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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 4 of 4)

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

[Attorneys for Respondents listed on following page]

Samuel W. Outten
Miles Coleman
Nelson Mullins Riley & Scarborough, LLP
2 W. Washington St., Suite 400
Greenville, SC 29601
(864) 250-2300
Attorneys for Respondents

A. Mattison Bogan
Nelson Mullins Riley & Scarborough, LLP
1320 Main Street, 17th Floor
Columbia, SC 29201
(803) 799-2000
Attorney for Respondents

Thomas H. Keim, Jr.
Ford Harrison
100 Dunbar St., Suite 300
Spartanburg, SC 29306
(864) 699-1100
Attorney for Respondents

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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.

Donza H. Mattison,

Defendant-Counterclaimant.

**DEFENDANT’S MEMORANDUM OF
 LAW IN OPPOSITION TO MOTION
 FOR SUMMARY JUDGMENT ON
 DERIVATIVE ACTION**

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 for Summary Judgment on Derivative Action.

As an initial matter, Third-Party Defendants’ motion for summary judgment is premature. As set forth in the Rule 56(f) Affidavit of Defendant’s Counsel, Defendant has not had sufficient opportunity to complete discovery necessary to address the affirmative defense alleged by Third-Party Defendants—that Mattison “does not fairly and adequately represent the interests of . . . members who are similarly situated in enforcing the rights of the [company].” Rule 23(b)(1).1(a),

SCRCP. Counsel for Plaintiff and Third-Party Defendants have thwarted Ms. Mattison's legitimate efforts to conduct necessary discovery in this matter, unilaterally attempting to limit Defendant to three depositions, instructing the witnesses who were deposed not to answer valid, relevant questions, refusing to provide key financial information and to supplement discovery responses, blocking crucial third-party subpoenas, and refusing to allow a Rule 34 inspection of the Spartanburg office to allow Defendant's expert witness to assess the condition of the building and measure the square footage of the office space and common areas of the building.

In any event, Third-Party Defendants ignore the cardinal rule of summary judgment: that all of the facts and inferences in the record must be viewed in the light most favorable to the non-moving party, here Ms. Mattison. See Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991) ("In determining whether summary judgment is appropriate, the evidence and its reasonable inferences must be viewed in the light most favorable to the nonmoving party."). Third-Party Defendants' motion improperly attempts to misrepresent or shade crucial facts in this case in their own favor, to present information in a misleading matter skewed in their own favor, and to rely on unsworn, self-serving statements from members that are nothing more than conclusory recitations of the "company line" that are plainly based on coercion, intimidation, or misinformation, that are not based on personal knowledge, and that contain inadmissible hearsay, speculation, and opinion. Furthermore, Third-Party Defendants fail to recognize that they bear the burden of proving that Ms. Mattison does not fairly and adequately represent the interest of the other similarly situated members in enforcing the rights of the company.

As set forth in detail below, Third-Party Defendants' Motion for Summary Judgment should be denied.

I. Discussion

A. Summary Judgment Motion is Premature

Plaintiff and Third-Party Defendants filed their motion for partial summary judgment on Friday, February 21, 2020, less than three months after the Court orally reiterated at the November 6, 2019 hearing that the issue of whether Ms. Mattison can fairly and adequately represent the interests of other minority members of the LLC in pursuing the company's rights under Rule 23(b)(1) can only be decided after discovery. The written order granting Plaintiffs' Motion to Quash Non-Party Subpoenas memorializing the ruling from the November 6 hearing was filed on January 23, 2020,¹ less than a month before Plaintiff and Third-Party Defendants filed their motion for summary judgment.

The Court did not bifurcate discovery in this case, but did place limits on the subject matters for permissible discovery:

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

Order of Nov. 22, 2019, at 4.

As set forth in the Rule 56(f) Affidavit of Defendant's Counsel, which is attached hereto as Exhibit A, Defendant needs additional time to conduct further discovery on the issue of whether

¹The Order was dated and signed on November 22, 2019, but was not actually filed until January 23, 2020.

Defendant can fairly and adequately represent the interests of similarly situated minority members in protecting the rights of the company, for purposes of the derivative action.

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

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

Here, Defendant requests additional time to conduct discovery in this case on the issue of whether she can fairly and adequately represent the interests of the other, similarly situated minority members in pursuing the rights of MPS in the derivative action. Defendant’s counsel has detailed in the Attached Rule 56(f) Affidavit his good-faith efforts to conduct discovery in this case and the

repeated stone-walling Defendant has encountered from Plaintiff and Third-Party Defendants. Clearly, Defendant has diligently attempted to pursue discovery related to this issue; however, counsel for Plaintiff and Third-Party Defendants have impeded discovery at every turn. Furthermore, there is a strong likelihood that additional discovery will uncover additional evidence on the fair and adequate representation issue. The three minority members that have been deposed thus far own a total of 2,094 membership units, or approximately 2.342% of the ownership of MPS.² Only Mr. Jacobs actually purchased his units; those owned by Joslin and Myers were conveyed to them as additional compensation. Defendant should be given the opportunity to take depositions of other members who actually paid for their shares and who know more about the circumstances surrounding the lease of MPS's Spartanburg Office. In addition, Defendant should be given the opportunity to take the deposition of Third-Party Defendant Cousins, former COO and now CEO of the company, who appears to have been responsible for providing information to the minority members about Ms. Mattison's allegations in the derivative action.

Under Rule 56(f), because Defendant has not had sufficient opportunity to conduct discovery in this case, the Court should either deny the motion for summary judgment outright or continue the consideration of the motion until Defendant has had a fair and reasonable opportunity to engage in such discovery.

B. Fair and Adequate Representation of Similarly Situated, Minority Members

If the Court is inclined to reach the merits of Plaintiff's and Third-Party Defendants' Motion for Summary Judgment at this time, the record developed in discovery this far, viewed in the light most favorable to Ms. Mattison, cannot disqualify her from bringing a derivative action because

²Joslin owns 53 units, Myers owns 41 units, and Jacobs owns 2,000 units.

there is not sufficient evidence that she “does not fairly and adequately represent the interests of the . . . members similarly situated in enforcing the rights of the [company, MPS].” Rule 23(b)(1), SCRCP.

i. Burden of Proof

Importantly, Plaintiff and Third-Party Defendants fail to acknowledge that they bear the burden of proof on the adequacy of representation issue. A leading legal encyclopedia, Corpus Juris Secundum, summarized the law on this issue as follows:

A stockholder bringing a derivative action generally bears the burden of proof, and must overcome a presumption that corporate directors are faithful to their fiduciary duties, but a challenge to the adequacy of the stockholder's representative status places the burden on the party challenging the plaintiff's standing. . . .

Whether a derivative action plaintiff fairly and adequately represents other stockholders and the corporation and thus has standing to maintain the action involves a factual determination by the court, and the burden of proof is on the party challenging the plaintiff's standing. In challenging the adequacy of a derivative plaintiff, the defendant bears the burden to show a substantial likelihood that the derivative action is not being maintained for the benefit of the stockholders.

C.J.S. Corporations, § 499; see also Halsted Video, Inc. v. Guttillo, 115 F.R.D 177, 179 (N.D. Ill. 1987) (“The burden is on the defendant³ to show that the plaintiff will not fairly and adequately represent the corporation and its shareholders.”); Youngman v. Tahmoush, 457 A.2d 376, 381 (Del. Ch. 1983) (“The defendant . . . must show a substantial likelihood that the derivative action is not being used as a device for the benefit of all the stockholders.”); In re Wal-Mart Stores, Inc. Delaware Derivative Litig., 167 A.3d 513, 527–28 (Del. Ch. 2017) (“Both Federal Rule 23 and Rule 23.1 require the proposed class or stockholder representative to be ‘adequate,’ and there are some

³In the typical shareholder derivative action, the plaintiff shareholder seeks to bring the action on behalf of the corporation, and the defendant would be opposing the derivative action. Here, because MPS brought the suit originally against Ms. Mattison, she is actually the Defendant in this case, bringing the derivative action as a Third-Party Complaint.

similarities in the standard of adequacy under the two rules. But in the class action context, the purported class representative has to affirmatively demonstrate his adequacy in order to obtain certification. In a derivative action, by comparison, the burden is on the defendant to show that the plaintiff is an inadequate representative.”) (emphasis added); Palmer v. U.S. Sav. Bank, 553 A.2d 781, 785 (N.H. 1989) (“The burden is on the defendant or on other interested shareholders to establish that a particular plaintiff or plaintiffs cannot provide fair and adequate representation for other similarly situated shareholders.”); Brandon v. Brandon Const. Co., 776 S.W.2d 349, 353 (Ark. 1989) (“The burden of showing that the party bringing a derivative action does not fairly and adequately represent the interests of the shareholders is always on the defendant.”).

At this stage in the litigation, where the Court must view all facts in the light most favorable to Ms. Mattison as the non-moving party, Plaintiff and Third-Party Defendants cannot meet their burden of proving that Ms. Mattison cannot be a fair and adequate representative.

ii. Member Statements in Opposition to Derivative Action

Plaintiff and Third-Party Defendants attempt to rely almost entirely on unsworn, non-notarized statements from every member of the firm except Ms. Mattison purporting to disavow her derivative claims, to argue that Ms. Mattison’s derivative claims should not be allowed to proceed. These documents, which were attached to Plaintiff’s and Third-Party Defendants’ Brief as Exhibit F, plainly do not meet the requirements of a proper affidavit in support of a motion for summary judgment. Rule 56(e), SCRPC states that “Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.” Rule 56(e), SCRPC (emphasis added). The member statements fail to meet each of the underlined pre-requisites

of Rule 56(e): (1) the statements are not sworn and notarized affidavits; (2) they are not based on personal knowledge, but are merely expressions of belief and opinion; (3) they are based on inadmissible hearsay from unspecified information that was “provided” to them, without any identification or description of the nature or the information or the source of the information; and (4) the members do not demonstrate that they are competent to testify about the conclusory and self-serving statements.

The deposition testimony of all three minority members who have been deposed thus far demonstrate that these written statements are essentially meaningless. Mr. Joslin testified that his understanding of the claims Ms. Mattison has raised in a derivative capacity are “Limited, based on my very brief reading of the document yesterday.” (Joslin Depo., at 31, ll. 12-17). He acknowledged that he has not done anything to determine whether Ms. Mattison’s allegations are accurate, nor does he have an opinion about whether Ms. Mattison’s allegations in the third-party complaint are true. (Id. at 32, ll. 3-12). He further testified that he is not aware of any evidence or information to dispute Ms. Mattison’s allegations about the compensation of the managing members of the firm and Third-Party Defendant Cousins. (Id. at 69, l. 20 to p. 70, l. 4; 72, ll. 12-25; 78, ll. 4-6). With regard to Ms. Mattison’s allegations about the excessive rental payments for the Spartanburg office, Mr. Joslin testified that he has not “concerned myself with it.” (Id. at 100, ll. 8-22). Mr. Joslin candidly admitted that he has not done anything to verify whether the managers of MPS have acted consistently with the best interests of the firm in mind. (Id. at 110, ll. 6-21). Mr. Joslin also acknowledged that he has not done anything to investigate whether Ms. Mattison’s allegations that Third-Party Defendants have authorized excessive benefits for themselves and their family members are true. (Id. at 120, ll. 11-16). The only information Mr. Joslin reviewed about the case prior to

signing the statement disavowing the derivative action was Ms. Mattison's formal protest of the member meeting on November 4, 2019 and Third Party Defendant Cousins's written response on November 13, 2019. (Id. at 122, l. 24 to p. 123, l. 16). Mr. Joslin stated, "I didn't know what a derivative lawsuit was, but I just decided for myself in that call, and being presented with this [statement], that there was no way that I was going to join the - - in any way in this counter lawsuit." (Id. at 125, ll. 5-9). Mr. Joslin clearly admitted that he did not do anything to determine whether the allegations in Ms. Mattison's derivative claims are true or not, and that he is not aware of any facts that directly contradict the allegations she has made. (Id. at 130, ll. 2-10). At the end of Mr. Joslin's deposition, after Mr. Outten asked a series of scripted and leading questions in an effort to verify Mr. Joslin's signature on the member statement, Mr. Outten asked a key question that revealed the inherent bias Mr. Joslin harbors towards her and the derivative claim:

Q. And can you envision any circumstance in which you would join this derivative action or - - or purported derivative action of Ms. Mattison's against those gentlemen?

A. Absolutely not. I cannot.

(Id. at 173, ll. 7-11).

During Mr. Jacobs's deposition, he testified that he had not actually seen a copy of Ms. Mattison's derivative action complaint until the Monday before his deposition, (Jacobs Depo., at 8, ll. 4-15), which would have been Monday, January 27, 2020, approximately two-and-a-half months after he signed the Member Statement in Opposition to Derivative Action. As to the allegations in Ms. Mattison's derivative lawsuit that Third-Party Defendants authorized excessive compensation for themselves, Mr. Jacobs testified, "I have absolutely no way of knowing if those are true." (Id.

at 75, ll. 16-17). He stated that he has not compared how the total compensation of the Third-Party Defendants compared to the increases in compensation of the other members of the firm during the same period: “No, sir, Monday afternoon was the first time I’ve been privy to any of this information.” (Id. at 102, ll. 8-14). With respect to the allegations in the derivative action about the excessive lease payments for the Spartanburg Office, Mr. Jacobs stated, “I did no investigation of anything, based on what she wrote or what you-all wrote.” (Id. at 77, ll. 19-20). He acknowledged that he has done nothing to determine whether the allegations that Ms. Mattison made in her Third-Party Complaint are true or not, other than, “I’ve compared it to my experience over the last 20-something years.” (Id. at 77, l. 25 to p. 78, ll. 4). He further testified, “I don’t have any reason to believe, in the 25 years that I’ve worked in that organization, that we’ve done anything but work together and benefit from one another’s hard work.” (Id. at 89, ll. 8-12).

The third deponent, Ms. Myers, who was recently elected to the newly established board of directors at MPS in early November 2019, testified that, although she claims to have read the Third-Party Complaint, she was not even aware of the three basic categories of Ms. Mattison’s allegations of self-dealing by Third-Party Defendants. (Myers Depo., at 40, ll. 3-22). She admitted that she had not done anything, either on her own or with any committee or board members to investigate whether or not Ms. Mattison’s allegations are true. (Id. at 41, ll. 9-13). She testified that she has an opinion that the allegations in Ms. Mattison’s derivative claims are untrue, but “That opinion probably is based on my day-to-day operations with those people,” Id. at 41, ll. 14-22. Ms. Myers was unable to identify any basis for her opinion other than “just my experience with the firm. . . . That I just don’t have any knowledge of it.” (Myers Depo., at 44, ll. 4-12; l. 25 to p. 45, l. 1). Ms. Myers testified that she did not know anything about the rent of the Spartanburg office, other than, “I’ve

always thought Ron [Smith]’s family owned the building, but I’m not sure.” (Id. at 53, ll. 20-21). When Ms. Myers signed the Member Statement in Opposition to Derivative Action on November 13, 2019, the same day it was distributed, she was not provided with any information about the lease of the Spartanburg office. (Id. at 75, ll. 12-22). When shown the specific allegations in the Third-Party Complaint about the Spartanburg Office (Paragraphs 108-111 of that document), Ms. Myers stated, “I don’t have enough knowledge to refute or support this information. I don’t have enough background.” (Id. at 99, ll. 11-16). With respect to the allegations in the Third-Party Complaint about Third-Party Defendants authorizing excessive compensation for themselves (Paragraphs 100-107 of the pleading), Ms. Myers stated, “First of all, I don’t have knowledge to substantiate this information. . . . So I do not have knowledge this information is correct or incorrect.” (Id. at 111, ll. 8-9, 17-18). As to the third category of self-dealing alleged in the Third-Party Complaint—excessive benefits and perquisites for the managing members—Ms. Myers acknowledged, “I don’t have facts to support or refute that.” (Id. at 148, ll. 2-24). Ms. Myers summed up her opposition to Ms. Mattison’s derivative action as follows: “Why do I oppose the derivative action? Well, I feel like – yeah, it’s a feeling, so I can’t say it. This has been drawn out. It’s taking a lot of time and resources from our entire firm, not just me today, but in times I’ve had to discuss it previously. And I do feel it’s – it has been a waste of our time. I feel like my personal time has been pulled away from projects I need to be working on today and many other days.” (Id. at 173, ll. 4-12).

The member statements are nothing more than unsupported, conclusory assertions that raise more questions than they answer. The minority members could not possibly know whether the information they have been spoon-fed by Third-Party Defendant Cousins or the other Third-Party Defendants is “adequate information” on which to base their purported conclusions. The blank

template statements were circulated in an email and memo of November 13, 2019 from Mr. Cousins, along with a document entitled “Response to Donza H. Mattison’s November 4, 2019 Letter.” A copy of that document is attached hereto as Exhibit B. The email, memo, and Response contain self-serving and misleading representations, including that the firm has hired “independent counsel,” attorney Bill Higgins, “to serve as a neutral third-party to be available to answer any further questions you may have.”⁴ The Response also falsely states that “The managers of MPS have always been transparent with the other members, and [Ms. Mattison’s] assertions that the managers receive excessive compensation and benefits are not true.” The Response concludes by disparaging Ms. Mattison, stating that she “is not aligned with our mission, and we believe her actions show that she is putting her interests above the best interests of the other members.”

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

iii. Standard for Fair and Adequate Representation

There appears to be no published South Carolina precedent about the standard for “fair and adequate” representation in the context of a shareholder derivative action. Because one seeking to

⁴The Court will recall that Mr. Higgins previously submitted an Affidavit to this Court in Opposition to Defendant’s Motion to Disqualify Counsel, in which he testified that he was hired by Nelson Mullins to defend against the allegations of conflict of interest. Defendant suggests that an attorney who has been hired by Plaintiff’s counsel as an expert witness cannot also serve as “independent counsel” to the minority shareholders of the Plaintiff LLC in the same case.

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

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

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

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

Here, Plaintiff and Third-Party Defendants first assert that Ms. Mattison has a conflict of

interest with the other members of the LLC because she is seeking a declaratory judgment as to the invalidity of the purported September 30, 2015 Operating Agreement. Ms. Mattison's requested relief in her counterclaims is completely independent from her Third-Party Claims. There is nothing inherently inconsistent with Ms. Mattison's asserting that the attempted amendment to MPS's Operating Agreement is invalid on the one hand, and her claims in the derivative action that the managing members have breached their fiduciary duties to the company by engaging in blatant self-dealing on the other. Because Ms. Mattison's Third-Party Complaint was verified, the court must accept her allegations as the equivalent of an affidavit for purposes of summary judgment. See Dawkins v. Fields, 354 S.C. 58, 67, 580 S.E.2d 433, 438 (2003). After this case is concluded and Ms. Mattison is no longer a member of MPS, Plaintiff can easily ratify the prior attempted amendments to its Operating Agreement and can ratify the issuance of shares to new members who may have obtained their shares in violation of the terms of the original Operating Agreement and S.C. Code Ann. § 33-44-404(c).

Next, Plaintiff and Third-Party Defendants assert that Ms. Mattison brought the derivative claims in her Third-Party Complaint solely to gain leverage in the underlying dispute about the valuation of her membership units. There is no competent evidence that Ms. Mattison has improperly brought the Third-Party Complaint as some type of strike suit. From the very outset of this dispute, after Ms. Mattison requested and received some of the financial information from Plaintiff, she has consistently alleged that Third-Party Defendants have taken out more than their fair share of the firm's profits in the form of excessive compensation and benefits and related-party transactions, which should be reflected in the fair market valuation of the firm through the well-established process of normalization. In their brief, Plaintiff and Third-Party Defendants improperly

reveal the substance of pre-litigation settlement discussions, which is clearly inadmissible under Rule 408, SCRE. The letter of January 14, 2019 from the undersigned counsel to MPS's attorney was not a hollow threat or mere saber rattling, but was actually intended to satisfy the pre-suit demand requirement of S.C. Code Ann. § 33-44-1101 et seq. Ms. Mattison and the undersigned counsel participated in good faith in a mediation after the January 14, 2019 letter was sent, in a good-faith effort to resolve all disputes among the parties. Of course, the discussions that occurred during mediation are also absolutely confidential, and Defendant's counsel will not violate that important cannon.

Incredibly, Plaintiff and Third-Party Defendants argue that "Only when such threats failed did Mattison choose to bring her derivative claims." (Br., at 12). Plaintiff's counsel know very well, as does this court, that this litigation started with MPS filing the lawsuit against Ms. Mattison, not the other way around. Plaintiff and Third-Party Defendants cannot use the filing of their own pre-emptive lawsuit as a basis for saying that Ms. Mattison cannot bring the derivative action because she is already engaged in litigation with MPS. See Vanderbilt v. Geo-Energy Ltd., 725 F.2d 204, 208 (3d Cir. 1983) ("[H]ere it was the corporate defendants who initiated the first round of litigation. Under these circumstances less weight should be given to a corporate defendant's claim for the disqualification of the representatives of the shareholder class where the corporate defendant was the one who initiated the litigation about which it now complains.").

Plaintiff's and Third-Party Defendants' citation to Palmer v. U.S. Savings Bank, 553 A.2d 781 (N.H. 1989), is unavailing. The court in Palmer noted that the plaintiff in the case was the former president of the defendant bank, who was pursuing a separate employment claim against the bank seeking in excess of \$1 million in damages. Id. at 786.

Likewise the case of Smith v. Ayres, 977 F.2d 946 (5th Cir. 1992), is easily distinguishable. In Ayres, the court noted that “A catalog of the various lawsuits between these two parties and their affiliates would consume well over a full page. . . . While those lawsuits bear no direct relationship to the instant case, they suggest the virulent antagonism [plaintiff] holds for [defendant].” Id. at 949. In addition, the plaintiff in the Ayres case owned an “infinitesimal” stake of 1/10,000,000th of the defendant company’s authorized shares. Id. at 948.

The instant case is also nothing like the facts in the unpublished case of Khanna v. McMinn, 2006 WL 1388744 (Del. Ch. Ct. 2006), which is cited in Plaintiff’s and Third-Party Defendants’ brief. In the Khanna case, the plaintiff was a disgruntled former general counsel of the company. Id. at *44 (“In concluding that Khanna must be disqualified as a representative plaintiff, the Court relies primarily on Khanna's position as Covad's former General Counsel and the ethical quagmire that follows.”).

Here, by contrast, Ms. Mattison was not and is not a disgruntled employee, despite the unsubstantiated allegations to the contrary. She was able to reach an amicable settlement of her employment-related claims with the help of undersigned counsel, without animosity or litigation, specifically reserving the issue of the valuation and buy-out of her membership units. The rank speculation of counsel for Plaintiff and Third-Party Defendants is clearly not sufficient to disqualify Ms. Mattison from continuing her derivative claims.

Plaintiff and Third-Party Defendants also attack Ms. Mattison’s representational fairness and adequacy by noting that no other, current member of MPS is supportive of her claim. They misleadingly argue that “[t]he submission of statements from 98% of the membership of MPS that they oppose Mattison’s derivative action is conclusive on this issue.” (Br., at 5). As discussed

above, the Member Statements should not even be considered by the Court on a motion for summary judgment, much less could they be “conclusive” on any issue.

In any event, Plaintiff and Third-Party Defendants omit the crucial fact that Third-Party Defendants themselves make up over 75.6% of the outstanding shares of MPS. Of the truly disinterested members in the derivative action—the remaining 24.4% minority owners collectively—Ms. Mattison holds almost 9.5% of those membership units and is the fourth largest minority shareholder in the firm (again not including Third-Party Defendants).

The mere size of a derivative action plaintiff’s share holdings or the fact that she is pursuing a derivative action without being joined by any other shareholders would not preclude her from being a fair and adequate representative of the minority shareholders of the firm under Rule 23(b)(1), SCRCp. Numerous courts have recognized that a single shareholder in a small or closely held corporation and bring a derivative action claim without being joined by any other shareholders. This so-called “class of one” derivative action is fairly common in closely held corporations. For example in Angel Investors, LLC v. Garrity, 216 P.3d 944 (Ut. 2009), the court recognized that “the nature of a closely held corporation, where there is often a small number of shareholders and many of those may have close ties to each other, lessens the likelihood that a minority shareholder will speak out against corporate malfeasance.” Id. at 951. The Garrity court stated, “In light of the greater vulnerability to malfeasance that is present in closely held corporations, we hold that a sole dissenting shareholder in a closely held corporation qualifies as a class of one for purposes of derivative standing when that shareholder (1) seeks by its pleading to enforce a right of the corporation and (2) does not appear to be similarly situated to any other shareholder.” Id.; see also Jordan v. Bowman Apple Prods. Co., 728 F. Supp. 409, 412 (W.D. Va. 1990) (“Rule 23.1 places no

minimum numerical limits on the number of shareholders who must be ‘similarly situated.’ In appropriate circumstances a single shareholder may be situated in a unique position and thus constitute a legitimate ‘class of one.’”); Brandon v. Brandon Const. Co., 776 S.W.2d 349, 352 (Ark. 1989) (“The fact that the appellant is the only person willing to continue this suit does not automatically disqualify her from individually maintaining a derivative action. The first sentence of Rule 23.1 refers to ‘a derivative action brought by one or more shareholders or members to enforce a right of a corporation’ If the rule intended to prevent one person from maintaining such an action, it would have been simple enough to require that an action be brought by ‘two or more shareholders.’”); Larson v. Dumke, 900 F.2d 1363, 1368 (9th Cir. 1990) (“Although the cases are not uniform, we are persuaded that a single shareholder may bring a derivative suit.”); Halsted Video, Inc. v. Guttillo, 115 F.R.D. 177, 179 (N.D. Ill. 1987) (“Rule 23.1 does not require that derivative action plaintiffs have the support of a majority of the shareholders or even that they be supported by all of the minority shareholders. The true measure of adequacy of representation under Rule 23.1 is not how many shareholders the plaintiff represents but rather how well the representative plaintiff advances the interests of similarly situated shareholders.”); HER, Inc. v. Parenteau, 770 N.E.2d 105, 112–13 (Ohio Ct. App. 2002) (“The fact that the only other shareholder in Stonebridge directly opposes this litigation does not preclude a finding that appellant can fairly and adequately represent similarly situated shareholders.”).

Even if the Court is concerned by the fact that no other member of MPS is willing to join her case, Ms. Mattison could still represent herself as a “class of one” in this case as the only member who is no longer an active employee of MPS. In this narrower category of “similarly situated” members, Ms. Mattison is actually in the unique position of being able to challenge the actions of

Third-Party Defendants, without fear of retaliation or employment-related retribution. Even Mr. Jacobs and Ms. Myers acknowledged that fact in their depositions. (Jacobs Depo., at 171, ll. 8-15) (“Q. You understand that Ms. Mattison is the only current member of the firm who is not presently employed by McMillan Pazdan Smith, right? A. I do understand that, yes, sir. Q. So she can make the allegations that she’s made without fear of losing her job, isn’t that right? A. I understand your question. Yes.”); (Myers Depo., at 33, ll. 15-22) (“Q. Well, she doesn’t have to worry about being retaliated against by one of the managing members, does she? THE WITNESS: “That is true, but that is not – that is not something that – I don’t think anyone would be afraid of within our firm.”).

II. Conclusion

For all of the foregoing reasons, the Court should deny or defer ruling on Plaintiff’s and Third-Party Defendants’ Motion for Summary Judgment, based on Rule 56(f), SCRCP to allow Defendant additional time to conduct necessary discovery in this matter. If the Court decides to reach the merits of Plaintiff’s and Third-Party Defendants’ arguments, their Motion for Summary Judgment should be denied. The evidence of record taken in the light most favorable to Ms. Mattison does not conclusively show that she cannot fairly and adequately represent the interests of similarly situated minority shareholders in enforcing the rights of the company against the alleged self-dealing and breaches of fiduciary duties by Third-Party Defendants.

* * *

Respectfully submitted,

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

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

May 11, 2020

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
) (Business Court—Judge McIntosh)
 Plaintiff-Counterclaim)
 Defendant,)

vs.)

**RULE 56(f) AFFIDAVIT OF
 DEFENDANT'S COUNSEL**

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

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

vs.)

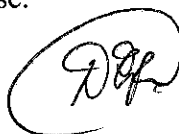
Rondald G. Smith, Joseph M. Pazdan,)
 Brad B. Smith, and Chad C. Cousins,)
)
 Third-Party Defendants.)

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)

PERSONALLY appeared before me David E. Rothstein, who, after being duly sworn,
 deposes and states the following:

1. My name is David E. Rothstein. I am older than eighteen years of age. The
 statements in this Affidavit are based upon my own personal knowledge.

2. I am counsel for Defendant-Counterclaimant/Third-Party Plaintiff, Donza H. Mattison
 (hereinafter "Mattison"), in the above-captioned case.



3. Following the Court's denial of Third-Party Defendants' Motion to Dismiss Mattison's Amended Third-Party Complaint, which is a derivative action brought by Ms. Mattison against the four largest owners of MPS, Third-Party Defendants, Ron Smith, Joe Pazdan, Brad Smith, and Chad Cousins, I have diligently attempted to conduct discovery consistent with the Court's directive at the hearing on November 6, 2019, that preliminary discovery in this case should be limited to the following issues: (1) the valuation of Ms. Mattison's membership units in MPS, including possible normalizing entries for excessive compensation and bonuses paid to managing members of the firm, as well as for related-party transactions such as the lease of the Spartanburg office; and (2) with respect to the derivative action, whether Ms. Mattison could fairly and adequately represent the interests of the similarly situated members in enforcing the rights of MPS.

4. On November 8, 2019, I served interrogatories and requests for production on each of the four Third-Party Defendants, which were intended to comply with the Court's oral ruling limiting preliminary discovery as discussed above. Third-Party Defendants refused to provide answers to this discovery until March 10, 2020, over three months after they were due, and only after Defendant's counsel threatened to file a motion to compel. Third-Party Defendants objected to answering 12 of the 19 interrogatories and 18 of 19 requests for production, citing the Court's Order of November 22, 2019. A copy of Third-Party Defendant Ron Smith's discovery responses are attached hereto as Exhibit 1.

5. On December 3, 2019, I served Notice of Depositions for six minority members of MPS: William R. Joslin, D. Paulette Myers, K.J. Jacobs, Harry D. Ballard, Donald L. Love, Jr., and R. Cullen Pitts. These depositions were scheduled for December 17-19, with two depositions scheduled for 10:00 a.m. and 2:00 p.m. each of those days. A copy of the cover letter and Notice of

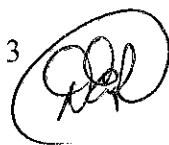


Depositions is attached hereto as Exhibit 2.

6. Earlier in the day on December 3, 2019, Plaintiff's counsel provided me with copies of unsworn, unnotarized statements signed by every member of MPS except Ms. Mattison, purporting to express opposition to the derivative action. I first became aware of the existence of these statements on December 2, 2019, in an email from attorney Sam Outten, who indicated that he would only agree to produce copies of the statements if they would be considered subject to confidentiality. A copy of the email string from December 2-4, 2019 between counsel is attached hereto as Exhibit 3.

7. On December 11, 2019, Plaintiff and Third-Party Defendants filed a Motion for Protective Order seeking to prevent Defendant from taking the depositions of the six members of MPS, arguing that "counsel's sole purpose in noticing the depositions was to subject the members of MPS to annoyance, embarrassment, oppression, and undue burden and expense." Defendant filed a Memorandum of Law in Opposition to Plaintiff's and Third-Party Defendants Motion for Protective Order on December 12, 2019, and expressed a willingness to address that motion during the hearing scheduled for December 13, 2019, on Defendant's Motion to Disqualify Counsel from representing both MPS and the individual Third-Party Defendants in the same case. In a cover email to Judge McIntosh containing a courtesy copy of that brief and the attached exhibits, I informed the Court that Defendant would be willing to waive the 10-day notice requirement under Rule 6(d), SCRCP, so the Court could also hear the motion for protective order during the December 13 hearing on the other motion, in the interests of judicial economy.

8. The Court conducted an informal conference call with counsel on the morning of December 13, 2019, in lieu of an in-person hearing that had been scheduled for 2:00 p.m. that same

3 

afternoon. During the conference call, which was conducted off the record with no court reporter present, the Court expressed its strong opinion that the motion to disqualify counsel was premature until the Court addressed the threshold issue under Rule 23(b)(1), about whether Ms. Mattison could fairly and adequately represent the interests of the similarly situated minority members in enforcing the rights of the company through the derivative action. The Court also stated that the depositions of the six minority members that Defendant had noticed could proceed, but that the Court was confident that the parties could work out the logistics of scheduling the depositions without the Court's involvement.

