the appointment of such officer to such office shall constitute the delegation to such officer of the authority and duties that are normally associated with that office, subject to any specific delegation of authorities and duties made pursuant to this Section 5.13. Any number of offices may be held by the same person. Any delegation made pursuant to this Section 5.13 may be revoked at any time by the Management Committee.

5.14 Management Committee Certificates. Any Person dealing with the Company may rely (without duty of further inquiry) upon a certificate issued by the Company that is signed by the members of the Management Committee (or an officer authorized to sign such certificate) as to any of the following:

- (a) The identity of any Member, Manager or officer;
- (b) The existence or nonexistence of any fact or facts which constitute(s) a condition precedent to acts by a Member, the Management Committee or any officer or which are in any other

manner germane to the affairs of the Company;

(c) The Person who is authorized to execute and deliver any instrument or document of the Company; or

(d) Any act or failure to act by the Company or any other matter whatsoever involving the Company.

ARTICLE VI

Fiduciary Duties; Right to Rely; Indemnification

6.1 **Duties of Members.** A Member who is not also a Manager owes no duties to the Company or to the Members solely by reason of being a Member; provided, however, that a Member who, pursuant to this Agreement, exercises some or all of the rights of a Manager in the management and conduct of the Company's business is held to the standards of conduct applicable to Managers under this Agreement and the Act to the extent that the Member exercises the managerial authority vested in a Manager by this Agreement or the Act.

6.2 **Duty of Loyalty.** A Manager's duty of loyalty to the Company and the Members is limited to the following:

(a) To account to the Company and to hold as trustee for the Company any property, profit or benefit derived by the Manager in the conduct or winding up of the Company's business or derived from a use by the Manager of the Company's property, including the appropriation of a Company opportunity;

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

(c) To refrain from competing with the Company in the conduct of the Company's business before dissolution of the Company.

All of the Disinterested Members may identify specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable. All of the Disinterested Members may authorize or ratify, after full disclosure of all material facts, a specific act or transaction that otherwise would violate the duty of loyalty.

6.3 **Duty of Care.** A Manager's duty of care to the Company and the Members in the conduct of and winding up of the Company's business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct or a knowing violation of law.

6.4 **Fiduciary Duties.** Each Manager shall discharge his duties and exercise any of his rights consistently with the obligation of good faith and fair dealing which he owes to the Company and the Members. A Manager does not violate a duty or obligation to the Company merely because the Manager's conduct furthers the Manager's own interest. A Manager may lend money to and transact other business with the Company. As to each loan or transaction, the rights and obligations of the Manager are the same as those of a Person who is not a Manager, subject to other applicable law.

6.5 **Right to Rely.** The Managers shall not be held liable to the Company, or to the Members, for relying in good faith upon the records required to be maintained by this Agreement and upon such information, opinions, reports or statements by any of the Managers, Members, attorneys, accountants, agents, advisors or any other Person who has been selected with reasonable care by or on behalf of the Company, as to matters the Managers reasonably believe are within such other Person's professional or expert competence, including information, opinions, reports or statements as to the value and amount of

the assets, liabilities, Profits or Losses of the Company or any other facts relevant to the existence or amount of assets from which Distributions to Members might properly be made.

6.6 Indemnification of Managers. To the fullest extent allowed by law, the Managers shall be indemnified and held harmless by the Company for any liability resulting from any act performed or omission made by them in good faith on behalf of the Company, except for acts or omissions of gross negligence, intentional misconduct, or knowing violation of the law.

6.7 Remedies. Each Manager acknowledges and represents that irreparable damage and harm could be done to the Company if there is a breach of the covenants contained herein, and that in the event of a breach, each Manager agrees that the Company shall be entitled to injunctive relief (both temporary and/or permanent), without posting bond, as well as monetary damages and reasonable attorney's fees for the enforcement of this Agreement. Each Manager agrees to return all documents and copies of documents upon request by the Company.

6.8 Scope of Duties. A Manager is relieved of liability imposed by law or this Agreement for violation of the standards prescribed by this Article VI to the extent of the managerial authority delegated to the Members by this Agreement.

ARTICLE VII

Accounting and Tax Elections

7.1 Accounting Decisions. All decisions as to accounting matters, except as specifically provided to the contrary herein, shall be made by the Management Committee.

7.2 Taxable Year and Tax Accounting Methods. Unless otherwise required by the Code, Treasury Regulations or the Internal Revenue Service, the Company's taxable and fiscal years shall be the calendar year, and the books of account of the Company shall be maintained on a cash basis consistently applied and shall show all items of income and expense. Subject to Section 7.4 hereof, all elections required or permitted to be made by the Company under the Code shall be made by the Management Committee.

7.3 Tax Returns. Not later than the time required by law, the Management Committee shall prepare and file or cause to be prepared and filed for each fiscal year, all federal, state, and local income tax returns required of the Company.

7.4 Tax Elections.

(a) The Company shall make the following elections for federal income tax purposes:

(i) To treat as an expense for federal income tax purposes all amounts incurred for real estate taxes, interest and other charges that may, in accordance with applicable law and regulations, be considered as an expense;

(ii) To deduct expenses incurred in organizing the Company ratably over a sixty (60) month period as provided in Section 709 of the Code; and

(iii) To be treated as a corporation taxed under Subchapter S of the Code unless otherwise decided under Section 4.2(c).

(b) In the event of a Distribution of Company Property to a Member or a Transfer, whether during life or at death, by a Member of all or any part of his Units, the Company shall determine

whether to elect pursuant to Section 754 of the Code, and in accordance with applicable law and regulations, to adjust the basis of the assets of the Company pursuant to Sections 734 and 743 of the Code.

ARTICLE VIII

Interim Distributions and Allocations

8.1 Distributions.

(a) All Distributions of cash or other property, except Distributions upon the Company's dissolution (which shall be governed by SECTION 9.6), shall be made in the following order and priority:

(i) Estimated Tax Distributions. First, to the extent the Company has Available Cash, the Company shall distribute within fifteen (15) days of the end of each fiscal quarter of the Company an amount equal to the excess, if any, of (A) the product of (1) the estimated Profits of Company for the fiscal period then ended, multiplied by (2) the Maximum Effective Tax Rate, over (B) any previous Distributions by the Company to the Members with respect to that fiscal year, to all the Members pro rata in proportion to their respective Financial Rights during the fiscal year.

(ii) Final Tax Distributions. Second, to the extent the Company has Available Cash and the Company has not made sufficient distributions under SECTION 8.1(a)(i) to cover a Member's net taxable income allocated to such Member for the fiscal year then ended (on Schedule K-1), the Company shall distribute to each Member within ninety (90) days of the end of each fiscal year of the Company an amount equal to the excess, if any, of (A) the product of (1) the estimated Profits allocated to such Member for the fiscal year then ended, multiplied by (2) the Maximum Effective Tax Rate, over (B) any previous Distributions by the Company to the Members with respect to said previous fiscal year, including any Distributions made under SECTION 8.1(a)(i).

(iii) Other Distributions of Available Cash. Finally, after the Distributions described in SECTIONS 8.1(a)(i) and 8.1(a)(ii) and at such times as determined by the Company, the Company shall distribute any remaining Available Cash to all the Members pro rata in proportion to their respective Financial Rights.

(b) Notwithstanding anything herein to the contrary, no Distribution to any Member may be made if, after giving effect to the Distribution, either (a) the Company would not be able to pay its debts as they become due in the ordinary course of business, or (b) the Company's total assets would be less than the sum of its total liabilities plus the amount that would be needed if the Company were to be dissolved, wound up and terminated at the time of the Distribution, to satisfy the preferential rights upon dissolution, winding up and termination of Members whose preferential rights are superior to those receiving the Distribution. The provisions of Section 33-44-406 of the Act shall apply in construing this Section 8.1.

8.2 Calculation of Profits and Losses. The Profits and Losses of the Company for each fiscal year or other period shall be the taxable income or loss of the Company for such year or period determined in accordance with the Code.

8.3 Allocation of Profits and Losses. The Profits and Losses of the Company for any fiscal year of the Company shall be allocated among the Members in accordance with their Financial Rights. Upon termination of the Company or upon liquidation of any Member's Membership Interest, Distributions shall be made in accordance with the positive Capital Account balances of the Members after taking into account all Capital Account adjustments for the year during which such termination or liquidation occurs.

8.4 Tax Item Allocation. Unless otherwise specially allocated herein, whenever a proportionate part of Profits or Losses is charged or credited to the Capital Account of a Member, every

item of income, gain, loss, deduction, credit, allowance or tax preference entering into the computation of such Profits or Losses or applicable to the period during which such Profits or Losses were realized shall be considered credited or charged, as the case may be, to such Capital Account in the same proportion. In the event of a Transfer of Financial Rights in the Company at any time other than at the end of the Company's tax year, the distributive share of Profits and Losses and any items of Company income, gain, loss, deduction, credit or tax preference attributable to the transferred Financial Rights shall be apportioned for income tax purposes between the transferor and transferee in accordance with the number of days in the taxable year of the Company that each was the owner of such Financial Rights.

ARTICLE IX

Dissolution, Winding Up, and Termination

9.1 Dissolution. The Company shall dissolve, its affairs shall be wound up, and the Company shall terminate upon the first to occur of the following:

(a) The written consent of the Management Committee and a Required Interest of the Members;

(b) Any event occurs that makes it unlawful for all or substantially all of the business of the Company to be continued, but any cure of illegality within ninety (90) days after notice to the Company of the event is effective retroactively to the date of the event for purposes of this Section 9.1(b);

(c) On application by a Member or a dissociated Member, upon entry of a judicial decree that:

(i) The economic purpose of the Company is likely to be unreasonably frustrated;

(ii) Another Member has engaged in conduct relating to the Company's business that makes it not reasonably practicable to carry on the Company's business with that Member;

(iii) It is not otherwise reasonably practical to carry on the Company's business in conformity with the Articles of Organization and this Agreement;

(iv) The Company failed to purchase the petitioner's Financial Rights as required by Section 33-44-701 of the Act; or

(v) The Members in control of the Company have acted, are acting, or will act in a manner that is illegal, oppressive, fraudulent or unfairly prejudicial the petitioner.

(d) The filing by the Secretary of State of a certificate administratively dissolving the Company pursuant to Section 33-44-810 of the Act, provided that the Company does not apply for reinstatement pursuant to Section 33-44-811 of the Act within the time period specified therein.