9. On December 16, 2019, with the specific permission of the Court, I wrote a letter to Judge McIntosh summarizing the Court's announced ruling during the conference call on December 13, 2019. On December 17, 2019, Judge McIntosh sent an email to me, with copies to all counsel, stating, "I believe your letter correctly states my ruling in the phone conference." A copy of that letter and the email string with the Court is attached hereto as Exhibit 4.

10. After the Court's telephone conference on December 13, 2019, counsel for Plaintiff and Third-Party Defendants sent me an email requesting a list of the first three members I would like to depose. I responded by stating that my preference for the order of the depositions was as I had originally noticed them: Joslin, Myers, Jacobs. In complete disregard for my stated preference, Mr. Outten responded, "We will start with Ballard Love and Pitts." The email thread regarding the order of the depositions and Mr. Outten's unilateral attempt to limit the number of depositions to three minority members is attached hereto as Exhibit 5. I never agreed to limit the number of depositions of minority members of MPS to three individuals.

11. Although Defendant originally noticed six depositions for Greenville, to be taken over



three consecutive days, starting on December 17, 2019, counsel for Plaintiff and Third-Party Defendants delayed the first deposition by one month until January 17, 2020, insisting that Joslin's deposition be taken in Charlotte. The next two depositions (Jacobs and Myers) were taken on January 29, 2020, and February 19, 2020, respectively. For each deposition, Mr. Outten insisted that the depositions start earlier than usual and attempted to limit the duration of the deposition to no more than four hours, stating that he or the witness had other obligations in their schedules for that day.

12. On February 7, 2020, I requested dates for the depositions of minority members Love and Pitts, which were part of the original group of six deponents noticed by Defendant. I requested that both depositions be done in a single day, one in the morning and one after lunch. A copy of the email string on February 7, 2020 is attached hereto as Exhibit 6. Counsel for Plaintiff and Third-Party Defendants refused to provide any dates for those depositions, but instead filed a motion for summary judgment and a motion for protective order on February 21, 2020.

13. Also on February 7, 2020, I requested dates for a Rule 34 inspection of MPS's office in Spartanburg, SC, for Defendant's expert commercial real estate appraiser to measure and photograph the premises. Counsel for Plaintiff and Third-Party Defendants refused to cooperate in the scheduling of such inspection, despite my offers to conduct the inspection outside of regular business hours, over a weekend, or during MPS's corporate retreat to minimize any distractions or disturbance of business activities. The email thread on February 7, 2020 regarding the Rule 34 inspection is attached hereto as Exhibit 7.

14. On February 13, 2020, after not receiving any acceptable dates for the Rule 34 inspection, I served Defendant's Rule 34 Request for Entry Upon Land for Inspection and Other

Purposes on counsel for Plaintiffs and Third-Party Defendants. A copy of the cover letter and Rule 34 request is attached hereto as Exhibit 8.

15. On February 12, 2020, I also served a subpoena on NAI Earle Furman, a Commercial Real Estate Broker in Spartanburg, South Carolina that apparently listed the MPS Office Building in Spartanburg for sale in or about September 2019. The subpoena sought information relating to the property at 127 Dunbar Street in Spartanburg, SC, which is the current office owned by C & P of Spartanburg, LLC and leased to MPS. A copy of the subpoena and cover letter is attached hereto as Exhibit 9.

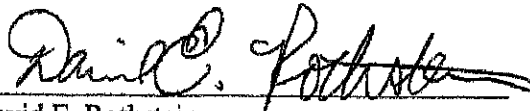
16. Plaintiff's and Third-Party Defendants' Motion for Protective Order filed on February 21, 2020, seeks to prevent Defendant from obtaining crucial discovery in this case, including depositions of other minority members of MPS, the Rule 34 request to inspect MPS's Spartanburg Office, and the subpoena duces tecum to NAI Earle Furman. This information is absolutely necessary for Defendant to counter Third-Party Defendants' argument that she cannot fairly and adequately represent the interests of similarly situated minority shareholders in pursuing the rights of MPS as an LLC. Furthermore, the information is directly relevant to the valuation of Mattison's ownership interests of the company, including normalizing entries that should have been made in determining the fair market value of Mattison's membership units. Without this information, Defendant would be unfairly denied access to important and relevant evidence on the issues raised by Plaintiff's and Third-Party Defendants' Motion for Summary Judgment on the derivative action.

17. Pursuant to Rule 56(f), SCRCP, I respectfully request that the Court delay consideration of Plaintiff's and Third-Party Defendants' Motion for Summary Judgment until Defendant has had sufficient time to complete preliminary discovery, including taking the

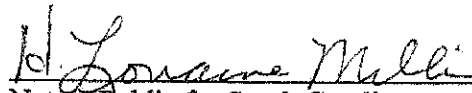


depositions of other minority members and Plaintiff's and Third-Party Defendants' expert witness, attorney Bill Higgins, obtaining the information requested in the third-party subpoena to NAI Earle Furman, and conducting the Rule 34 inspection of MPS's Spartanburg Office.

FURTHER AFFIANT SAYETH NOT.


David E. Rothstein

SWORN to and subscribed before me,
this 10th day of May, 2020.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: 3/28/2027

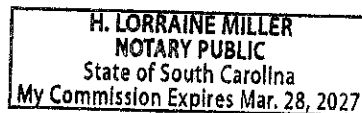


Exhibit 1

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>RON G. SMITH'S RESPONSES TO</u>
	)	<u>DEFENDANT/THIRD-PARTY</u>
	)	<u>PLAINTIFF'S FIRST SET OF</u>
	)	<u>INTERROGATORIES AND</u>
	)	<u>REQUESTS FOR PRODUCTION OF</u>
	)	<u>DOCUMENTS</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 Rules 33 and 34 of the South Carolina Rules of Civil Procedure, Ron G. Smith ("Smith") responds to Defendant/Third-Party Plaintiff's First Set of Interrogatories and Requests for Production of Documents as follows:

INTERROGATORIES

1. Identify any and all persons known to Third-Party Defendant Ron Smith or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

RESPONSE: Smith identifies the following individuals:

A. Ron G. Smith
Managing Principal at McMillan Pazdan Smith, LLC ("MPS")

Ron Smith has knowledge of Defendant's employment with MPS from when she was hired as an architect for MPS's predecessor firm, McMillan Smith & Partners Architects, PLLC, in 1994 through her cessation of employment in February 2018. Mr. Smith directs the Spartanburg office and the K-12 and Higher Education clients of the firm, and therefore has knowledge of Defendant's job performance.

In addition, as a Managing Principal of MPS, Mr. Smith has knowledge of MPS's corporate structure and governance, including but not limited to the members of MPS and their respective interests, and the provisions of MPS's September 30, 2015 Operating Agreement. Mr. Smith is also familiar with MPS's financial information, including but not limited to financial statements, valuations of the company, etc.

B. Joseph M. Pazdan
Managing Principal at MPS

Joseph Pazdan has knowledge of Defendant's employment with MPS from 2009 through her cessation of employment in February 2018. In addition, as a Managing Principal of MPS, Mr. Pazdan has knowledge of MPS's corporate structure and governance, including but not limited to the members of MPS and their respective interests, and the provisions of MPS's September 30, 2015 Operating Agreement. Mr. Pazdan is also familiar with MPS's financial information, including but not limited to financial statements, valuations of the company, etc.

C. Brad B. Smith
Managing Principal at MPS

Brad Smith has knowledge of Defendant's employment with MPS from 2009 through her cessation of employment in February 2018. In addition, as a Managing Principal of MPS, Mr. Smith has knowledge of MPS's corporate structure and governance, including but not limited to the members of MPS and their respective interests, and the provisions of MPS's September 30, 2015 Operating Agreement. Mr. Smith is also familiar with MPS's financial information, including but not limited to financial statements, valuations of the company, etc.

D. Chad C. Cousins
Chief Executive Officer at MPS

Chad Cousins has knowledge of Defendant's employment with MPS from 2009 through her cessation of employment in February 2018. In addition, as the Chief Executive Officer of MPS, Mr. Cousins has knowledge of MPS's corporate structure and governance, including but not limited to the members of MPS and their respective interests, and the provisions of MPS's September 30, 2015 Operating Agreement. Mr. Cousins has knowledge

regarding MPS's financial information, including but not limited to financial statements, valuations of the company, etc.

**E. Jamie Kemp
Human Resources Director at MPS**

Jamie Kemp has knowledge of Defendant's employment with MPS and the events leading to her cessation of employment in February 2018. As the Human Resources Director, Ms. Kemp has specific knowledge regarding Defendant's term of employment with the firm.

**F. Michael Chewning
Associate Principal at MPS**

Michael Chewning is the studio director of educational facilities. Mr. Chewning has knowledge of Defendant's employment with MPS and specifically her job performance relating to the firm's educational clients.

2. For each person known to Third-Party Defendant Ron Smith or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform Defendant/Third-Party Plaintiff of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

RESPONSE: See Response to Interrogatory No. 1.

3. Set forth a list of photographs, plats, sketches or other prepared documents in possession of Third-Party Defendant Ron Smith that relate to the claims or defenses in this case.

RESPONSE: Smith objects to this Interrogatory to the extent that it requests information protected by the attorney-client privilege or the work product doctrine. Subject to and without waiving these objections, Smith refers Defendant to all responsive documents produced herewith.

4. Set forth the names and addresses of all insurance companies which have liability insurance coverage relating to the Third-Party claims in Defendant's Amended Answer, Counterclaims and Third-Party Complaint, and set forth the number or numbers of the policies involved and the amount or amounts of liability coverage provided in each policy.

RESPONSE: MPS maintains an Executive Liability Policy with Chubb Group of Insurance Companies, Policy Number 8250-3549, which includes (1) directors & officers and entity liability coverage, (2) employment practices liability coverage, (3) fiduciary liability coverage, and (4) crime coverage. Smith refers Defendant to the document Bates numbered MPS_000190-000345.

5. Identify any expert witnesses whom Third-Party Defendant Ron Smith proposes to use as a witness at the trial of the case.

RESPONSE: Smith has not yet identified an expert witness in this matter, but will supplement this response as necessary. Smith expressly reserves the right to call upon any expert identified by Defendant.

6. Identify by case caption, case number and jurisdiction, any lawsuit in which Third-Party Defendant Ron Smith has been involved, either as a plaintiff or defendant, from January 1, 2013 to the present. For each such case, describe in detail the nature of the case, state the outcome or current status of the case, and identify the attorneys for Third-Party Defendant Ron Smith and the opposing party.

RESPONSE: Smith refers Defendant to Judge McIntosh's Order dated November 22, 2019, in which the Court held that "as it relates to the derivative action, discovery shall be conducted at this time only on the issue of whether Mattison fairly and adequately represents the interests of other members" of MPS. To the extent this Interrogatory seeks information unrelated to that issue, Smith objects on the grounds that it is overly broad, unduly burdensome, and not proportional to the needs of this case.

7. Identify any and all accounts where Third-Party Defendant Ron Smith has maintained any credit card, charge card, debit card, or line of credit from which any expenses relating to McMillan Pazdan Smith, LLC (hereinafter "MPS") or for which he received reimbursement from MPS at any time from January 1, 2013 to the present. For each such account, provide the name and address of the financial institution, the account number(s), and identify any and all individuals who have been signatories or authorized card-holders or users of the account.

RESPONSE: Smith refers Defendant to Judge McIntosh's Order dated November 22, 2019, in which the Court held that "as it relates to the derivative action, discovery shall be conducted at this time only on the issue of whether Mattison fairly and

adequately represents the interests of other members” of MPS. To the extent this Interrogatory seeks information unrelated to that issue, Smith objects on the grounds that it is overly broad, unduly burdensome, and not proportional to the needs of this case. Subject to and without waiving these objections, Smith refers Defendant to MPS’s Response to Interrogatory No. 8 in Defendant’s First Set of Interrogatories and Requests for Production of Documents to Plaintiff.

8. Identify any and all accountants, tax preparers, or tax attorneys who have provided any services to Third-Party Defendant Ron Smith at any time between January 1, 2013 and the present.

RESPONSE: Smith refers Defendant to Judge McIntosh’s Order dated November 22, 2019, in which the Court held that “as it relates to the derivative action, discovery shall be conducted at this time only on the issue of whether Mattison fairly and adequately represents the interests of other members” of MPS. To the extent this Interrogatory seeks information unrelated to that issue, Smith objects on the grounds that it is overly broad, unduly burdensome, and not proportional to the needs of this case.

9. Identify any and all transactions involving the sale, purchase, gift, redemption, hypothecation, pledging as collateral, or transfer of any membership units of MPS held by you at any time between September 30, 2009 and the present. For such transaction, provide the number of units involved, the stated price for any such units, the cost basis for such units, the identity of all parties or entities involved in the transaction, and any gain or loss recognized in such transaction.

RESPONSE: Smith refers Defendant to Judge McIntosh’s Order dated November 22, 2019, in which the Court held that “as it relates to the derivative action, discovery shall be conducted at this time only on the issue of whether Mattison fairly and adequately represents the interests of other members” of MPS. To the extent this Interrogatory seeks information unrelated to that issue, Smith objects on the grounds that it is overly broad, unduly burdensome, and not proportional to the needs of this case. Subject to and without waiving these objections, Smith refers Defendant to MPS’s Responses to Interrogatory No. 11 and Request for Production Nos. 27 and 33 in Defendant’s First Set of Interrogatories and Requests for Production of Documents to Plaintiff.

10. Identify any and all banks, credit unions, finance companies, or other lenders with whom Third-Party Defendant has applied for or received any loan, financing, credit, notes, or line of credit at any time from January 1, 2013 to the present.

RESPONSE: Smith refers Defendant to Judge McIntosh's Order dated November 22, 2019, in which the Court held that "as it relates to the derivative action, discovery shall be conducted at this time only on the issue of whether Mattison fairly and adequately represents the interests of other members" of MPS. To the extent this Interrogatory seeks information unrelated to that issue, Smith objects on the grounds that it is overly broad, unduly burdensome, and not proportional to the needs of this case.

11. Identify any and all individuals or entities to who you have provided a statement of personal net worth or personal financial statement at any time from January 1, 2013 to the present.

RESPONSE: Smith refers Defendant to Judge McIntosh's Order dated November 22, 2019, in which the Court held that "as it relates to the derivative action, discovery shall be conducted at this time only on the issue of whether Mattison fairly and adequately represents the interests of other members" of MPS. To the extent this Interrogatory seeks information unrelated to that issue, Smith objects on the grounds that it is overly broad, unduly burdensome, and not proportional to the needs of this case.

12. Identify all instances in which you have signed any documents or otherwise acted on behalf of C & P of Spartanburg, LLC, as a manager or otherwise. For each such instances, provide the date or dates involved, the names and addresses of any other parties involved, a description of the nature of such documents or actions, and the capacity in which you have acted.

RESPONSE: Smith refers Defendant to Judge McIntosh's Order dated November 22, 2019, in which the Court held that "as it relates to the derivative action, discovery shall be conducted at this time only on the issue of whether Mattison fairly and adequately represents the interests of other members" of MPS. To the extent this Interrogatory seeks information unrelated to that issue, Smith objects on the grounds that it is overly broad, unduly burdensome, and not proportional to the needs of this case.

13. Identify any and all ownership interests you or any member of your immediately family have (or had) in any company, LLC, corporation, or other entity that has done business with MPS since September 30, 2009.

RESPONSE: Smith refers Defendant to Judge McIntosh's Order dated November 22, 2019, in which the Court held that "as it relates to the derivative action, discovery shall be conducted at this time only on the issue of whether Mattison fairly and adequately represents the interests of other members" of MPS. To the extent this Interrogatory seeks information unrelated to that issue, Smith objects on the grounds that it is overly broad, unduly burdensome, and not proportional to the needs of this case.

14. Identify any and all payments made on your (or your family member's) behalf directly by MPS or for which you have been reimbursed by MPS for any of the following from January 1, 2013 to the present: business expenses, credit cards or charge cards, charitable contributions, political contributions, social, athletic, or alumni club dues, professional membership dues, continuing education, automobile expenses, taxes, insurance (including liability, health, life, disability, long-term care), travel expenses, health savings accounts, entertainment and meal expenses (including tickets for sporting or cultural events), professional fees for attorneys, accountants, or tax professionals. For each such payment, provide the date and amount of any such payment and a description of the nature of the payment.

RESPONSE: Smith refers Defendant to Judge McIntosh's Order dated November 22, 2019, in which the Court held that "as it relates to the derivative action, discovery shall be conducted at this time only on the issue of whether Mattison fairly and adequately represents the interests of other members" of MPS. To the extent this Interrogatory seeks information unrelated to that issue, Smith objects on the grounds that it is overly broad, unduly burdensome, and not proportional to the needs of this case. Subject to and without waiving these objections, Smith refers Defendant to MPS's Responses to Request for Production Nos. 8 and 9 in Defendant's First Set of Interrogatories and Requests for Production of Documents to Plaintiff.

15. Provide the make, model, and year of any automobile for which you have received any payments or reimbursements for expenses from MPS from January 1, 2013 to the present.

RESPONSE: Smith refers Defendant to Judge McIntosh's Order dated November 22, 2019, in which the Court held that "as it relates to the derivative action, discovery shall be conducted at this time only on the issue of whether Mattison fairly and adequately represents the interests of other members" of MPS. To the extent this Interrogatory seeks information unrelated to that issue, Smith objects on the grounds that it is overly broad, unduly burdensome, and not proportional to the needs of this case.

16. Identify any and all professional, charitable, civic, church, or corporate boards or commissions you have served on from January 1, 2013 to the present. For each such board, provide the name of the entity or organization, the dates of service, any positions on the board, and whether or not the position was paid or otherwise compensated.

RESPONSE: Smith refers Defendant to Judge McIntosh's Order dated November 22, 2019, in which the Court held that "as it relates to the derivative action, discovery shall be conducted at this time only on the issue of whether Mattison fairly and adequately represents the interests of other members" of MPS. To the extent this Interrogatory seeks information unrelated to that issue, Smith objects on the grounds that it is overly broad, unduly burdensome, and not proportional to the needs of this case.

17. Identify by date and amount any payments you have received for your service as a managing member or as a member of the Executive Committee of MPS, from January 1, 2013 to the present.

RESPONSE: Smith refers Defendant to Judge McIntosh's Order dated November 22, 2019, in which the Court held that "as it relates to the derivative action, discovery shall be conducted at this time only on the issue of whether Mattison fairly and adequately represents the interests of other members" of MPS. To the extent this Interrogatory seeks information unrelated to that issue, Smith objects on the grounds that it is overly broad, unduly burdensome, and not proportional to the needs of this case.

18. To the extent that you deny any of the requests in Defendant/Third-Party Plaintiff's First Set of Requests for Admission, provide the basis for such denial, identify any evidence or documents supporting such denial, and identify any individuals who will offer testimony to support such denial.

RESPONSE: Defendant has not served any Requests for Admission on Smith.

19. Identify all persons who participated or assisted in the preparation of the responses to these Interrogatories and Requests for Production, and describe in detail the nature of their participation or assistance.

RESPONSE: Smith objects to this Interrogatory to the extent it seeks information protected by the attorney-client privilege or the work product doctrine. Subject to and without waiving these objections, MPS identifies the following individuals:

- A. Counsel for MPS
Samuel Outten, Katie Towery, and Tom Keim
- B. Ron G. Smith
Managing Principal at MPS

Mr. Smith was involved in locating documents and information responsive to Defendant/Third-Party Plaintiff's discovery requests.

REQUESTS FOR PRODUCTION

1. Produce any and all documents relating to any distributions you have received from MPS, in consideration of, or in relation to, your ownership shares, membership units, or equity interest in MPS from September 30, 2009 to the present.

RESPONSE: Smith refers Defendant to Judge McIntosh's Order dated November 22, 2019, in which the Court held that "as it relates to the derivative action, discovery shall be conducted at this time only on the issue of whether Mattison fairly and adequately represents the interests of other members" of MPS. To the extent this Request seeks information unrelated to that issue, Smith objects on the grounds that it is overly broad, unduly burdensome, and not proportional to the needs of this case. Subject to and without waiving these objections, Smith refers Defendant to MPS's Response to Request for Production No. 1 in Defendant's First Set of Interrogatories and Requests for Production of Documents to Plaintiff.

2. Produce any and all documents relating to your state and federal income tax returns for tax years 2013 to 2018, including all schedules, reports, attachments, amendments, or corrections.

RESPONSE: Smith refers Defendant to Judge McIntosh's Order dated November 22, 2019, in which the Court held that "as it relates to the derivative action, discovery shall be conducted at this time only on the issue of whether Mattison fairly and adequately represents the interests of other members" of MPS. To the extent this Request seeks information unrelated to that issue, Smith objects on the grounds that it is overly broad, unduly burdensome, and not proportional to the needs of this case.

3. Produce any and all documents relating to any audit or proposed audit of your income tax returns by any state or federal revenue agency or department, including the South Carolina Department of Revenue or the Internal Revenue Service, at any time from January 1, 2013 to the present.

RESPONSE: Smith refers Defendant to Judge McIntosh's Order dated November 22, 2019, in which the Court held that "as it relates to the derivative action, discovery shall be conducted at this time only on the issue of whether Mattison fairly and adequately represents the interests of other members" of MPS. To the extent this Request seeks information unrelated to that issue, Smith objects on the grounds that it is overly broad, unduly burdensome, and not proportional to the needs of this case.

4. Produce any and all agendas, minutes, memos, notes, spreadsheets, or other materials relating to any meetings (regular or special) of Plaintiff's Managing Members, Managing Committee, and Executive Committee from 2009 to the present.

RESPONSE: Smith refers Defendant to Judge McIntosh's Order dated November 22, 2019, in which the Court held that "as it relates to the derivative action, discovery shall be conducted at this time only on the issue of whether Mattison fairly and adequately represents the interests of other members" of MPS. To the extent this Request seeks information unrelated to that issue, Smith objects on the grounds that it is overly broad, unduly burdensome, and not proportional to the needs of this case. Subject to and without waiving these objections, Smith refers Defendant to MPS's Response to Request for Production No. 14 in Defendant's First Set of Interrogatories and Requests for Production of Documents to Plaintiff.

5. Produce any and all documents relating to any bonuses or other compensation you received for your role as a Managing Member or Managing Principal of MPS from January 1, 2013 to the present.

RESPONSE: Smith refers Defendant to Judge McIntosh's Order dated November 22, 2019, in which the Court held that "as it relates to the derivative action, discovery shall be conducted at this time only on the issue of whether Mattison fairly and adequately represents the interests of other members" of MPS. To the extent this Request seeks information unrelated to that issue, Smith objects on the grounds that it is overly broad, unduly burdensome, and not proportional to the needs of this case.

6. Produce any and all documents relating to any application to, or acceptance or approval from, any banks, credit unions, finance companies, financial institutions, or other lenders or creditors with whom you have applied for or received any loan, financing, credit, notes, or line of credit from January 1, 2013 to the present.

RESPONSE: Smith refers Defendant to Judge McIntosh's Order dated November 22, 2019, in which the Court held that "as it relates to the derivative action, discovery shall be conducted at this time only on the issue of whether Mattison fairly and adequately represents the interests of other members" of MPS. To the extent this Request seeks information unrelated to that issue, Smith objects on the grounds that it is overly broad, unduly burdensome, and not proportional to the needs of this case.

7. Produce a copy of your statement of personal net worth or personal financial statement from January 1, 2013 to the present.

RESPONSE: Smith refers Defendant to Judge McIntosh's Order dated November 22, 2019, in which the Court held that "as it relates to the derivative action, discovery shall be conducted at this time only on the issue of whether Mattison fairly and adequately represents the interests of other members" of MPS. To the extent this Request seeks information unrelated to that issue, Smith objects on the grounds that it is overly broad, unduly burdensome, and not proportional to the needs of this case.

8. Produce any and all documents in your possession relating to any work performed for MPS by HDH Advisors, including any correspondence, notes, emails, or text messages.

RESPONSE: Smith refers Defendant to Judge McIntosh's Order dated November 22, 2019, in which the Court held that "as it relates to the derivative action, discovery shall be conducted at this time only on the issue of whether Mattison fairly and adequately represents the interests of other members" of MPS. To the extent this Request seeks information unrelated to that issue, Smith objects on the grounds that it is overly broad, unduly burdensome, and not proportional to the needs of this case. Subject to and without waiving these objections, Smith refers Defendant to MPS's Response to Request for Production No. 23 in Defendant's First Set of Interrogatories and Requests for Production of Documents to Plaintiff.

9. Produce any and all documents in your possession relating to any work performed for MPS by Markel Valuation, PC (John R. Markel) for MPS or any of its predecessor companies.

RESPONSE: Smith refers Defendant to Judge McIntosh's Order dated November 22, 2019, in which the Court held that "as it relates to the derivative action,

discovery shall be conducted at this time only on the issue of whether Mattison fairly and adequately represents the interests of other members” of MPS. To the extent this Request seeks information unrelated to that issue, Smith objects on the grounds that it is overly broad, unduly burdensome, and not proportional to the needs of this case. Subject to and without waiving these objections, Smith refers Defendant to MPS’s Response to Request for Production No. 24 in Defendant’s First Set of Interrogatories and Requests for Production of Documents to Plaintiff.

10. Produce any and all statements regarding any credit card, charge card, or line of credit you have used for MPS or for which MPS has reimbursed you at any time from January 1, 2013 to the present.

RESPONSE: Smith refers Defendant to Judge McIntosh’s Order dated November 22, 2019, in which the Court held that “as it relates to the derivative action, discovery shall be conducted at this time only on the issue of whether Mattison fairly and adequately represents the interests of other members” of MPS. To the extent this Request seeks information unrelated to that issue, Smith objects on the grounds that it is overly broad, unduly burdensome, and not proportional to the needs of this case.

11. Produce any and all recordings of Defendant/Third-Party Plaintiff in your possession.

RESPONSE: Smith refers Defendant to Judge McIntosh’s Order dated November 22, 2019, in which the Court held that “as it relates to the derivative action, discovery shall be conducted at this time only on the issue of whether Mattison fairly and adequately represents the interests of other members” of MPS. To the extent this Request seeks information unrelated to that issue, Smith objects on the grounds that it is overly broad, unduly burdensome, and not proportional to the needs of this case. Subject to and without waiving these objections, Smith refers Defendant to MPS’s Response to Request for Production No. 30 in Defendant’s First Set of Interrogatories and Requests for Production of Documents to Plaintiff.

12. Produce any and all memoranda, correspondence, letters, notes, phone messages, e-mail messages, voice mail messages, instant messages, text messages, or other documents relating in any way to Defendant/Third-Party Plaintiff or her employment with, termination from, or membership in MPS.

RESPONSE: Smith refers Defendant to Judge McIntosh’s Order dated November 22, 2019, in which the Court held that “as it relates to the derivative action, discovery shall be conducted at this time only on the issue of whether Mattison fairly and

adequately represents the interests of other members” of MPS. To the extent this Request seeks information unrelated to that issue, Smith objects on the grounds that it is overly broad, unduly burdensome, and not proportional to the needs of this case. Subject to and without waiving these objections, Smith refers Defendant to MPS’s Response to Request for Production No. 31 in Defendant’s First Set of Interrogatories and Requests for Production of Documents to Plaintiff.

13. Produce a complete copy of any liability insurance policy that might provide coverage for the Third-Party Claims raised in this lawsuit, including any riders, declarations pages, exclusions, or addenda.

RESPONSE: Smith refers Defendant to Judge McIntosh’s Order dated November 22, 2019, in which the Court held that “as it relates to the derivative action, discovery shall be conducted at this time only on the issue of whether Mattison fairly and adequately represents the interests of other members” of MPS. To the extent this Request seeks information unrelated to that issue, Smith objects on the grounds that it is overly broad, unduly burdensome, and not proportional to the needs of this case. Subject to and without waiving these objections, Smith refers Defendant to MPS’s Response to Request for Production No. 32 in Defendant’s First Set of Interrogatories and Requests for Production of Documents to Plaintiff.

14. Produce any and all documents relating to any and all transactions involving the sale, purchase, gift, redemption, hypothecation, pledging as collateral, or transfer of any membership units of MPS held by you at any time between September 30, 2009 and the present.

RESPONSE: Smith refers Defendant to Judge McIntosh’s Order dated November 22, 2019, in which the Court held that “as it relates to the derivative action, discovery shall be conducted at this time only on the issue of whether Mattison fairly and adequately represents the interests of other members” of MPS. To the extent this Request seeks information unrelated to that issue, Smith objects on the grounds that it is overly broad, unduly burdensome, and not proportional to the needs of this case. Subject to and without waiving these objections, Smith refers Defendant to his Response to Interrogatory No. 9 above.

15. Produce any and all documents you have signed as a manager of C&P of Spartanburg, LLC.

RESPONSE: Smith refers Defendant to Judge McIntosh’s Order dated November 22, 2019, in which the Court held that “as it relates to the derivative action, discovery shall be conducted at this time only on the issue of whether Mattison fairly and adequately represents the interests of other members” of MPS. To the extent this Request

seeks information unrelated to that issue, Smith objects on the grounds that it is overly broad, unduly burdensome, and not proportional to the needs of this case.

16. Produce any and all documents relating to at any and all payments made on your (or any family member's) behalf directly by MPS or for which you have been reimbursed by MPS for any of the following from January 1, 2013 to the present: business expenses, credit cards or charge cards, charitable contributions, political contributions, social, athletic, or alumni club dues, professional membership dues, continuing education, automobile expenses, taxes, insurance (including liability, health, life, disability, long-term care), travel expenses, health savings accounts, entertainment and meal expenses (including tickets for sporting or cultural events), professional fees for attorneys, accountants, or tax professionals.

RESPONSE: Smith refers Defendant to Judge McIntosh's Order dated November 22, 2019, in which the Court held that "as it relates to the derivative action, discovery shall be conducted at this time only on the issue of whether Mattison fairly and adequately represents the interests of other members" of MPS. To the extent this Request seeks information unrelated to that issue, Smith objects on the grounds that it is overly broad, unduly burdensome, and not proportional to the needs of this case. Subject to and without waiving these objections, Smith refers Defendant to his Response to Interrogatory No. 13 above.

17. Produce any and all documents relating to any monetary compensation received from MPS, either by way of regular salary, bonus, distribution, stipend, dividend, reimbursement, deferred compensation, allowance, or retirement contribution, from January 1, 2013 to the present.

RESPONSE: Smith refers Defendant to Judge McIntosh's Order dated November 22, 2019, in which the Court held that "as it relates to the derivative action, discovery shall be conducted at this time only on the issue of whether Mattison fairly and adequately represents the interests of other members" of MPS. To the extent this Request seeks information unrelated to that issue, Smith objects on the grounds that it is overly broad, unduly burdensome, and not proportional to the needs of this case. Subject to and without waiving these objections, Smith refers Defendant to MPS's Response to Request for Production No. 14 in Defendant's First Set of Interrogatories and Requests for Production of Documents to Plaintiff, as well as MPS's tax returns Bates numbered MPS_001730-001923 and MPS_009499-009527.

18. Produce any and all documents identified, referred to, or relied upon in your Answers to any of the Interrogatories above.

RESPONSE: Smith refers Defendant to Judge McIntosh's Order dated November 22, 2019, in which the Court held that "as it relates to the derivative action, discovery shall be conducted at this time only on the issue of whether Mattison fairly and adequately represents the interests of other members" of MPS. To the extent this Request seeks information unrelated to that issue, Smith objects on the grounds that it is overly broad, unduly burdensome, and not proportional to the needs of this case. Subject to and without waiving these objections, see documents produced herewith or referred to herein.

19. Produce any and all documents or other tangible things you intend to use at the trial of this case, either as affirmative evidence, demonstrative aids, or impeachment materials.

RESPONSE: Smith objects to this Request on the ground that it is premature. Subject to and without waiving the foregoing objection, Smith refers Defendant to all responsive documents produced herewith or referred to herein. Smith reserves the right to use at trial any documents produced during discovery or obtained by subpoena.

(signature page follows)

By: Katie E. Towery

Samuel W. Outten
SC Bar No. 4295
E-Mail: sam.outten@nelsonmullins.com
Katie E. Towery
SC Bar No. 103219
E-Mail: katie.towery@nelsonmullins.com
NELSON MULLINS RILEY & SCARBOROUGH LLP
2 W. Washington Street / Suite 400
Post Office Box 10084 (29603-0084)
Greenville, SC 29601
(864) 373-2300

Thomas H. Keim, Jr.
SC Bar No. 10244
E-Mail: tkeim@fordharrison.com
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
March 10, 2020

CERTIFICATE OF SERVICE

I, the undersigned attorney of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for McMillan Pazdan Smith, LLC, Ron G. Smith, Joseph M. Pazdan, Brad B. Smith, and Chad C. Cousins, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by United States Mail and electronic mail, to the following address(es):

Pleadings:

RON G. SMITH'S RESPONSES TO DEFENDANT'S FIRST SET OF
INTERROGATORIES AND REQUESTS FOR PRODUCTION OF
DOCUMENTS

Counsel Served:

David E. Rothstein
Rothstein Law Firm, PA
1312 Augusta Street
Greenville, SC 29605
drothstein@rothsteinlawfirm.com



Katie E. Towery

March 10, 2020

Exhibit 2

drothstein@rothsteinlawfirm.com

From: David Rothstein <drothstein@rothsteinlawfirm.com>
Sent: Tuesday, December 3, 2019 7:15 PM
To: 'Katie Towery'; 'Sam Outten'
Cc: 'Tom Keim'; 'Lorry Miller'
Subject: RE: McMillan Pazdan Smith, LLC v. Donza H. Mattison; C.A. No. 2019-CP-23-00998
Attachments: mattisondeponoticecoverltrscanned.pdf; mattisondeponotice120319scanned.pdf

Sam and Katie. I hope you all had a nice Thanksgiving last week. Attached please find a cover letter and Notice of Depositions for six of the MPS Members whose statements you provided to me earlier today. I have noticed the depositions for December 17-19 in my office in Greenville.

With regard to the statements of the MPS Members, I do not believe that there is anything in any of the documents that justifies the designation as "Confidential," especially if you intend to submit them to the Court. I believe that it is a clear violation of the discovery rules blanketly to mark as "Confidential" every document you produce, which it appears that you all have done in this case. This does nothing but needlessly increase the cost of litigation by requiring the parties to litigate the confidentiality issues before such documents can be submitted to the court.

Next, I served Defendant's Second Set of Interrogatories and Requests for Production to Plaintiff by hand delivery on October 31, 2019. Accordingly, the responses were due back on yesterday, December 2, 2019. I expected to receive them in the mail today, since you have not requested an extension. I know that last week was Thanksgiving, but I do not believe that the deadline can simply be ignored. Furthermore, as I mentioned yesterday in my email to Sam, it has been almost a month since Ms. Mattison and I reviewed the documents in your office (without incident, I might add) and requested copies of the documents from the Directors' portal and the four folders on the desktop of the lap-top on which we were viewing the documents. Also, Sam previously indicated that you all would produce a number of documents in response to my deficiency letter of October 11, 2019 (now seven weeks ago), however, I have not received anything from you since August 8, 2019.

Please accept this email as my effort to consult with you under Rule 11 prior to my filing a motion to compel. If we do not have an acceptable resolution to this matter by the close of business tomorrow, I will have no choice but to file a motion to compel and ask that it be heard on December 13, 2019, along with Defendant's Motion to Disqualify Counsel. I will look forward to hearing from you soon. Thank you.

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

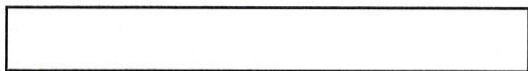
From: Katie Towery <katie.towery@nelsonmullins.com>
Sent: Tuesday, December 03, 2019 8:28 AM
To: 'David Rothstein' <drothstein@rothsteinlawfirm.com>; Sam Outten <sam.outten@nelsonmullins.com>
Cc: 'Tom Keim' <tkeim@fordharrison.com>
Subject: RE: McMillan Pazdan Smith, LLC v. Donza H. Mattison; C.A. No. 2019-CP-23-00998

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

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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 firste 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.

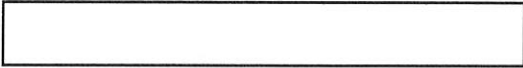
Since our last hearing, we have obtained statements from every member of the LLC, except Ms. Mattison, expressing opposition to the continued pursuit of this derivative action. These statements include a refusal to support or join Ms. Mattison in her alleged claims against the Third-Party Defendants.

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

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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

December 3, 2019

VIA EMAIL AND U.S. MAIL

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

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

Dear Sam and Katie:

Enclosed please find a copy of Defendant's Notice of Depositions of MPS Members Joslin, Myers, Jacobs, Ballard, Love, and Pitts, in the above-referenced case, which notice is hereby served upon you as counsel for Plaintiff and Third-Party Defendants.

My normal practice is to coordinate with counsel and the witnesses to select acceptable dates for everyone's schedule; however, in light of the Member Statements in Opposition to Derivative Action that you first provided to me earlier today, I believe that these depositions need to be taken as soon as practicable. If there are accommodations that need to be made with respect to individual witnesses' schedules so that we have two depositions per day from December 17-19, I am certainly willing to work with you on that. Given that there are three attorneys of record on your side, I am hopeful that at least one attorney will be able to make each of the depositions as scheduled.

Please call me or email me if you have any questions or would like to discuss the scheduling of these depositions.

Sincerely yours,


David E. Rothstein

Enclosure

cc: Thomas H. Keim, Jr., Esq. (via email only)

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,



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

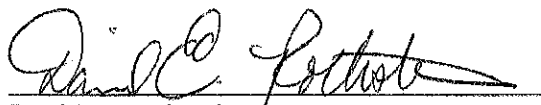
Greenville, SC.

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

Exhibit 3

drothstein@rothsteinlawfirm.com

From: David Rothstein <drothstein@rothsteinlawfirm.com>
Sent: Wednesday, December 4, 2019 3:45 PM
To: 'Katie Towery'
Cc: 'Sam Outten'; 'Tom Keim'
Subject: RE: McMillan Pazdan Smith, LLC v. Donza H. Mattison; C.A. No. 2019-CP-23-00998

Katie. With all due respect, I believe that the member statements actually make the depositions of the members more relevant and necessary. Are you really going to argue that the statements are conclusive and cannot be challenged or questioned? As I read these boiler-plate statements, they raise more questions than they purport to answer, including what information the members have been provided about the allegations in the derivative claims, who provided the information, when the information was provided, and how the members determined that the information was "adequate"?

Next, I appreciate your efforts to supplement MPS's discovery responses by the end of this week. I will look forward to receiving the additional documents and written responses.

Finally, as I understand Judge McIntosh's oral ruling from the hearing on Nov. 7, he limited discovery in the case to information relating to the valuation of Ms. Mattison's shares, normalizing entries that would need to be made for excessive compensation, benefits, and related-party transactions, and whether Ms. Mattison could fairly and adequately represent the interests of the similarly situated members in enforcing the rights of the LLC. I have ordered a copy of the transcript from that hearing, but have not yet received it from the court reporter. I attempted to comply Judge McIntosh's directive, as I understand it, in issuing the interrogatories and requests for production to Third-Party Defendants on Nov. 8, 2019. If you have specific objections to certain interrogatories or requests, I would be willing to discuss those with your side; however, I do not think you can just raise a blanket objection and refuse to answer this discovery.

Please let me know if you have any questions or would like to discuss any of these matters further. 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: Katie Towery <katie.towery@nelsonmullins.com>
Sent: Wednesday, December 04, 2019 1:26 PM
To: 'David Rothstein' <drothstein@rothsteinlawfirm.com>; Sam Outten <sam.outten@nelsonmullins.com>
Cc: 'Tom Keim' <tkeim@fordharrison.com>; 'Lorry Miller' <lmiller@rothsteinlawfirm.com>
Subject: RE: McMillan Pazdan Smith, LLC v. Donza H. Mattison; C.A. No. 2019-CP-23-00998

David,

We do not believe the depositions you noticed for December 17-19 are necessary in light of the member statements. We will voice our objection to Judge McIntosh at the hearing on December 13.

We are in the final stages of amending our prior discovery responses, drafting our responses to your second set of discovery requests, and preparing additional documents for production. We will submit all of this to you by the end of this week.

We are also in receipt of your Interrogatories and Requests for Production to the Third-Party Defendants dated November 8, 2019. Pursuant to Judge McIntosh's instruction at our last hearing, discovery in the derivative action is limited at this time to the issue of whether Donza Mattison fairly and adequately represents the interests of the other members. Therefore, we object to the issuance of these discovery requests as violative of Judge McIntosh's verbal Order to the parties at the November 6, 2019 hearing.

Thank you.



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

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From: David Rothstein <drothstein@rothsteinlawfirm.com>

Sent: Tuesday, December 3, 2019 7:15 PM

To: Katie Towery <katie.towery@nelsonmullins.com>; Sam Outten <sam.outten@nelsonmullins.com>

Cc: 'Tom Keim' <tkeim@fordharrison.com>; 'Lorry Miller' <lmiller@rothsteinlawfirm.com>

Subject: RE: McMillan Pazdan Smith, LLC v. Donza H. Mattison; C.A. No. 2019-CP-23-00998

Sam and Katie. I hope you all had a nice Thanksgiving last week. Attached please find a cover letter and Notice of Depositions for six of the MPS Members whose statements you provided to me earlier today. I have noticed the depositions for December 17-19 in my office in Greenville.

With regard to the statements of the MPS Members, I do not believe that there is anything in any of the documents that justifies the designation as "Confidential," especially if you intend to submit them to the Court. I believe that it is a clear violation of the discovery rules blanketly to mark as "Confidential" every document you produce, which it appears that you all have done in this case. This does nothing but needlessly increase the cost of litigation by requiring the parties to litigate the confidentiality issues before such documents can be submitted to the court.

Next, I served Defendant's Second Set of Interrogatories and Requests for Production to Plaintiff by hand delivery on October 31, 2019. Accordingly, the responses were due back on yesterday, December 2, 2019. I expected to receive them in the mail today, since you have not requested an extension. I know that last week was Thanksgiving, but I do not believe that the deadline can simply be ignored. Furthermore, as I mentioned yesterday in my email to Sam, it has been almost a month since Ms. Mattison and I reviewed the documents in your office (without incident, I might add) and requested copies of the documents from the Directors' portal and the four folders on the desktop of the lap-top on which we were viewing the documents. Also, Sam previously indicated that you all would produce a number of documents in response to my deficiency letter of October 11, 2019 (now seven weeks ago), however, I have not received anything from you since August 8, 2019.

Please accept this email as my effort to consult with you under Rule 11 prior to my filing a motion to compel. If we do not have an acceptable resolution to this matter by the close of business tomorrow, I will have no choice but to file a motion to compel and ask that it be heard on December 13, 2019, along with Defendant's Motion to Disqualify Counsel. I will look forward to hearing from you soon. Thank you.

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

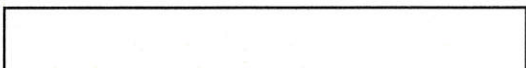
From: Katie Towery <katie.towery@nelsonmullins.com>
Sent: Tuesday, December 03, 2019 8:28 AM
To: 'David Rothstein' <drothstein@rothsteinlawfirm.com>; Sam Outten <sam.outten@nelsonmullins.com>
Cc: 'Tom Keim' <tkeim@fordharrison.com>
Subject: RE: McMillan Pazdan Smith, LLC v. Donza H. Mattison; C.A. No. 2019-CP-23-00998

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
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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. 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.

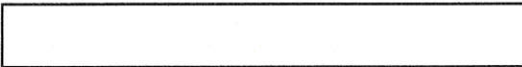
Since our last hearing, we have obtained statements from every member of the LLC, except Ms. Mattison, expressing opposition to the continued pursuit of this derivative action. These statements include a refusal to support or join Ms. Mattison in her alleged claims against the Third-Party Defendants.

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**
sam.outten@nelsonmullins.com

GREENVILLE ONE | SUITE 400
2 W. WASHINGTON STREET | GREENVILLE, SC
T 864.373.2299 F 864.373.2925
NELSONMULLINS.COM

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Exhibit 4

drothstein@rothsteinlawfirm.com

From: McIntosh, Lawton <lmcintoshj@sccourts.org>
Sent: Tuesday, December 17, 2019 9:43 AM
To: David Rothstein
Cc: McIntosh, Lawton Secretary (Tammy Jennings); McIntosh, Lawton Law Clerk (Jordan Thayer); 'Sam Outten'; Katie Towery; 'Tom Keim'; 'Lorry Miller'
Subject: RE: Courtesy NEF RE: 2019CP2300998

I believe your letter correctly states my ruling in the phone conference.
 Lawton McIntosh

From: David Rothstein <drothstein@rothsteinlawfirm.com>
Sent: Monday, December 16, 2019 9:03 PM
To: McIntosh, Lawton <lmcintoshj@sccourts.org>
Cc: McIntosh, Lawton Secretary (Tammy Jennings) <lmcintoshsc@sccourts.org>; McIntosh, Lawton Law Clerk (Jordan Thayer) <lmcintoshlc@sccourts.org>; 'Sam Outten' <sam.outten@nelsonmullins.com>; Katie Towery <katie.towery@nelsonmullins.com>; 'Tom Keim' <tkeim@fordharrison.com>; 'Lorry Miller' <lmiller@rothsteinlawfirm.com>
Subject: FW: Courtesy NEF RE: 2019CP2300998

*** **EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. ***

Dear Judge McIntosh. Attached is a courtesy copy of a letter I filed this evening via the Court's Electronic Filing System. Sincerely yours,

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: efiledonotreply@sccourts.org <efiledonotreply@sccourts.org>
Sent: Monday, December 16, 2019 8:57 PM
To: drothstein@rothsteinlawfirm.com
Cc: lmiller@rothsteinlawfirm.com
Subject: Courtesy NEF RE: 2019CP2300998

***** **IMPORTANT NOTICE - READ THIS INFORMATION** *****
NOTICE OF ELECTRONIC FILING [NEF]

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

Official File Stamp: 12-16-2019 08:57:05 PM
Court: CIRCUIT COURT
Common Pleas
Greenville
Case Caption: McMillan Pazdan Smith LLC , plaintiff, et al vs. Donza H Mattison , defendant, et al
Document(s) Submitted: Letter/Letter
Filed by or on behalf of: David Eliot Rothstein

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

The following people were served electronically:

David Eliot Rothstein for Donza H Mattison
Samuel W. Outten for McMillan Pazdan Smith LLC
Katie Elizabeth Towery for McMillan Pazdan Smith LLC

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

Brad B Smith
Joseph M Pazdan
Rondald G Smith
McMillan Pazdan Smith LLC
Donza H Mattison
Chad C Cousins

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# 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](mailto:drothstein@rothsteinlawfirm.com)

Jill C. Rothstein  
*Special Counsel*  
[jrothstein@rothsteinlawfirm.com](mailto:jrothstein@rothsteinlawfirm.com)

December 16, 2019

**VIA EMAIL ([jmcintoshj@sccourts.gov](mailto:jmcintoshj@sccourts.gov))**  
**AND ECF SYSTEM**

Hon. R. Lawton McIntosh  
Circuit Court Judge  
P.O. Box 8002  
Anderson, SC 29622

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

Dear Judge McIntosh:

As we discussed during the conference call with you on Friday, December 13, 2019, I want to make sure that my position on the motions is protected for the record, since there was no court reporter taking down the call, and we all agreed that an in-person hearing would not be necessary that afternoon, as originally scheduled. I understand your ruling to be that Defendant's Motion for Disqualification of Mr. Outten's and Mr. Keim's law firms from continuing to represent both the Plaintiff LLC and the individual, Third-Party Defendants simultaneously is premature until the court first rules on the issue of whether Ms. Mattison could fairly and adequately represent the interests of similarly situated members in enforcing the rights of the company under Rule 23(b)(1), SCRCF. Although I did not withdraw the motion at this time, you indicated that you would hold the motion in abeyance and that Plaintiff and Third-Party Defendants could not assert waiver or estoppel based on any alleged delay on Ms. Mattison's part in raising the alleged conflict of interest again at a later date.

I believe that the legal and factual bases for my motion are fully set forth in my brief and attachments, including the expert affidavit by Prof. John P. Freeman, so I will not repeat them here.

As to Mr. Outten's motion for protective order regarding the depositions of the minority members (other than Ms. Mattison) who submitted signed, unsworn statements, you indicated that such depositions would be allowed to proceed subject to your previous ruling at the hearing on November 6, 2019, about the permissible scope of discovery at this preliminary phase of the case. You also expressed your confidence that the parties and witnesses should be able to coordinate the depositions as everyone's schedule will allow, without further involvement by the Court.

Judge McIntosh  
December 16, 2019  
Page 2

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Pursuant to your ruling, my preliminary depositions of the minority members will be limited to the following issues: (1) the valuation of Ms. Mattison's membership units in MPS, including possible normalizing entries for excessive compensation and bonuses paid to the managing members of the firm, as well as for related-party transactions such as the lease of the Spartanburg office; and (2) whether Ms. Mattison could fairly and adequately represent the interests of the similarly situated members in enforcing the rights of MPS. These issues will necessarily include the financial records of the company, the minority members' access to, and knowledge of, the company's financial information and records, and the circumstances surrounding the creation, communication, and execution of the member statements. Because I will not be allowed to expand the scope of the depositions beyond those areas, I reserve the right to take subsequent depositions of these witnesses when, and if, the derivative claim are allowed to move forward.

If I have misunderstood any of your directives from the conference call as summarized above, please let me know.

Sincerely yours,



David E. Rothstein

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

## **Exhibit 5**

**drothstein@rothsteinlawfirm.com**

---

**From:** David Rothstein <drothstein@rothsteinlawfirm.com>  
**Sent:** Monday, December 16, 2019 1:25 PM  
**To:** 'Sam Outten'  
**Cc:** 'Katie Towery'; 'Tom Keim'; 'Lorry Miller'  
**Subject:** RE: MPS v Mattison

Sam. I do not understand what possible rationale you could have for objecting to the six depositions I have noticed, but if this is going to become an issue, I would rather start with Joslin, Myers, and Jacobs. As you know, the SC Rules of Civil Procedure do not have a set limit of depositions like the federal rules do (10), without obtaining leave of court. Judge McIntosh was pretty clear that he did not think much of your motion for protective order, but wants us to work out the logistics of taking the depositions. Should I go ahead and cancel the court reporter for tomorrow (and/or the rest of the week)? I have cleared my schedule Tuesday – Thursday, so I would appreciate a prompt response. 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](mailto:drothstein@rothsteinlawfirm.com)  
[www.rothsteinlawfirm.com](http://www.rothsteinlawfirm.com)

**From:** Sam Outten <sam.outten@nelsonmullins.com>  
**Sent:** Sunday, December 15, 2019 11:58 AM  
**To:** David Rothstein <drothstein@rothsteinlawfirm.com>  
**Cc:** Katie Towery <katie.towery@nelsonmullins.com>; 'Tom Keim' <tkeim@fordharrison.com>; 'Lorry Miller' <lmiller@rothsteinlawfirm.com>  
**Subject:** RE: MPS v Mattison

We are not agreeing that you can take 6 depositions. So if the three you really want are Joslin, Myers and Jacobs then we will check with them first.

I doubt seriously any depositions will be taken this week. I have no idea what their schedules/commitments are and while we will make them available as soon as reasonably possible there is no emergency here.

As I wrote in my email Friday, we will check with them and follow up with you.

The discovery request in your email does not include any internal communications with members re: the derivative action.

**From:** David Rothstein <[drothstein@rothsteinlawfirm.com](mailto:drothstein@rothsteinlawfirm.com)>  
**Sent:** Friday, December 13, 2019 5:58 PM  
**To:** Sam Outten <[sam.outten@nelsonmullins.com](mailto:sam.outten@nelsonmullins.com)>  
**Cc:** Katie Towery <[katie.towery@nelsonmullins.com](mailto:katie.towery@nelsonmullins.com)>; 'Tom Keim' <[tkeim@fordharrison.com](mailto:tkeim@fordharrison.com)>; 'Lorry Miller' <[lmiller@rothsteinlawfirm.com](mailto:lmiller@rothsteinlawfirm.com)>  
**Subject:** RE: MPS v Mattison

Sam. I am not going to make a big deal out of the order of the depositions this time, as long as I can still take Joslin, Myers, and Jacobs sometime relatively soon. Just to clarify your last email, are you stating that the depositions of Ballard Love and Pitts will be able to go forward next week, or that you will let me know next week when these three witnesses would be available in the future? I need to know what to tell the court reporters I have reserved.

On the supplementation of discovery, Request for Production No. 31 in Defendant's First set of discovery states as follows: "Produce any and all memoranda, correspondence, letters, notes, phone messages, e-mail messages, voice mail messages, text message, or other documents relating in any way to Defendant or her employment with, termination from, or membership in Plaintiff, which are not otherwise included in other of these requests." Any documents relating to the member statements, how they were drafted, how they were communicated to the members, how they were explained to members, and any questions by the members about the statements would be responsive to this request. If you think I need to send a more targeted request, please let me know that is your position. 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](mailto:drothstein@rothsteinlawfirm.com)  
[www.rothsteinlawfirm.com](http://www.rothsteinlawfirm.com)

**From:** Sam Outten <[sam.outten@nelsonmullins.com](mailto:sam.outten@nelsonmullins.com)>  
**Sent:** Friday, December 13, 2019 3:55 PM  
**To:** David Rothstein <[drothstein@rothsteinlawfirm.com](mailto:drothstein@rothsteinlawfirm.com)>  
**Cc:** Katie Towery <[katie.towery@nelsonmullins.com](mailto:katie.towery@nelsonmullins.com)>; Tom Keim <[tkeim@fordharrison.com](mailto:tkeim@fordharrison.com)>  
**Subject:** Re: MPS v Mattison

We will start with Ballard Love and Pitts. I will let you know of their availability next week. Because there has been no determination that the derivative claim can go forward the statements should be confidential. We will make the appropriate motion next week. If you have further discovery requests then send them to me.

Sent from my iPad

On Dec 13, 2019, at 3:42 PM, David Rothstein <[drothstein@rothsteinlawfirm.com](mailto:drothstein@rothsteinlawfirm.com)> wrote:

Sam. The order in which I had noticed the depositions was Joslin, Myers, Jacob as the first three, followed by Ballard, Love, and Pitts. Two depositions each day Tuesday, Wednesday, and Thursday (Dec. 17-19). If we can only do the first three next week or we need to move some days and time around, I am fine with that. My sense of urgency in noticing the depositions for next week was anticipating that Judge McIntosh would take the disqualification motion under advisement and that we might be able to supplement the record before he actually ruled on the motion. Now that he has essentially deferred the motion until after addressing the fair and adequate representation issue, some of the exigency has been alleviated. As I mentioned on the call with Judge McIntosh, I am willing to work with you on scheduling these depositions at mutually convenient times for you and the witnesses.

In light of your comment from this morning's conference call with Judge McIntosh about your firm having nothing to do with obtaining the member statements, I imagine that there is some type of communication among the members about these statements, such as emails, text messages, memos, or cover letters. I believe that such documents would be responsive to our previous discovery requests and should be produced to me as soon as possible. As I have mentioned in a prior email, I also do not believe that the statements contain anything that would justify the designation of those documents as "confidential." If you believe there is something that justifies the confidential designation, please let me know specifically what it is; otherwise, you will need to file a motion with the court to demonstrate the need for them to be confidential. Thanks, 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](mailto:drothstein@rothsteinlawfirm.com)  
[www.rothsteinlawfirm.com](http://www.rothsteinlawfirm.com)

**From:** Sam Outten <[sam.outten@nelsonmullins.com](mailto:sam.outten@nelsonmullins.com)>  
**Sent:** Friday, December 13, 2019 3:10 PM  
**To:** David Rothstein <[drothstein@rothsteinlawfirm.com](mailto:drothstein@rothsteinlawfirm.com)>  
**Cc:** Katie Towery <[katie.towery@nelsonmullins.com](mailto:katie.towery@nelsonmullins.com)>  
**Subject:** MPS v Mattison

Please send me a list of the first three members you would like to depose. I will then contact them and get back to you with available dates.  
We will try to get these scheduled as soon as possible.

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 6**

**drothstein@rothsteinlawfirm.com**

**From:** David Rothstein <drothstein@rothsteinlawfirm.com>  
**Sent:** Friday, February 7, 2020 3:58 PM  
**To:** 'Sam Outten'  
**Cc:** 'Katie Towery'; 'Lorry Miller'  
**Subject:** RE: MPS v Mattison

Sam. February 19 at 8:00 is good for us to take Ms. Myers's deposition. I will get the notice out soon. As with Mr. Jacobs's deposition, I should be able to complete the deposition within 4 hours, but I am not going to artificially place an absolute 4-hour time limit on the deposition. If we do not get Ms. Myers's deposition completed from 8:00-12:00 on that day, we will need to discuss holding the deposition open. In terms of other minority member depositions, we would like to depose Donnie Love and Cullen Pitts after Ms. Myers. Please check to see when they might be available to be deposed in Greenville. I believe that I could get them both completed in a single day—one in the morning and one after lunch.

On another note, I have retained an expert witness for commercial real estate appraisal, and we would like to schedule an inspection of the MPS office in Spartanburg under Rule 34, SCRPC. Can you please check with your people in Spartanburg and let me know when the best date and time to do that would be. I think the appraiser will need to take some measurements and photographs of the office, but I cannot imagine it taking more than 2-3 hours. Rule 34 seems to require 30-days' notice, like any request for production, but I am sure that the parties could stipulate to a shorter time. I will look forward to hearing back from you soon. Thanks, 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  
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[drothstein@rothsteinlawfirm.com](mailto:drothstein@rothsteinlawfirm.com)  
[www.rothsteinlawfirm.com](http://www.rothsteinlawfirm.com)

**From:** Sam Outten <sam.outten@nelsonmullins.com>  
**Sent:** Friday, February 07, 2020 11:29 AM  
**To:** David Rothstein <drothstein@rothsteinlawfirm.com>  
**Cc:** Katie Towery <katie.towery@nelsonmullins.com>  
**Subject:** MPS v Mattison

As an accommodation to you, Ms. Myers will agree to a deposition in Greenville on Wednesday February 19 if you agree to begin the deposition at 8 am and agree to conclude it by 12. Ms. Myers has a meeting at 1.  
 If you are unable to agree to this, then I will check with her on dates in Charleston.  
 Please let me know.

Confidentiality Notice

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## **Exhibit 7**

**drothstein@rothsteinlawfirm.com**

**From:** David Rothstein <drothstein@rothsteinlawfirm.com>  
**Sent:** Friday, February 7, 2020 5:44 PM  
**To:** 'Sam Outten'  
**Cc:** 'Katie Towery'; 'Lorry Miller'  
**Subject:** RE: MPS v Mattison

Sam. Rule 34(a)(2), SCRPC specifically allows for a request "to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property." I do not need MPS's "agreement" to have such a Rule 34 evaluation performed. I was trying to be courteous to schedule a time and date that would be least intrusive to your client's business. If you are not interested in cooperating in this regard, however, I will simply pick a date at least 30 days out that works for me, my client, and my expert witness. This information is clearly within the permissible scope of discovery as outlined by Judge McIntosh and relates both to the derivative action and the normalization entries for the valuation of Ms. Mattison's ownership shares. I am hopeful that we can work this out without having to present yet another discovery motion to the court. 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  
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[drothstein@rothsteinlawfirm.com](mailto:drothstein@rothsteinlawfirm.com)  
[www.rothsteinlawfirm.com](http://www.rothsteinlawfirm.com)

**From:** Sam Outten <sam.outten@nelsonmullins.com>  
**Sent:** Friday, February 07, 2020 4:43 PM  
**To:** David Rothstein <drothstein@rothsteinlawfirm.com>  
**Cc:** Katie Towery <katie.towery@nelsonmullins.com>; 'Lorry Miller' <lmiller@rothsteinlawfirm.com>  
**Subject:** RE: MPS v Mattison

Further to your email, MPS will not agree to a real estate appraiser coming to our offices in Spartanburg, at least until after a ruling on whether the derivative action can continue.  
 Happy to discuss.  
 Thank you.

**From:** David Rothstein <[drothstein@rothsteinlawfirm.com](mailto:drothstein@rothsteinlawfirm.com)>  
**Sent:** Friday, February 7, 2020 3:58 PM  
**To:** Sam Outten <[sam.outten@nelsonmullins.com](mailto:sam.outten@nelsonmullins.com)>  
**Cc:** Katie Towery <[katie.towery@nelsonmullins.com](mailto:katie.towery@nelsonmullins.com)>; 'Lorry Miller' <[lmiller@rothsteinlawfirm.com](mailto:lmiller@rothsteinlawfirm.com)>  
**Subject:** RE: MPS v Mattison

Sam. February 19 at 8:00 is good for us to take Ms. Myers's deposition. I will get the notice out soon. As with Mr. Jacobs's deposition, I should be able to complete the deposition within 4 hours, but I am not going to artificially place an absolute 4-hour time limit on the deposition. If we do not get Ms. Myers's deposition completed from 8:00-12:00 on that day, we will need to discuss holding the deposition open. In terms of other minority member depositions, we

would like to depose Donnie Love and Cullen Pitts after Ms. Myers. Please check to see when they might be available to be deposed in Greenville. I believe that I could get them both completed in a single day—one in the morning and one after lunch.

On another note, I have retained an expert witness for commercial real estate appraisal, and we would like to schedule an inspection of the MPS office in Spartanburg under Rule 34, SCRPC. Can you please check with your people in Spartanburg and let me know when the best date and time to do that would be. I think the appraiser will need to take some measurements and photographs of the office, but I cannot imagine it taking more than 2-3 hours. Rule 34 seems to require 30-days' notice, like any request for production, but I am sure that the parties could stipulate to a shorter time. I will look forward to hearing back from you soon. Thanks, Dave.

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[drothstein@rothsteinlawfirm.com](mailto:drothstein@rothsteinlawfirm.com)  
[www.rothsteinlawfirm.com](http://www.rothsteinlawfirm.com)

**From:** Sam Outten <[sam.outten@nelsonmullins.com](mailto:sam.outten@nelsonmullins.com)>  
**Sent:** Friday, February 07, 2020 11:29 AM  
**To:** David Rothstein <[drothstein@rothsteinlawfirm.com](mailto:drothstein@rothsteinlawfirm.com)>  
**Cc:** Katie Towery <[katie.towery@nelsonmullins.com](mailto:katie.towery@nelsonmullins.com)>  
**Subject:** MPS v Mattison

As an accommodation to you, Ms. Myers will agree to a deposition in Greenville on Wednesday February 19 if you agree to begin the deposition at 8 am and agree to conclude it by 12. Ms. Myers has a meeting at 1.  
 If you are unable to agree to this, then I will check with her on dates in Charleston.  
 Please let me know.

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## **Exhibit 8**



# 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](mailto:drothstein@rothsteinlawfirm.com)

Jill C. Rothstein  
*Special Counsel*  
[jrothstein@rothsteinlawfirm.com](mailto:jrothstein@rothsteinlawfirm.com)

February 13, 2020

**VIA HAND DELIVERY**

Samuel W. Outten, Esq.  
Katie E. Towery, Esq.  
NELSON MULLINS RILEY & SCARBOROUGH LLP  
Greenville One Building  
2 W. Washington St., Suite 400  
Greenville, SC 29601

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

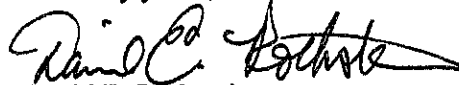
Dear Sam and Katie:

Enclosed please find a copy of Defendant's Rule 34 Request for Entry Upon Land for Inspection and Other Purposes in the above-referenced case. This Request is hereby served upon you as counsel for Plaintiff.

This inspection is relevant and necessary for both Ms. Mattison's counterclaims, as well as the derivative action set forth in the Third-Party Complaint. I am confident that this Request is proper under Judge McIntosh's prior rulings, as summarized in my letter of December 16, 2019, which Judge McIntosh confirmed by email on December 17, 2019. I am happy to work with you on selecting a date that is most convenient for your clients and least disruptive to their business. I have selected the date of Monday, March 16, 2020, at 10:00 a.m. because of your initial refusal to work with me in setting the date for this inspection.

If you have any questions about this Request or would like to discuss the case further, please feel free to call me or email me.

Sincerely yours,

  
David E. Rothstein

Enclosure

cc: Thomas H. Keim, Jr., Esq. (via email and U.S. mail)

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

McMillan Pazdan Smith, LLC, ) Case No. 2019-CP-23-00998

Plaintiff-Counterclaim  
Defendant,

vs.

Donza H. Mattison,

Defendant-Counterclaimant.