9.2 Waiver of Right to Wind Up. Notwithstanding anything herein to the contrary, at any time after the dissolution of the Company and before the winding up of its business is completed, the Members, including a dissociated Member whose dissociation caused the dissolution, may unanimously waive the right to have the Company's business wound up and the Company terminated. In that case, (a) the Company shall resume carrying on its business as if dissolution had never occurred and any liability incurred by the Company or a Member after the dissolution and before the waiver is determined as if the dissolution had never occurred, and (b) the rights of a third party accruing under Section 33-44-804(a) of the Act or arising

out of conduct in reliance on the dissolution before the third party knew or received a notification of the waiver shall not be adversely affected.

9.3 Winding Up: Powers and Duties of Liquidator. Following the dissolution of the Company, if the Members do not continue the Company's business under Section 9.1 or Section 9.2, the Management Committee, with the approval of a Majority-in-Interest of the Members, shall appoint one or more Managers or an independent third party to serve as liquidator. The liquidator shall have full authority in winding up the Company's affairs, and may preserve the Company's business or property as a going concern for a reasonable time, prosecute and defend actions and proceedings, whether civil, criminal, or administrative, settle and close the Company's business, dispose of and transfer the Company's property, discharge the Company's liabilities, distribute the assets of the Company pursuant to Section 6.6, settle disputes by mediation or arbitration, and perform other necessary acts. In winding up the Company's affairs, the liquidator shall:

(a) Deliver notice of the Company's dissolution to all of the Company's known claimants and creditors in the form and manner described in Section 33-44-807 of the Act;

(b) Publish notice of the Company's dissolution as provided in Section 33-44-808 of the Act;

(c) Make final liquidating Distributions as provided in Section 9.6, and distribute any Company Property discovered after any such final liquidating Distributions in accordance with Section 9.6; and

(d) After dissolution and the completion of winding up, file Articles of Termination with the South Carolina Secretary of State to terminate the legal existence of the Company in accordance with Section 33-44-805 of the Act.

9.4 Sale of Company Property. Unless otherwise agreed by all the Members, the liquidator shall first attempt to sell all or any part of the Company's business as a going concern. If any such sale or partial sale is not consummated within six (6) months after the date of the dissolution, or such other period of time agreed to by all the Members, the liquidator shall publish notice that all unsold Company assets are for sale and solicit bids for such assets. Any Company assets which remain unsold six (6) months after the date of the first publication of such notice shall be marshaled and auctioned by the liquidator. All assets unsold after the auction shall be distributed in kind in accordance with Section 9.5.

9.5 Distribution In Kind. The Company may distribute assets in kind to satisfy any or all of its obligations. If the Company will distribute assets in kind, the Members shall have thirty (30) days to agree upon the fair market value of such assets. If the Members cannot agree on the fair market value of any asset, the liquidator shall hire two (2) independent appraisers to appraise the asset(s) in question. The fair market value of each asset or group of assets appraised shall be the average of the two appraisals.

9.6 Final Liquidating Distributions. After the sale of all Company assets, or the determination of fair market value for distribution in kind of Company assets, the liquidator shall apply the proceeds of the sale or the Company assets as follows:

(a) First, payment or adequate provision for payment shall be made to creditors including the liquidator if the liquidator is not a Member for reimbursement for out-of-pocket expenses incurred and reasonable compensation for services rendered in connection with winding up the Company, and to the extent permitted by law, Members who are creditors in satisfaction of liabilities of the Company;

(b) Second, if the liquidator is a Manager, to the liquidator for reimbursement for out-of-pocket expenses incurred and reasonable compensation for services rendered in connection with winding up the Company; and

(c) Third, all remaining cash and other assets shall be distributed to the Members in accordance with their respective Financial Rights.

9.7 Final and Complete Distribution. The Distributions provided for in this ARTICLE IX shall constitute a complete return of the Members' Contributions to Capital, and a final and complete Distribution to the Members in satisfaction of all of their rights in the Company.

ARTICLE X **Dissociation**

10.1 Events of Proper Dissociation. If a Member dissociates in any one or more of the following ways, such shall be deemed to be a proper dissociation:

- (a) The death of a Member;
- (b) The Disability of a Member when such Member has discontinued employment with Company;
- (c) The permanent retirement from the practice of architecture provided the Member has attained the age of fifty-five (55) and has provided at least two (2) years notice of such retirement; and
- (d) The involuntary termination of a Member's employment with Company without cause as approved by the Management Committee and a Required Interest of the Members.

10.2 Effect of Member's Proper Dissociation. Unless otherwise agreed between the Company and all of the remaining Members, the rights of a properly dissociating Member shall be governed by ARTICLE XI.

10.3 Events of Wrongful Dissociation. If a Member dissociates in any one or more of the following ways, such shall be deemed to be a wrongful dissociation:

- (a) The voluntary termination of a Member's employment with Company, except in the event of retirement or disability as provided in Section 10.1 above;
- (b) The involuntary termination of a Member's employment with Company for Cause. For purposes hereof, the termination of a Member's employment for Cause shall mean termination of employment for one of the following reasons:

- (i) a Member's insolvency or bankruptcy;
- (ii) a Member's loss of professional license;
- (iv) a Member's conviction of a crime resulting in an inability to continue practicing his or her profession;
- (v) a serious disagreement among Members;
- (vi) a serious decline in productivity or professional competence by the Member; or
- (vii) an act or omission or series of acts or omissions by a Member making it not reasonably practicable, at the Company's sole discretion, to continue Member's employment;

as determined by the Management Committee and a Required Interest of the Members.

- (c) The permanent retirement from the practice of architecture when the Member either (i) has not reached the age of 55 or (ii) has not provided at least two (2) years notice of such retirement;

(d) Any other withdrawal or resignation from the Company except as provided in Section 10.1 above; or

(e) On application by the Company or another Member, the Member's expulsion by judicial determination under Section 33-44-601(6) of the Act because the Member:

(i) Engaged in wrongful conduct that adversely and materially affected the Company's business; or

(ii) Willfully or persistently committed a material breach of this Agreement or of a duty owed to the Company or the other Members under Section 33-44-409 of the Act; or

(iii) Engaged in conduct relating to the Company's business which makes it not reasonably practicable to carry on the business with the Member.

Except as set forth above, a Member shall not have the power to dissociate.

10.4 Effect of Member's Wrongful Dissociation. A wrongfully dissociating Member is liable to the Company and to the other Members for all costs, expenses (including reasonable attorneys' fees) and damages caused by the wrongful dissociation, including the reasonable costs of obtaining replacement of the services the wrongfully dissociating Member was obligated to perform. The Company may offset such costs, expenses and damages against any Distributions to which the wrongfully dissociating Member may be entitled in addition to pursuing any remedies provided for in this Agreement or otherwise available under applicable law. The parties to this Agreement agree that a wrongfully dissociating Member's sole entitlement upon wrongfully dissociating from the Company shall be receipt of the purchase price for his Units, as determined and reduced in Section 11.2(b) and Section 11.3, paid upon the terms set forth in Section 11.4. The parties to this Agreement agree that the purchase price as so determined and reduced shall constitute fair value for the Units of a wrongfully dissociating Member within the meaning of Sections 33-44-701 and 33-44-702 of the Act, and that payment of the purchase price upon the terms contained in Section 11.4 is permissible, authorized and in compliance with all provisions of the Act. The parties waive any right they may have to assert that the provisions of this Agreement regarding the rights of a wrongfully dissociating Member are inconsistent with or in contravention of the Act.

10.5 Statement of Dissociation. A dissociated Member or the Company may file a Statement of Dissociation in accordance with Section 33-44-704 of the Act.

ARTICLE XI

Restrictions on Transfer and Buy-Sell Provisions

11.1 Restrictions on Transfer. Any purported transfer or assignment of all or any portion of a Member's Units which has been approved by the Management Committee and a Required Interest of the Members shall be deemed a proper transfer or assignment of the Units and subject to Section 3.3, if applicable. Any purported transfer (an "Unauthorized Transfer") of all or any portion of a Member's Units in contravention of this ARTICLE XI shall be null and void and of no force or effect whatsoever; provided, however, that if the Company is required by a court of competent jurisdiction to recognize such Unauthorized Transfer, the rights of the transferee of the Units transferred shall be strictly limited to that of a transferee who is not admitted as a Member with respect to the transferred Units. Any allocations and Distributions with respect to such transferred Units may be applied (without limiting any other legal or equitable rights or remedies of the Company) to satisfy any debts, obligations, or liabilities for damages that the transferor or transferee of such Units may have to the Company. In the case of an Unauthorized Transfer or attempted Unauthorized Transfer, the parties engaging or attempting to engage in such Unauthorized Transfer shall be liable to indemnify and hold harmless the Company and the other Members from all costs, liabilities, and damages that any of such indemnified Persons may incur (including, without limitation, incremental tax liability and the fees and expenses of attorneys and other

professionals) as a result of such Unauthorized Transfer or attempted Unauthorized Transfer and efforts to enforce the indemnity granted hereby.

11.2 Right to Buy.

(a) Proper Dissociation of a Member. If a Member properly dissociates from the Company within the meaning of Section 10.1, (other than as a result of such Member's death) such Member, or such Member's legal representative (the "Dissolving Member") shall comply with the following procedure:

(i) Subject to Section 11.4(d), the Dissolving Member shall promptly deliver written notice to the Company offering to sell all, but not less than all, of his Units at the price determined under Section 11.3 and upon the terms of purchase described in Section 11.4. During the thirty (30) day period commencing on the date the Company receives such notice (the "Company's Purchase Period"), the Company shall have the right (but not the obligation) to purchase all, but not less than all, of the Dissolving Member's Units. Before the expiration of the Company's Purchase Period, the Company shall deliver written notice to the Dissolving Member and all of the remaining Members of its election to purchase or not to purchase the Dissolving Member's Units (the "Company's Election Notice").

(ii) If the Company elects not to purchase the Dissolving Member's Units, then, during the thirty (30) day period (the "Remaining Members' Purchase Period") commencing on the earlier of (A) the date of the Company's Election Notice, or (B) the expiration of the Company's Purchase Period, the remaining Members shall have the right (but not the obligation) to purchase all, but not less than all, of the Dissolving Member's Units at the price determined under Section 11.3 and upon the terms of purchase described in Section 11.4. Before the expiration of the Remaining Members' Purchase Period, each remaining Member shall deliver written notice to the Company, the Dissolving Member and the other remaining Members of his election to purchase or not to purchase the Dissolving Member's Units. If more than one remaining Member wishes to purchase the Dissolving Member's Units, the remaining Members desiring to purchase shall purchase such Units pro rata in proportion to their respective ownership, unless such Members otherwise agree.