**DEFENDANT'S RULE 34 REQUEST  
FOR ENTRY UPON LAND FOR  
INSPECTION AND OTHER PURPOSES**

---

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:**

Pursuant to Rule 34(a)(2) of the South Carolina Rules of Civil Procedure, Defendant, Donza H. Mattison, by and through her undersigned counsel, hereby serves upon Plaintiff, McMillan Pazdan Smith, LLC, (hereinafter "Plaintiff" or "MPS") this Request for Entry Upon Land for Inspection and Other Purposes. Defendant hereby requests that Plaintiff permit entry upon its Spartanburg Office at 127 Dunbar Street, Spartanburg, South Carolina, which is in the possession or control of Plaintiff, for the purpose of inspection and measuring, surveying,

photographing, testing, and otherwise analyzing the property by one or more experts employed by Defendant for such purposes. Such inspection shall commence on **Monday, March 16, 2020, at 10:00 a.m.**, or at such other time as may be mutually agreed upon by counsel for Plaintiff and Defendant, and shall continue thereafter until concluded. Pursuant to Rule 34(b), SCRCF, Plaintiff must serve a written response to this Request within thirty (30) days after service hereof.

Respectfully submitted,



David E. Rothstein  
ROTHSTEIN LAW FIRM, PA  
1312 Augusta Street  
Greenville, SC 29605  
(864) 232-5870 (office)  
(864) 241-1386 (facsimile)  
drothstein@rothsteinlawfirm.com

Attorney for Defendant, Donza H. Mattison

February 13, 2020

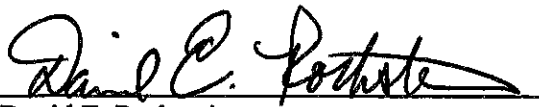
Greenville, South Carolina.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that he served a copy of the foregoing **DEFENDANT'S RULE 34 REQUEST FOR ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES** in the above-captioned case upon Plaintiff by email and by causing a copy of the same to be hand-delivered to Plaintiff's counsel of record, this 13th day of February, 2020, addressed as follows:

Samuel W. Outten, Esq.  
Katie E. Towery, Esq.  
NELSON MULLINS RILEY & SCARBOROUGH LLP  
Greenville One Building  
2 W. Washington St., Suite 400  
Greenville, SC 29601

Thomas H. Keim, Jr., Esq. (via email and U.S. mail)  
FORD HARRISON  
100 Dunbar St., Suite 300  
Spartanburg, SC 29306

  
David E. Rothstein

Greenville, SC

## **Exhibit 9**



# 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](mailto:drothstein@rothsteinlawfirm.com)

Jill C. Rothstein  
*Special Counsel*  
[jrothstein@rothsteinlawfirm.com](mailto:jrothstein@rothsteinlawfirm.com)

February 12, 2020

**VIA CERTIFIED MAIL, RETURN**  
**RECEIPT REQUESTED**

NAI Earl Furman  
Attn. Records Custodian or Broker in Charge  
314 S. Pine Street, Building 100  
Spartanburg, SC 29302

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

Dear Sir or Madam:

I represent Defendant, Donza H. Mattison, in the above-referenced lawsuit, which is pending in the Greenville County Court of Common Pleas. Enclosed please find a subpoena duces tecum requiring you to produce certain documents that might be relevant to the case.

The subpoena is returnable on Friday, February 28, 2020, at 10:00 a.m. at my office in Greenville. In lieu of personally appearing at my office to produce the documents, you may copy the documents and deliver them or mail them to my office before the due date. I will reimburse you for the reasonable costs of the copies and postage.

If you have any questions about the subpoena or would like to discuss anything about the documents requested, please do not hesitate to call me or email me.

Sincerely yours,

David E. Rothstein

Enclosure

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

**STATE OF SOUTH CAROLINA**

ISSUED BY THE CIRCUIT COURT IN THE COUNTY OF GREENVILLE

McMillan Pazdan Smith, LLC, Plaintiff

v.

SUBPOENA IN A CIVIL CASE

Donza H. Mattison, Defendant

Case Number: 2019-CP-23-00998

Pending in Greenville County

TO: NAI Earl Furman, 314 S. Pine Street,, Building 100, Spartanburg, SC 29302

☐ YOU ARE COMMANDED to appear in the above named court at the place, and time specified below to testify in the above case.

PLACE OF TESTIMONY

COURTROOM

DATE AND TIME , AM

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION

DATE AND TIME , AM

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents of objects:

See attached Exhibit A

PLACE

Rothstein Law Firm, PA

1312 Augusta Street, Greenville, SC 29605

DATE AND TIME February 28, 2020, 10:00 AM

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES

DATE AND TIME , AM

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS IS HEREBY DIRECTED TO RULE 30(b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1), AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.

Attorney/Issuing Officer's Signature

2/12/2020

David E. Rothstein

Date

Print Name

Indicate if Attorney for Plaintiff or Defendant

Attorney's Address and Telephone Number :

David E. Rothstein, Rothstein Law Firm, PA, 1312 Augusta St., Greenville, SC 29605 (864) 232-5870

Attorney for Defendant, Donza H. Mattison

Clerk of Court/Issuing Officer's Signature

Date

Print Name

Pro Se Litigant's Name, Address and Telephone Number :

**PROOF OF SERVICE**

|                  |              |                                                                                                                     |
|------------------|--------------|---------------------------------------------------------------------------------------------------------------------|
| <b>SERVED</b>    | <b>DATE</b>  | <b>FEES AND MILEAGE TENDERED TO WITNESS</b><br><input type="checkbox"/> YES <input type="checkbox"/> NO   AMOUNT \$ |
|                  | <b>PLACE</b> |                                                                                                                     |
| <b>SERVED ON</b> |              | <b>MANNER OF SERVICE</b>                                                                                            |
| <b>SERVED BY</b> |              | <b>TITLE</b>                                                                                                        |

**DECLARATION OF SERVER**

I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on \_\_\_\_\_

\_\_\_\_\_  
SIGNATURE OF SERVER

\_\_\_\_\_  
ADDRESS OF SERVER

Rule 45, South Carolina Rules of Civil Procedures, Parts (c) and (d):

**(c) Protection of Persons Subject to Subpoenas.**

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises—or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

(i) fails to allow reasonable time for compliance; or

(ii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; or

(iii) requires disclosure of privileged or otherwise protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) If a subpoena:

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(III) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed or regularly transacts business in person, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

**(d) Duties in Responding to Subpoena.**

**(1)(A)** A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

**(B)** If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

**(C)** A person responding to a subpoena need not produce the same electronically stored information in more than one form.

**(D)** A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(3)(B). The court may specify conditions for the discovery.

**(2)(A)** When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

**(B)** If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, the receiving party must take reasonable steps to retrieve the information. The person who produced the information must preserve the information until the claim is resolved.

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

Exhibit A to Subpoena to NAI Earl Furman

Produce copies of the following documents:

1. Any and all documents relating to the listing for sale of the property at 127 Dunbar Street, Spartanburg, SC 29306, owned by C & P of Spartanburg, LLC, including listing agreement, brokerage contract, listings, fliers, brochures, descriptions, lease-back information, appraisals, offers, counter-offers, proposals, options, letters of intent, sellers' disclosure statements, inspections, measurements, surveys, blue-prints, plats, or as-built drawings.
2. Any and all communications sent to or received from Caroline Smith, Ron Smith, Pam Deichman, Brian Deichman, or any other member, employee, or agent of C & P of Spartanburg, LLC regarding the property at 127 Dunbar Street, Spartanburg, SC 29306, including emails, text messages, voicemail messages, or instant messages.
3. Any and all documents relating to the fair-market value of the commercial rental rate for the office space at 127 Dunbar Street, Spartanburg, SC 29306, including any analysis, study, report, comparable market analysis, appraisal, estimate, or adjustments.

## **Exhibit B**

Redacted

◀External Email▶ - From: ccousins@mcmillanpazdansmith.com

-----Original Message-----

From: Chad Cousins

Sent: Wednesday, November 13, 2019 9:12 AM

To: MPS Principals <principals@mcmillanpazdansmith.com>

Subject: Member Statement in Opposition to Derivative Action

Importance: High

Sensitivity: Confidential

In follow up to our most recent Principals meeting, please see the attached letter and Member Statement for each member's consideration.

We've additionally asked KJ Jacobs to be a coordinator rather than Joe, Brad, Ron, or me if needed for any further assistance in communication any members might need with Mr. Higgins.

Thanks everyone,  
Chad

Date: November 13, 2019

From: Chad Cousins

To: Ron Smith, Joe Pazdan, Brad Smith, Chad Cousins, Cullen Pitts, Donnie Love, Lisa Lanni, KJ Jacobs, David Moore, Karen Calhoun, Tom Hund, Dave Ballard, Michael Chewning, Aaron Jeffers, Bill Joslin, Stuart Barber, Cary Perkins, Joe Alcock, Paulette Myers, William Gray, Ben Thompson

Subject: Statement Re: Derivative Action Brought by Donza Mattison

All,

As you all know, Donza Mattison has brought a derivative action purportedly on behalf of the members of MPS against Ron Smith, Joseph Pazdan, Brad Smith, and me. In order to maintain this action, Ms. Mattison must be found to fairly and adequately represent the interests of the other members of MPS.

At our most recent Principals meeting, a request was made by several of the members for a statement to be provided by which they might express their disagreement with the attempted derivative action by Ms. Mattison. Attached for your review and consideration please find a Member Statement in Opposition to Derivative Action. If you agree with the Statement and wish to voice your opposition to Ms. Mattison's derivative action, you may sign and return the Statement to me. You are not required to sign this Statement, and the decision to do so is voluntary.

If you have any questions regarding the derivative action, the firm has retained Bill Higgins—a well-respected ethics lawyer who practices in Columbia, SC—as independent counsel to answer such questions. You can set up a call or meeting with Mr. Higgins by contacting him directly at (803) 404-5712 or [bhiggins@glvlawfirm.com](mailto:bhiggins@glvlawfirm.com).

Thank you to everyone for their consideration in this matter.



Chad Cousins

**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 \_\_\_\_\_ day of November, 2019.

\_\_\_\_\_  
Member of McMillan Pazdan Smith, LLC

Print Name: \_\_\_\_\_

**Response to Donza H. Mattison's November 4, 2019 Letter**

Since the inception of the lawsuit between McMillan Pazdan Smith and Donza Mattison, we have kept the members apprised of the status of the case. While we have not previously felt the need to address her baseless allegations in detail, we believe it is now necessary to respond to the letter that she attached to her Nomination Ballot at the member meeting on November 4, 2019.

First and foremost, Ms. Mattison's claim that there has been "potential misinformation" is untrue. Here are the facts. Ms. Mattison left the firm in 2017. When we received the HDH Advisors valuation following the close of FY2017, we made an offer to repurchase her shares based on the per unit price determined by HDH. The firm made no attempt to negotiate her down from this stated value, and we by no means made her a "low-ball" offer. However, Ms. Mattison refused to accept this offer, and wanted a much higher value for her units. The firm initiated the lawsuit only after Ms. Mattison refused to accept our offer, which was consistent with the provisions of the Operating Agreement and her Severance Agreement. MPS simply asked the court to declare that Ms. Mattison's Severance Agreement was a valid and enforceable contract, and for her dissociation to be conducted in accordance with the September 30, 2015 Operating Agreement.

In response, Ms. Mattison asserted counterclaims against MPS, and brought a derivative action against Joe Pazdan, Brad Smith, Ron Smith, and Chad Cousins. We believe the claims made in Ms. Mattison's derivative action are meritless, and are not aligned with the interests of the other members. The managers of MPS have always been transparent with the other members, and her assertions that the managers receive excessive compensation and benefits are not true. In fact, the firm hired an independent consultant to analyze our compensation structure to ensure that manager salaries were in line with the market and a firm of our size and structure. We have always been more than forthcoming about the firm's finances, and are frankly insulted by Ms. Mattison's unfounded accusations.

Ms. Mattison's claims regarding the Board of Directors are not supported by the rest of the members of MPS, as we overwhelmingly elected the slated Board members during our November 4, 2019 meeting. As all of you know, transitioning from an Executive Committee to a Board of Directors has taken months of hard work and thoughtful input from all the members. Given the growth of MPS over the years, this transition was necessary in order to ensure the continued

success and prosperity of the company. With the future of MPS at the forefront of our strategic planning, we are excited for the Board of Directors to advance those objectives.

Ms. Mattison's letter mischaracterized the current status of her derivative action. In order for the derivative action to move forward, the Court must first determine whether Ms. Mattison fairly and adequately represents the interests of the other members. If the Court finds that she does not represent our membership, then her derivative action will be dismissed on the merits. In order to answer any remaining questions you may have about Ms. Mattison's claims, we have hired independent counsel to come in and meet with you. Bill Higgins practices law in Columbia, SC, and is a well-respected attorney in the area of legal ethics. He serves on the South Carolina Bar's Ethics Advisory Opinion Committee and the Professional Responsibility Committee. We have retained Mr. Higgins to serve as a neutral third-party to be available to answer any further questions you may have. We will keep you posted on the dates and times he will be available to meet with you.

In closing, we know the members of MPS are united in their commitment to the firm and its continued success. Ms. Mattison, however, is not aligned with our mission, and we believe her actions show that she is putting her interests above the best interests of the other members. We will not allow her or this lawsuit to distract from our business and the continued success of MPS.

|                                       |   |                                         |
|---------------------------------------|---|-----------------------------------------|
| 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.            | ) |                                         |
|                                       | ) | <b><u>MEMORANDUM IN SUPPORT OF</u></b>  |
|                                       | ) | <b><u>MOTION FOR SUMMARY</u></b>        |
|                                       | ) | <b><u>JUDGMENT AS TO MATTISON'S</u></b> |
|                                       | ) | <b><u>AMENDED THIRD-PARTY</u></b>       |
|                                       | ) | <b><u>COMPLAINT</u></b>                 |
| Donza H. Mattison, in a Derivative    | ) |                                         |
| Capacity on Behalf of McMillan Pazdan | ) |                                         |
| Smith, LLC,                           | ) |                                         |
|                                       | ) |                                         |
| Third-Party Plaintiff,                | ) |                                         |
|                                       | ) |                                         |
| vs.                                   | ) |                                         |
|                                       | ) |                                         |
| Rondald G. Smith, Joseph M. Pazdan,   | ) |                                         |
| Brad B. Smith, and Chad C. Cousins,   | ) |                                         |
|                                       | ) |                                         |
| Third-Party Defendants.               | ) |                                         |
|                                       | ) |                                         |

McMillan Pazdan Smith, LLC (“MPS”), and Ron G. Smith, Joseph M. Pazdan, Brad B. Smith, and Chad C. Cousins (collectively, the “Third-Party Defendants”), submit this Memorandum in Further Support of their Motion for Summary Judgment as to Defendant Donza H. Mattison’s (“Mattison”) Amended Third-Party Complaint. MPS and Third-Party Defendants incorporate the arguments made in prior briefs submitted to this Court. In the interest of time and efficiency, the Third-Party Defendants will not fully restate those arguments in this Memorandum.

# **I. SUMMARY OF ARGUMENT**

This 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. No other members of MPS support this derivative action or the allegations made by Mattison. The remedies that Mattison is seeking in her Amended Third-Party Complaint directly contradict what the other members of MPS want. Therefore, she cannot serve as a derivative plaintiff and bring this action on behalf of the other members of MPS.

Further, as confirmed by the statements of her counsel during the May 12, 2020 hearing, Mattison’s motivation in bringing the derivative action is to gain leverage in her dispute with MPS regarding the valuation of her membership units. Courts routinely dismiss derivative actions where, as here, they were brought as a means of gaining leverage in other pending litigation. For these reasons, the Court should grant summary judgment as to Mattison’s derivative claims.

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

MPS filed a Declaratory Judgment Action on February 22, 2019, asking the Court to declare that the parties’ Severance Agreement dated December 5, 2017 is a valid and enforceable contract, and that Mattison’s membership units are to be valued in accordance with the terms of the September 30, 2015 Operating Agreement. (See Compl.) 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 a derivative cause of action against Ron Smith, Joseph Pazdan, Brad Smith, and Chad Cousins, alleging 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. (Am. Third-Party Compl. at ¶ 100.)

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 derivative action. In light of this evidence, and pursuant to

Rule 11 of the South Carolina Rules of Civil Procedure, counsel for MPS and Third-Party Defendants requested that Mattison dismiss her derivative action. A copy of the statements was provided to counsel for Mattison by email dated December 3, 2019.

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 all of the minority members of MPS that they oppose Mattison's derivative action on several grounds 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 depositions.

The Court permitted Mattison to depose minority members of MPS, primarily based upon counsel for Mattison's false allegation that the Members Statements were coerced by the Third-Party Defendants or their counsel. The depositions of William Joslin, KJ Jacobs, and Paulette Myers took place on January 17, 2020, January 29, 2020, and February 19, 2020, respectively. 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.

On February 21, 2020, MPS and the Third-Party Defendants moved for summary judgment on Mattison's derivative action on the basis that she does not meet the representational requirements of Rule 23(b)(1), SCRCF. A hearing was held on this Motion on May 12, 2020. Judge McIntosh entered a Form 4 Order on May 15, 2020, in which the Court held the Motion for Summary Judgment in abeyance pending the taking of the remaining three minority member depositions. Judge McIntosh limited the scope of these depositions to the issues of whether or not

the members want a derivative action to continue and, if so, whether Mattison should be the representative.

The depositions of Donnie Love, Cullen Pitts, and Dave Ballard took place on June 17, 2020, June 22, 2020, and July 10, 2020, respectively. As with the previous minority member depositions, each of these deponents affirmed the statements made in the Member Statements under oath, and testified generally that they opposed Mattison's derivative action.

### III. ARGUMENT

One of the strict requirements of Rule 23(b)(1), SCRCP, 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). In making a determination of whether the requirement of fair and adequate representation has been met, the Court should assess the following factors:

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

*Davis v. Comed, Inc.*, 619 F.2d 588, 593-94 (6th Cir. 1980); *see also Office of Strategic Services, Inc. v. Sadeghian*, 528 Fed. Appx. 336, 350 (4th Cir. 2013) (citing *Davis* as setting forth the factors

to be considered when determining whether a plaintiff will adequately represent the interests of other shareholders).

For the reasons set forth below, Mattison's Amended Third-Party Complaint should be dismissed pursuant to Rule 23(b)(1), SCRCp, because she does not fairly and adequately represent the interests of the other members of MPS.

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

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

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

...

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

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

...

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

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

The reality of this case is that Mattison is trying to use this derivative action to gain a higher value for her equity interest. In doing so, she is improperly using a derivative action to inflict harm on MPS hoping that will result in receiving more for her equity. Despite Mr. Rothstein's assertions that "there's nothing wrong with that," courts across the country have routinely dismissed derivative actions on the basis that the derivative plaintiff is using the lawsuit as a means of gaining

leverage in other pending litigation. *See 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”); *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”); *Recchion v. Kirby*, 637 F. Supp. 1309, 1315 (W.D. Pa. 1986) (finding 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); *Khanna v. McMinn*, No. Civ. A. 20545, 2006 WL 1388744 (Del. Ch. May 9, 2006) (finding that the derivative plaintiff’s employment dispute with the company impaired his capacity to vindicate the shareholders’ best interests); *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).

It is evident that Mattison has vindictive feelings towards MPS—specifically the Third-Party Defendants—due to the circumstances surrounding her resignation from the firm. Mattison is pursuing this derivative action for her own interests, and not to vindicate the interests of MPS, which is the proper purpose of a derivative action. 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 derivative claim must be dismissed.

**B. Mattison is Seeking Relief that is Contrary to what the Other Members of MPS Believe is in the Best Interest of the Company.**

The remedies that Mattison is seeking in her Amended Third-Party Complaint directly contradict what the other members of MPS want. Mattison cannot be a fair and adequate representative of the other members because she is trying to undo agreements, resolutions, and transactions that every other member voted on and supported. Mattison, a 2% owner, is attempting to circumvent what 98% of the membership has properly voted on and approved by bringing this derivative action. Her dissatisfaction with how the other members believe the company should be run is not a proper basis for a derivative suit.

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

- (1) In her Amended Third-Party Complaint, Mattison asserts a counterclaim against MPS seeking a declaration from the Court that the September 30, 2015 Operating Agreement is invalid because she did not sign the agreement. (Am. Third-Party Compl. ¶¶ 48, 90.) However, Mattison was the **only** member of MPS who did not sign the Operating Agreement. All other members of MPS acted pursuant to the provisions of this Operating Agreement for years.
- (2) Mattison asks the Court to declare invalid any proposed amendments to MPS's Operating Agreement which were not adopted by unanimous consent. (Am. Third-Party Compl. ¶ 90.) MPS recently adopted a Second Amended and Restated Operating Agreement dated September 16, 2019, which every member of MPS signed except for Mattison. Thus, Mattison is asking the Court to declare invalid an agreement that the members she purports to represented signed, consented to, and support.

(3) Mattison asks the Court to find that the addition of any new members without unanimous consent be declared null and void. (Am. Third-Party Compl. ¶ 90.) Essentially, Mattison seeks to divest two current members of their ownership interests. How can she represent a member she seeks to strip of their equity? Every other member of MPS approved the issuance of units to these two members.

Mattison's objectives in bringing this derivative action run counter to what all other members of MPS view to be in the best interest of the company. Therefore, Mattison cannot serve as a fair and adequate representative of the other members of MPS.

**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.

During the recent depositions of Donnie Love, Cullen Pitts, and Dave Ballard, each of these members affirmed their Member Statements and opposition to Mattison's derivative claims. Transcripts from these depositions, as well as relevant excerpts that support granting summary judgment, were emailed to the Court on July 20, 2020. Namely, the deposed minority members testified that they oppose the derivative action and do not believe that Mattison can fairly and

adequately represent the other members of MPS. (Love Depo. at 48:14-24, 230:17-231:17; Pitts Depo. at 55:21-56:20, 188:14-189:12; Ballard Depo. at 52:6-15, 193:24-195:19.)

The members 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. (Love Depo. at 85:9-24, 236:21-24; Pitts Depo. at 75:3-19; Ballard Depo. at 35:14-21, 72:15-25.) Even after counsel for Mattison showed the members an exhibit detailing the compensation paid to the Third-Party Defendants compared to the other members of MPS, they continued to have no interest in participating in Mattison's derivative action. For example, Dave Ballard testified as follows:

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

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

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

A: Yes.

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

Mattison's subjective belief that the Third-Party Defendants are overpaid is insufficient to state a valid derivative claim. Contrary to Mattison, the other members are supportive of the Third-Party Defendants. The members 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 patently false. (See Love Depo. at 233:10-234:12; Pitts Depo. at 192:4-15; Ballard Depo. at 37:8-15, 54:3-13, 196:25-198:3.) Mattison cannot maintain this derivative action when her views and beliefs about what is in the best interest of the company are completely divergent from the members she purports to represent.

These three additional depositions affirmed that every minority member of MPS opposes Mattison's derivative action and believe it should be dismissed. As detailed below, the members of MPS are asking the Court to dismiss Mattison's derivative action.

Q: And as a member of McMillan Pazdan & Smith, is it your wish that Judge McIntosh dismiss the derivative action?

A: Yes.

(Love Depo. at 237:6-9.)

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

A: Yes.

(Pitts Depo. at 193:20-23.)

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

A: I am.

(Ballard Depo. at 202:2-5.)

#### **IV. 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.

*(signature page follows)*

Respectfully submitted,

By: s/ Samuel W. Outten

Samuel W. Outten  
SC Bar No. 4295  
E-Mail: sam.outten@nelsonmullins.com  
Katie E. Towery  
SC Bar No. 103219  
E-Mail: katie.towery@nelsonmullins.com  
NELSON MULLINS RILEY & SCARBOROUGH LLP  
2 W. Washington Street / Suite 400  
Post Office Box 10084 (29603-0084)  
Greenville, SC 29601  
(864) 373-2300

Thomas H. Keim, Jr.  
SC Bar No. 10244  
E-Mail: tkeim@fordharrison.com  
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  
July 31, 2020

|                                    |   |                                     |
|------------------------------------|---|-------------------------------------|
| 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,                         | ) |                                     |
|                                    | ) | <b>DEFENDANT’S SUPPLEMENTAL</b>     |
| vs.                                | ) | <b>MEMORANDUM OF LAW IN</b>         |
|                                    | ) | <b>OPPOSITION TO THIRD-PARTY</b>    |
| Donza H. Mattison,                 | ) | <b>DEFENDANTS’ MOTION FOR</b>       |
|                                    | ) | <b>SUMMARY JUDGMENT ON</b>          |
| Defendant-Counterclaimant.         | ) | <b>DERIVATIVE ACTION</b>            |
|                                    | ) |                                     |
| Donza H. Mattison, in a Derivative | ) |                                     |
| Capacity on Behalf of McMillan     | ) |                                     |
| Pazdan Smith, LLC,                 | ) |                                     |
|                                    | ) |                                     |
| Third-Party Plaintiff,             | ) |                                     |
|                                    | ) |                                     |
| vs.                                | ) |                                     |
|                                    | ) |                                     |
| Rondald G. Smith et al.            | ) |                                     |
|                                    | ) |                                     |
| Third-Party Defendants.            | ) |                                     |
|                                    | ) |                                     |

Defendant, Donza H. Mattison (hereinafter “Mattison”), by and through her undersigned counsel, hereby submits this Supplemental Memorandum of Law in Opposition to Third-Party Defendants’ Motion for Summary Judgment on Derivative Action.

The three depositions of minority members that Defendant took following the summary judgment hearing on May 12, 2020<sup>1</sup> are remarkable not only for the lack of information the minority

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<sup>1</sup>Defendant took the deposition of Donald L. Love, Jr. on June 17, 2020 (hereinafter “Love Depo.”), the deposition of R. Cullen Pitts on June 22, 2020 (hereinafter “Pitts Depo.”), and the deposition of Harry David Ballard on July 10, 2020 (hereinafter “Ballard Depo.”). Counsel for Plaintiff and Third-Party Defendants submitted the transcripts from all three depositions to the Court by email on Monday, July 20, 2020. In accordance with the Court’s

members actually have about Defendant's underlying claims in the Derivative Action, but also for Plaintiff's and Third-Party Defendants' Counsel's desperate efforts to keep crucial information from the minority members of MPS. Counsel for Plaintiff and Third-Party Defendants obstructed all three depositions (as well as the three previous depositions) by repeatedly making speaking objections and by repeatedly instructing the witnesses not to answer questions about documents the witnesses had not seen before and about subjects with which the witnesses were not familiar.<sup>2</sup> Plaintiff's and Third-Party Defendants' efforts to keep the minority members in the dark about the information and records supporting Defendant's Derivative Action illustrate the inherent conflict of interest counsel for Plaintiff and Third-Party Defendants have in this case. Furthermore, Third-Party Defendants themselves were the primary source of information upon which the minority members' pattern statements in opposition to the Derivative Action were based. The self-serving member statements and the witnesses' scripted answers to the same leading questions by Plaintiff's counsel at the end of each deposition are not dispositive of the issue presently before the court—whether Defendant can fairly and adequately represent the interests of similarly situated, minority members in this Derivative Action in enforcing the rights of the company—especially on a motion for summary judgment and where each of the minority members has substantial, inherent bias because of their current employment with Plaintiff. The minority members' articulated opposition to the Derivative

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responsive email of July 21, 2020, which allowed supplemental briefs of up to 20 pages, but no exhibits unless approved by the Court in advance, the excerpts from these depositions are not being attached to this Supplemental Brief.

<sup>2</sup>Third-Party Defendants' counsel instructed the witness not to answer questions at least 35 times during Mr. Love's deposition, at least 30 times during Mr. Pitts's deposition, and at least 22 times during Mr. Ballard's deposition. Those issues will be addressed in further detail in Defendant's forthcoming response to the three new Motions for Protective Order filed by Third-Party Defendants.

Action is based entirely on their subjective observations of Third-Party Defendants' character and on Third-Party Defendants' own misleading pronouncements that the allegations in Defendant's case are untrue. In sum, Third-Party Defendants cannot carry their burden of proving that Defendant could not fairly and adequately represent the interests of similarly situated minority members in enforcing the rights of the company. Accordingly, the Court should deny Third-Party Defendants' Motion for Summary Judgment and should allow the Derivative Action to proceed.

As an initial matter, the Court's limitation on discovery in the Derivative Action, allowing only the depositions of three additional minority members and "limited to the issue of whether they want a derivative action to continue and if so whether the defendant should be the representative" (Email from Judge McIntosh to Counsel, May 20, 2020), did not provide a fair and reasonable opportunity for Defendant to develop the record to respond fully to the motion for summary judgment. As previously set forth in the Rule 56(f) Affidavit of Defendant's Counsel and in Defendant's Memorandum of Law in Opposition to Third-Party Defendants' Motion for Summary Judgment, Defendant should have been allowed to conduct at least the following additional discovery before the Court considers Third-Party Defendants' Motion for Summary Judgment: (1) deposition of Third-Party Defendant Chad Cousins, previous COO and now CEO of MPS, who sent an email and memorandum on November 13, 2019, to all members of the firm attaching the proposed Member Statement in Opposition to Derivative Action; (2) deposition of Attorney Bill Higgins, whom Third-Party Defendant Cousins described as an "independent counsel" purportedly hired to assist members of MPS with any questions they might have about Ms. Mattison's Derivative Claims; (3) subpoena duces tecum to NAI Earl Furman regarding the proposed sale of the Spartanburg Office of MPS; and (4) Rule 34 inspection of Spartanburg Office of MPS by

Defendant's counsel and Defendant's expert witness on commercial real estate appraisal. The limitations imposed by the Court on discovery in the Derivative Action deprived Defendant of the opportunity to develop potentially critical information about the Derivative Action and especially the self-dealing transaction by Third-Party Defendant Ron Smith in connection with the Spartanburg Office location of MPS, which building is owned by an LLC in which his wife holds an 85% interest of the outstanding member units. Nevertheless, the evidence currently in the record at this stage of the case demonstrates that Defendant can fairly and adequately represent the interests of similarly situated minority shareholders in enforcing the rights of the company.

Third-Party Defendants' primary argument in support of their summary judgment motion is that Ms. Mattison's Derivative Action cannot be allowed to proceed because all other members of MPS have expressed opposition to such a claim. According to Third-Party Defendants, the fact that they have obtained unsworn, written statements from all members of the LLC (except for Ms. Mattison) disagreeing with the Derivative Action conclusively demonstrates that she cannot "fairly and adequately" represent their interests in enforcing the rights of the LLC (MPS). This argument fails for several reasons.

First of all, there is no requirement in the law that other shareholders or members of a corporation or LLC actually join in a derivative action or otherwise express support for it. The Derivative Actions portion of the South Carolina Uniform Limited Liability Company Act provides, in relevant part, that "A member of a limited liability company may maintain an action in the right of the company if the members or managers having authority to do so have refused to commence the action or an effort to cause those members or managers to commence the action is not likely to succeed." S.C. Code Ann. § 33-44-1101 (emphasis added). The statute uses the singular "[a]

member,” not “two or more members” in describing the right to bring a derivative action. Similarly, Rule 23(b)(1) of the South Carolina Rules of Civil Procedure also uses the singular: “In a derivative action brought by one or more shareholders or members to enforce the right of a corporation . . . .” Rule 23(b)(1), SCRCPP (emphasis added). Defendant’s previous brief contains numerous citations to cases from around the country that have allowed derivative actions to proceed with a single shareholder or member as the plaintiff, even when the derivative action has been expressly disavowed by other shareholders or owners. (Def’s Br., at 17-18).

In the document entitled “Response to Donza H. Mattison’s November 4, 2019 Letter,” which was part of the same packet encouraging other members to sign the “Member Statement in Opposition to Derivative Action,” Third-Party Defendant Cousins incorrectly stated, “If the Court finds that she [Ms Mattison] does not represent our membership, then her derivative action will be dismissed on the merits.” (MPS\_009498). This statement falsely implies that if MPS can get all other members of the firm to sign the “Member Statement in Opposition to Derivative Action,” the court will simply dismiss the claim. Minority member Love interpreted Third-Party Defendant Cousins’s document exactly so. (Love Depo., at 129, ll. 12-18) (“Q. So did you believe that Mr. Cousins was saying, if we can - - if the firm can show to the court that nobody supports her [Ms. Mattison’s] claim, that the Third-Party Complaint would be dismissed? A. That was my understanding.”). Yet, in the state of South Carolina, there is no requirement that other members join in the derivative action before it is allowed to proceed.

Secondly, the requirement that a shareholder or member who brings a derivative action must fairly and adequately represent the interests of similarly situated shareholder or members in enforcing the rights of the corporation or company is analogous to a traditional class action under Rule 23,

where the class representative has a fiduciary duty to absent class members and can potentially bind the represented class through the action under principles of res judicata or collateral estoppel. In Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949), the United States Supreme Court made the following pronouncement:

[A] stockholder who brings suit on a cause of action derived from the corporation assumes a position, not technically as a trustee perhaps, but one of a fiduciary character. He sues, not for himself alone, but as representative of a class comprising all who are similarly situated. The interests of all in the redress of the wrongs are taken into his hands, dependent upon his diligence, wisdom and integrity. And while the stockholders have chosen the corporate director or manager, they have no such election as to a plaintiff who steps forward to represent them. He is a self-chosen representative and a volunteer champion.