(iii) If no remaining Member wishes to purchase the Dissolving Member's Units under Section 11.2(a)(ii) and the Dissolving Member's offer to sell his Units under Section 11.2(a)(i) was triggered by the Dissolving Member's desire to Transfer his Units to another Person, the Dissolving Member shall be entitled to Transfer his Units to such Person at the end of the Remaining Members' Purchase Period, provided that the Dissolving Member shall have first given thirty (30) days, advance, written notice to the Company and all of the remaining Members of: (A) the name of the Person to which the Dissolving Member intends to Transfer his Units; and (B) the price and terms of the contemplated Transfer to such Person. During such thirty (30) day period, the Company and the remaining Members shall have the right of first refusal to elect to purchase the Dissolving Member's Units at the price and on the terms offered to such Person by providing written notice thereof to the Dissolving Member, it being understood that the Company's right of first refusal shall be given priority over the remaining Members' right of first refusal. If the Company chooses not to exercise its right of first refusal and more than one remaining Member wishes to exercise his right of first refusal, the Members desiring to exercise their right of first refusal shall be entitled to purchase the Dissolving Member's Units pro rata in proportion to their respective ownership, unless such Members otherwise agree. If neither the Company nor any remaining Member exercises his right of first refusal and the Transfer of the Dissolving Member's Units is not consummated within thirty (30) days after the end of the thirty day right of first refusal period described above, the Dissolving Member shall have no right to Transfer his Units to such proposed transferee unless the Dissolving Member's Units are offered again to the Company and the remaining Members in the manner and in accordance with the terms of this Section 11.2(a).

(iv) If no remaining Member wishes to purchase the Dissolving Member's Units under Section 11.2(a)(ii) and the Dissolving Member's offer to sell his Units under Section 11.2(a)(i) was triggered by an event of proper dissociation under Section 10.1, the Dissolving Member shall be entitled to retain ownership of his Units, in which event the Dissolving Member shall continue to be bound by the provisions of this Agreement as they relate to Members, except that the Dissolving Member shall only have the rights of a transferee not admitted as a Member (as provided in Section 3.4).

(b) Wrongful Dissociation of a Member. If a Member wrongfully dissociates from the Company within the meaning of Section 10.3, such Member (the "Withdrawing Member") shall comply with the procedure set forth in Section 11.2(a) above provided that the price determined under Section 11.3 shall be reduced as set forth herein. The purchase price as determined under Section 11.3 shall be reduced as follows:

(i) In the event the wrongful dissociation is a result of the Member's failure to provide two (2) years notice of retirement to the Company or in the event the Member retires prior to the attainment of the age of fifty-five (55), the purchase price as determined under Section 11.3 shall be reduced by four (4%) percent for each year of early retirement and each year of failure to give notice to the Company; and

(ii) In the event the wrongful dissociation is a result of the Member's voluntary termination of the Member's employment with Company (other than for disability or retirement as provided in Section 10.1), involuntary termination of the Member's employment with Company for Cause or any withdrawal, resignation or expulsion of Member from the Company, the purchase price as determined under Section 11.3 shall be reduced by fifty (50%) percent.

Notwithstanding any provision in this Agreement to the contrary, upon the approval of the Management Committee and a Required Interest of the Members, the percentage reduction in purchase price as provided in this Section 11.2(b) above may be changed so that the purchase price reduction the Withdrawing Member incurs is a percentage less than that imposed by this Section 11.2(b), including no reduction.

In addition, the reduced purchase price shall then be further reduced by the amount of all costs, expenses (including reasonable attorneys' fees) and damages incurred by the Company as a result of the Withdrawing Member's wrongful dissociation from the Company. No amount of the purchase price shall be due to the Withdrawing Member unless and until he gives written notice of his dissociation to the Company.

(c) Involuntary Transfers. Upon any Involuntary Transfer of all or any portion of a Member's Units, such Member (or his or her legal representative) shall promptly, but in any event within thirty (30) days after the date of such Involuntary Transfer, give written notice to the Company, with a copy to the Person to whom the Involuntary Transfer was made, stating that the Involuntary Transfer occurred, the reason therefor, the date of the transfer, the name and address of the Person to whom the Involuntary Transfer was made, and the portion of such Member's Units acquired by such Person. Upon receipt of such written notice by the Company, the Company, followed by the remaining Members, shall have the option to purchase all, but not less than all, of such Member's Units for the periods and on the terms described in Section 11.2(a) above.

(d) Death. Upon the death of a Member, the estate of the deceased Member shall be deemed to have immediately offered to sell, and the Company shall be deemed to have immediately agreed to purchase, all of the deceased Member's Membership Interest at the price determined under SECTION 11.3, and on the terms contained in SECTION 11.4.

11.3 Purchase Price. Subject to Section 11.2(b), the price of any Membership Interest to be

sold under Section 11.2 shall be the Fair Market Value of such Membership Interest.

11.4 Payment of Purchase Price.

(a) The closing of any sale under Section 11.2 shall take place at the principal place of business of the Company, or at such other place as the parties may agree, and at a time and date designated by the parties.

(b) The purchase price described in Section 11.3 shall be paid upon such terms as the parties may mutually agree. Except in the event of death of a Member, if the parties are unable to agree upon payment terms, then, at the election of the purchaser(s), twenty percent (20%) of the purchase price shall be paid in cash at closing and the balance in not more than four (4) equal annual installments to be paid in cash only and evidenced by a promissory note of the purchaser, with the first installment becoming due one (1) year from the day on which the sale is closed and the remaining installments annually thereafter. In the event of death of a Member, the purchase price shall be paid out within two (2) years of the death of the Member with the first year's payments of the purchase price to be paid monthly in an amount equal to no less than the value of such Members' annual salary at the time of death and the balance paid on the second anniversary of the death of the Member evidenced by a promissory note of the Company. Any such note given under this SECTION 11.4(b) shall provide for interest, payable annually, from the date of closing at the prime rate as published in *The Wall Street Journal* on the day prior to the date of closing, and the note shall provide that the maker shall have the privilege of prepaying all or any part thereof at any time after the end of the year in which the closing takes place with interest to date of prepayment, and that a default in the payment of any installment of principal and/or interest shall cause the remaining unpaid principal balance to become due and payable forthwith.

(c) Any closing adjustments which are then usual and customary shall be made between the seller and the purchaser(s) on and as of the date of closing. The seller shall pay any transfer, gains or similar taxes arising out of or in connection with the sale and transfer of his Units. Except as specifically provided in this Agreement, such sale shall be subject to all liabilities and obligations of the Company, matured and un-matured, absolute or contingent. All Members agree to execute and deliver all certificates and other instruments reasonably necessary to effectuate any transaction contemplated herein. Without limiting the foregoing, any Member transferring his Units shall transfer such interest free and clear of any liens, encumbrances or any interests of any third party and shall execute or cause to be executed any and all documents required to fully transfer good and clear title to such Units to the purchaser(s), including, but not limited to, any documents required to release any interest of a Member's spouse or any other party who may claim an interest in such Member's Units.

(d) The Company shall maintain key man life insurance policies on the lives of the four (4) Members owning the largest Financial Interest in the Company (such Members, the "Insured Members") in such amounts as the Management Committee deems appropriate. All such policies shall be owned by the Company and made payable to it and shall be held by the Company for the purposes of purchasing the Insured Member's Units in the event of the death of such Insured Member, pursuant to the provision of Section 11.2(d). The Company may apply to the payment of premiums any dividends declared and paid on such policies. As authorized by Section 5.1(d), the Management Committee may increase the amount of life insurance on an Insured Member from time to time by procuring increased coverage limits on existing insurance policies or by purchasing additional insurance policies on an Insured Member to reflect the appropriate amount of insurance death benefits payable to the Company in order to fund the Company's obligations under Section 11.2(d) as a result of any adjustments to the value of the Membership Interests or Units made by the Management Committee pursuant to Section 5.1(s). On the death of such Insured Member, the Company agrees to collect the proceeds of the policy or policies payable to it by reason of the Insured Member's death and to pay the proceeds to the estate of the deceased Insured Member in exchange for the Membership Interest or Units owned by the deceased Insured Member. The Company and the Members agree that notwithstanding any determination of the Fair Market Value of the Membership Interest or Units owned by the deceased Insured Member pursuant

to other provisions of this Agreement, including Section 11.3, the Purchase Price for such Membership Interest or Units shall be deemed to be equal to the amount of insurance proceeds received by the Company as a result of the death of such Insured Member.

11.5 Drag-Along Rights. Subject to the Right to Buy provisions of SECTION 11.2, if a Required Interest of the Members (for purposes of this section the "Selling Members") determine to transfer all (but not less than all) of their Units to a third party, the other Members shall, upon written demand by the Selling Members to all such Members and to the Company, be obligated to sell all of their Units, at the same price, and upon the same terms and conditions as are to be paid and given to the Selling Members. In the event that the Selling Members exercise their rights under this SECTION 11.5, the Company shall have the Power of Attorney to transfer the Units of all of the Members subject to the proposed transfer.

11.6 Tag-Along Rights. Subject to the Right to Buy provisions of SECTION 11.2, if a Required Interest of the Members (for purposes of this section the "Selling Members") determine to transfer a majority of the Units to a third party (the "Offered Interest"), the other Members (the "Non-Selling Members") shall have the right to offer and sell a pro rata portion of the Offered Interest determined by multiplying the Offered Interest by such Non-Selling Member's Units at the time of the proposed sale (the "Co-Sale Interest"); provided that each Non-Selling Member agrees to make substantially the same representations, warranties, covenants and indemnities and other similar agreements relating to title to their Units as the Selling Members agree to make in connection with the proposed transfer of their Units divided by the aggregate number of Units owned by the Selling Members and the other Members exercising their Co-Sale Rights expressed as a percentage. The Co-Sale Interest exercised under the Members' Co-Sale Rights shall reduce the percentage of the Selling Members' outstanding Units included in the Offered Interest *pari passu*. Prior to any sale under this section, the Selling Members shall give notice to the other Members of their Co-Sale Rights, and the Non-Selling Members shall have fifteen (15) days after receipt of such notice to determine if they desire to offer their Units to the third party acquiring the Selling Members' Units. In the event the Selling Members fail to give the other Members the notice required hereunder the Selling Members hereby agree, jointly and severally, to purchase, upon request, for cash, payable immediately, that portion of the other Members' Units that they would have been entitled to sell pursuant to the terms hereof, at a purchase price equal to the aggregate consideration received by the Selling Members for an equivalent number of Units.

ARTICLE XII

Miscellaneous Provisions

12.1 Notices. Any notice, payment, demand, or communication (collectively referred to as a "notice") required or permitted to be given by any provision of this Agreement or applicable law shall be in writing and sent by first class mail, overnight courier, hand delivery or facsimile; except if such notice is made by facsimile, such facsimile shall be promptly followed by the written original of such notice sent by overnight courier or hand delivery within twenty-four (24) hours thereafter. Charges for any notice hereunder shall be prepaid and addressed as follows, or to such other address as such Person may from time to time specify by notice to the Members or the Company, as the case may be:

(a) If to the Company, to the Company at the address of its principal place of business; and

(b) If to a Member or a Manager, to the address shown on the records of the Company as the address for such Member or Manager, unless the Manager has been notified in the manner provided in this Section 12.1 by such Member or Manager of a change in such Member's or Manager's address for receiving notices hereunder, then to the address most recently designated by such Member or Manager in the manner provided in this Section 12.1.

12.2 Time of Essence. Time is of the essence of this Agreement.

12.3 Governing Law. This Agreement shall be governed by and construed in accordance with the South Carolina Uniform Limited Liability Company Act of 1996, as amended, any corresponding provisions of future laws, and other applicable laws of the State of South Carolina.

12.4 Consent to Jurisdiction. The parties to this Agreement hereby agree that, provided it is still in effect, the Business Court Pilot Program in Greenville County, South Carolina shall have jurisdiction over any matter arising from the interpretation, purpose, effect, or operation of this Agreement, and with regard to all matters associated with operation of the Company's business, regardless of the residence, now or in the future, of any party hereto. The parties consent to venue in Greenville County, South Carolina, and waive any rights they may have to assert jurisdiction or venue in any other court, administrative forum, or other adjudicative body.

12.5 Waiver. No waiver of any breach of any covenant, agreement or undertaking contained herein shall operate as a waiver of any subsequent breach of the same covenant, agreement or undertaking or as a waiver of any breach of any other covenant, agreement or undertaking. In the case of a breach by any party of any covenant, agreement or undertaking, the nonbreaching party may nevertheless accept from the other, any payment or performance without waiving its right to exercise any right or remedy provided herein or otherwise, with respect to any such breach which was in existence at the time such payment or performance was accepted by it. No failure of any party to exercise any power given herein or to insist upon strict compliance with any covenant, agreement or undertaking contained herein, or to object to any custom or practice which varies from the terms hereof, shall constitute a waiver of such party's right to demand exact compliance with the terms of this Agreement. The waiver by any party of a breach of any covenant, agreement or undertaking contained herein shall be made only by a written waiver in each case, and no such waiver shall operate or be construed as a waiver of any prior or subsequent breach.

12.6 Severability. If any provision of this Agreement shall, to any extent, be held invalid, illegal or unenforceable, in whole or in part, the validity, legality, and enforceability of the remaining part of such provision, and the validity, legality and enforceability of the other provisions hereof, shall not be affected thereby and each term, covenant or condition shall be valid and enforced to the fullest extent permitted by law. If any such invalidity shall be caused by the length of any period of time, the size of any area or the scope of activities set forth in any provision hereof, such period of time, such area or scope or all, shall be considered to be reduced to a period, area, or scope which would cure such invalidity. Any provision of this Agreement which is held invalid, illegal or unenforceable in any jurisdiction shall not be deemed invalid, illegal or unenforceable in any other jurisdiction.

12.7 Counterparts. This Agreement may be executed in more than one counterpart, each such counterpart shall be deemed an original, and all such counterparts shall constitute one and the same agreement. This Agreement shall be effective when executed by all parties, but all parties need not execute the original or the same counterpart.

12.8 Captions. The headings, titles and captions of the Articles and Sections of this Agreement are inserted only to facilitate reference. They shall not define, limit, extend or describe the scope or intent of this Agreement or any provision hereof, and they shall not constitute a part hereof or affect the meaning or interpretation of this Agreement or any part hereof.

12.9 Entire Agreement. This Agreement and the Schedules attached hereto embody the entire understanding and agreement among the parties pertaining to the subject matter hereof, and all prior agreements and understandings of the parties, whether written or oral, are terminated and superseded by this Agreement and shall be deemed merged herein.

12.10 Remedies Cumulative. Except as otherwise expressly provided herein, all rights, powers and privileges conferred hereunder upon any party shall be cumulative and not restrictive of those given by law. No remedy herein conferred is exclusive of any other available remedy, but each and every such

remedy shall be cumulative and shall be in addition to every other remedy given by agreement or now or hereafter existing at law or in equity or by statute.

12.11 Binding Effect. This Agreement shall be binding upon, shall inure to the benefit of, and shall be enforceable by and against all the parties and their respective heirs, legal representatives, personal representatives, successors and permitted assigns. Nothing in this Agreement, expressed or implied, is intended to or shall confer upon any person other than the parties, and their respective heirs, legal representatives, personal representatives, successors and permitted assigns, any rights, remedies, obligations or liabilities.

12.12 Use of Terms. Use of the terms "herein", "hereby", "hereunder", "hereof", "hereinbefore", "hereinafter", and other equivalent words refer to this Agreement in its entirety and not solely to the particular portion of the Agreement in which such word is used. Reference to "this Article", "this Section", or a similar reference to a specific part of this Agreement shall refer to the particular Article, Section or specific part in which such reference appears. Whenever used herein, any pronoun shall be deemed to include both the singular and plural and all genders.

12.13 Further Assurances. Each of the parties will execute, deliver, acknowledge or supply such further documents, instruments and assurances as shall be reasonably necessary or appropriate to carry out the full intent and purposes of this Agreement.

12.14 Equitable Remedies. The rights and remedies of the Members, the Company and the Managers hereunder shall not be mutually exclusive, and the exercise of one or more of the provisions hereof shall not preclude the exercise of any other provisions hereof. The parties confirm that damages at law may be an inadequate remedy for a breach or threatened breach of this Agreement and agree that in the event of a breach or threatened breach of any provision hereof, the respective rights and obligations hereunder shall be enforceable by specific performance, injunction (temporary and/or permanent), without posting bond, or other equitable remedy, but nothing herein contained is limited to, nor shall it limit or affect any right or rights at law or by statute or otherwise of any party aggrieved against any other party for a breach or threatened breach of any provision hereof, it being the intention of this Section 12.14 to make clear the agreement of the parties that the respective rights and obligations of the parties hereunder shall be enforceable in equity as well as at law or otherwise.

12.15 Schedules. The Schedules attached to this Agreement are hereby made a part hereof and incorporated herein by reference. All such Schedules read as of the date of this Agreement or, as to any of the Schedules bearing a particular date, as of any other date specified therein.

12.16 Effective Date. This Agreement shall be effective as of the later of (a) the day and year set forth on the first page of this Agreement or (b) the effective time of the Merger.

12.17 Construction. If and to the extent the provisions of this Agreement conflict with the Act, this Agreement shall control. If and to the extent the provisions of this Agreement do not conflict with the Act, the Act shall control.

12.18 Mediation. Any claims, disputes and other matters in question arising out of or related to this Agreement shall be subject to mediation. Request for mediation shall be filed in writing with the other party to this Agreement. The administration of the mediation shall be as mutually agreed by the parties. Mediation shall precede any legal or equitable proceedings regarding any claims, disputes or other matters in question arising out of or related to this Agreement. The parties shall agree on a neutral mediator. Cost of the mediation shall be shared equally by the parties. The mediation shall be held in Greenville, South Carolina or in another location mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

[Signature Pages Follows.]

IN WITNESS WHEREOF, the parties have duly executed this Amended and Restated Operating Agreement of McMillan Pazdan Smith, LLC as of the day and year first above written.

COMPANY:

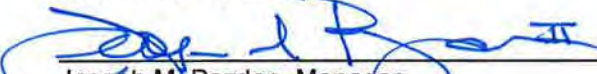
McMillan Pazdan Smith, LLC

By: 

Its: Chief Operating Officer / Principal

MANAGEMENT COMMITTEE:


Ron G. Smith, Manager


Joseph M. Pazdan, Manager


Brad B. Smith, Manager

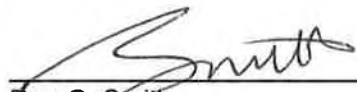
MEMBERS:

Separate signature pages attached

MCMILLAN PAZDAN SMITH, LLC

**AMENDED AND RESTATED OPERATING AGREEMENT
COUNTERPART SIGNATURE PAGE**

The undersigned hereby agrees to become a party to that certain McMillan Pazdan Smith, LLC Amended and Restated Operating Agreement dated as of September 30, 2015, as amended (the "Company Operating Agreement"), through his execution and delivery of this Counterpart Signature Page, and agrees to be bound by and subject to the terms and conditions of the Company Amended and Restated Operating Agreement.

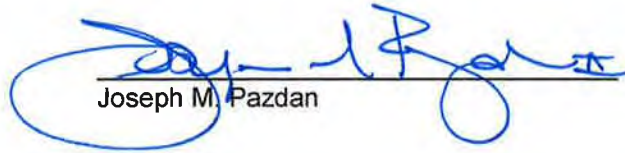


Ron G. Smith

MCMILLAN PAZDAN SMITH, LLC

**AMENDED AND RESTATED OPERATING AGREEMENT
COUNTERPART SIGNATURE PAGE**

The undersigned hereby agrees to become a party to that certain McMillan Pazdan Smith, LLC Amended and Restated Operating Agreement dated as of September 30, 2015, as amended (the "Company Operating Agreement"), through his execution and delivery of this Counterpart Signature Page, and agrees to be bound by and subject to the terms and conditions of the Company Amended and Restated Operating Agreement.



Joseph M. Pazdan

MCMILLAN PAZDAN SMITH, LLC

**AMENDED AND RESTATED OPERATING AGREEMENT
COUNTERPART SIGNATURE PAGE**

The undersigned hereby agrees to become a party to that certain McMillan Pazdan Smith, LLC Amended and Restated Operating Agreement dated as of September 30, 2015, as amended (the "Company Operating Agreement"), through his execution and delivery of this Counterpart Signature Page, and agrees to be bound by and subject to the terms and conditions of the Company Amended and Restated Operating Agreement.


Brad B. Smith

SCHEDULE A

(to Amended and Restated Operating Agreement of McMillan Pazdan Smith, LLC)

Membership Information as of September 30, 2015

<u>Name of Member</u>	<u>Units</u>	<u>Financial Rights</u>

Totals:	100,000	100.00%

SCHEDULE B

(to Amended and Restated Operating Agreement of McMillan Pazdan Smith, LLC)

Price Per Unit

As of September ____, 2015, the price per Unit is \$63.01.