Id. at 549 (emphasis added). As the Supreme Court recognized in Cohen, a derivative action is not a popularity contest. The relevant inquiry is whether the proposed derivative action plaintiff can pursue the asserted claims in a vigorous and conscientious manner. Larson v. Dumke, 900 F.2d 1363, 1366 (6<sup>th</sup> Cir. 1990) (“An adequate representative must have the capacity to vigorously and conscientiously prosecute a derivative suit and be free from economic interests that are antagonistic to the interests of the class.”).

The case of Davis v. Comed, Inc., 619 F.2d 588 (6<sup>th</sup> Cir. 1980), which Third-Party Defendants cite as the applicable standard for the “fair and adequate” inquiry, contains numerous elements that courts generally consider in evaluating this issue:

[1] economic antagonisms between representative and class; [2] the remedy sought by plaintiff in the derivative action; [3] indications that the named plaintiff was 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 interest in the derivative action itself; [7] plaintiff's vindictiveness toward the defendants; and, finally, [8] the degree of support plaintiff was receiving from the shareholders he purported to represent.

Id. at 593–94 (6th Cir. 1980).

Here, at least seven out of the eight elements from the Davis case clearly favor allowing Ms. Mattison to continue the derivative action. As to item [1], there is no economic antagonism between Ms. Mattison and the other minority shareholders. In fact, she is trying to increase the value of the company as a whole by bringing additional money back into the firm. As to item [2], the remedy Ms. Mattison is seeking through the Derivative Action is for Third-Party Defendants to return the excessive proceeds gained by the individuals through the self-dealing transactions back to the firm as a whole, which is completely consistent with enhancing the investment interests of the minority members in the firm. As to item [3], there is no evidence (or even a suggestion) that Ms. Mattison is not the driving force behind the case. As to item [4], Ms. Mattison is clearly familiar with the litigation, as she verified the pleading containing the Derivative Action, and she has personally attended every court proceeding and deposition in this case. As to item [5], there is no other litigation pending between the parties other than the original portion of this case in which Plaintiff MPS brought a declaratory judgment action against Ms. Mattison, and she filed counterclaims and the Third-Party derivative action in her responsive pleading. As Defendant pointed out in the previous brief, the company cannot affirmatively start a lawsuit against Ms. Mattison and then complain about being in litigation with her. See Vanderbilt v. Geo-Energy Ltd., 725 F.2d 204, 208 (3d Cir. 1983) (“[H]ere it was the corporate defendants who initiated the first round of litigation. Under these circumstances less weight should be given to a corporate defendant's claim for the disqualification of the representatives of the shareholder class where the corporate defendant was the one who initiated the litigation about which it now complains.”). Furthermore, in her defense and counterclaims in this case, Ms. Mattison seeks remedies that are perfectly consistent with the

claims in her Derivative Action—namely, to increase the fair market value of her stake in the company by recovering the excessive amounts taken out through the self-dealing transactions or to adjust the valuation of the firm through normalization of those transactions. As to item [6] Ms. Mattison does not have any personal interests that are inconsistent with her claims in the derivative action. She is the fourth largest shareholder of the firm (with 2,035 units) who is not one of the four, Third-Party Defendants. Perhaps more importantly, she is the only shareholder of MPS who does not have to worry about the personal interest in keeping their job with MPS and is, therefore, uniquely positioned to pursue this action vigorously and diligently. As to item [7], there is no indication that Ms. Mattison is pursuing the derivative action because of some type of personal vindictiveness.<sup>3</sup> In fact, in her Supplemental Affidavit, which was filed on May 14, 2020, Ms. Mattison testified as follows: “I do not harbor any animosity or ill will towards MPS or any of the minority shareholders of the firm for how I was treated in being forced out of the firm. In fact, I believe that my attorney and I were able to negotiate a fair and equitable resolution relating to the separation of my employment from the firm.” (Mattison Aff., at 6, ¶ 18). Third-Party Defendants have produced no evidence to establish that Ms. Mattison is pursuing the Derivative Action to “grind an axe” or out of a sense of vindictiveness, especially not on a motion for summary judgment on an issue on which Third-Party Defendants bear the burden of proof.

The only factor from Davis v. Comed, Inc. that Third-Party Defendants seriously argue is the fact that all other shareholders of the firm have signed the same, boiler-plate statement in opposition

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<sup>3</sup>Mr. Love testified that he has never observed Ms. Mattison acting in a petty or vindictive manner. (Love Depo., at 21, ll. 3-7); (see also Love Depo., at 110, ll. 20-20) (“Do you believe that Ms. Mattison has some type of animosity towards MPS for the separation of her employment? A. I don’t know about that.”).

to the derivative action. A careful reading of the statement itself and an evaluation of the circumstances under which the statements were signed reveal that the member statements were not knowing and voluntary disavowals of the rights Ms. Mattison seeks to vindicate through the Derivative Action, much less could they be considered dispositive so to prevent Ms. Mattison from proceeding with the Derivative Action.

As with the three previous depositions of minority members of MPS (Joslin, Jacobs, and Myers), the most recent three deponents acknowledged that they had not even read Ms. Mattison's derivative action at the time their statements were signed in mid- to late-November 2019. The first time they actually reviewed the Derivative Action Third-Party Complaint was shortly before their depositions, when Plaintiff or Plaintiff's counsel provided it to them to review.<sup>4</sup>

The member statements provide, "I know of no facts which support Mattison's derivative action against the Third-Party Defendants." (Member Statements, at ¶ 8). In other words, the members who signed the statements are merely acknowledging that they are simply ignorant of the facts as alleged by Ms. Mattison. Importantly, the members do not state that they are aware of any facts that contradict or refute the allegations of self-dealing in the derivative action. Looking at the three broad categories of self-dealing alleged in the Derivative Action—(1) excessive compensation and bonuses, (2) excessive benefits, perquisites, and expense accounts, and (3) the Spartanburg Lease with Third-Party Defendant Ron Smith's wife's company, C & P of Spartanburg, LLC—all

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<sup>4</sup>(Love Depo., at 12, ll. 1-14) ("Q. When did you review the court filing document? A. Yesterday."); (*Id.* at 43, l. 24 to 44., l. 1) ("Q. And again, yesterday was the first time you had ever seen this document [Exhibit 2, Verified, Amended Answer, Counterclaims, and Third-Party Complaint]. A. Yes, sir."); (Pitts Depo., at 8, ll. 8-11) ("And I received the derivative lawsuit information maybe two weeks ago, right before, I think, the original scheduled deposition."); (Ballard Depo., at 8, ll. 6-9) ("Q. So this week Tuesday, Wednesday, or Thursday was the first time you had seen the copy of any of the court filings in this case? A. Correct.").

three of the most recent deponents testified that they had not done anything to determine whether or not Ms. Mattison's allegations of self-dealing by Third-Party Defendants were true. For example, in the last deposition taken in this case, Mr. Ballard testified as follows: "Q. Do you think Ms. Mattison's accusations in the Third-Party Complaint are unfounded? A. I have no reason to believe that they are founded, which is why I signed the document. Q. Well, couldn't you look at the financial records and the other documents underlying Ms. Mattison's claims regarding the compensation and bonus and the Spartanburg lease to determine whether they were founded or not? A. Yeah, I mean it would have been possible. Yes. Q. But to your knowledge, no other minority member of the firm has done that? A. To my knowledge, no one else has done that." (Ballard Depo., at 149, l. 24 to 150, l. 15).

As to the allegations that Third-Party Defendants have authorized excessive bonuses and compensation for themselves, Mr. Love conceded that he did not have any information or knowledge about those allegations. (Love Depo., at 84, ll. 14-24) ("Q. And she's alleging that the rate of their [Third-Party Defendants'] increase [in compensation] has exceeded the rate of increase of other members of the firm, right? A. That's what she says, yes. Q. Okay. Do you have any information or knowledge about that issue? A. I don't. Q. Okay. Did you ever do anything to attempt to determine whether the allegation was true or not? A. I did not."). Similarly, Mr. Pitts testified, "I mean, to be honest, I didn't really do any research on salaries and stuff like that, no." (Pitts Depo., at 121, ll. 13-14). Mr. Ballard testified essentially the same way: "Q. I mean, if you were curious about whether Ms. Mattison's allegations were true or not in terms of the amounts she put in her Complaint, how would you go about verifying those amounts? A. Well, as I said earlier, I don't think it's my business. I'm not curious of what they make." (Ballard Depo., at 36, ll. 12-18). In a

recent article on derivative actions appearing in the March 2020 issue of SC Lawyer magazine, three attorneys from the Nelson Mullins law firm wrote that directors, officers, and majority shareholders who owe fiduciary duties to the corporation and its shareholders “cannot engage in transactions that divert proceeds to themselves or otherwise reward themselves with self-dealing bonuses.” Manning, Cory et al., “Dead on Arrival: The Perils of Litigating an Aggrieved Shareholder’s Breach of Fiduciary Duty Claim,” SC Lawyer, at 40 (March 2020) (emphasis added). Third-Party Defendants have not produced any evidence to dispute Defendant’s claims regarding excessive bonuses and compensation they authorized for themselves, nor has any minority member even bothered to look into those allegations, based on the depositions in the record.

The minority members deposed thus far similarly have no knowledge, information, or facts to dispute Ms. Mattison’s allegations that the benefits and other perquisites that Third-Party Defendants have approved for themselves are excessive. Mr. Love testified repeatedly that he is not aware of the benefits received by Third-Party Defendants. (Love Depo., at 173, ll. 6-9) (“Q. You’ve also indicated you didn’t have information about the benefits that the managing members and their families received from MPS, right? A. Correct.”). When asked about the allegations Ms. Mattison raised regarding excessive benefits, Mr. Pitts candidly acknowledged, “I don’t know the details. So the fringe benefits, I didn’t see as excessive. It’s kind of - - I think, that just didn’t really raise an alarm for me.” (Pitts Depo., at 150, ll. 8-11). Mr. Ballard also testified that he does not know what perquisites and fringe benefits are provided to Third-Party Defendants. (Ballard Depo., at 42, ll. 16-18) (“Q. Do you know what the perquisites and fringe benefits the Third-Party Defendants receive? A. No.”).

The issue of the Spartanburg lease was particularly contentious during the depositions of the

minority members and probably triggered the most instructions by Mr. Outten to the witnesses not to answer questions and multiple phone calls to the Court seeking protection from questions involving the Spartanburg lease. Mr. Love testified that he does not know anything about the terms of the Spartanburg lease. (Love Depo., at 154, ll. 19-21). He also testified that, after reviewing Ms. Mattison's allegations about the Spartanburg lease, including the allegations that after half of the second floor was sold to a law firm, MPS continued to pay the same rent on the entire building for several years, he never did anything to look into those matters. (Love Depo., at 159, l. 22 to 160, l. 3) ("Q. Did you do anything to make yourself aware of the details of the Spartanburg lease after you reviewed Ms. Mattison's protest? A. I did not. Q. Okay. Have you ever been privy to any of the details of the Spartanburg lease? A. No, sir."). Mr. Pitts similarly testified that he was not aware of the issues with the Spartanburg lease until he read Ms. Mattison's Third-Party Complaint and that he did not do anything to determine whether her allegations were accurate or not. (Pitts Depo., at 106, l. 21 to 107, l. 24). When Mr. Pitts was asked whether he thought it would be appropriate for MPS to continue paying rent on the entire building after it sold approximately half of the second floor to a law firm, Mr. Pitts stated, "I don't, but I don't know the details between the agreement between C & P and the law firm, what they had in there, you know, for their closing documents, I don't know." (Pitts Depo., at 109, ll. 9-20). Mr. Ballard also disclaimed any knowledge of the Spartanburg lease. (Ballard Depo., at 152, l. 20 to 153, l. 2) ("Q. After you read the allegations in Ms. Mattison's protest letter and the allegations in her Third-Party Complaint, did you do anything to check up on the terms of the Spartanburg lease? A. No. Q. Do you know if you discussed the Spartanburg lease with any of your colleagues? A. No."); (see also Ballard Depo., at 155, l. 22 to 156, l. 1) ("Q. So you have no way of knowing whether Ms. Mattison's allegations regarding the

Spartanburg lease are accurate or not? A. I have not undergone any type of discovery as to that, no.”). Importantly, both Mr. Pitts and Mr. Ballard agreed that if MPS paid more rent than the square footage they were actually using, that the money should be returned to the firm. (Pitts Depo., at 201, ll. 6-25)); (Ballard Depo., at 158, ll. 16-24).

The minority members’ opposition to Ms. Mattison’s Derivative Action appears to be based largely on a subjective belief that Ms. Mattison’s allegations would be contrary to the character and integrity of Third-Party Defendants, with whom the minority members have worked for many years. For example, Mr. Love testified, “We’ve had a relationship with these guys for a long time and have felt like that they’ve always had the best interest of the company at heart, and so there’s no reason for me to think now that they don’t.” (Love Depo., at 85, ll. 15-19). Mr. Love candidly admitted that his opposition to the derivative action is based entirely on his subjective assessment of Third-Party Defendants’ integrity. (Love Depo., at 179, l. 24 to 180, l. 5) (“They’ve never been accused of doing anything wrong before and so I don’t - - you know, that plays into it, I think. Q. Okay. Is your opposition to the derivative action based on anything else? A. No.”). Mr. Pitts testified that his belief that Ms. Mattison cannot fairly and adequately represent the interests of the other minority members is based on “My experience with working with these guys for 25 years.”) (Pitts Depo., at 56, ll. 10-20). Mr. Ballard also testified along the same lines: “I think everybody just brought their own experience with - - their own personal experiences with the managing partners and didn’t seem to gel with what was said here with what our individual experiences were.” (Ballard Depo., at 128, ll. 18-22). There are two glaring problems with Third-Party Defendants’ argument that the subjective statements of the minority members should prevent the Derivative Action from moving forward, especially on a motion for summary judgment: (1) there is inherent bias in the minority

members' statements because they all still work for MPS and do not want to risk alienating the super-majority of the ownership of the firm held by Third-Party Defendants collectively; and (2) the only information the minority members have received about Ms. Mattison's Derivative Action has come directly from Third-Party Defendants themselves, who have carefully filtered the information and skewed things in their favor.

Ms. Mattison is the only member of MPS who is not currently employed by MPS and, therefore, is not "under the thumb" of Third-Party Defendants. Collectively, Third-Party Defendants hold more than 66 2/3% of the outstanding shares of MPS and could terminate the employment of any member they chose or otherwise affect the terms and conditions of their employment, including discretionary bonus awards and raises. In September 2015, the leadership of MPS attempted to amend the Operating Agreement to reduce the "required interest of the members" from 75% to 66 2/3%. Ms. Mattison was the only member of MPS who refused to accept this revision of the Operating Agreement. Importantly, termination of the employment of a member of the firm must be approved by a "required interest of the members." (Operating Agreement, § 4.2(c)(ix); see also Love Depo., at 239, l. 23 to 240, l. 10) ("So the four of these individuals who are being sued in this case have the authority to terminate your employment for any reason, if they desired to do so, isn't that right? A. They do, but you also have to assume that all four of them would agree to do it at the same time. . . . Q. And every other minority member of the firm is under the same predicament you're in? A. Correct."); (Pitts Depo., at 61, l. 23 to 62, l. 6); (Ballard Depo., at 50, ll. 3-6) ("Q. Well, you'll agree with me that she [Ms. Mattison] can make these allegations without fear of losing her job, right? A. I would agree with that, yes.")). Accordingly, job security, possible demotion, or reduction in compensation are not potential constraints on Ms. Mattison's ability to fairly and

adequately pursue the derivative action. In this regard, Ms. Mattison is acting solely as an investor, not as an employee-investor in the firm, and she is not conflicted in the same manner as other minority members would be in pursuing redress for the company through a Derivative Action.

Next, it is very clear that the only information the minority members have received about the Derivative Action has come directly from Third-Party Defendants or their counsel. Mr. Love conceded that everything he has heard about the case has come entirely from Third-Party Defendants. (Love Depo., at 172, ll. 17-21) (“Q. But the information - - the sole information you’ve received about the allegations in Ms. Mattison’s derivative action came from the very people that she was suing? A. Correct.”); (Love Depo., at 174, ll. 7-11) (“Q. The only information that you’ve gotten about whether Ms. Mattison’s allegations are meritorious comes from the very people that she’s suing, isn’t that right? A. That’s correct.”). Mr. Pitts testified similarly: “Q. Did anyone provide you information that contradicted [Ms. Mattison’s] protest letter other than Mr. Cousins’ statement? A. No.” (Pitts Depo., at 148, ll. 10-13). Mr. Ballard testified that Third-Party Defendant Cousins is the only one who provided him and the other minority members an explanation about the Derivative Action. (Ballard Depo., at 148, ll. 9-17).

The fact that Mr. Cousins affirmatively misled the minority members into believing that the firm had retained “independent counsel” to advise them about the Derivative Action is particularly telling. All three of the recent deponents testified that the offer in and of itself was a material factor in their opposition statements. (Love Depo., at 118, ll. 10-14) (“Did that give you some comfort, that the firm was willing to hire an independent attorney to provide assistance in your decision? A. It did.”); (Pitts Depo., at 140, ll. 20-24) (“Q. Were you somewhat comforted that Mr. Cousins and the managing members were willing to hire a neutral party to provide independent advice to you? A.

Yes.”); (Ballard Depo., at 132, ll. 17-23) (“Did you think that was a significant item that Mr. Cousins said, you know, we’re willing to hire an independent lawyer to look at this for you? A. Yes. Q. Did that give you some sense of comfort that Mr. Cousin’s position was accurate? A. Yes.”). Of course, the so-called “independent counsel” was a complete misrepresentation by Mr. Cousins, designed merely as a bluff to bolster the support of the minority members. As the Court knows, Mr. Higgins was hired by the Nelson Mullins firm to defend against their potential conflict of interest in simultaneously representing both the LLC and the Third-Party Defendants who have been accused of harming the LLC.

There is nothing in the record to suggest that Ms. Mattison’s character or integrity would preclude her from fairly and adequately representing the interests of the minority shareholders in enforcing the rights of MPS in the Derivative Action. Mr. Love conceded that he had not personally observed anything about Ms. Mattison, or heard anything from anyone at MPS, that would cause him to question her integrity or truthfulness. (Love Depo., at 20, l. 14 to 21, l.7; and at 228, ll. 12-17). Mr. Pitts testified the same way in his deposition. (Pitts Depo., at 22, ll. 1-14). Mr. Ballard did too. (Ballard Depo., at 37, ll. 16-23; and at 193, ll. 5-9). All three recent deponents also described Ms. Mattison as conscientious, detail oriented, and dedicated to the successful operation of the firm. (Love Depo., at 20, ll. 18-23; at 21, ll. 12-16; and at 22, ll. 4-7); (Pitts Depo., at 16, ll. 12-18; and at 22, ll. 21-24); (Ballard Depo., at 19, ll. 16-24). One of the leading courts in the country on corporate litigation and derivative shareholder actions recognized that the main concern in the “fair and adequate” inquiry is ensuring that the person bringing the derivative claim can carry out her “fiduciary capacity as representative of persons whose interests are in plaintiff’s hands and the redress of whose injuries is dependent upon her diligence, wisdom and integrity.” South v. Baker,

62 A.3d 1, 21 (Del. Ch. Ct. 2012) (emphasis added). Mr. Love clearly testified that Ms. Mattison fits the bill in that regard. (Love Depo., at 90, ll. 8-20) (“Q. Do you believe Ms. Mattison has the mental capacity to pursue the claim? A. Yes, I do. Q. Okay, do you think Ms. Mattison is a determined person, that she has the - - I guess the wherewithal to see the lawsuit through to the end? A. She does. Q. Okay. Do you think she has the - - for lack of a better term - - cajones to stand up to the four Third-Party Defendants? . . . . A. I suppose.”).

Also, Ms. Mattison’s financial interests in pursuing the Derivative Action are actually aligned with those of the minority members. (Love Depo., at 91, ll. 13-17) (“Q. In terms of Ms. Mattison’s financial interests, she has the same interest in maximizing the value of her shares tha[t] any other member of the firm would have, isn’t that right? A. That’s correct.”); (Ballard Depo., at 177, l. 14 to 178, l. 3) (“Q. You testified earlier that you think that all members of the firm have an interest in increasing or preserving the value of their investments or their ownership interest in the firm, right? A. Right. Q. So how is Ms. Mattison’s interest in increasing or maximizing the value of her shares different than any other minority member? . . . . A. I would not see that there is a difference. I mean, every member has an expectation and has a responsibility to one another that we’re all working towards the same goal of increasing the value of our shares.”).

There is also no competent evidence in the record that Ms. Mattison has some type of improper, ulterior motive in pursuing the Derivative Action. Ms. Mattison is simply seeking to obtain fair value, and nothing more than fair value, for her shares. The Derivative Action and the main action are seeking to accomplish the same thing: the excessive amounts that the Third-Party Defendants have taken out of the company through self-dealing transactions must first be added back to firm’s shareholder’s equity, and the excessive compensation, bonuses, and “related party”

transactions must be normalized before fair market value can be accurately determined. Plaintiffs and Third-Party Defendants have repeatedly argued that the Derivative Action is used by Ms. Mattison improperly as some type of leverage to increase the buy-out of her shares. Ms. Mattison endeavored in good faith to settle this matter through pre-litigation mediation, just like she had previously done with the amicable resolution of her employment claims over a year earlier. Since MPS filed suit in this case, neither she nor her undersigned counsel have ever suggested that she would jettison the Derivative Action in exchange for a higher personal buy-out of her shares via a negotiated settlement. Neither Ms. Mattison nor her counsel has ever sought to receive anything but true, fair value for her shares; however, that would necessarily include whatever is first brought back into the firm through the Derivative Action.

One of the minority members even speculated that Ms. Mattison was trying to embarrass the company or harm its reputation by filing the Derivative Action. (Pitts Depo., at 131, ll. 6-10) (“Well, I don’t think it’s about the money. I mean, my 4 percent, I’m not going to get much. I’m more concerned about the reputation of the firm and the people in the company, so maybe that’s the alignment.”). The truth is that Ms. Mattison has been very discrete and professional in making her allegations in the Derivative Action, voluntarily filing the pleadings under seal, not making any public statements or press releases about the case, not contacting former colleagues at MPS, and abiding by her confidentiality agreement with MPS and the confidentiality order in this case.<sup>5</sup> Ms. Mattison has also not brought an individual claim for judicial dissolution of the LLC in this case, which is an available remedy under the statute.

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<sup>5</sup>Every single document produced by MPS in discovery in this case has been marked “CONFIDENTIAL” by Plaintiff’s counsel. Defendant has not yet challenged any of the designations, despite the fact that they are obviously overly broad.

As a practical matter, Ms. Mattison's Derivative Action is the only potential remedy the minority members of the firm would have to challenge the self-dealing by Third-Party Defendants as alleged in the Third-Party Complaint. Ms. Mattison clearly could not pursue her claims in an individual action against the individual managers and COO of the firm, because the injuries she has sustained from the alleged acts stem directly from her status as a member of the LLC. See Manning et al., supra, "Dead on Arrival," SC Lawyer, at 40 ("This direct-derivative distinction is not merely academic. Indeed, 'an individual stockholder has no right to bring an action in his own name and in his own behalf for a wrong committed solely against the corporation.'") (quoting Ward v. Griffin, 295 S.C. 219, 222, 367 S.E.2d 703, 704 (Ct. App. 1988)). Per the Severance Agreement, the valuation of Ms. Mattison's shares is supposed to be determined as of December 31, 2017, the last fiscal year prior to her resignation from the firm. Her Derivative Action seeks retrospective damages for actions taken by Third-Party Defendants prior to her departure from the firm and the corresponding reduction in the value of her ownership interest in the firm. If Ms. Mattison's Derivative Action is dismissed, the statute of limitations would largely preclude any other minority member from challenging those actions. In addition, the information that Ms. Mattison claims was fraudulently concealed has now been made known to her fellow members. If her Derivative Action is dismissed, the minority members would lose the equitable estoppel argument to toll any applicable statutes of limitations. Finally, the newly elected Board of MPS, which is essentially still controlled by Third-Party Defendants, could potentially ratify past acts, including breaches of fiduciary duties, according to the new Operating Agreement of MPS, which Ms. Mattison refused to sign. If Ms. Mattison's Derivative Action were to be dismissed, the minority members likely could not prevent such ratification by the new Board of MPS, which is still effectively controlled by Third-Party

Defendants. Not only is Ms. Mattison a fair and adequate representative of the interests of minority members of the firm in enforcing the rights of MPS in this case, but also she is uniquely positioned to do so. She is the only current member of the firm who can speak up without fear of retribution in her employment. She has superior knowledge of the firm's financial records and conditions based on the information she obtained pursuant to the Severance Agreement. And, she is the only member who has not voted to elect the current board and to adopt the recent amendments to the Operating Agreement.

For all of the foregoing reasons, and for the reasons previously stated in Defendant's prior brief and during oral argument on this matter, the Court should deny Plaintiff's and Third-Party Defendants' Motion for Summary Judgment. Based on the evidence of record taken in the light most favorable to Ms. Mattison, Third-Party Defendants have failed to meet their burden of proving that Ms. Mattison cannot fairly and adequately represent the interests of similarly situated minority shareholders in enforcing the rights of the company against the alleged self-dealing and breaches of fiduciary duties by Third-Party Defendants.

Respectfully submitted,

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

Attorney for Defendant, Donza H. Mattison

July 31, 2020

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/Counter-Defendant,          | ) |                                         |
|                                       | ) |                                         |
| vs.                                   | ) |                                         |
|                                       | ) |                                         |
| Donza H. Mattison,                    | ) |                                         |
|                                       | ) |                                         |
| Defendant/Counterclaimant.            | ) | <b><u>BRIEF IN SUPPORT OF AWARD</u></b> |
|                                       | ) | <b><u>OF ATTORNEYS' FEES</u></b>        |
|                                       | ) |                                         |
| Donza H. Mattison, in a Derivative    | ) |                                         |
| Capacity on Behalf of McMillan Pazdan | ) |                                         |
| Smith, LLC,                           | ) |                                         |
|                                       | ) |                                         |
| Third-Party Plaintiff,                | ) |                                         |
|                                       | ) |                                         |
| vs.                                   | ) |                                         |
|                                       | ) |                                         |
| Rondald G. Smith, Joseph M. Pazdan,   | ) |                                         |
| Brad B. Smith, and Chad C. Cousins,   | ) |                                         |
|                                       | ) |                                         |
| Third-Party Defendants.               | ) |                                         |
|                                       | ) |                                         |

McMillan Pazdan Smith, LLC (“MPS”), and Ron G. Smith, Joseph M. Pazdan, Brad B. Smith, and Chad C. Cousins (collectively, the “Third-Party Defendants”), submit this Brief in Support of an award of attorneys’ fees and costs in having to defend the derivative claim filed by Defendant Donza H. Mattison (“Mattison”).

# **I. FACTUAL AND PROCEDURAL BACKGROUND**

MPS filed a Declaratory Judgment Action on February 22, 2019, asking the Court to declare that the parties’ Severance Agreement dated December 5, 2017 (“Severance Agreement”) is a valid and enforceable contract, and that Mattison’s membership units are to be valued in accordance with the terms of the September 30, 2015 Operating Agreement (“Operating

Agreement”). (*See* Compl.) 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 a derivative cause of action against Ron Smith, Joseph Pazdan, Brad Smith, and Chad Cousins, alleging 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. (Am. Third-Party Compl. ¶ 100.)

Early on in this case, Judge McIntosh voiced his concern that Mattison did not meet Rule 23(b)(1)’s requirement that a derivative plaintiff “fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association.” During a hearing on November 6, 2019, the Court expressed “doubts ... as to whether or not [Mattison] is a proper representative member to bring such an action.” (Nov. 6, 2019 Hearing Tr. at 14:10-13.) In response to MPS’s request that third-party subpoenas issued by Mattison be quashed, the Court stated that it had reservations about “allow[ing] Ms. Mattison to continue with vexatious discovery under a theory that she’s yet to be determined to be a proper representative.” (*Id.* at 14:15-17.) Mattison and her counsel were warned that the Court would issue sanctions by way of an award of attorneys’ fees and costs if discovery in this case was being abused. (*Id.* at 15:8-10.)

On December 2, 2019, counsel for Mattison was put on notice that every minority member of MPS except Mattison opposed the derivative action and had signed a statement memorializing their objection to Mattison’s derivative claims (the “Member Statements,” Ex. F to May 6, 2020 Mem. Supp. M. Summ. J.). Despite the repeated cautionary instructions from the Court, and after receiving these Member Statements, Mattison and her counsel continued to pursue the derivative claim without making any effort to make discovery more efficient. Mattison noticed the

depositions of six of MPS's members, in an attempt to somehow persuade the members to recant their unambiguous statements. In response to these notices, MPS and the Third-Party Defendants filed a Motion for Protective Order on December 11, 2019, asking the Court to order that the 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. The Court permitted Mattison to take the depositions of these minority members in order to determine if the Member Statements were given voluntarily, but again cautioned Mattison that the Court could award attorneys' fees and costs for conducting needless discovery.

Despite representing to the Court that the depositions should be allowed to go forward on the issue of whether the statements were voluntary, counsel for Mattison asked relatively few questions about their signing of the Member Statements. Instead, counsel for Mattison improperly used these depositions as an opportunity to try to convince the members to join Mattison's derivative action by questioning them on the "excessive compensation of the founders," and the alleged "self-dealing" involved in the lease for the Spartanburg office. All three members (William Joslin, KJ Jacobs and Paulette Myers) affirmed the declarations made in their Member Statements, testified that they did not support Mattison's derivative claims and made clear that their statements were voluntarily executed.

Following these depositions, on February 21, 2020, MPS and the Third-Party Defendants moved for summary judgment on Mattison's derivative action on the basis that she does not meet

the representational requirement of Rule 23(b)(1), SCRCP. During the May 12, 2020 hearing on this Motion for Summary Judgment, the following statements were made on the record:

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

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

...

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

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

...

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

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

Even before bringing the derivative action, Mattison's counsel threatened to bring a derivative claim in a letter dated January 14, 2019 during negotiations over the purchase of Mattison's membership units. (*See* Ex. H to May 6, 2020 Memo. Supp. M. Summ. J.) Mattison rejected MPS's offer, and demanded a much higher price for her units, contrary to what she agreed to in the Severance Agreement. In the last paragraph of the letter, Mattison's counsel stated:

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

Mattison and her counsel followed through on this threat, and in doing so, Mattison improperly used a derivative action to inflict harm on MPS, hoping that would result in her receiving more money for her membership units. Mr. Rothstein's assertions that "there's nothing wrong with that," are incorrect as courts across the country have dismissed derivative actions on

the basis that it is improper to use a derivative claim as a means of gaining leverage in other pending litigation. (*See* May 6, 2020 Memo. Supp. M. Summ. J. at 10-13.)

During the May 12, 2020 hearing, counsel for Mattison requested that the Court allow three more minority member depositions to go forward before issuing a ruling. (May 12, 2020 Hearing Tr. at 41:4-8.) The Court, yet again, advised counsel for Mattison that attorneys' fees and costs would be awarded if these additional depositions confirmed that the other minority members did not support the derivative action. (*Id.* at 14:10-21; 39:10-18.) As with the previous minority member depositions, the depositions of Donnie Love, Cullen Pitts, and Dave Ballard confirmed the accuracy of the statements made in their Member Statements under oath, and their opposition to the derivative claim made by Mattison.

After reviewing these deposition transcripts, as well as supplemental briefs submitted by the parties, Judge McIntosh entered a Form 4 Order on August 4, 2020. The Court granted MPS and the Third-Party Defendants' Motion for Summary Judgment on the ground that Mattison does not fairly and adequately represent the interests of the other members of MPS. The Court also awarded MPS and the Third-Party Defendants attorneys' fees, in an amount to be determined by the Court at a later date.

Following the entry of this Order, counsel for Mattison submitted a letter to Judge McIntosh asserting that he and his client had not been given an opportunity to be heard on this issue. That is false, and a mischaracterization of the record in this case. Judge McIntosh, though not required to, has repeatedly warned Mattison and her counsel over many months that attorneys' fees would be awarded if Mattison continued to conduct needless discovery on the derivative action. Mattison has had numerous opportunities to argue and/or brief the issue of attorneys' fees, but chose not to do so. Though Mattison and her counsel knew that the derivative action was

brought for an improper purpose, and that every other minority member of MPS opposed the derivative action, she insisted on engaging in time consuming discovery on her derivative claims. Now, after the Court has issued an Order doing exactly what he told Mattison many times that he was inclined to do, she complains as if she is was caught off guard by this Court's Order.