EXHIBIT E

From: Katie Towery
Sent: Tuesday, December 3, 2019 8:28 AM
To: 'David Rothstein'; Sam Outten
Cc: 'Tom Keim'
Subject: RE: McMillan Pazdan Smith, LLC v. Donza H. Mattison; C.A. No. 2019-CP-23-00998
Attachments: MPS Member Opposition Statements to Mattison Derivative Claim - 4851-9643-6910 1.pdf

David,

Please see the attached statements that have been marked as **CONFIDENTIAL** pursuant to our Confidentiality Agreement. We plan to submit these statements in opposition to your Motion to Disqualify and the continuation of Ms. Mattison's derivative suit.

We are working with our client to supplement our discovery requests and will have those responses and accompanying documents to you as soon as reasonably possible.

Best regards,



KATIE E. TOWERY **ASSOCIATE**
katie.towery@nelsonmullins.com
GREENVILLE ONE | SUITE 400
2 W. WASHINGTON STREET | GREENVILLE, SC 29601
T 864.373.2294 F 864.373.2925
NELSONMULLINS.COM **VCARD** **VIEW BIO**

From: David Rothstein <drothstein@rothsteinlawfirm.com>
Sent: Monday, December 2, 2019 12:22 PM
To: Sam Outten <sam.outten@nelsonmullins.com>
Cc: 'Tom Keim' <tkeim@fordharrison.com>; Katie Towery <katie.towery@nelsonmullins.com>
Subject: RE: McMillan Pazdan Smith, LLC v. Donza H. Mattison; C.A. No. 2019-CP-23-00998

Sam. On two separate occasions, Judge McIntosh has ruled that the issue of whether Ms. Mattison can fairly and adequately represent the interest of the similarly situated members in enforcing the rights of MPS requires additional discovery. When I attempted to take the deposition of one of the current members last Monday, you informed me that you would not allow any depositions to proceed while my motion to disqualify counsel was pending. I would be very interested in seeing the signed statements that you have obtained from the other members of MPS. Please forward them to me as soon as possible. I will agree that you can stamp them as "CONFIDENTIAL" under the terms of the confidentiality agreement we previously signed, like you have done with every other document you have produced thus far; however, I cannot agree that such documents are legitimately confidential unless and until I see the documents and know the circumstances surrounding their signing. I will, of course, treat them as confidential unless and until I challenge such designation, the legitimacy of which I believe you would have the burden to establish. Judge McIntosh has already ruled that the derivative claim in the Amended Complaint was properly pleaded and brought. Whether or not Third-

Party Defendants can establish that Ms. Mattison is not a fair and adequate representative will have to be determined after additional discovery. For now, Ms. Mattison has not intention of withdrawing her motion to disqualify counsel or her derivative claims. Please forward to me as soon as possible the signed statements from the other members of MPS.

Also, Ms. Mattison and I met with Katie Towery in your conference room almost four weeks ago to review documents on MPS's directors' portal and four desk-top folders on a lap-top computer. I am still waiting to receive copies of those documents as I requested (and others), which Katie indicated she first needed to Bates label and organize. I am hopeful that you will provide those documents to me early this week, or I will be forced to file a motion to compel. I do not want to involve the court in another discovery dispute, but will have no choice if you and your clients do not respond in a timely manner to Defendant's discovery requests. Thank you. Dave.

David E. Rothstein
Certified Specialist in Employment and Labor Law (S.C.)
(Also licensed in North Carolina)
Rothstein Law Firm, PA
1312 Augusta Street
Greenville, SC 29605
(864) 232-5870
(864) 241-1386 (fax)
drothstein@rothsteinlawfirm.com
www.rothsteinlawfirm.com

From: Bobbie Schilder <bobbie.schilder@nelsonmullins.com> **On Behalf Of** Sam Outten
Sent: Monday, December 02, 2019 10:26 AM
To: David Rothstein <drothstein@rothsteinlawfirm.com>
Cc: 'Tom Keim' <tkeim@fordharrison.com>; Sam Outten <sam.outten@nelsonmullins.com>; Katie Towery <katie.towery@nelsonmullins.com>
Subject: McMillan Pazdan Smith, LLC v. Donza H. Mattison; C.A. No. 2019-CP-23-00998

David,

Please consider this email my Rule 11 consultation with you regarding your Motion to Disqualify, as well as your client's continued pursuit of a derivative action against Chad Cousins, Joe Pazdan, Brad Smith, and Ron Smith.

The Motion to Disqualify alleges that there is a conflict in Nelson Mullins and Ford Harrison representing McMillan Pazdan & Smith, LLC and the Third-Party Defendants. According to your Motion, the basis for this contention is that a conflict exists between the interests of the LLC and the Third-Party Defendants.

Your Motion to Disqualify is premised on the notion that the derivative action is properly pled and brought. That is not the case. SCRCF 23(b)(1) provides in relevant part that:

“The 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.”

Ms. Mattison cannot meet this requirement of SCRCF 23(b)(1).

There have been several hearings in which we advised the court that this derivative action was not proper because Ms. Mattison did not represent the interests of the other members of the LLC. Each time, you have disputed that that is the case.

Since our last hearing, we have obtained statements from every member of the LLC, except Ms. Mattison, expressing opposition to the continued pursuit of this derivative action. These statements include a refusal to support or join Ms. Mattison in her alleged claims against the Third-Party Defendants.

I will be happy to forward those statements to you if we can agree that they are subject to confidentiality.

I respectfully request that, in light of this evidence, you withdraw the Motion to Disqualify and notify the court of the dismissal of Ms. Mattison's derivative action.

Thank you.

Sam Outten



SAMUEL W. OUTTEN PARTNER

sam.outten@nelsonmullins.com

GREENVILLE ONE | SUITE 400

2 W. WASHINGTON STREET | GREENVILLE, SC

T 864.373.2299 F 864.373.2925

NELSONMULLINS.COM

Confidentiality Notice

This message is intended exclusively for the individual or entity to which it is addressed. This communication may contain information that is proprietary, privileged, confidential or otherwise legally exempt from disclosure. If you are not the named addressee, you are not authorized to read, print, retain, copy or disseminate this message or any part of it. If you have received this message in error, please notify the sender immediately either by phone (800-237-2000) or reply to this e-mail and delete all copies of this message.

EXHIBIT F

MCMILLAN PAZDAN SMITH, LLC
MEMBER STATEMENT IN OPPOSITION TO DERIVATIVE ACTION

1. I am a Member of McMillan Pazdan Smith, LLC ("MPS").
2. I am over the age of eighteen (18) years old.
3. I am of sound mind and competent to execute this Statement.
4. Donza H. Mattison ("Mattison") is a former employee and current member of MPS.
5. I understand that Mattison filed a derivative action against Ron G. Smith, Joseph M. Pazdan, Brad B. Smith, and Chad C. Cousins (the "Third-Party Defendants") on March 4, 2019, and that an Amended Third-Party Complaint was filed on July 30, 2019.
6. I have reviewed and have been provided adequate information about the allegations of Mattison's derivative action against the Third-Party Defendants.
7. In my capacity as a Member of MPS, I have considered Mattison's allegations and determined that the derivative action is not in the best interests of the other Members of MPS.
8. I know of no facts which support Mattison's derivative action against the Third-Party Defendants.
9. I do not join, or in any way support, Mattison's derivative action.
10. The information in this Statement is based upon my personal knowledge and belief.
11. I am executing this Statement of my own volition, and I have in no way been coerced, placed under duress, forced, or pressured to sign this Statement.

This the 26th day of November, 2019.



Member of McMillan Pazdan Smith, LLC

Print Name: Joseph R. Alcock

MCMILLAN PAZDAN SMITH, LLC
MEMBER STATEMENT IN OPPOSITION TO DERIVATIVE ACTION

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This the 13 day of November, 2019.



Member of McMillan Pazdan Smith, LLC

Print Name: Walter D Ballard

MCMILLAN PAZDAN SMITH, LLC
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This the 13 day of November, 2019.



Member of McMillan Pazdan Smith, LLC

Print Name: Stuart M. Barber

MCMILLAN PAZDAN SMITH, LLC
MEMBER STATEMENT IN OPPOSITION TO DERIVATIVE ACTION

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This the 22 day of November, 2019.


Member of McMillan Pazdan Smith, LLC

Print Name: Karen J Calhoun

MCMILLAN PAZDAN SMITH, LLC
MEMBER STATEMENT IN OPPOSITION TO DERIVATIVE ACTION

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This the 25 day of November, 2019.



Member of McMillan Pazdan Smith, LLC

Print Name: MICHAEL CHANNING

MCMILLAN PAZDAN SMITH, LLC
MEMBER STATEMENT IN OPPOSITION TO DERIVATIVE ACTION

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This the 22 day of November, 2019.



Member of McMillan Pazdan Smith, LLC

Print Name: Chad Cousins

MCMILLAN PAZDAN SMITH, LLC
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This the 15 day of November, 2019.



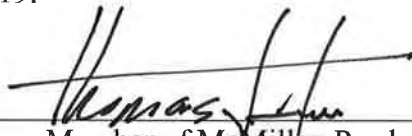
Member of McMillan Pazdan Smith, LLC

Print Name: William J. Gray

MCMILLAN PAZDAN SMITH, LLC
MEMBER STATEMENT IN OPPOSITION TO DERIVATIVE ACTION

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This the 13 day of November, 2019.



Member of McMillan Pazdan Smith, LLC

Print Name: Thomas J. Hund

MCMILLAN PAZDAN SMITH, LLC
MEMBER STATEMENT IN OPPOSITION TO DERIVATIVE ACTION

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This the 14th day of November, 2019.



Member of McMillan Pazdan Smith, LLC

Print Name: K. J. Jacobs

MCMILLAN PAZDAN SMITH, LLC
MEMBER STATEMENT IN OPPOSITION TO DERIVATIVE ACTION

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This the 18 day of November, 2019.



Member of McMillan Pazdan Smith, LLC

Print Name: AARON JEFFERS

MCMILLAN PAZDAN SMITH, LLC
MEMBER STATEMENT IN OPPOSITION TO DERIVATIVE ACTION

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This the 18 day of November, 2019.



Member of McMillan Pazdan Smith, LLC

Print Name: WILLIAM R. JOSLIN

MCMILLAN PAZDAN SMITH, LLC
MEMBER STATEMENT IN OPPOSITION TO DERIVATIVE ACTION

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This the 13th day of November, 2019.



Member of McMillan Pazdan Smith, LLC

Print Name: Lisa Lanni

MCMILLAN PAZDAN SMITH, LLC
MEMBER STATEMENT IN OPPOSITION TO DERIVATIVE ACTION

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This the 18th day of November, 2019.



Member of McMillan Pazdan Smith, LLC

Print Name: Donald L. Love Jr

MCMILLAN PAZDAN SMITH, LLC
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This the 18 day of November, 2019.



Member of McMillan Pazdan Smith, LLC

Print Name: DAVID P. MOORE II, AIA

MCMILLAN PAZDAN SMITH, LLC
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This the 13 day of November, 2019.



Member of McMillan Pazdan Smith, LLC

Print Name: D. PAULATIE MYERS

MCMILLAN PAZDAN SMITH, LLC
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This the 22nd day of November, 2019.


Member of McMillan Pazdan Smith, LLC

Print Name: JOSEPH M. PAZDAN II

MCMILLAN PAZDAN SMITH, LLC
MEMBER STATEMENT IN OPPOSITION TO DERIVATIVE ACTION

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3. I am of sound mind and competent to execute this Statement.
4. Donza H. Mattison ("Mattison") is a former employee and current member of MPS.
5. I understand that Mattison filed a derivative action against Ron G. Smith, Joseph M. Pazdan, Brad B. Smith, and Chad C. Cousins (the "Third-Party Defendants") on March 4, 2019, and that an Amended Third-Party Complaint was filed on July 30, 2019.
6. I have reviewed and have been provided adequate information about the allegations of Mattison's derivative action against the Third-Party Defendants.
7. In my capacity as a Member of MPS, I have considered Mattison's allegations and determined that the derivative action is not in the best interests of the other Members of MPS.
8. I know of no facts which support Mattison's derivative action against the Third-Party Defendants.
9. I do not join, or in any way support, Mattison's derivative action.
10. The information in this Statement is based upon my personal knowledge and belief.
11. I am executing this Statement of my own volition, and I have in no way been coerced, placed under duress, forced, or pressured to sign this Statement.

This the 25 day of November, 2019.



Member of McMillan Pazdan Smith, LLC

Print Name: Caroline Perkins

MCMILLAN PAZDAN SMITH, LLC
MEMBER STATEMENT IN OPPOSITION TO DERIVATIVE ACTION

1. I am a Member of McMillan Pazdan Smith, LLC ("MPS").
2. I am over the age of eighteen (18) years old.
3. I am of sound mind and competent to execute this Statement.
4. Donza H. Mattison ("Mattison") is a former employee and current member of MPS.
5. I understand that Mattison filed a derivative action against Ron G. Smith, Joseph M. Pazdan, Brad B. Smith, and Chad C. Cousins (the "Third-Party Defendants") on March 4, 2019, and that an Amended Third-Party Complaint was filed on July 30, 2019.
6. I have reviewed and have been provided adequate information about the allegations of Mattison's derivative action against the Third-Party Defendants.
7. In my capacity as a Member of MPS, I have considered Mattison's allegations and determined that the derivative action is not in the best interests of the other Members of MPS.
8. I know of no facts which support Mattison's derivative action against the Third-Party Defendants.
9. I do not join, or in any way support, Mattison's derivative action.
10. The information in this Statement is based upon my personal knowledge and belief.
11. I am executing this Statement of my own volition, and I have in no way been coerced, placed under duress, forced, or pressured to sign this Statement.

This the 25 day of November, 2019



Member of McMillan Pazdan Smith, LLC

Print Name: R. CULLEN PITTS

MCMILLAN PAZDAN SMITH, LLC
MEMBER STATEMENT IN OPPOSITION TO DERIVATIVE ACTION

1. I am a Member of McMillan Pazdan Smith, LLC ("MPS").
2. I am over the age of eighteen (18) years old.
3. I am of sound mind and competent to execute this Statement.
4. Donza H. Mattison ("Mattison") is a former employee and current member of MPS.
5. I understand that Mattison filed a derivative action against Ron G. Smith, Joseph M. Pazdan, Brad B. Smith, and Chad C. Cousins (the "Third-Party Defendants") on March 4, 2019, and that an Amended Third-Party Complaint was filed on July 30, 2019.
6. I have reviewed and have been provided adequate information about the allegations of Mattison's derivative action against the Third-Party Defendants.
7. In my capacity as a Member of MPS, I have considered Mattison's allegations and determined that the derivative action is not in the best interests of the other Members of MPS.
8. I know of no facts which support Mattison's derivative action against the Third-Party Defendants.
9. I do not join, or in any way support, Mattison's derivative action.
10. The information in this Statement is based upon my personal knowledge and belief.
11. I am executing this Statement of my own volition, and I have in no way been coerced, placed under duress, forced, or pressured to sign this Statement.

This the 22nd day of November, 2019.



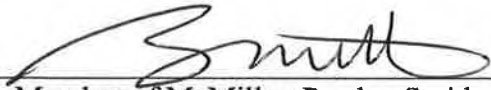
Member of McMillan Pazdan Smith, LLC

Print Name: BRAD B. SMITH

MCMILLAN PAZDAN SMITH, LLC
MEMBER STATEMENT IN OPPOSITION TO DERIVATIVE ACTION

1. I am a Member of McMillan Pazdan Smith, LLC ("MPS").
2. I am over the age of eighteen (18) years old.
3. I am of sound mind and competent to execute this Statement.
4. Donza H. Mattison ("Mattison") is a former employee and current member of MPS.
5. I understand that Mattison filed a derivative action against Ron G. Smith, Joseph M. Pazdan, Brad B. Smith, and Chad C. Cousins (the "Third-Party Defendants") on March 4, 2019, and that an Amended Third-Party Complaint was filed on July 30, 2019.
6. I have reviewed and have been provided adequate information about the allegations of Mattison's derivative action against the Third-Party Defendants.
7. In my capacity as a Member of MPS, I have considered Mattison's allegations and determined that the derivative action is not in the best interests of the other Members of MPS.
8. I know of no facts which support Mattison's derivative action against the Third-Party Defendants.
9. I do not join, or in any way support, Mattison's derivative action.
10. The information in this Statement is based upon my personal knowledge and belief.
11. I am executing this Statement of my own volition, and I have in no way been coerced, placed under duress, forced, or pressured to sign this Statement.

This the 22 day of November, 2019.



Member of McMillan Pazdan Smith, LLC

Print Name: RON G. SMITH

MCMILLAN PAZDAN SMITH, LLC
MEMBER STATEMENT IN OPPOSITION TO DERIVATIVE ACTION

1. I am a Member of McMillan Pazdan Smith, LLC ("MPS").
2. I am over the age of eighteen (18) years old.
3. I am of sound mind and competent to execute this Statement.
4. Donza H. Mattison ("Mattison") is a former employee and current member of MPS.
5. I understand that Mattison filed a derivative action against Ron G. Smith, Joseph M. Pazdan, Brad B. Smith, and Chad C. Cousins (the "Third-Party Defendants") on March 4, 2019, and that an Amended Third-Party Complaint was filed on July 30, 2019.
6. I have reviewed and have been provided adequate information about the allegations of Mattison's derivative action against the Third-Party Defendants.
7. In my capacity as a Member of MPS, I have considered Mattison's allegations and determined that the derivative action is not in the best interests of the other Members of MPS.
8. I know of no facts which support Mattison's derivative action against the Third-Party Defendants.
9. I do not join, or in any way support, Mattison's derivative action.
10. The information in this Statement is based upon my personal knowledge and belief.
11. I am executing this Statement of my own volition, and I have in no way been coerced, placed under duress, forced, or pressured to sign this Statement.

This the 25 day of November, 2019.


Member of McMillan Pazdan Smith, LLC

Print Name: GARYSEN B. THOMPSON

EXHIBIT G

**WRITTEN CONSENT IN LIEU OF A SPECIAL MEETING OF
THE MEMBERS OF
MCMILLAN PAZDAN SMITH, LLC**

The undersigned, being all of the members of McMillan Pazdan Smith, LLC, a South Carolina limited liability company (the "Company"), hereby approve and adopt the following resolutions by this written consent in accordance with the provisions of South Carolina law, said resolutions to have the same force and effect as if they had been unanimously adopted at a duly convened meeting of the Members of the Company.

WHEREAS, as of March 31, 2018, the Management Committee of the Company approved and authorized the redemption of a collective 38 units of Membership Interests in the Company from Ron G. Smith, Joseph M. Pazdan and Brad B. Smith.

WHEREAS, in exchange for past services and in order to retain him as an employee in the Company, the Members believe it to be in the best interest of the Company to approve the issuance by the Company of thirty eight (38) units of Membership Interest of the Company to William Gray, a current employee of the Company.

NOW THEREFORE, BE IT RESOLVED, that the Management Committee has recommended to the Members and the Members hereby approve the admission of William Gray as a Member of Company and the issuance of units of Membership Units to William Gray, all pursuant to the terms forth in that certain Unit Transfer Agreement dated as of March 31, 2018.

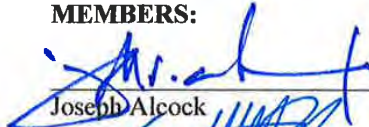
FURTHER RESOLVED, that upon the execution of a counterpart signature page to the Operating Agreement, a copy of which is attached hereto as Exhibit A, by William Gray, the Company shall issue such units to be effective as of March 31, 2018.

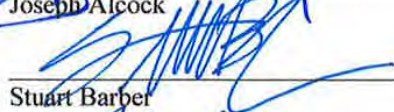
FURTHER RESOLVED, that this written consent shall be placed in the record book of the Company.

[Signature Page to Follow]

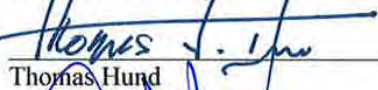
IN WITNESS WHEREOF, the undersigned, being the members of McMillan Pazdan Smith, LLC, have executed this Written Consent to be effective as of the 31st day of March, 2018:

MEMBERS:


Joseph Alcock

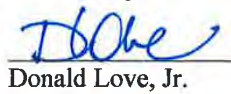

Stuart Barber


Michael Chewning

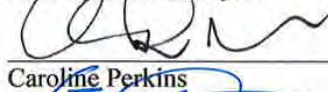

Thomas Hund

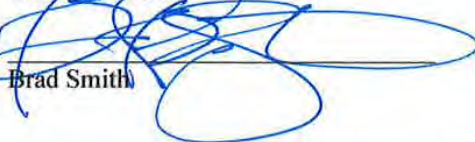

Aaron Jeffers

James Langlois

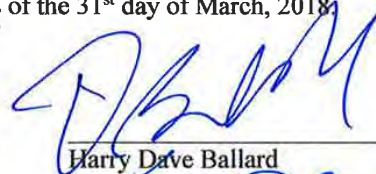

Donald Love, Jr.