## II. ARGUMENT

### A. **Attorneys' Fees Should Be Awarded Pursuant to the Terms of the Severance Agreement.**

"The award of attorney's fees under a contract is left to the discretion of the trial court...." *JASDIP Props. SC, LLC v. Estate of Richardson*, 395 S.C. 633, 642, 720 S.E.2d 485, 489 (Ct. App. 2011). In this matter, the parties memorialized the terms of Mattison's cessation of employment with MPS in a Severance Agreement. This Severance Agreement is a valid and enforceable contract. (See Am. Third-Party Compl. ¶ 61.)

In exchange for the receipt of significant consideration, including FMLA leave, payment for PTO time, generous severance pay, and a substantial bonus, Mattison agreed to a general release of MPS and the Third-Party Defendants from any and all claims relating to her employment, termination of her employment, and any conduct, actions or omissions by MPS and the Third-Party Defendants. Section 4 of the Severance Agreement provides, in part:

Employee hereby releases and forever discharges the Company, ... its respective managers, officers, [and] directors ... from any and all known and unknown claims of action that Employee may have against the Released Parties arising from or in connection with: (a) the terms and conditions of her employment with the Company; (b) the termination of her employment from the Company; and (c) any conduct, actions or omissions, known or unknown, by the Released Parties occurring on or before the date Employee executes this Agreement.

For the avoidance of doubt, Section 4 goes on to state, in bold and italics:

***Employee acknowledges and understands that this paragraph is intended to prevent her from making any claim against the Released Parties regarding any matter or incident relating to or arising from the Operating Agreement, other***

*operating agreements, the employment relationship or its termination that occurs up to the date Employee executes this Agreement; provided, however, that nothing in this Agreement shall have any effect on Employee's rights and remedies relating to her dissociation from the Company.*

Thus, the Severance Agreement resolved *all* of Mattison's claims against MPS except for the valuation of her membership units.

Pursuant to Section 5 of the Severance Agreement, Mattison further agreed "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." More specifically, Mattison agreed "not to commence or file any class action ... or serve in any representative capacity in any class action ... against or involving the Company."

By filing a derivative action against the Third-Party Defendants, Mattison breached the express terms of the Covenant Not to Sue in the Severance Agreement. Section 5 provides that in the event of breach, Mattison must "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."

Pursuant to Sections 4 and 5 of the Severance Agreement, MPS and the Third-Party Defendants are entitled to an award of their reasonable attorneys' fees and costs in having to defend against Mattison's derivative action.

**B. Mattison's Willful Misconduct in Bringing the Derivative Action Warrants an Award of Attorneys' Fees Pursuant to MPS's Operating Agreement.**

MPS and the Third-Party Defendants are also entitled to an award of attorneys' fees pursuant to the provisions of the Operating Agreement. Section 4.1 of the Operating Agreement provides:

[N]o 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.

Without the consent or support of the other minority members, Mattison brought a derivative action purportedly on behalf of herself and the other minority members of MPS. Each of the minority members signed a Member Statement expressing opposition to the derivative action, and yet Mattison refused to dismiss her derivative claims after receipt of these statements. Instead, she continued to interfere with MPS's business by deposing six busy members of MPS for hours about issues unrelated to the claims and defenses at issue in this lawsuit. Despite testimony from these six minority members that they opposed the derivative action and wanted it to be dismissed, Mattison refused to back down.

Mattison purported to "act for or on behalf of the Company," but knew she had no support from the other members. Instead, it is clear from her actions throughout this lawsuit that Mattison used the derivative action to "interfere ... with the management ... [and] affairs of the Company," and as a result, the Operating Agreement mandates that Mattison pay any costs and damages that MPS incurred as a result of her actions.

Furthermore, Section 4.3(b) of the Operating Agreement states:

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 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 damages 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.

Mattison violated the terms of the Operating Agreement and engaged in willful misconduct by bringing the derivative action. Again, despite opposition from every other minority member of MPS, Mattison continued to assert that she was acting on behalf of the other members of MPS—

an assertion which she undoubtedly knew to be false. Her actions constitute willful misconduct, and therefore Mattison should be required to pay MPS and the Third-Party Defendants' attorneys' fees pursuant to Section 4.3(b) of the Operating Agreement.

**C. An Award of Attorneys' Fees is Proper Under the South Carolina Rules of Civil Procedure.**

MPS and the Third-Party Defendants are also entitled to an award of attorneys' fees under the South Carolina Rules of Civil Procedure. The South Carolina Rules of Civil Procedure are designed "to secure the just, speedy, and inexpensive determination of every action." Rule 1, SCRPC. Regarding discovery, Rule 26, SCRPC, consistently anticipates that discovery will be completed in a reasonable manner, without imposing undue burden or expense on one party. *See generally* Rule 26, SCRPC. As the South Carolina Supreme Court has cautioned, "discovery serves as an important tool in the truth-seeking function of our legal system, [however] ... 'discovery practice' has become a cottage industry and the merits of a claim are being relegated to a secondary status." *Oncology & Hematology Associates of S.C., LLC v. S.C. Dept. of Health & Envtl. Control*, 387 S.C. 380, 388, 692 S.E.2d 920, 924 (2010).

Throughout the pendency of this action, Mattison has used the discovery process as a weapon to inflict harm on MPS, instead of as a fact-finding tool for which it was designed. For example, upon receiving the Member Statements, in which every other member of MPS stated opposition to the derivative action, Mattison should have dismissed her derivative claims, in the absence of any evidence that they were coerced. Instead, Mattison presumed without any evidence that these statements were coerced and ignored their effect on whether she was a "fair and adequate" representative of them and noticed the depositions of six minority members. A review of the transcripts of these depositions indicates that they were not taken to discover relevant facts

and information relating to the case, but instead to harass the minority members, try to get them to join her derivative action and/or to sow discord within MPS.

The South Carolina Rules of Civil Procedure provide mechanisms by which the Court and parties to an action may prevent and address abuse of the discovery process, such as the behavior engaged in by Mattison and her counsel in this case. Rule 26(a), SCRPC, gives the trial court the authority to oversee the discovery process and *sue sponte* act to limit the discovery process to prevent abusive discovery tactics. Rule 26(c), SCRPC, allows a party to seek a protective order to protect that party from abusive discovery tactics, and further allows a moving party to be awarded expenses and attorneys' fees related to the motion for protective order under Rule 37(a)(4), SCRPC. Rule 37, SCRPC, generally permits the trial court to sanction any party abusing the discovery process, including an award of attorneys' fees. Specifically, Rule 37(a)(4), SCRPC, permits a moving party to recover attorneys' fees incurred in relation to a granted motion for protective order.

Here, MPS and Third-Party Defendants filed at least six motions for protective orders during the pendency of this action regarding the scope of the discovery process and depositions of several MPS members. The Court issued an Order granting MPS's Motion for Protective Order, signed on November 22, 2019 and electronically filed on January 23, 2020, limiting the scope of discovery in this action to cover only whether Mattison met the representational requirements of Rule 23(b)(1), SCRPC. Therefore, the Court may award attorneys' fees to MPS and Third-Party Defendants pursuant to Rules 26(c) and 37(a)(4), SCRPC. Moreover, during two of the depositions of the MPS members, MPS and Third-Party Defendants' counsel had to contact the Court pursuant to Rule 30(d), SCRPC, to move for a court order limiting the scope of the examination of the deponent based on Mattison's counsel's harassment of each deponent. On this

basis and pursuant to Rule 30(d), the Court may also award attorneys' fees under Rule 37(a)(4), SCRCPP.

While MPS and Third-Party Defendants do not rely on the following as a basis for the award of attorneys' fees, MPS points out that in each of the six depositions of MPS members, Mattison's counsel significantly exceeded the scope of discovery ordered and directed by the Court. The Court directed that the scope of the depositions of MPS members was limited to the narrow issue of whether Mattison met the representational requirements of Rule 23(b)(1), SCRCPP. (Nov. 22, 2019 Order.) Each of the six depositions of MPS members lasted in excess of four hours, some lasted six hours, and it is inconceivable that it would take that amount of time to cover the narrow topic defined by the Court's Order.

It has been clear from the beginning of this case that Mattison was pursuing the derivative action for her own self-interest. After every other minority member of the firm signed a Member Statement opposing the derivative action, Mattison knew, without a shadow of a doubt, that she could not meet Rule 23(b)(1)'s representational requirement. Instead of withdrawing her derivative action, or allowing the Court to dismiss the claim based upon the current record, Mattison used the discovery process as a weapon against MPS and the Third-Party Defendants—to inflict as much harm as she could against her former employer before her derivative claim was properly dismissed. The South Carolina Supreme Court has observed that “zealous advocacy” will not justify discovery abuse.” *In re Anonymous Member of S.C. Bar*, 346 S.C. 177, 193, 552 S.E.2d 10, 18 (2001). In this case, Mattison engaged in needless, vexatious, and wasteful discovery that did nothing to further the “just, speedy, and inexpensive” determination of her claims. Rule 1, SCRCPP. Instead, she only further delayed the dismissal of this action and drove up the costs and expenses for MPS's defense of this action. Now that Mattison's derivative action has been

dismissed, attorneys' fees are warranted to deter Mattison and her counsel from participating in similar misconduct going forward. As the South Carolina Court of Appeals has found, "[i]f [ ] counsel has taken action warranting sanctions, dismissing the issue without ruling on its merits allows them to go unpenalized. Such action also decreases the likelihood of others being deterred from similar misconduct." *Creighton v. Coligny Plaza Ltd. P'ship*, 334 S.C. 96, 123-24, 512 S.E.2d 510, 524 (Ct. App. 1998). Moreover, "[c]ourts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible." *Ex parte Dibble*, 279 S.C. 592, 596, 310 S.E.2d 440, 442 (Ct. App. 1983).

Mattison caused MPS and the Third-Party Defendants to unnecessarily incur attorneys' fees and costs in defending this derivative action, even after repeated warnings by the Court that continuing discovery would likely result in such an award. Therefore, for all these reasons and in order to reach just results in this case, MPS and the Third-Party Defendants are entitled to an award of their reasonable attorneys' fees and costs.

### III. CONCLUSION

Mattison brought this derivative claim not to benefit MPS but for her own interests. The pursuit of one's personal interests is not the proper basis for a derivative action. Attorneys' fees in this case are warranted because Mattison improperly pursued the derivative claim to try to inflict harm on her former employer. Despite the minority members' repeated pleas for her to dismiss the derivative action, she persisted with time consuming and expensive discovery.

The Court repeatedly warned Mattison and her counsel that attorneys' fees would be awarded. Mattison ignored the Court's warning and continued to drive up the costs of this litigation in an effort to harm MPS, and now must suffer the consequences. Pursuant to the provisions of the Severance Agreement and Operating Agreement, as well as the South Carolina

Rules of Civil Procedure, MPS and the Third-Party Defendants are entitled to an award of their reasonable attorneys' fees and costs in defending Mattison's derivative action.

Respectfully submitted,

By: s/ Samuel W. Outten

Samuel W. Outten

SC Bar No. 4295

E-Mail: sam.outten@nelsonmullins.com

Katie E. Towery

SC Bar No. 103219

E-Mail: katie.towery@nelsonmullins.com

NELSON MULLINS RILEY & SCARBOROUGH LLP

2 W. Washington Street / Suite 400

Post Office Box 10084 (29603-0084)

Greenville, SC 29601

(864) 373-2300

Thomas H. Keim, Jr.

SC Bar No. 10244

E-Mail: tkeim@fordharrison.com

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  
August 21, 2020

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.

Donza H. Mattison,

Defendant-Counterclaimant.

**DEFENDANT’S MEMORANDUM OF  
 LAW IN OPPOSITION TO AWARD  
 OF ATTORNEY’S FEES IN  
 DERIVATIVE ACTION**

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

Third-Party Plaintiff,

vs.

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

Third-Party Defendants.

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Defendant, Donza H. Mattison (hereinafter “Mattison”), by and through her undersigned counsel, hereby submits this Memorandum of Law in Opposition to Award of Attorney’s Fees in Derivative Action. As set forth in detail below, there is no contractual basis, either in the Severance Agreement or the Operating Agreement, for an award of attorneys’ fees. Nor is there a basis under the derivative action provisions of the LLC statute or in Rules 11, 26, or 37 of the South Carolina Rules of Civil Procedure, for an award of attorney’s fees based on the dismissal of Defendant’s derivative action.

By email of July 21, 2020, which allowed supplemental briefing on the Motion for Summary

Judgment following three additional depositions of minority members of McMillan Pazdan Smith, LLC (hereinafter “Plaintiff” or “MPS”), the Court specifically stated, “I request that neither party address the issue of attorney’s fees and costs in their briefing.” In the Form 4 Order of August 4, 2020, the Court instructed Plaintiff’s counsel to “include in the [proposed] order that attorney’s fees related to the derivative action are awarded but do not specify an amount.” (Form 4 Order, at 1). Plaintiff’s and Third-Party Defendants’ statement in their brief that “Mattison has had numerous opportunities to argue and/or brief the issue of attorneys’ fees, but chose not to do so” (Pl.’s Br. at 5), is preposterous. The Court’s previous sua sponte comments, both on and off the record, about the possibility of an attorney’s fee award to the prevailing party at the conclusion of the derivative action never gave Defendant an opportunity “to argue and/or brief” this issue, because no motion or petition to that effect was ever filed. The Form 4 Order was entered without the opportunity for the parties to research or brief this issue and specifically after the Court had expressly instructed the parties not to address the attorneys’ fee issue in their supplemental summary judgment briefs. This is now the first opportunity for Defendant to formally address the legal and factual propriety for an award of attorney’s fees.

The proposed order submitted by Plaintiff’s counsel appears to base the award of attorney’s fees and costs on Rule 11, SCRCP; however, the Court’s previous comments about attorney’s fees appear to have been based on the Court’s mistaken impression that the award of attorney’s fees is a matter of contract in this case.

During the hearing on November 6, 2019, on Plaintiff’s Motion to Quash Subpoenas and for Protective Order, the Court first mentioned a potential award of attorney’s fees and costs, but only if discovery in this case were used vexatiously or abusively, neither of which has occurred here.

(Nov. 6, 2019 Tr., at 15, ll. 8-10) (“And I’m not above issuing sanctions by way of costs and fees or otherwise if I feel like [the discovery process is] being abused, okay?”). No allegations have been raised under Rule 37(b), SCRCP, about any allegedly improper discovery following the Court’s comment during the November 6 hearing. Although Plaintiff and Third-Party Defendants now attempt to accuse Defendant’s counsel of improperly using the six depositions of minority members “as an opportunity to convince the members to join Mattison’s derivative action,” (Pl.’s Br. at 3), they have never filed a motion under Rule 37, SCRCP seeking sanctions for discovery abuse, nor would there be a valid basis to do so. There is absolutely no basis for Plaintiff’s and Third-Party Defendants’ new assertion that “Mattison has used the discovery process as a weapon to inflict harm on MPS, instead of as a fact-finding tool for which it was designed.” (Pl.’s Br., at 9). Interestingly, the proposed order submitted by counsel for Plaintiff and Third-Party Defendants does not even mention Rules 26 or 37, SCRCP, as the basis for the attorneys’ fee award.<sup>1</sup>

The next mention by the Court about attorney’s fees occurred during the conference call on December 13, 2019, in advance of the hearing originally scheduled for later that afternoon on Defendant’s Motion for Disqualification of Counsel and on Plaintiff’s Motion for Protective Order

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<sup>1</sup>Plaintiff’s and Third-Party Defendants’ gratuitous citation to In re Anonymous Member of S.C. Bar, 346 S.C. 177, 552 S.E.2d 10 (2001), is outrageous, especially after they conceded that they “do not rely on the following as a basis for the award of attorneys’ fees.” (Pl.’s Br., at 11). If Plaintiff’s and Third-Party Defendants truly believe that there was some improper conduct during any of the depositions, the undersigned counsel would welcome the opportunity to address all counsels’ conduct during the depositions in further detail. The numerous motions for protective orders that Plaintiff and Third-Party Defendants filed in this case related to questions for which their counsel instructed the witness not to answer, not to any conduct of Defendant’s counsel during the depositions. Plaintiff’s counsel recently informed the Court that a hearing is no longer necessary on the outstanding motions for protective order filed by Plaintiff’s counsel relating to the recent depositions during which Mr. Outten instructed all three of the witnesses not to answer numerous questions. (Email from S. Outten to T. Jennings, Aug. 5, 2020).

Regarding Depositions of Minority Members. Although no transcript was made of that phone conference, the undersigned counsel's contemporaneous notes from the call reflect that the Court indicated its recollection or understanding that there was an attorney's fee provision in the Severance Agreement or in the Operating Agreement of MPS that might shift attorneys' fees in the derivative action to the losing party. Plaintiff's counsel, Mr. Outten, indicated during the call that the Operating Agreement does have such a provision for attorney's fees. The Court then indicated that if there were such a provision, whoever loses the derivative action would be facing a pretty big burden at the end of the case for the opposing party's attorneys' fees, in addition to the outcome of the derivative action. Defendant's counsel never conceded that point, but merely indicated that he heard and understood the Court's comment to that effect.

During the Web-Ex hearing on May 12, 2020 the motion for summary judgment on the derivative action, the Court did make a couple of passing comments about a potential award of attorney's fees. (Tr. of May 12, 2020 hearing at 14, ll. 12-140) ("If she loses on that point, then there's an issue of attorney's fees, which the math that keeps getting greater."); (*id.* at 39, ll. 17-18) ("That case, that's going to run up attorney's fees."). However, the issue of attorney's fees was never argued on its merits during that hearing.

Upon further review of the Operating Agreement, it appears that no such attorney fee-shifting provision exists for a derivative action such as the one raised in Defendant's Amended Third-Party Complaint. The only specific attorney's fee-shifting provision in the Operating Agreement relates to remedies against a Managing Member for breach of the covenants applicable to Managers. (MPS Operating Agreement, at 15, ¶ 6.7) ("[I]n 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.") (emphasis added). Ms. Mattison has never been a managing member of MPS, so this provision is plainly not applicable.

Section 4.3(b) of the Operating Agreement provides as follows: "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." (MPS Operating Agreement, at 8, ¶ 4.3(b) (emphasis added)). Ms. Mattison brought the derivative action in her capacity as a member of the LLC in good faith in an attempt to recover back, on behalf of the firm itself, the self-dealing transactions of Third-Party Defendants, which transactions she first became aware of after she obtained detailed financial information pursuant to the Severance Agreement, in connection with the supposedly forthcoming "mutual" determination of the value of her equity interests of the firm. The broad immunity provision in Section 4.3(b) of the Operating Agreement should preclude an award of attorney's fees, unless the company could show that Ms. Mattison had committed "fraud, deceit, gross negligence, willful misconduct, breach of [the Operating] Agreement, or a knowing violation of the law." (Id.). Plaintiff and Third-Party Defendants have made no such showing in this case (or even an allegation of such conduct), especially for purposes of a motion for summary judgment. This is not merely a fee-shifting provision, but would require a much higher showing than merely losing the derivative action.

Plaintiff and Third-Party Defendants now cite to Section 4.1 of the Operating Agreement as a potential basis for the award of attorney's fees under the Operating Agreement, although no mention of that section was contained in their proposed order. Section 4.1 is the first section under the Member Article of the Operating Agreement, and is entitled "No Right of Control." This section merely states that an individual member of the company does not have any right to bind the company or to take any official act on behalf of the company, without the written authorization of the Management Committee. Under Section 4.1, each member of the LLC agrees to "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." (MPS Operating Agreement, at 7, ¶ 4.1) (emphasis added). Plaintiff and Third-Party Defendants completely ignore the adjective "unauthorized" in describing such actions that could trigger a member's duty to indemnify the Company. Section 33-44-1101 of the South Carolina Code of Laws specifically authorizes a member of a limited liability company to "maintain an action in the right of the company if the members or managers having authority to do so have refused to commence the action." S.C. Code Ann. § 33-44-1101. Thus, Ms. Mattison's proposed derivative action could not be considered an "unauthorized" act by a member of the firm, even if the derivative action were unsuccessful. Plaintiff's proposed order fails to make any reference to the Operating Agreement as the basis for an award of attorney's fees because no such provision exists.

The Severance Agreement likewise does not provide for an award of attorney's fees in the derivative action by Ms. Mattison, which is a separate action both from Plaintiff's declaratory judgment action under the Severance Agreement and from Defendant's counterclaims involving the same document. Section 5 of the Severance Agreement provides, in relevant part, that "[i]f

Employee breaches this covenant not to sue, she hereby agrees to pay all of the reasonable costs and attorney's 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.” (Severance Agreement, at 5, ¶ 5) (emphasis added). Ms. Mattison's Derivative Action is clearly not a breach of the covenant not to sue because the Derivative Action is not one of the claims released and forever discharged by the Severance Agreement. The Court already rejected Plaintiff's argument to that effect in denying Plaintiff's first motion to dismiss. (See Memo. Opinion and Order filed July 2, 2019, at 7 ):

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

In addition, Section 17 of the Severance Agreement provides, “If either party brings a claim for breach of the terms of this Agreement, the prevailing party shall be entitled to its reasonable attorney fees and expenses incurred in prosecuting or defending such an action.” (Severance Agreement, at 9, ¶ 17) (emphasis added). Ms. Mattison's Derivative Action is not a claim for breach of the Severance Agreement; in fact, as discussed by Defendant's counsel in detail before, her rights as a member of MPS were expressly carved out of the release in the Severance Agreement in at least

three separate places. (See Severance Agreement, at 2, ¶ 2(j) (“The Proper Dissociation will be handled separately from this Agreement . . .”); *id.* at 5, ¶ 4 (“. . . ***provided, however, that nothing in this Agreement shall have any effect on Employee’s rights and remedies relating to her dissociation from the Company.***”) (bold and italics in original); and *id.* at 10, ¶ 19(j) (“Employee is not waiving rights or claims that may arise after the date this Agreement is executed, nor is Employee waiving any rights or claims relating to her financial interests as a member or owner of the Company.” (emphasis added))).

There is also nothing in the South Carolina Uniform Limited Liability Company Act that would authorize an award of attorneys’ fees against Ms. Mattison for pursuing the Derivative Action claim here. The fee-shifting provision of the Derivative Action Article only authorizes an award of reasonable expenses and attorney’s fees to a successful plaintiff in a derivative action case, S.C. Code Ann. § 33-44-1104; it does not provide that an unsuccessful derivative action plaintiff can be held responsible for the defendant’s attorney’s fees and costs in defending against a derivative action. See Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 437-38, 673 S.E.2d 448, 458-59 (2009) (reversing award of attorney’s fees under LLC statute where plaintiff failed to properly plead the underlying case as a shareholder derivative action; also not awarding attorney’s fees to defendant which successfully defeated derivative action).

Neither Ms. Mattison’s actions in verifying the Third-Party Complaint and the Amended Third-Party Complaint nor her undersigned counsel’s actions in filing or continuing the Derivative Action in this case would constitute a violation of Rule 11, SCRCP. All of the pleadings and motions in this case were filed in good faith and with a reasonable belief that the Derivative Action was supported by good grounds, both factually and legally. In fact, the Court specifically allowed

Ms. Mattison to re-plead the Derivative Action after amending and re-sending the pre-suit demand, and the Court denied Third-Party Defendants' second Motion to Dismiss Under Rule 12(b)(6), SCRCP. Defendant's counsel's refusal to accept, at face value, the unsworn, conclusory statements from all of the other minority members of MPS as dispositive of the merits of the Derivative Action was simply not a violation of Rule 11. Defendant had every right to conduct discovery about the underlying circumstances surrounding the execution of those statements and the knowledge and information (or lack thereof) upon which those statements were based.

Plaintiff and Third-Party Defendants misconstrue Defendant's counsel's statements during the summary judgment hearing about trying to maximize the value of Defendant's shares in MPS. The derivative action was not filed as a negotiating tactic to try to extort an artificially high payout for Ms. Mattison's shares, despite Plaintiff's and Third-Party Defendants' repeated accusations to that effect. During the hearing, Defendant's counsel explained, "the beneficiary of the derivative action is the firm itself. And, certainly, the third-party defendants are going to feel some pain by that because they're going to have to put money that they [took] out back into the firm, but the minority shareholders won't [feel] that. The value of the firm will increase. . . . This is - - we legitimately think that there [was] a lot of money taken out of the firm by the managing third-party defendants that needs to be put back in before her shares [are valued]." (Tr., at 20 l. 15 to 21, l. 8). Defendant's counsel clearly stated that the derivative action was not being used "as a strike suit." (Tr., at 21, l. 2). As Ms. Mattison stated in her Supplemental Affidavit, she "was not seeking any additional value or 'premium' on the value of [her] shares to 'purchase [her] silence' with respect to the possible derivative shareholder claim." (Mattison Aff., at 5, ¶ 15). Ms. Mattison has never sought anything from MPS beyond the fair value of her ownership share in the company.

Significantly, Ms. Mattison was precluded by the Confidentiality provisions of the Severance Agreement from discussing the terms of her Severance Agreement with any of the other minority members of MPS, and she was required to sign a separate confidentiality agreement before MPS would provide her the financial information she requested through her counsel. (A copy of the Confidentiality and Non-Disclosure Agreement signed by Ms. Mattison and Third-Party Defendant Cousins as COO/Principal of MPS in mid-October 2018 is attached hereto as Exhibit A). The “recitals” portion of that document states, “The Parties wish to value Mattison’s Units in accordance with the Operating Agreement between the Parties, the Separation Agreement and Release dated December 5, 2015, and the South Carolina Uniform Limited Liability Company Act, S.C. Code Ann. § 33-44-101 et seq. As part of this valuation (“Valuation”) MPS will provide confidential and proprietary information to Mattison.” (Exhibit A, at 1, ¶¶ A-B). Although the second Confidentiality Agreement contains an attorneys’ fee provision (Exhibit A, at 3, ¶ 4.5), Plaintiff and Third-Party Defendants have not alleged that Ms. Mattison has violated that agreement, so this cannot be a viable source for an award of attorneys’ fees either. This document, which was signed approximately 10 months after the Severance Agreement, further confirms that the Severance Agreement did not incorporate the valuation methodology for Ms. Mattison’s shares as set forth in the Amended and Restated Operating Agreement of MPS from September 2015, which Ms. Mattison never signed. If, as Plaintiff’s counsel has repeatedly argued, the valuation of Ms. Mattison’s shares were conclusively determined (per the 2015 Operating Agreement) by the HDH Advisors’ report from early 2018, there would be no need for Ms. Mattison to obtain any financial records of MPS as contemplated by Severance Agreement and as repeated in the Confidentiality Agreement.

The South Carolina Supreme Court has recognized that “Attorney’s fees are not recoverable

unless authorized by contract or statute.” Jackson v. Speed, 326 S.C. 289, 307, 486 S.E.2d 750, 759 (1997). The case cited by Plaintiff and Third-Party Defendants, JASDIP Props. SC, LLC v. Estate of Richardson, 395 S.C. 633, 720 S.E.2d 485 (Ct. App. 2011), is readily distinguishable from the facts presented here. The Richardson case involved a contract for the sale of commercial property, which contract included an express attorney’s fee provision. The plaintiff buyer sued the seller for return of partial payments and earnest money paid on the contract after the seller rescinded the contract because of repeated delays in the closing. Following the jury’s verdict that neither party breached the underlying contract, the circuit court refused to make an award to the buyer plaintiff for unjust enrichment for restitution of the earnest money and partial payments on the contract, which ruling the court of appeals reversed. On the attorney’s fee issue, the court of appeals concluded, “The Agreement provided for attorney’s fees to the prevailing party if a dispute arose out of the execution of the Agreement or the sale. This cause of action did arise out of the sale of the Property and therefore was contemplated by the Agreement.” Id. at 642, 720 S.E.2d at 489-90. The court of appeals remanded the case to the trial court to determine whether attorney’s fees should be awarded on the unjust enrichment cause of action, based on the provision for attorney’s fees in the real estate contract. Id. at 642, 720 S.E.2d at 490.

Here, by contrast, Defendant’s derivative action did not arise out of the Severance Agreement itself or relate to any subject matter covered by the Severance Agreement. The Severance Agreement related only to Ms. Mattison’s employment-related matters and specifically carved out her rights as a member of the firm and the value of the redemption of her ownership shares in MPS. Tellingly, the proposed order submitted by Plaintiff’s and Third-Party Defendants’ counsel did not base the award of attorney’s fees on a contractual provision, but instead attempted to rely entirely on Rule 11,

SCRCP.

For all of the foregoing reasons, the Court should vacate its ruling on attorney's fees announced in the Form 4 Order and should not make an award of attorney's fees against Defendant in the derivative action.

Respectfully submitted,

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

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

August 24, 2020

Greenville, SC.

## **Exhibit A**

## CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT

THIS CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT (the "Agreement") is made and entered into by and between McMillan Pazdan Smith, LLC, ("MPS"), and Donza Mattison ("Mattison") (collectively "the Parties").

### RECITALS

A. The Parties wish to value Mattison's Units in accordance with the Operating Agreement between the Parties, the Separation Agreement and Release dated December 5, 2017, and the South Carolina Uniform Limited Liability Company Act, S.C. Code Ann. § 33-44-101 et seq.

B. As part of this valuation ("Valuation") MPS will provide confidential and proprietary information to Mattison.

C. Mattison acknowledges the need to maintain the confidentiality of all confidential and proprietary information disclosed by MPS, and agrees to use the information provided by MPS solely for the purpose of the Valuation.

### TERMS

**NOW, THEREFORE**, the parties, intending to be legally bound, hereby agree as follows:

#### 1. Section 1 - Definition of Confidential Information

1.1 For purposes of this Agreement, the term "Confidential Information" includes:

- a. all information used in MPS's business that are not known or otherwise available by proper means through sources outside MPS, and that therefore have value to MPS and provide an actual or potential advantage over competitors, including but not limited to: the information requested in Mattison's attorney request correspondence dated November 19, 2017, August 16, 2018, and August 28, 2018, attached hereto; and any other financial information provided during the Valuation.
- b. all copies, reproductions and extracts of any of the foregoing, whether in machine readable or human readable form, and regardless of the method of copying, reproduction or extraction; and
- c. all documents, letters, memoranda, notes, records, diskettes, tapes, electronic transmissions, other storage media, and any copies thereof, which contain or relate to proprietary information of MPS.

*DMC*  
10/10/18

1.2 Confidential Information does not include information which:

- a. was publicly available at the time of disclosure or subsequently becomes publicly available through no fault of Mattison;
- b. was subsequently disclosed to Mattison by a third party who is under no obligation of confidentiality to MPS; or
- c. is independently developed by Mattison without reliance upon Confidential Information.

2. Section 2 – Restrictions Related to Confidential Information

2.1 Disclosure. Except as otherwise permitted by this Section 2.1, Mattison agrees that all Confidential Information disclosed by MPS will not be used in any way detrimental to MPS, will be kept confidential by Mattison and her representatives (which term includes attorneys, attorneys' staff, accountants, accountants' staff, financial and other advisers, and their staff and any other person to which information is shared for purposes of the Valuation), will not be disclosed by Mattison or her representatives to any third party in any manner whatsoever, and will not be used by Mattison or her representatives for any purpose other than the Valuation. Mattison further agrees to transmit the Confidential Information only to her representatives who need to know such information for the purpose of the Valuation, and to advise all representatives receiving Confidential Information of Mattison's obligations under this Agreement. Representatives agree to execute the attached Acknowledgement prior to receiving Confidential Information.

2.2 Use. Mattison shall not use any of the Confidential Information for any purpose other than in connection with the Valuation.

2.3 Copying. Mattison shall not copy, reproduce or extract any of MPS's Confidential Information for any reason whatsoever, other than as contemplated in this Agreement.

2.4 Return. Upon completion of the Valuation or termination of this Agreement, Mattison shall promptly, upon the request of MPS, deliver to MPS all written materials which comprise MPS's Confidential Information, including all copies. Mattison shall not retain any copies of MPS's Confidential Information unless specifically approved by MPS in writing. Mattison may retain copies of documents which consist of analysis, compilations, studies or other documents prepared by Mattison or her representatives using or containing MPS's Confidential Information (the "Mattison Documents"); however, any Mattison Documents shall be maintained in strict confidence and shall not be disclosed to third parties. Nothing in this Agreement is intended to waive any Party's claims of privilege or protection under the attorney-client privilege or the attorney work product doctrine.

2.5 Degree of Care. Mattison shall exercise the same degree of care with respect to MPS's Confidential Information as she customarily exercises with her own Confidential Information of similar importance.

*DM* 10/10/18

2.6 Term. The restrictions contained in this Section 2 shall continue until the restrictions with respect to particular Confidential Information are no longer applicable for any reason set forth in Section 1.2.

3. Section 3 – Continuing Obligations

Mattison agrees to continue to be bound by the obligations in the Confidentiality and Nonsolicitation Agreement entered September 30, 2009, the Separation Agreement and Release entered December 5, 2017, and all other similar obligations under statutory and common law.

4. Section 4 - Miscellaneous

4.1 Governing Law. The validity, term, performance and enforcement of this Agreement shall be governed and construed in accordance with the laws of the State of South Carolina.

4.2 Survivability. In order to ensure that Confidential Information will not be wrongfully used or disclosed after the termination of the Valuation, each Party understands and agrees that the Parties' obligations under this Agreement shall survive any termination of the Valuation.

4.3 Partial Invalidity. If any provision of this Agreement shall be held invalid, illegal or unenforceable in any respect, such invalidity, illegality or enforceability shall not affect any other provision of this Agreement, and any provision found to be invalid, illegal or unenforceable shall be reformed and construed so that it will be valid, legal and enforceable to the maximum extent permitted by law.

4.4 Waiver and Amendment. No waiver of any right or remedy under this Agreement, and no amendment, change or modification of its terms, or rescission or termination of this Agreement, shall be binding unless it is in writing and is signed by both parties. Nothing in this Agreement shall be interpreted as a waiver of Mattison's statutory rights or remedies under the South Carolina Uniform Limited Liability Company Act, S.C. Code Ann. § 33-44-101 et seq., as a member of MPS; nor shall this Agreement be interpreted to limit either Party's rights to obtain documents or other information in any subsequent litigation between the Parties through discovery as provided under the South Carolina or Federal Rules of Civil Procedure.

4.5 Injunctive Relief and Attorney's Fees. In the event that Mattison or MPS violates any terms of this Agreement, the non-breaching Party shall be entitled to injunctive relief, damages, and all attorney's fees related to enforcing its rights under this Agreement.

4.6 Successors and Assigns. This Agreement shall be binding upon and inure to the benefit of the Parties hereto and their respective heirs, personal representatives, successors and permitted assigns, as the case may be.

*peru*  
10/18/18

The foregoing is established by the following signatures of the Parties.

MPS:  DATE: 10/17/18

TITLE: Coo / Principal

DONZA MATTISON: 

DATE: 10/18/18

WSACTIVE LLP:10085035.1

|                                    |   |                                     |
|------------------------------------|---|-------------------------------------|
| STATE OF SOUTH CAROLINA            | ) |                                     |
|                                    | ) | IN THE COURT OF COMMON PLEAS        |
| COUNTY OF GREENVILLE               | ) | FOR THE THIRTEENTH JUDICIAL CIRCUIT |
| McMillan Pazdan Smith, LLC,        | ) | Case No. 2019-CP-23-00998           |
|                                    | ) | (Business Court–Judge McIntosh)     |
| Plaintiff-Counterclaim             | ) |                                     |
| Defendant,                         | ) |                                     |
|                                    | ) | <b>DEFENDANT’S MOTION TO</b>        |
| vs.                                | ) | <b>ALTER OR AMEND OR FOR</b>        |
|                                    | ) | <b>RECONSIDERATION OF</b>           |
| Donza H. Mattison,                 | ) | <b>SUMMARY JUDGMENT ORDER</b>       |
|                                    | ) |                                     |
| Defendant-Counterclaimant.         | ) |                                     |
| _____                              | ) |                                     |
|                                    | ) |                                     |
| Donza H. Mattison, in a Derivative | ) |                                     |
| Capacity on Behalf of McMillan     | ) |                                     |
| Pazdan Smith, LLC,                 | ) |                                     |
|                                    | ) |                                     |
| Third-Party Plaintiff,             | ) |                                     |
|                                    | ) |                                     |
| vs.                                | ) |                                     |
|                                    | ) |                                     |
| Rondald G. Smith et al.            | ) |                                     |
|                                    | ) |                                     |
| Third-Party Defendants.            | ) |                                     |
| _____                              | ) |                                     |

Defendant, Donza H. Mattison (hereinafter “Mattison”), by and through her undersigned counsel and pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, hereby files this Motion to Alter or Amend Judgment or for Reconsideration of Summary Judgment Order filed on September 30, 2020. As set forth in further detail below, the Court should reconsider its previous ruling and should instead deny Plaintiff’s and Third-Party Defendants’ Motion for Summary Judgment on the Derivative Action set forth in Defendant’s Third-Party Complaint.

A motion for reconsideration pursuant to Rule 59(e), SCRPC, is appropriate to “correct a clear error of law or prevent manifest injustice.” Collison v. International Chem. Workers Union,

34 F.3d 233, 236 (4th Cir. 1994) (applying Fed. R. Civ. P. 59(e), upon which the SC Rule 59(e) is modeled). Motions for reconsideration are completely within the Court's discretion. Sullivan v. Hawker Beechcraft Corp., 397 S.C. 143, 153, 723 S.E.2d 835, 841 (Ct. App. 2012).

With all due respect, the Court's Order granting summary judgment to Plaintiff and Third-Party Defendants on Defendant's Third-Party Derivative Action should be reversed by the Court because the Order contains clear error of law and would result in manifest injustice for the following reasons: (1) the Court has misinterpreted or misconstrued Defendant's counsel's statement that her derivative claims were brought to maximize the value of her ownership interests in the Plaintiff LLC, as evidence that the derivative claims were brought merely as leverage to extort a higher settlement for the buy-out of her units than "fair value"; (2) the Court failed to recognize that Plaintiff and Third-Party Defendants bear the burden of proof under Rule 23(b)(1), SCRCP, to demonstrate that Defendant cannot fairly and adequately represent the interests of similarly situated members in enforcing the rights of the LLC against its self-dealing managers and COO through the asserted Derivative Action; (3) the Court improperly based its ruling largely on the minority members' boilerplate statements about their subjective view of the merits of Defendant's alleged derivative action; yet the Court refused to allow Defendant to conduct sufficient discovery about the merits of Defendant's claims or to question the minority members about crucial elements of Defendant's claims; (4) the Court improperly relied on unsworn statements of minority members that were based entirely on hearsay and subjective beliefs, in finding that every member of the LLC opposed Defendant's derivative action; (5) the Court rejected out of hand Defendant's argument that she could be considered a "class of one" under the Derivative Action because she is the only member of the Plaintiff LLC who is not a current employee of the company and, therefore, is the only person

who could bring such a claim without fear of retaliation; (6) the Court refused to address the intractable conflict of interest that exists in the same law firm's representing three distinct constituencies simultaneously in the Derivative Action: (a) the Plaintiff LLC, (b) the individual Third-Party Defendants, and (c) the minority members of the LLC, including the six who were deposed by Defendant's counsel; (7) in purporting to quote the crucial portion of the Severance Agreement, the Court omitted the key word "mutually" from the provision addressing the valuation of Defendant's ownership interests in the LLC: "The parties agree that the value of Employee's membership units shall be mutually determined in early 2018 following the close of YR2017, with Company providing access to all current and prior year financial reports, tax returns, and other financial information as requested by Employee's Counsel." (Severance Agreement and General Release, at 2, ¶ 2(j)) (emphasized word omitted by Court); (8) in stating that "Mattison has presented no facts, by affidavit or otherwise, to support her allegations against the Third-Party Defendants," (Order at 9), the Court disregarded Defendant's Affidavit filed on May 14, 2020, as well as the fact that Defendant's Amended Answer, Counterclaims, and Third-Party Complaint was actually verified by Defendant, which is the equivalent of an affidavit for purposes of summary judgment; (9) the Court's ruling would preclude Defendant or any other minority member of MPS from holding Third-Party Defendants accountable for their alleged breaches of fiduciary duty, because those claims could not have been brought in Defendant's individual capacity, and the statute of limitations will have run on any possible derivative claims by any other representative of the minority members of MPS; (10) the Court erred in relying on four out-of-state decisions that are easily distinguishable from the facts presented here, and there are no facts in the record to support a finding that Ms. Mattison is a "disgruntled former employee"; in fact, she amicably resolved all of her employment-related disputes

with MPS several months prior to her voluntary resignation as an employee of the firm, leaving only the valuation of her ownership interests in the firm to be determined; and (11) with regard to the “additional sustaining grounds” set forth in the Court’s order, the remedies that Defendant seeks in her compulsory counterclaims are not contrary to her ability to fairly and adequately pursue the derivative action, and Defendant has never sought to divest any members of MPS of their ownership interests; in fact, Defendant has repeatedly offered to sign whatever paperwork would be necessary to ratify the member status of individuals who were purportedly made members of MPS after her separation of employment from the firm.

Defendant will provide additional legal authorities and support for this Motion in a forthcoming Memorandum of Law in Support of this Motion and during any oral argument on this Motion that may be allowed by the Court. In addition, Defendant incorporates by reference the brief and supplemental brief in opposition to Plaintiff’s and Third-Party Defendants’ Motion for Summary Judgment, as well as the Rule 56(f) Affidavit of Defendant’s Counsel previously filed with the Court.

\* \* \*

In summary, the Court should reconsider its prior ruling and should deny Plaintiff's and Third-Party Defendants' Motion for Summary Judgment on Defendant's Third-Party Complaint.

Respectfully submitted,

s/ David E. Rothstein

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

Attorney for Defendant, Donza H. Mattison

October 12, 2020

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/Counter-Defendant,          | ) |                                        |
|                                       | ) |                                        |
| vs.                                   | ) |                                        |
|                                       | ) |                                        |
| Donza H. Mattison,                    | ) |                                        |
|                                       | ) |                                        |
| Defendant/Counterclaimant.            | ) | <b><u>MEMORANDUM IN OPPOSITION</u></b> |
|                                       | ) | <b><u>TO DEFENDANT DONZA H.</u></b>    |
|                                       | ) | <b><u>MATTISON’S MOTION FOR</u></b>    |
|                                       | ) | <b><u>RECONSIDERATION OF</u></b>       |
|                                       | ) | <b><u>SUMMARY JUDGMENT ORDER</u></b>   |
| 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 Third-Party Defendants Ron G. Smith, Joseph M. Pazdan, Brad B. Smith, and Chad C. Cousins (collectively, “Third-Party Defendants”), hereby submit this Memorandum in Opposition to Defendant Donza H. Mattison’s (“Mattison”) Motion for Reconsideration of the Court’s Order granting MPS and the Third-Party Defendants’ Motion for Summary Judgment as to Mattison’s derivative action.<sup>1</sup>

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<sup>1</sup> MPS and the Third-Party Defendants incorporate the arguments made in their Motion for Summary Judgment and supporting memoranda.

Mattison has not and cannot show that the Court erred in granting MPS and the Third-Party Defendants' Motion for Summary Judgment. Instead, Mattison merely re-hashes the same arguments that this Court has already carefully considered and rejected.

### **FACTUAL BACKGROUND**

Mattison is a former employee of MPS, which is a regional architectural and interior design firm. Mattison's employment with MPS ended on February 12, 2018. The parties memorialized Mattison's cessation of employment in a Severance Agreement and General Release ("Severance Agreement") dated December 5, 2017. The Severance Agreement provides that the value of Mattison's membership units in MPS would be determined in early 2018, following the close of fiscal year 2017. Mattison's proper dissociation from MPS was to be handled separately from the Severance Agreement and done in accordance with MPS's September 30, 2015 Operating Agreement ("Operating Agreement"). MPS made an offer to Mattison on August 3, 2018 to purchase her membership units for the per unit price determined by the 2017 valuation of the company. Mattison, however, contested the valuation and demanded a much higher per unit price.

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. MPS further asked the Court to declare that it followed the Operating Agreement's provisions regarding the annual valuation of the company, and therefore that the value of Mattison's membership units should be determined by applying the per unit price from the 2017 valuation.

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 a derivative cause of action against the Third-Party Defendants for breach of fiduciary duty and breach of the Operating

Agreement. Mattison alleged that the Third-Party Defendants breached their fiduciary duties to MPS by receiving excessive compensation, bonuses, and fringe benefits.

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

On December 2, 2019, counsel for MPS and the Third-Party Defendants emailed counsel for Mattison to advise that they had obtained statements from every member of the firm, except Mattison, expressing opposition to the continued pursuit of the derivative action (the "Member Statements"). Every other minority member of MPS stated that they do not join, or in any way support, Mattison's derivative action. Based upon this evidence, counsel for MPS and the Third-Party Defendants requested that Mattison dismiss her derivative action.

Instead, Mattison noticed the depositions of six of MPS's members. The depositions of William Joslin, KJ Jacobs, and Paulette Myers took place on January 17, 2020, January 29, 2020, and February 19, 2020, respectively. Following the completion of these three depositions, MPS and the Third-Party Defendants filed a Motion for Summary Judgment on February 21, 2020. A hearing was held on the Motion for Summary Judgment on May 12, 2020. The Court entered a Form 4 Order on May 15, 2020, holding the Motion for Summary Judgment in abeyance pending the taking of the remaining three minority member depositions.

The depositions of Donnie Love, Cullen Pitts, and Dave Ballard took place on June 17, 2020, June 22, 2020, and July 10, 2020, respectively. Both parties filed supplemental briefs for the Court's consideration on July 31, 2020.

This Court issued a Form 4 Order granting MPS and the Third-Party Defendants' Motion for Summary Judgment on August 4, 2020. The Court issued a formal Order on September 30, 2020, in which the Court found that Mattison does not fairly and adequately represent the interests of the other members of MPS. The Court relied primarily upon the following grounds: (1) every other member of MPS opposes Mattison's derivative action; (2) Mattison brought the derivative action to gain leverage in her dispute regarding the valuation of her membership units; and (3) Mattison seeks relief in the derivative action contrary to the interests of the other members of MPS.

### **SUMMARY OF ARGUMENT**

Mattison filed a Motion for Reconsideration on October 12, 2020, raising the same arguments that have been presented to and rejected by the Court on numerous instances. Since the filing of Mattison's derivative action, MPS has maintained that she is not a proper derivative plaintiff because she does not fairly and adequately represent the other members of MPS. MPS first raised this argument in a Motion to Dismiss the derivative action on April 1, 2019, which was heard before the Court on May 16, 2019. Over the next year and half, Mattison was given opportunity after opportunity to amend her derivative complaint, take extensive depositions, engage in substantial written discovery and document production, and gather any evidence and legal support for her derivative claims.

Despite being given wide latitude to persuade the Court of the merits of her derivative action, Mattison was unable to put forth any evidence or case law supporting her derivative claims. To the contrary, the relevant case law and the uncontroverted evidence in this case support the

Court's dismissal of Mattison's derivative action. Mattison's disagreement with the Court's ruling does not entitle her to continue litigating the same underlying facts, and to cause MPS to spend significant time, effort, and resources defending this meritless derivative action.

### **LEGAL STANDARD**

Rule 59(e), SCRCP allows a court to alter or amend a judgment upon a party's timely motion. Under South Carolina law, a motion to reconsider is appropriate in two basic situations. First, "[a] party *may* wish to file such a motion when [he] believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). Second, "[a] party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." *Id.* A party's dissatisfaction with the outcome of the underlying litigation and the instant action is not grounds for relief under Rule 59. *Id.*

### **ARGUMENT**

#### **I. Mattison's Motion for Reconsideration is Improper Under Rule 59.**

As an initial matter, Mattison's Motion for Reconsideration does not identify any point of law or fact that the Court misunderstood, did not fully consider, or failed to rule upon in granting MPS and the Third-Party Defendants' Motion for Summary Judgment. Rather, Mattison's Motion merely asks the Court to reconsider its prior ruling in this case because she disagrees with the conclusions reached by the Court. Mattison's dissatisfaction with the outcome of her derivative action is not grounds for relief under Rule 59. *See Elam*, 361 S.C. at 24, 602 S.E.2d at 780. Thus, Mattison's Motion for Reconsideration must be denied.

## **II. The Court Properly Granted MPS and the Third-Party Defendants' Motion for Summary Judgment.**

The Court properly granted MPS and the Third-Party Defendants' Motion for Summary Judgment based upon the factors set forth in *Davis v. Comed, Inc.*, 619 F.2d 588, 593-94 (6th Cir. 1980), for determining whether a derivative plaintiff meets Rule 23(b)(1)'s requirement of fair and adequate representation. *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 represent the interests of other shareholders).

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

One factor used to determine whether the representational requirement has been met is the degree of support the derivative plaintiff receives from the shareholders or members he or she purports to represent. *See Davis*, 619 F.2d at 593-94. Here, every member of MPS opposes Mattison's derivative action, and 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 action; and (4) they do not join, or in any way support, Mattison's derivative action.

Mattison argues in her Motion for Reconsideration that the Court improperly relied upon the Member Statements because they are "boilerplate," contain a "subjective view of the merits of Defendant's derivative action," and are "based entirely on hearsay and subjective beliefs." Despite being allowed to take six depositions of minority members for thirty (30) hours or so, Mattison asserts that "the Court refused to allow Defendant to conduct sufficient discovery about the merits of Defendant's claims."

The Court gave Mattison vast leeway in discovery to determine the circumstances surrounding the signing of the Member Statements. Following receipt of the Member Statements, Mattison deposed six minority members of her choosing. During those depositions, the minority members affirmed under oath their Member Statements, and their opposition to Mattison's derivative action. Mattison cannot cite any testimony from these lengthy depositions which supports her purported derivative action. The Court reviewed the transcripts from these depositions and, based upon the testimony given by the six members, determined that Mattison was not a fair and adequate representative of the other members of MPS.

Mattison's assertion that she was not given a full opportunity for discovery on the representational requirement of Rule 23(b)(1) is inexplicable. The Court allowed Mattison every opportunity to conduct discovery on this issue, but Mattison was unable to find any evidence to support her contention that she could serve as a proper representative of the other members of MPS. The Court has reviewed the Member Statements and deposition transcripts, which reveal that Mattison has received no support from the other members of MPS whom she purports to represent in the derivative action. Her own subjective belief that the Third-Party Defendants are overpaid, which sums up the entirety of her evidence, is insufficient to state a valid derivative claim. Therefore, the Court correctly found that Mattison cannot meet the requirements of Rule 23(b)(1), and Mattison's Motion for Reconsideration should be denied.

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

In determining whether a derivative plaintiff is a fair and adequate representative of the other members or shareholders, another factor courts frequently consider is whether the derivative plaintiff is using the lawsuit as a means of gaining leverage in other pending litigation. If the answer is "yes," then the derivative action will be dismissed. *See Davis*, 619 F.2d at 593-94; *see*

*also Palmer v. U.S. Sav. Bank of Am.*, 131 N.H. 433, 441, 553 A.2d 781, 786 (1989) (stating that “[a] number of courts have held that plaintiffs who had large personal suits against the company which they purported to represent were not adequate representatives because of the likelihood that they would use the derivative suit as leverage in settling the personal suit”).

Mattison asserts in her Motion for Reconsideration that the Court has misinterpreted or misconstrued Defendant’s counsel’s statement that her derivative claims were brought for the purpose of maximizing the value of her ownership interests in the Plaintiff LLC. The Court did not misinterpret or misconstrue the statements that Mattison’s counsel made on the record during the hearing held on May 12, 2020:

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

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

...

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

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

...

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

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

These unambiguous statements confirm that Mattison’s motivation in bringing the derivative action was to gain a higher value for her equity interest. These statements, combined with the January 14, 2019 letter sent by Mattison’s counsel to MPS threatening to bring a derivative action if the parties were unable to resolve the valuation of her membership units, confirm that Mattison pursued this derivative action for her own interests, and not to vindicate the interests of

the other members of MPS. Derivative lawsuits brought for this purpose are improper, and get dismissed.

Case law on this point is clear. Courts across the country have routinely dismissed derivative actions on the basis that the derivative plaintiff is using the lawsuit as a means of gaining leverage in other pending litigation. *See Zarowitz v. BankAmerica Corp.*, 866 F.2d 1164, 1166 (9th Cir. 1989) (holding that plaintiff was not a proper derivative plaintiff because his interest in the derivative suit was “dwarfed by his interest in pursuing his litigation with the Bank”); *Smith v. Ayres*, 977 F.2d 946, 949 (5th Cir. 1992) (finding that plaintiff’s vindictiveness toward the defendant and use of the derivative action as leverage in other litigation disqualified him from serving as a fair and adequate representative of the other shareholders); *Recchion v. Kirby*, 637 F. Supp. 1309, 1311 (W.D. Pa. 1986); *Khanna v. McMinn*, No. Civ. A. 20545, 2006 WL 1388744, at \*1 (Del. Ch. May 9, 2006). The reality is that a disgruntled ex-employee has improperly used a derivative action to try to inflict as much harm as she can on MPS. This conduct should not be tolerated by this Court.

### **CONCLUSION**

Mattison has not demonstrated that the Court erred in granting MPS and the Third-Party Defendants’ Motion for Summary Judgment. The points raised in Mattison’s Motion for Reconsideration have been fully considered by the Court. Therefore, MPS and the Third-Party Defendants respectfully request that Mattison’s Motion for Reconsideration be denied.

*(signature page follows)*

Respectfully submitted,

By: *s/ Samuel W. Outten*

Samuel W. Outten

SC Bar No. 4295

E-Mail: sam.outten@nelsonmullins.com

Katie E. Towery

SC Bar No. 103219

E-Mail: katie.towery@nelsonmullins.com

NELSON MULLINS RILEY & SCARBOROUGH LLP

2 W. Washington Street / Suite 400

Post Office Box 10084 (29603-0084)

Greenville, SC 29601

(864) 373-2300

Thomas H. Keim, Jr.

SC Bar No. 10244

E-Mail: tkeim@fordharrison.com

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  
October 22, 2020

|                                    |   |                                     |
|------------------------------------|---|-------------------------------------|
| 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,                         | ) | <b>MEMORANDUM OF LAW IN</b>         |
|                                    | ) | <b>SUPPORT OF DEFENDANT’S</b>       |
| vs.                                | ) | <b>MOTION TO ALTER OR AMEND OR</b>  |
|                                    | ) | <b>FOR RECONSIDERATION OF</b>       |
| Donza H. Mattison,                 | ) | <b>SUMMARY JUDGMENT ORDER</b>       |
|                                    | ) |                                     |
| Defendant-Counterclaimant.         | ) |                                     |
|                                    | ) |                                     |
| Donza H. Mattison, in a Derivative | ) |                                     |
| Capacity on Behalf of McMillan     | ) |                                     |
| Pazdan Smith, LLC,                 | ) |                                     |
|                                    | ) |                                     |
| Third-Party Plaintiff,             | ) |                                     |
|                                    | ) |                                     |
| vs.                                | ) |                                     |
|                                    | ) |                                     |
| Rondald G. Smith et al.            | ) |                                     |
|                                    | ) |                                     |
| Third-Party Defendants.            | ) |                                     |
|                                    | ) |                                     |

Defendant, Donza H. Mattison (hereinafter “Mattison”), by and through her undersigned counsel, hereby files this Memorandum of Law in Support of Defendant’s Motion to Alter or Amend Judgment or for Reconsideration of Summary Judgment Order. With all due respect, the Court should reconsider its previous ruling granting summary judgment in favor of Plaintiff and Third-Party Defendants, and should allow this case to proceed to full discovery and trial on Defendant’s derivative action.

Defendant acknowledges that a motion for reconsideration pursuant to Rule 59(e), SCRCF, requests an extraordinary remedy and that circuit judges are often hesitant to revisit their decisions.

As the South Carolina Supreme Court stated in Elam v. South Carolina Dep't of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004), “There is nothing inherently unfair in allowing a party one final chance not only to call the court’s attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument.” Id. at 22, 602 S.E.2d at 779. As the Elam court stated, “A party may wish to file [a Rule 59(e)] motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule upon it.” Id. at 24, 602 S.E.2d at 780 (emphasis in original). The federal Fourth Circuit Court of Appeals has similarly recognized that a motion for reconsideration pursuant to Rule 59(e) is appropriate to “correct a clear error of law or prevent manifest injustice.” Collison v. International Chem. Workers Union, 34 F.3d 233, 236 (4th Cir. 1994) (applying Fed. R. Civ. P. 59(e), upon which the SC Rule 59(e) is modeled).

Defendant’s Motion to Alter or Amend or for Reconsideration of Summary Judgment Order raises eleven separate grounds, which are addressed in further detail below.

First, the Court has misinterpreted or misconstrued Defendant’s counsel’s statement that her derivative claims were brought to maximize the value of her ownership interests in the Plaintiff LLC, as evidence that the derivative claims were brought merely as leverage to extort a higher settlement for the buy-out of her units than “fair value.” The exchange between Defendant’s counsel and the Court during the summary judgment hearing on May 12, 2020, which is quoted in the Court’s Order, is not an admission of type of improper motive on the part of Defendant. Obviously, the goal of Defendant’s position in this lawsuit is to obtain more for her ownership interests than Plaintiff offered her prior to the firm’s filing of this lawsuit against her. As Defendant’s counsel has repeatedly tried to explain, the derivative action seeks to restore the proceeds of Third-Party

Defendants' self-dealing transactions back into the coffers of the firm before the final valuation of her shares is calculated. When Defendant's counsel stated, "there's nothing wrong with that," in referring to her "ultimate goal [of] increas[ing] what her buyout is," (Order, at 10) (quoting Hearing Tr., at 15, ll. 6-10, at 17, ll. 10-17, and at 20, ll. 23-24)), that was simply not an admission of an improper motivation in bringing the derivative claim. Every derivative action lawsuit, by definition, seeks to enhance the value of the corporation as a whole. Neither Ms. Mattison nor her counsel has ever offered to drop her derivative action claims in exchange for an above-market payment for her shares. All she is seeking, both through the derivative action and her counterclaims, is to obtain the true fair value of her shares. As Ms. Mattison plainly stated in her Affidavit, which was filed on May 14, 2020, "I was not seeking any additional value or 'premium' on the value of my shares to 'purchase my silence' with respect to the possible derivative shareholder claim." (Mattison Aff., at 5, ¶ 15).

Similarly, the letter of January 14, 2019, from Defendant's counsel to Plaintiff's counsel prior to the mediation in this case is not evidence of any type of improper motivation by Defendant in threatening a derivative action. As the Court well knows, a pre-requisite to bringing a derivative action claim is making a pre-litigation demand on the corporation itself. S.C. Code Ann. §§ 33-44-1101 & -1103; Rule 23(b)(1), SCRCPP. Defendant's effort to comply with that pre-requisite is not evidence of some improper motivation on her part when she later follows through on the demand.

Second, the Court failed to recognize that Plaintiff and Third-Party Defendants bear the burden of proof under Rule 23(b)(1), SCRCPP, to demonstrate that Defendant cannot fairly and adequately represent the interests of similarly situated members in enforcing the rights of the LLC

against its self-dealing managers and COO through the asserted Derivative Action. Although no South Carolina appellate decisions appear to have expressly adopted this holding, Defendant's previous brief contains a string citation to a half-dozen cases from around the country, plus a leading legal encyclopedia, recognizing that the party opposing a derivative action bears the burden of proving that the derivative-action plaintiff is an unfair and inadequate representative of the minority shareholders whose interests she is seeking to advance. Plaintiff and Third-Party Defendants have simply not met their burden of proof on this issue, especially on a motion for summary judgment, when all of the facts and inference in the record must be taken in the light most favorable to Ms. Mattison.

Plaintiff and Third-Party Defendants appear to advocate for a flipping of the burden of proof on this issue when that argue that "the Court correctly found that Mattison cannot meet the requirements of Rule 23(b)(1)." (Pl.'s Br., at 7) (emphasis added). This is not Ms. Mattison's burden to meet; Plaintiff and Third-Party Defendants, in opposing the derivative action, must show that she "does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association." Rule 23(b)(1), SCRCF.

Third, the Court improperly based its ruling largely on the minority members' boilerplate statements about their subjective view of the merits of Defendant's alleged derivative action; yet the Court refused to allow Defendant to conduct sufficient discovery about the merits of Defendant's claims or to question the minority members about crucial elements of Defendant's claims. The Court unfairly tied at least one arm behind Ms. Mattison's back in this case by imposing strict limitations on discovery, which prohibited Ms. Mattison from thoroughly exploring the merits of her claims in the derivative action or questioning other minority members about the merits of those

claims. Ms. Mattison's Third-Party Complaint is not based on "[h]er own subjective belief that the Third-Party Defendants are overpaid," as Plaintiff and Third-Party Defendants falsely and offensively assert in their latest filing. (Pl.'s Br., at 7). If Plaintiff's counsel have been telling the other minority members of MPS that this is "the entirety of her evidence," it is no wonder why all of the minority members signed the flimsy statements that Third-Party Defendant Cousins asked them to sign. Ms. Mattison's derivative action is based on financial information that she alone (among the minority members) has been provided access to following the separation of her employment, which information shows a systematic practice of self-dealing by Third-Party Defendants in setting their own salary, bonuses, and benefits, as well as approving related-party transactions like the lease of the Spartanburg Office that are objectively unreasonable. Perhaps most concerning is the extent to which Third-Party Defendants have concealed their self-dealing by not being transparent with the minority members or submitting their compensation to a vote of the requisite number of disinterested members, as required by the MPS Operating Agreement.

For Plaintiff and Third-Party Defendants now to say that Ms. Mattison's "subjective belief" about the Third-Party Defendants' compensation "sums up the entirety of her evidence" (Pl.'s Br., at 7), is particularly galling because Plaintiff and Third-Party Defendants have prevented Ms. Mattison from conducting sufficient discovery on the underlying merits of this case. Plaintiff's counsel instructed every one of the six minority members not to answer multiple questions during their depositions; Plaintiff's counsel moved to quash every third-party subpoena issued by Defendant in this case; Plaintiff has filed at least a half-dozen motions for protective order; and Plaintiff refused to make the Spartanburg Office available for inspection by Defendant's expert in commercial real estate appraisal. Plaintiff's and Third-Party Defendants' obvious and extensive efforts to stone-wall

Defendant's attempted discovery in this case begs the question: if Third-Party Defendants have nothing to hide from the minority members, why are they so adamant about keeping everything confidential? Plaintiff's counsel even recently took the extraordinary step of requiring Defendant and her counsel to certify that they have destroyed the affidavit and attachments submitted by Plaintiff's counsel in support of their petition for attorneys' fees and costs in defending against the derivative action since December 2019. The undersigned cannot imagine any reason for such an urgent request other than to keep such information secret from the minority members of MPS.

Fourth, the Court improperly relied on unsworn statements of minority members that were based entirely on hearsay and subjective beliefs, in finding that every member of the LLC opposed Defendant's derivative action. A careful review of the member statements reveals that they confirm only what the minority members do not know about the merits of Ms. Mattison's allegations. The member statements actually raise more questions than they answer, as Defendant demonstrated in the six limited depositions that were taken. The summary statement by each minority member that "I have reviewed and have been provided adequate information about the allegations of Mattison's derivative action against the Third-Party Defendants" (Member Statements, at ¶ 6) begs at least the following questions: who provided the information? what information was provided? and how did each member determine such information was "adequate"? All six of the minority members who were deposed confirmed that the information in question was provided solely by Third-Party Defendants or Plaintiff's counsel and that they only reviewed Ms. Mattison's formal objection to the vote for the new MPS Board and Third-Party Defendant Cousins's email response from November 2019. Every member who was deposed stated that they had not even read Ms. Mattison's Third-Party Complaint at the time they signed their members statements.

Each member statement also states, “I know of no facts which support Mattison’s derivative action against the Third-Party Defendants.” (Member Statements, ¶ 8). This statement is meaningless: just because the minority members are not aware of facts supporting Ms. Mattison’s allegations does not mean the allegations are untrue; it simply means that Third-Party Defendants have succeeded in concealing the true facts from the other members of the firm. Ms. Mattison only became privy to the financial information of the firm after her departure from the firm and pursuant to an express provision in her Severance Agreement that required Plaintiff to turn over such information to Defendant’s counsel. Accordingly, she is uniquely positioned among the minority members of the firm to pursue the derivative action.

The preliminary “fairly and adequately represent” issue should not delve too deeply into the merits of the case, but should focus on Ms. Mattison’s ability and willingness to vigorously pursue the derivative claims. Like other forms of representative actions under Rule 23, the crucial concern the court must examine in a derivative action is fairness to the non-party individuals whose interests might be conclusively determined in the underlying suit based on principles of res judicata or collateral estoppel, without their direct participation in the case as a party. Every minority member who testified confirmed that Ms. Mattison is a conscientious, outspoken, and thorough person, who has never given any of them a reason to question her integrity or truthfulness. Defendant is a fair and adequate representative of the minority members, regardless of Third-Party Defendants’ objections.

Fifth, the Court rejected out of hand Defendant’s argument that she could be considered a “class of one” under the derivative action because she is the only member of the Plaintiff LLC who is not a current employee of the company and, therefore, is the only person who could bring such a

claim without fear of job-related retaliation. Not only did Ms. Mattison have substantially greater access to the firm's financial records than other minority members, but also she is no longer dependent on the discretion of the Third-Party Defendants for her livelihood or for the progression of her career as an architect. Every other minority member of MPS is "under the thumb" of the Third-Party Defendants, who had been given the power to make conclusive decisions about firing employees of the firm or to make decisions regarding the compensation and bonuses of the members of the firm. This inherently coercive situation demonstrates that Ms. Mattison is not only a fair and adequate representative of the interests of the firm, she is the only minority member who could realistically be expected to bring these allegations to light and to hold the Third-Party Defendants accountable for their years of self-dealing.

Because of Ms. Mattison's current status as only an investor in the firm (not an employee/investor like all other minority members), she does not have the same conflicts that they would have in pursuing a derivative action. The annual salaries, bonuses, and benefits that each of the minority members currently receives far surpasses the value of their membership shares as investors. It is only natural for the other minority members to want to protect their status as employees to a greater degree than their status as investors. Because of Ms. Mattison's unique position, her allegiance is solely to the firm as an entity, not to the company's managing members or Board as her supervisor.

During the oral argument on Plaintiff's and Third-Party Defendants' Motion for Summary Judgment, when Defendant's counsel tried to raise the "class of one" argument that many courts around the country have recognized and adopted in derivative actions, the Court summarily dismissed it: "I don't buy that argument, but you can try it. And I thought it was very clever, but I

don't buy the fact that she's the only similarly situated being the nonemployee shareholder. I don't buy that. Okay." (Hearing Tr., at 12, ll. 7-11). The statute and Rule 23(b)(1) specifically contemplate that a sole shareholder/member can bring an derivative action without the express support of other members of the corporation/LLC. See S.C. Code Ann. § 33-44-1101 ("A member [not two or more members] of a limited liability company may maintain an action in the right of the company . . .") (emphasis added); Rule 23(b)(1), SCRCF ("In a derivative action brought by one or more shareholders or members . . .") (emphasis added). Although degree of support from other members may be one of the factors set forth by the Sixth Circuit in the case of Davis v. Comed, Inc., 619 F.2d 588, 593-94 (6th Cir. 1980), it is not the only factor, much less a dispositive factor in the "fair and adequate" analysis. The Davis case enumerated eight factors on this issue, most of which actually favor Ms. Mattison's serving as a proper derivative action plaintiff in this case.

Sixth, the Court refused to address the intractable conflict of interest that exists in the same law firms' representing three distinct constituencies simultaneously in the Derivative Action: (a) the Plaintiff LLC, (b) the individual Third-Party Defendants, and (c) the minority members of the LLC, including the six who were deposed by Defendant's counsel. The Court's decision to hold Defendant's Motion to Disqualify Counsel in abeyance pending a decision on the preliminary issue of whether Ms. Mattison could fairly and adequately represent the interests of similarly situated minority members in enforcing the rights of the LLC allowed Third-Party Defendants (with the aid of Plaintiff's counsel) to exploit the intractable conflict of interest to obtain the Member Statements and effectively to control the deposition testimony of the six minority members. Perhaps the most egregious example is Third-Party Defendant Cousins's gross misrepresentation that the firm had hired attorney Bill Higgins as an "independent counsel" to advise the minority members about the

derivative action. The Court will recall that Mr. Higgins was actually hired by the Nelson Mullins firm to submit an expert affidavit opining that there was no conflict of interest between or among Third-Party Defendants, MPS, and the minority members of MPS arising out of the allegations in Ms. Mattison's derivative action lawsuit. For Plaintiff's counsel to meet with each of the minority members to prepare them for depositions and then to ask the same leading, self-serving questions at the conclusion of each deposition would be akin to defendant's counsel in a class action lawsuit being allowed to communicate directly with the members of the putative class. Even if no direct threat of retaliation or reprisal was ever made by Third-Party Defendants or their counsel, the inherent coercion that was present in this situation cannot be ignored or marginalized.

Seventh, in purporting to quote the crucial portion of the Severance Agreement, the Court omitted the key word "mutually" from the provision addressing the valuation of Defendant's ownership interests in the LLC: "The parties agree that the value of Employee's membership units shall be mutually determined in early 2018 following the close of YR2017, with Company providing access to all current and prior year financial reports, tax returns, and other financial information as requested by Employee's Counsel." (Severance Agreement and General Release, at 2, ¶ 2(j)) (emphasized word omitted by Court). This provision regarding the valuation of Ms. Mattison's ownership interests is not a part of the 2015 Amended and Restated Operating Agreement of MPS that Ms. Mattison refused to sign. The Severance Agreement is very clear about how the valuation was supposed to proceed: Ms. Mattison and her counsel were supposed to be given all requested financial information, after which the parties were supposed to try to get together to "mutually" determine the value of her shares. The first step in this process never occurred: Ms. Mattison and her counsel were not given all of the financial information they requested. Instead, the

COO of MPS, Third-Party Defendant Cousins, rushed out and hired HDH Advisors to perform a valuation in January or February 2018, at least five or six months earlier than they had ever done for MPS before in the regular course of business, and the HDH valuation was forced upon Ms. Mattison as the conclusive value of her shares. The omission of the word “mutually” from the proposed order submitted by Plaintiff’s counsel to the Court, which the Court ultimately signed, is misleading and conflates the “valuation” provision of the Severance Agreement with the “Proper Dissociation” provision. The “Factual and Procedural Background” portion of the Order makes it appear that MPS’s retention of HDH Advisors to conduct the valuation was a regular, anticipated step in the valuation process, which it plainly was not. Although Defendant agreed in the Severance Agreement that her “Proper Dissociation” from the firm would be governed by the September 30, 2015 Operating Agreement, the valuation provision of the Severance Agreement is materially different from the valuation provision in the purported Amended and Restated Operating Agreement from September 30, 2015. The clear intent of the Severance Agreement was that Ms. Mattison would be given all of the financial information she requested, then the parties would try to “mutually determine” the value of her shares. This is essentially the procedure from the original MPS Operating Agreement and the provision that was explained to Ms. Mattison in the memorandum presented to her initially when the firm tried to force her resignation in November 2017. The Court should inquire into the misquoting of this crucial part of the Severance Agreement and should reconsider its summary judgment ruling.

Eighth, in stating that “Mattison has presented no facts, by affidavit or otherwise, to support her allegations against the Third-Party Defendants,” (Order at 9), the Court disregarded Defendant’s Affidavit filed on May 14, 2020, as well as the fact that Defendant’s Amended Answer,

Counterclaims, and Third-Party Complaint was actually verified by Defendant, which is the equivalent of an affidavit for purposes of summary judgment. Again, the procedural posture of this case is on a motion for summary judgment filed by Plaintiff and Third-Party Defendants before the close of discovery. Ms. Mattison's Verified, Amended Answer, Counterclaims, and Third-Party Complaint contains very detailed allegations about the underlying self-dealing transactions engaged in by Third-Party Defendants. (Verified, Amended Answer, Counterclaims, and Third-Party Complaint, at 7-25, ¶¶ 35-124). All of these allegations must be taken as true on Plaintiff's and Third-Party Defendants' Motion for Summary Judgment. Furthermore, Ms. Mattison submitted a Supplemental Affidavit on May 14, 2020, which contains additional sworn testimony about other facts, which again must be accepted as true by the Court. Ms. Mattison's Affidavit confirms that she can fairly and adequately represent the interests of similarly situated minority members in enforcing the rights of MPS against Third-Party Defendants: "In bringing this Derivative Action, I understand that I have a fiduciary duty to act in the interests of the firm and similarly situated minority members. I have conscientiously and diligently attempted to carry out my fiduciary obligations in this case by doing independent research on derivative actions and by personally attending every deposition and hearing in this case thus far." (Mattison Aff., at 7, ¶ 23). For the Court to find that "Mattison has present no facts, by affidavit or otherwise, to support her allegations against the Third-Party Defendants," (Order at 9), is demonstrably wrong, especially on a motion for summary judgment. The subjective "belief" expressed by the minority members who were deposed that the allegations in Ms. Mattison's derivative action are false, is simply not a proper basis for summary judgment against her derivative action.

Ninth, the Court's ruling would preclude Defendant or any other minority member of MPS

from holding Third-Party Defendants accountable for their alleged breaches of fiduciary duty, because those claims could not have been brought in Defendant's individual capacity, and the statute of limitations will have run on any possible derivative claims by any other representative of the minority members of MPS. The Court's ruling on summary judgment would preclude any remedy to Ms. Mattison for the self-dealing transactions at issue in her derivative action. As stated in Defendant's Supplemental Memorandum of Law in Opposition to Plaintiff's and Third-Party Defendants' Motion for Summary Judgment, Ms. Mattison could not have brought this action in her individual capacity, because the claims at issue belong to the company, and the alleged wrong-doing only affects her interests as a shareholder/member of the company. Accordingly, a derivative action is the only proper mechanism for her to obtain the relief she seeks. No other member is apparently willing or able to bring this claim, and the statute of limitations on all of those claims is about to expire. Ms. Mattison's Derivative Action is the only way that Third-Party Defendants could possibly be held accountable for their breaches of fiduciary duty. The Court should not dismiss these claims on what amounts to a procedural defect based largely on an incomplete view of the merits of her allegations.

Tenth, the Court erred in relying on four out-of-state decisions that are easily distinguishable from the facts presented here, and there are no facts in the record to support a finding that Ms. Mattison is a "disgruntled former employee"; in fact, she amicably resolved all of her employment-related disputes with MPS several months prior to her voluntary resignation as an employee of the firm, leaving only the valuation of her ownership interests in the firm to be determined. The four cases cited by the Court's Order as authority for the proposition that it is improper for an individual to bring a derivative action to gain leverage in other pending litigation are easily distinguishable from

the situation here. The case of Zarowitz v. BankAmerica Corp., 866 F.2d 1164 (9th Cir. 1989), was an appeal from an approval of a settlement in a derivative action case. The intervenor-appellant in that case was the sole shareholder who objected to the settlement, primarily because the settlement would have had preclusive effect on his pending wrongful termination case against the bank. In dicta, the Court stated that the intervenor would not have been qualified under Fed. R. Civ. P. 23.1 from bringing a derivative action against the bank because of his obvious conflict of interest. Id. at 1166. The court noted that the appeal “borders on the frivolous.” Id. The Zarowitz case offers nothing of value in the analysis of this case.

Similarly, the case of Smith v. Ayers, 977 F.2d 946 (5th Cir. 1992), is not supportive authority for the Court’s decision here. In Smith, the purported derivative action plaintiff retained one share out of 10 million shares of the company, solely so to try to establish standing in a securities fraud case. The Smith court rejected the “class of one” theory in that case, stating, “the trial court should beware allowing a derivative suit to proceed where the ‘representative could conceivably use the derivative action as “leverage” in other litigation.’” Id. at 949 (quoting Blum v. Morgan Guar. Trust Co., 539 F.2d 1388, 1390 (5th Cir. 1976)).

The case of Recchion v. Westinghouse Elec. Corp., 637 F. Supp. 1309 (W.D. Pa. 1986), is also inapplicable to the situation here. In Recchion, the plaintiff was a former employee in Westinghouse’s accounting department who had been asked to resign from the company in April 1980 for improperly approving excessive expenditures of company funds. The plaintiff purchased one share of Westinghouse in April 1983 (out of more than 174 million outstanding shares), after he and his wife had already brought suit against Westinghouse for wrongful termination in September 1982. The plaintiff in Recchion bought his one share for the sole purpose of bringing a

derivative action lawsuit. Id. at 1312. Not surprisingly, the court had no trouble in dismissing the case after a specific hearing about the plaintiff's adequacy as a representative on the derivative action.

The unpublished case of Khanna v. McMinn, No. Civ. A. 20545-NC, 2006 WL 1388744 (Del. Ch. Ct. May 9, 2006), also offers no support for the Court's decision in this case. The Khanna case was brought as a derivative action by the company's former general counsel and executive vice president, who had been terminated amidst charges of sexual impropriety. The court disqualified Mr. Khanna from serving as a derivative action plaintiff for two reasons: (1) he was ethically disqualified from bringing suit relating to issues that were substantially related to his prior representation of the corporation as its general counsel; id. at \* 41; and (2) "a substantial likelihood exists that the representative action is 'not being maintained for the benefit of the shareholders.'" Id. at \* 43. The court noted that the plaintiff's "employment dispute with [the defendant company] has impaired [his] capacity to vindicate shareholders' best interests." Id.

Here, there is no evidence to support the Court's finding that Ms. Mattison is a "disgruntled" former employee of MPS who is "pursuing this derivative action for her own interests, and not to vindicate the interests of other members of MPS." (Order, at 14). As Ms. Mattison testified in her Affidavit, she does not "harbor any animosity or ill will towards MPS or any of the minority shareholders of the firm for how [she] was treated in being forced out of the firm." (Mattison Aff., at 6, ¶ 18). As she pointed out, she amicably resolved any employment-related disputes on terms that she believes to be "fair and equitable." (Id.).

There is no "other litigation" pending between Defendant and Plaintiff that might affect or compromise the vigor with which she pursues the derivative action. Both the derivative action and

the underlying counterclaims she has asserted in the original action have consistent objectives: to achieve a true fair valuation of her shares in the company. These goals are not antagonistic with any of the minority members, who would benefit substantially if Ms. Mattison is successful in her derivative action. Only Third-Party Defendants, who have taken out of the company more than they rightfully should have for years, would have conflicting interests with Defendant and the other minority members.

There is absolutely nothing in the record to support Plaintiff's and Third-Party Defendants' spurious allegation in their latest brief that "The reality is that a disgruntled ex-employee has improperly used a derivative action to try to inflict as much harm as she can on MPS." (Pl.'s Br., at 9). Ms. Mattison's interests are aligned with all other minority members' interests in seeing the firm succeed, be profitable, and grow in value. Her derivative claims are not at cross purposes with those goals; instead, her intent is to address prior breaches of fiduciary duties by Third-Party Defendants such that the firm can be made whole, and to discourage that type of abuse in the future.

Eleventh, and finally, with regard to the "additional sustaining grounds" set forth in the Court's order, the remedies that Defendant seeks in her compulsory counterclaims are not contrary to her ability to fairly and adequately pursue the derivative action, and Defendant has never sought to divest any members of MPS of their ownership interests; in fact, Defendant has repeatedly offered to sign whatever paperwork would be necessary to ratify the member status of individuals who were purportedly made members of MPS after her separation of employment from the firm.

The Court uses an odd phrase—"additional sustaining ground"—in its summary judgment order. (Order, at 14). This phrase is usually employed by an appellate court as a reason to sustain a lower court's ruling other than the ground articulated by the lower court. In any event, the Court

states that Defendant “is trying to undue agreements, resolutions, and transactions that every other member voted on and supported. Her dissatisfaction with how the other members believe the company should be run is not a proper basis for a derivative suit.” (Order, at 14). There is absolutely nothing in the record to support these “additional sustaining grounds.”

As Ms. Mattison clearly stated in her Affidavit of May 14, 2020, “My intention in filing the Counterclaims against MPS is not to strip any current shareholder or members of MPS of their partnership status. Although my research shows that Section 33-44-404(c)(7) requires unanimous consent of all members of an LLC to admit new members, **I have offered to sign whatever documents would be necessary to ratify the admission of any current members of MPS.**” (Mattison Aff., at 7-8, ¶ 26) (emphasis in original). Ms. Mattison brought her Counterclaims against MPS to “ensure that MPS follows its original Operating Agreement,” which plainly requires that any amendments to the operating agreement that affect the financial interests of a member must be passed by unanimous vote.

For all of the foregoing reasons, and for the reasons previously set forth in Defendant’s prior summary judgment briefs, the Court should reconsider its ruling on summary judgment and should enter a new order denying Plaintiff’s and Third-Party Defendants’ Motion for Summary Judgment as to Defendant’s Derivative Action.

\* \* \*

Respectfully submitted,

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

Attorney for Defendant, Donza H. Mattison

October 23, 2020

Greenville, SC.

# **McMillan Pazdan Smith, LLC**

(a South Carolina limited liability company)

## **OPERATING AGREEMENT**

**September 25, 2009**

### **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 OPERATING AGREEMENT. THE UNITS WILL NOT BE TRANSFERRED OF RECORD EXCEPT IN COMPLIANCE WITH SUCH LAWS AND THIS OPERATING AGREEMENT. PURCHASERS OF THE UNITS WILL BE REQUIRED TO BEAR THE RISK OF THEIR INVESTMENT FOR AN INDEFINITE PERIOD OF TIME.

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#### SCHEDULE A – MEMBER INFORMATION

**OPERATING AGREEMENT  
OF  
MCMILLAN PAZDAN SMITH, LLC**

THIS 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 25<sup>th</sup> day of September, 2009, by and among the undersigned parties.

W I T N E S S E T H:

WHEREAS, the parties hereto desire to form a limited liability company under South Carolina law for the limited purposes hereinafter set forth.

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 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 in accordance with the procedure set forth in this paragraph. 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 seventy-five percent (75%) of all 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 300 E. McBee Avenue, Suite 500, 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;
- (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 Property and business;

(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.

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) Tax Distributions. First, to the extent the Company has Available Cash and the Company agrees to make a Distribution pursuant to this SECTION 8.1(a)(i), 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 net taxable income allocated to such Member for the fiscal year then ended (on Schedule K-1), 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. Distributions made pursuant to this SECTION 8.1(a)(i) shall be deemed to constitute an advance (without interest) against any Distributions provided for in SECTION 8.1(a)(ii).

(ii) Other Distributions of Available Cash. Second, after the Distributions described in SECTION 8.1(a)(i) 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. 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 to the extent and in a manner consistent with this Agreement.

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 Agreement as of the day and year first above written.

**COMPANY:**

McMillan Pazdan Smith, LLC

By: \_\_\_\_\_

Its: \_\_\_\_\_

**MANAGEMENT COMMITTEE:**

\_\_\_\_\_  
Ron G. Smith, Manager

\_\_\_\_\_  
Joseph M. Pazdan, Manager

\_\_\_\_\_  
Brad B. Smith, Manager

**MEMBERS:**

Separate signature pages attached

**MCMILLAN PAZDAN SMITH, LLC**

**OPERATING AGREEMENT  
COUNTERPART SIGNATURE PAGE**

The undersigned hereby agrees to become a party to that certain McMillan Pazdan Smith, LLC Operating Agreement dated as of September 25, 2009, 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 Operating Agreement.

---

Ron G. Smith

**MCMILLAN PAZDAN SMITH, LLC**

**OPERATING AGREEMENT  
COUNTERPART SIGNATURE PAGE**

The undersigned hereby agrees to become a party to that certain McMillan Pazdan Smith, LLC Operating Agreement dated as of September 25, 2009, 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 Operating Agreement.

---

M. Brian Deichman

**MCMILLAN PAZDAN SMITH, LLC**

**OPERATING AGREEMENT  
COUNTERPART SIGNATURE PAGE**

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---

Joseph M. Pazdan

**MCMILLAN PAZDAN SMITH, LLC**

**OPERATING AGREEMENT  
COUNTERPART SIGNATURE PAGE**

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---

Brad B. Smith

**MCMILLAN PAZDAN SMITH, LLC**

**OPERATING AGREEMENT  
COUNTERPART SIGNATURE PAGE**

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---

Marvin T. Coker, Jr.

**MCMILLAN PAZDAN SMITH, LLC**

**OPERATING AGREEMENT  
COUNTERPART SIGNATURE PAGE**

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---

Donza H. Mattison

**MCMILLAN PAZDAN SMITH, LLC**

**OPERATING AGREEMENT  
COUNTERPART SIGNATURE PAGE**

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\_\_\_\_\_  
Donald L. Love, Jr.

**MCMILLAN PAZDAN SMITH, LLC**

**OPERATING AGREEMENT  
COUNTERPART SIGNATURE PAGE**

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---

Richard Cullen Pitts

**MCMILLAN PAZDAN SMITH, LLC**

**OPERATING AGREEMENT  
COUNTERPART SIGNATURE PAGE**

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---

Lisa Marie Lanni

**MCMILLAN PAZDAN SMITH, LLC**

**OPERATING AGREEMENT  
COUNTERPART SIGNATURE PAGE**

The undersigned hereby agrees to become a party to that certain McMillan Pazdan Smith, LLC Operating Agreement dated as of September 25, 2009, 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 Operating Agreement.

---

Harry D. Ballard

## **SCHEDULE A**

(to Operating Agreement of McMillan Pazdan Smith, LLC)

Membership Information as of September 25, 2009

| <u>Name of Member</u> | <u>Units</u> | <u>Financial<br/>Rights</u> |
|-----------------------|--------------|-----------------------------|
| Ron G. Smith          | 1            | 33.3%                       |
| Joseph M. Pazdan      | 1            | 33.3%                       |
| Brad B. Smith         | 1            | 33.3%                       |
| <b>Totals:</b>        | <b>3</b>     | <b>100.00%</b>              |

## SCHEDULE A

(to Operating Agreement of McMillan Pazdan Smith, LLC)

### Membership Information as of September 30, 2009

| <u>Name of Member</u> | <u>Units</u>   | <u>Financial Rights</u> |
|-----------------------|----------------|-------------------------|
| Ron G. Smith          | 34,800         | 34.8%                   |
| M. Brian Deichman     | 16,335         | 16.335%                 |
| Joseph M. Pazdan      | 14,774         | 14.774%                 |
| Brad B. Smith         | 14,774         | 14.774%                 |
| Marvin T. Coker, Jr.  | 3,883          | 3.883%                  |
| Donza H. Mattison     | 3,883          | 3.883%                  |
| Donald L. Love, Jr.   | 3,883          | 3.883%                  |
| Richard Cullen Pitts  | 3,883          | 3.883%                  |
| Lisa Marie Lanni      | 3,721          | 3.721%                  |
| Harry D. Ballard      | 64             | 0.064%                  |
| <b>Totals:</b>        | <b>100,000</b> | <b>100.00%</b>          |

## SCHEDULE A

(to Operating Agreement of McMillan Pazdan Smith, LLC)

### Membership Information as of January 1, 2010

| <u>Name of Member</u> | <u>Units</u>   | <u>Financial Rights</u> |
|-----------------------|----------------|-------------------------|
| Ron G. Smith          | 34,740         | 34.74%                  |
| M. Brian Deichman     | 16,335         | 16.335%                 |
| Joseph M. Pazdan      | 14,774         | 14.774%                 |
| Brad B. Smith         | 14,774         | 14.774%                 |
| Marvin T. Coker, Jr.  | 3,883          | 3.883%                  |
| Donza H. Mattison     | 3,883          | 3.883%                  |
| Donald L. Love, Jr.   | 3,883          | 3.883%                  |
| Richard Cullen Pitts  | 3,883          | 3.883%                  |
| Lisa Marie Lanni      | 3,721          | 3.721%                  |
| Harry D. Ballard      | 64             | 0.064%                  |
| K.J. Jacobs           | 20             | 0.02%                   |
| Karen Calhoun         | 20             | 0.02%                   |
| Sally Sarratt         | 20             | 0.02%                   |
| <b>Totals:</b>        | <b>100,000</b> | <b>100.00%</b>          |

Writer's Direct Dial:

THOMAS H. KEIM, JR.  
864-699-1129  
tkeim@fordharrison.com

August 3, 2018

Dave E. Rothstein, Esq.  
Rothstein Law Firm, P.A.  
1312 Augusta Street  
Greenville, SC 29605

**Re: Donza H. Mattison**

Dear Dave:

My client and I are very understanding of Ms. Mattison's health issues and difficulties associated with carrying on business matters while receiving treatment for her serious illness. However, the purchase of her units by my client has extended well beyond February and even longer beyond November 2017 when this process began.

The Operating Agreement requires Ms. Mattison tender her units. McMillan Pazdan Smith will buy all of Ms. Mattison's Units at the fair market value determined in the latest valuation of the firm which I provided to you previously. The fair market value of a unit is \$131.50. Ms. Mattison owns a total of 2035.34 units. The total amount of her units using that fair market valuation is \$267,647.21. The total will be paid as provided in Section 11.4 of the Operating Agreement which provides for a lump-sum payment in cash of 20% of the purchase price (\$53,529.45) at closing and payment of the balance in four (4) equal annual installments of \$53,529.44. Of course, my client will execute the appropriate promissory note addressing the four (4) equal annual payments.

My client intends to raise this matter by written consent in order to bring this matter to a conclusion this month.

Please let me know if you have any questions about this plan or would like to discuss this matter on or before August 17, 2018 .

With warmest regards,

  
Thomas H. Keim, Jr.

THK/dmo

WSACTIVE LLP:9845690.1

**From:** McIntosh, Lawton Secretary (Tammy Jennings) <Imcintoshsc@sccourts.org>  
**Sent:** Friday, January 3, 2020 11:05 AM  
**To:** David Rothstein  
**Cc:** 'Tom Keim'; 'Lorry Miller'; 'Sam Outten'; 'Katie Towery'; McIntosh, Lawton Law Clerk (Jordan Thayer)  
**Subject:** RE: 2019CP2300998 McMillan Pazdan Smith, LLC v. Donza H. Mattison- Business Court Case  
**Attachments:** McIntosh Letter.docx

All,

Please see the attached letter from Judge McIntosh concerning this case. If you have any questions pertaining to this letter please let us know.

Thank you,

Tammy

---

**From:** David Rothstein [mailto:drothstein@rothsteinlawfirm.com]  
**Sent:** Wednesday, December 18, 2019 11:44 AM  
**To:** McIntosh, Lawton Secretary (Tammy Jennings) <Imcintoshsc@sccourts.org>  
**Cc:** 'Tom Keim' <tkeim@fordharrison.com>; 'Lorry Miller' <lmiller@rothsteinlawfirm.com>; 'Sam Outten' <sam.outten@nelsonmullins.com>; 'Katie Towery' <katie.towery@nelsonmullins.com>; McIntosh, Lawton Law Clerk (Jordan Thayer) <Imcintoshlc@sccourts.org>; McIntosh, Lawton <Imcintoshj@sccourts.org>  
**Subject:** RE: 2019CP2300998 McMillan Pazdan Smith, LLC v. Donza H. Mattison- Business Court Case

**\*\*\* EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. \*\*\*

Dear Ms. Jennings. Although Ms. Towery and I exchanged numerous red-lines to the draft status report, many of which were accepted by both sides, I could not agree to some of the verbiage that Ms. Towery insisted be in the document. I am attaching to this email my red-lined version of Ms. Towery's document, which I believe presents a more accurate description of the proceedings thus far. I do not have any issue with consenting to the filing of a complete, accurate, and balanced joint status report. Thank you.

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](mailto:drothstein@rothsteinlawfirm.com)  
[www.rothsteinlawfirm.com](http://www.rothsteinlawfirm.com)

---

**From:** Katie Towery <[katie.towery@nelsonmullins.com](mailto:katie.towery@nelsonmullins.com)>  
**Sent:** Wednesday, December 18, 2019 8:34 AM



**State of South Carolina**  
**The Circuit Court of the Tenth Judicial Circuit**

**R. Lawton McIntosh**  
Judge

Post Office Box 8002  
100 South Main Street  
Anderson, SC 29622-8002  
Phone: (864) 260-4059  
Fax: (864) 224-6320  
lmcintoshj@sccourts.org

January 3, 2020

Mr. Samuel W. Outten; [sam.outten@nelsonmullins.com](mailto:sam.outten@nelsonmullins.com) (via email only)  
Mrs. Katie Elizabeth Towery; [katie.towery@nelsonmullins.com](mailto:katie.towery@nelsonmullins.com) (via email only)  
Mr. David Eliot Rothstein; [drothstein@rothsteinlawfirm.com](mailto:drothstein@rothsteinlawfirm.com) (via email only)

RE: 2019-CP-23-00998 McMillan Pazdan Smith et, al. v. Donza H. Mattison et, al.

Counsel,

Following up on recent emails and updates, this is my understanding of where the case stands:

1.) I am waiting on a formal order from MPS concerning MPS motion for a protective Order and to Quash Non-party subpoenas filed October 3, 2019. The Orders should provide that discovery is presently limited to the following issues:

A.) valuation of Mattison's membership units, including possible normalizing entries for excessive compensation, bonuses and benefits paid to managing members of the fair as well as account related transactions such as the lease of the firms Spartanburg office; and

B.) Whether Mattison fairly and adequately represents the interest of other members in enforcing rights of MPS in a derivative capacity.

2) Additionally, I intend to issue a Form 4 Order without a formal order being requested (unless requested by counsel) continuing to hold Mattison's renewed Motion for Disqualification of Plaintiff's counsel in abeyance pending further discovery.

3.) Also, I intend to issue another Form 4 without request for a formal order (unless requested by counsel) denying MPS and third-party Defendant's Motion for a Protective Order from deposing minority members consistent with the formal order (#1 above) to be prepared by MPS.

If anyone would like to have a phone conference before I issues these Order or before the formal Order (#1) is filed, please let me know. If anyone requests a formal Order for numbers 2&3 above, please let us know.

Please note that the court is aware of the September 30, 2015 Amended and Restated Operating Agreement especially the definition of "Fair Market Value" (p.5), section 11.2 Right to buy (and sub parts) (p.25-26), and section 11.3 Purchase Price (p.26-27), section 11.4 Payment of purchase price (p.27-28). The court is also aware of the Severance Agreement providing that the September 30, 2015 Operating Agreement will control the purchase of Mattison's units. The General Release at paragraph 2(e) & (J) page 2 does not refer to the operating agreement as being "Amended and Restated" but simply refers to the "September 30, 2015 Operating Agreement. [Please note that we have not been able to locate any document simply captioned "September 30, 2015 Operating Agreement". If one exist separate from the "September 30, 2015 Amended and Restated Operating Agreement" please advise and provide us with a copy.]

With kindest regards, I remain

Yours truly,

R. Lawton McIntosh  
Judge

cc: file

|                                     |   |                                     |
|-------------------------------------|---|-------------------------------------|
| 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.                                 | ) |                                     |
|                                     | ) | <b>AFFIDAVIT OF DEFENDANT</b>       |
| Donza H. Mattison,                  | ) | <b>DONZA H. MATTISON</b>            |
|                                     | ) |                                     |
| Defendant-Counterclaimant.          | ) |                                     |
| _____                               | ) |                                     |
|                                     | ) |                                     |
| Donza H. Mattison, in a Derivative  | ) |                                     |
| Capacity on Behalf of McMillan      | ) |                                     |
| Pazdan Smith, LLC,                  | ) |                                     |
|                                     | ) |                                     |
| Third-Party Plaintiff,              | ) |                                     |
|                                     | ) |                                     |
| vs.                                 | ) |                                     |
|                                     | ) |                                     |
| Rondald G. Smith, Joseph M. Pazdan, | ) |                                     |
| Brad B. Smith, and Chad C. Cousins, | ) |                                     |
|                                     | ) |                                     |
| Third-Party Defendants.             | ) |                                     |
| _____                               | ) |                                     |
| STATE OF SOUTH CAROLINA             | ) |                                     |
|                                     | ) |                                     |
| COUNTY OF GREENVILLE                | ) |                                     |

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

1. My name is Donza H. Mattison. I am older than eighteen years of age and am otherwise competent to provide this Affidavit. The statements in this Affidavit are based upon my own personal knowledge.



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

3. I previously verified my original Answer, Counterclaims, and Third-Party Complaint, as well as my Amended Answer, Counterclaims, and Third-Party Complaint.

4. I was employed by McMillan Pazdan Smith, LLC ("MPS") and its predecessor, McMillan Smith & Partners Architects ("MS"), from September 1994 until February 12, 2018, when I voluntarily resigned from the firm for health reasons and went on long-term disability.

5. I became a partner in MS on January 1, 1997. I bought in to the firm when I became a partner, purchasing my shares without any discounts for lack of marketability or lack of control. Then-MS shareholders Marvin Coker, Donnie Love, Cullen Pitts, and I purchased additional shares of MS from a departing partner in the firm, Chris Voso, again without any discounts for marketability or lack of control.

6. When MS merged with Pazdan-Smith Group, Inc. on September 20, 2009, I held a 5.825% membership interest in MS. At some point after the merger, because of the economic down-turn known as the "Great Recession," Mr. Coker and I were not able to make the scheduled payments to Mr. Voso for the shares we had agreed to purchase from him. MPS ended up buying out my contract and Mr. Coker's with Mr. Voso on March 31, 2014, effective January 1, 2014.

7. I currently hold 2,035 membership