Dorothy Paulette Myers

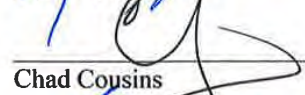

Caroline Perkins


Brad Smith

Donza Mattison

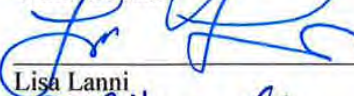

Harry Dave Ballard

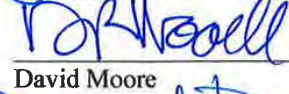

Karen Calhoun

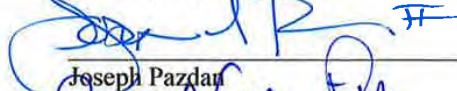

Chad Cousins


Keith Jacobs

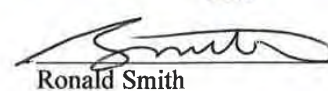

William Joslin


Lisa Lanni


David Moore


Joseph Pazdan

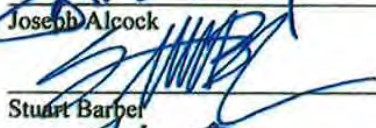

Richard Cullen Pitts

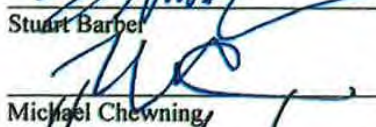

Ronald Smith

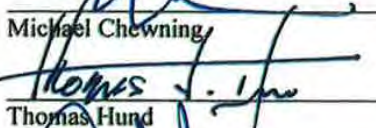
IN WITNESS WHEREOF, the undersigned, being the members of McMillan Pazdan Smith, LLC, have executed this Written Consent to be effective as of the 31st day of March, 2018.

MEMBERS:


Joseph Alcock

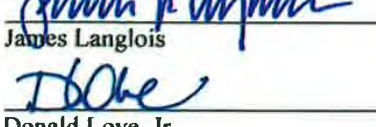

Stuart Barber

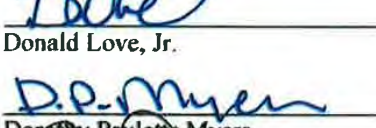

Michael Chewning


Thomas Hund


Aaron Jeffers


James Langlois


Donald Love, Jr.


Dorothy Paulette Myers


Caroline Perkins


Brad Smith


Donza Mattison


Harry Dave Ballard


Karen Calhoun

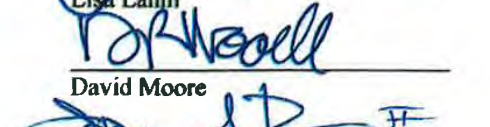

Chad Cousins

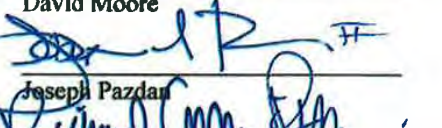

Keith Jacobs


William Joslin


Lisa Lanni


David Moore


Joseph Pazdan


Richard Cullen Pitts


Ronald Smith

**WRITTEN CONSENT IN LIEU OF A SPECIAL MEETING OF
THE MEMBERS OF
MCMILLAN PAZDAN SMITH, LLC**

The undersigned, being all of the members of McMillan Pazdan Smith, LLC, a South Carolina limited liability company (the "Company"), hereby approve and adopt the following resolutions by this written consent in accordance with the provisions of South Carolina law, said resolutions to have the same force and effect as if they had been unanimously adopted at a duly convened meeting of the Members of the Company.

WHEREAS, as of June 30, 2018, the Management Committee of the Company approved and authorized the redemption of a collective 38 units of Membership Interests in the Company from Ron G. Smith, Joseph M. Pazdan and Brad B. Smith.

WHEREAS, in exchange for past services and in order to retain him as an employee in the Company, the Members believe it to be in the best interest of the Company to approve the issuance by Company of thirty eight (38) units of Membership Interest of the Company to Grayson Bennett Thompson, a current employee of the Company.

NOW THEREFORE, BE IT RESOLVED, that the Management Committee has recommended to the Members and the Members hereby approve the admission of Grayson Bennett Thompson as a Member of Company and the issuance of units of Membership Units to Grayson Bennett Thompson, all pursuant to the terms forth in that certain Unit Transfer Agreement dated as of June 30, 2018.

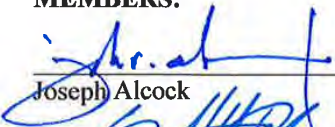
FURTHER RESOLVED, that upon the execution of a counterpart signature page to the Operating Agreement, a copy of which is attached hereto as Exhibit A, by Grayson Bennett Thompson, the Company shall issue such units to be effective as of June 30, 2018.

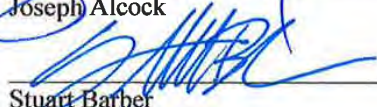
FURTHER RESOLVED, that this written consent shall be placed in the record book of the Company.

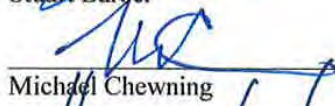
[Signature Page to Follow]

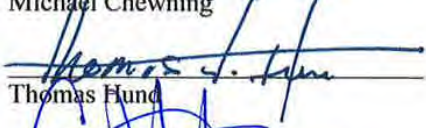
IN WITNESS WHEREOF, the undersigned, being the members of McMillan Pazdan Smith, LLC, have executed this Written Consent to be effective as of the 30th day of June, 2018.

MEMBERS:

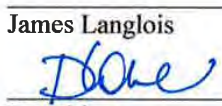

Joseph Alcock


Stuart Barber


Michael Chewning

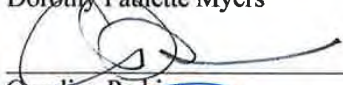

Thomas Hund

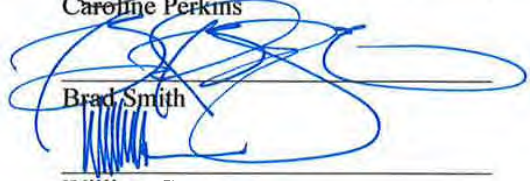

Aaron Jeffers


James Langlois

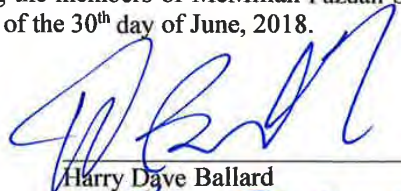

Donald Love, Jr.


Dorothy Paulette Myers

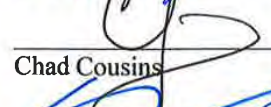

Caroline Perkins


Brad Smith


William Gray

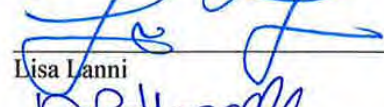

Harry Dave Ballard


Karen Calhoun

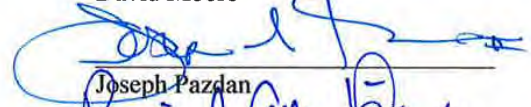

Chad Cousins

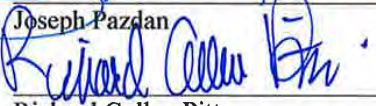

Keith Jacobs

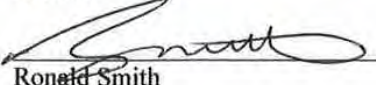

William Joslin


Lisa Lanni


David Moore


Joseph Pazdan

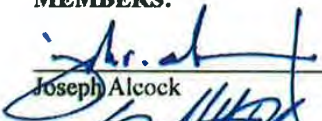

Richard Cullen Pitts


Ronald Smith


Donza Mattison

IN WITNESS WHEREOF, the undersigned, being the members of McMillan Pazdan Smith, LLC, have executed this Written Consent to be effective as of the 30th day of June, 2018.

MEMBERS:

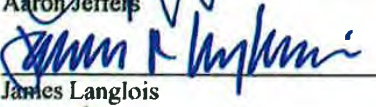

Joseph Alcock


Stuart Barber


Michael Chewning


Thomas Hund

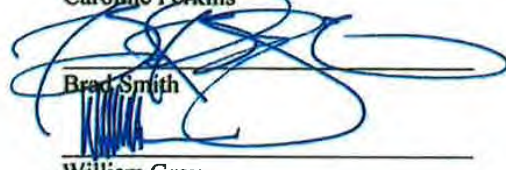

Aaron Jeffers

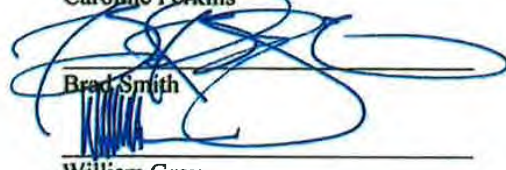

James Langlois

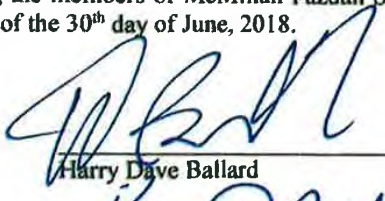

Donald Love, Jr.


Dorothy Paulette Myers


Caroline Perkins


Brad Smith

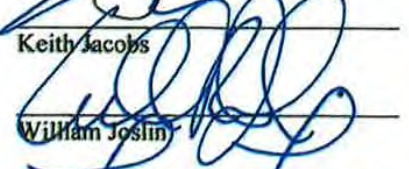

William Gray


Harry Dave Ballard


Karen Calhoun

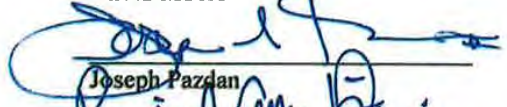

Chad Cousins

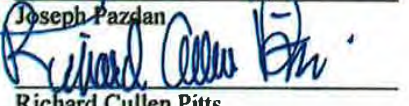

Keith Jacobs

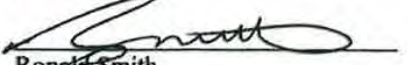

William Joslin


Lisa Lanni


David Moore


Joseph Pazdan


Richard Cullen Pitts


Ronald Smith


Donza Mattison

EXHIBIT H



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

January 14, 2019

VIA EMAIL (tkeim@fordharrison.com)

AND U.S. MAIL

Thomas H. Keim, Jr., Esq.
Ford Harrison
100 Dunbar Street, Suite 300
Spartanburg, SC 29306

Re: Donza H. Mattison v. McMillan Pazdan Smith

Dear Tom:

Although all of the financial information I have previously requested about McMillan Pazdan Smith ("MPS") has still not been completely or satisfactorily provided, our financial expert, Charlie Alford, has completed his analysis of HDH Advisors's purported appraisal of MPS's membership unit price. The offer communicated in your letter of August 3, 2018, to purchase Ms. Mattison's 2,035.34 units for purported "fair market value" of \$267,647.21, as calculated using HDH's appraisal of \$131.50 per share as of December 31, 2017, is not acceptable to Ms. Mattison. Based on the documents you have provided, there are a number of material mistakes in HDH's report, which have caused a substantial undervaluation of Ms. Mattison's ownership interest in the firm as of the close of the 2017 fiscal year.

First of all, HDH has failed to perform a normalization of MPS's SG&A expenses to account for the managing members' excessive compensation, perks, and benefits, as well as above-market lease payments to related parties (an entity owed by spouses of one current and one former founding member of the firm) for the Spartanburg office. These items represent a non-market diminution of MPS's capital resources or net income and would artificially reduce the actual value of the company. Interestingly, HDH's engagement letters with MPS have requested itemized information to enable HDH to perform such normalization calculations each year, but either HDH did not perform such calculations or MPS did not provide the information requested. A proper normalization would increase the value of Ms. Mattison's ownership share to approximately \$530,700, without any discounts for lack of control or marketability of her units.

Second, for some reason HDH's 2017 Report did not use MPS management's actual forecasts for revenue growth, as HDH has done in prior years. According to HDH's 2017 Report, MPS reported an expected growth in gross revenues of 11.4% for 2018 to \$55MM. (2017 HDH

Report, at 3). HDH's analysis used only 9.9% for the expected growth in revenues in its 2017 valuation report. (*Id.* at Exhibit 2). In every previous report you have provided to me, HDH used the exact growth rate figures provided by management. This change alone would increase the value of Ms. Mattison's ownership shares to approximately \$551,800, without any discounting for control or marketability.

Third, the HDH model is very sensitive to the assumption regarding gross margin; yet, without any explanation, HDH has assumed a gross profit margin of 43.3% in the 2017 Report, which is significantly less than MPS's actual gross margin in prior years. MPS's actual gross margin in 2017 was 45.2%. The average gross margin according to HDH's reports from 2014-2017 was 43.6%, excluding the 47.1% value from 2015 as a statistical outlier. Using a gross margin assumption of 43.6%, which is significantly less than the 2017 figure, would yield a value of approximately \$388,700 for Ms. Mattison's units, without discounting for control or marketability.

Fourth, HDH has assumed a 10.0% cash-free net working capital requirement as a percentage of gross revenues. (2017 HDH Report, at 7). According to our expert, cash-free net working capital of 6.5% would be more appropriate for an architectural firm. Changing this assumption from 10.0% to 6.5% would increase the value of Ms. Mattison's ownership share to approximately \$428,600, again without any discounting for control or marketability.

Fifth, HDH has made a significant change in the weighting allocation in the Guideline Transactions approach, compared to prior reports, again without any satisfactory explanation. In the 2017 Report, HDH used a weighting of 50% revenue and 50% EBITDA. The footnote for this change states, "Analyst judgment based on a qualitative and qualitative [sic] review of the selected guideline transactions and that of the Company." (2017 HDH Report, at Exhibit 5, n.3). In prior years, HDH has used weighted allocations of 100% revenue, 0% EBITDA (2016, 2015) or 75% revenue, 25% EBITDA (2014). (Compare Exhibit 5 in all HDH Reports). In prior footnotes, HDH stated that the "revenue multiple is more applicable when future growth is expected to be modest." The HDH model continues to forecast modest, long-term growth for MPS. Using the prior weighting allocation of 100% revenue, 0% EBITDA (as used in for the two prior reports) would increase the value of Ms. Mattison's units to approximately \$398,700, without discounting for control or marketability.

Sixth, according to our expert, HDH should have added MPS's actual cash balance to the equity value computation in the Guideline Transactions Method. That change alone would have increased the value of Ms. Mattison's share of the firm to approximately \$378,200, without discounting for control or marketability.

Seventh, HDH assumed a long-term, revenue growth rate of 4% in the 2017 Report. Our expert believes that the long-term, revenue growth rate should be 5% instead of 4%. This change alone would increase the value of Ms. Mattison's share to approximately \$381,100.

Taking all of these issues together, our expert has concluded that the fair market value of Ms. Mattison's ownership share of MPS is \$829,000.

There are a number of other areas where HDH's analysis could be questioned, if we were allowed to conduct full discovery about HDH's methodologies and the inputs, projections, and assumptions provided almost entirely by MPS's management. Furthermore, there is substantial evidence to suggest that MPS has used HDH over the years to accomplish strategic objectives, rather than to create a good-faith appraisal of fair market value of the company. As an example, in 2014, when Brian Deichman was bought out, HDH's valuation was \$87.52 per share. In 2015, HDH's valuation had increased to \$169.80 per share, over a 94% increase in value in one year. During that same period (2014 to 2015), MPS's gross revenues increased by only 47%. The following year, 2016, MPS's gross revenues increased by almost 25%, well above the projected 21.94% used by HDH in its 2015 valuation; yet, HDH's analysis for 2016 actually showed MPS's share price declining to \$164.33 per share (3.22% drop). These are just a few examples of the glaring discrepancies we have noted in HDH's work.

In an effort to resolve this matter without litigation over the unit price, Ms. Mattison has authorized me to demand payment of \$829,000 for her ownership interest in MPS. We are still willing to mediate this dispute, if necessary, and believe that Tom Traxler would have a solid understanding of the issues involved in the valuation of a company as a going concern.

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

If you have any questions or would like to discuss this matter further, please feel free to call me or email me.

Sincerely yours,

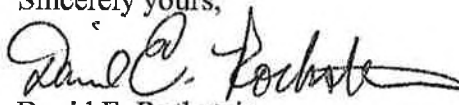

David E. Rothstein

EXHIBIT J

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

MCMILLAN PAZDAN SMITH, LLC, CIVIL ACTION NO.
 Plaintiff- 2019-CP-23-00998
Counterclaim Defendant,
 VS.
DONZA H. MATTISON,
 Defendant.

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.

DEPOSITION OF KEITH ALLEN JACOBS, II

DATE TAKEN: January 29, 2020

TIME BEGAN: 8:30 a.m.

TIME ENDED: 12:30 p.m.

LOCATION: Rothstein Law Firm, P.A.
 1312 Augusta Street
 Greenville, South Carolina

REPORTED BY: Eileen Thompson, CCR
 EveryWord, Inc.
 P.O. Box 1459
 Columbia, South Carolina 29202
 803-212-0012

1 about certifying the ballot, or something.

2 Q. I mean, did you attend the November 4th,
3 2019 meeting in person?

4 A. Yes.

5 Q. Okay. And as I understand it, the first
6 part of the meeting was the vote for the board of
7 directors, is that correct?

8 A. That sounds right.

9 Q. Okay. At some point, do you recall, after
10 the votes were gathered, that Ms. Mattison was
11 dismissed from the meeting?

12 MR. OUTTEN: I object to the form.

13 THE WITNESS: At the conclusion of the
14 formal principals meeting, that meeting was
15 adjourned, and the current employees, who were
16 also principals, had a separate meeting after
17 that.

18 EXAMINATION RESUMED BY MR. ROTHSTEIN:

19 Q. Okay. What was discussed at that separate
20 meeting after the employees remained and the
21 nonemployees of the firm were dismissed?

22 A. I don't recall specifics of it.

23 Q. Was Ms. Mattison discussed?

24 A. She was.

25 Q. Okay. What can you recall about Ms.

1 Mattison's -- the discussion involving Ms. Mattison?

2 A. The only thing that sticks out to me --
3 and with all due respect, there was a lot of anger
4 and frustration among shareholders and people
5 wanting to know what they could do to help expedite
6 this being resolved and dismissed.

7 Q. Who do you recall expressing anger and
8 frustration during that separate meeting?

9 A. There were a couple people, but I don't
10 recall who they were.

11 Q. Okay. What about Mr. Ron Smith? Did Ron
12 Smith express anger and frustration about Ms.
13 Mattison?

14 A. The comment I just made is referring to
15 nonmanaging principals or Chad Cousins -- I think
16 you called them regular shareholders earlier. The
17 minority shareholders were the ones that I was
18 referring to that expressed that frustration.

19 Q. And you can't recall any of the sort of
20 leaders of that anger and frustration?

21 A. No, sir.

22 Q. Okay. Did you speak up and express anger
23 and frustration about the case?

24 A. I don't recall doing that.

25 Q. Okay. What was the nature of the anger

1 and frustration among the shareholders?

2 A. Quite frankly, they believed that Donza's
3 accusations are unfounded and they're not interested
4 in participating in that kind of a derivative
5 lawsuit.

6 Q. How many of the, I guess, minority members
7 would you say expressed anger and frustration about
8 their belief that Donza's allegations are unfounded?

9 A. Several.

10 Q. Is it more than five?

11 A. It might have been. Certainly
12 nonverbally, more than five.

13 Q. Okay. Any other members of the executive
14 committee express anger and frustration?

15 A. No, sir.

16 Q. Do you recall responding or adding to the
17 discussion, when the anger and frustration among the
18 shareholders was expressed?

19 A. Not specifically.

20 Q. At the time that this anger and
21 frustration was being sort of vented or discussed at
22 the November 4th meeting, had you reviewed Ms.
23 Mattison's derivative -- the allegations in her
24 derivative complaint?

25 A. I was familiar with the allegations in

1 the allegations that Ms. Mattison made are -- in her
2 third-party complaint are true or not, right?

3 A. I've compared it to my experience over the
4 last 20-something years.

5 Q. Okay. But if the four managing principals
6 of the firm -- or the three managing members and Mr.
7 Cousins were keeping information from you, you
8 wouldn't necessarily know that, would you?

9 MR. OUTTEN: Object to the form of the
10 question.

11 THE WITNESS: Would you care to ask it in
12 a different way?

13 EXAMINATION RESUMED BY MR. ROTHSTEIN:

14 Q. Yes. If Mr. Smith, Mr. Pazdan -- Mr. Ron
15 Smith, Mr. Pazdan, Brad Smith, and Mr. Cousins were
16 not disclosing information to the minority members,
17 they were just making the decisions to benefit
18 themselves, you wouldn't necessarily know that,
19 would you?

20 MR. OUTTEN: Object to the form.

21 THE WITNESS: I've worked for this
22 organization for just rounded to 25 years.
23 I've never seen anything remotely approaching
24 unethical in any form.

25 EXAMINATION RESUMED BY MR. ROTHSTEIN: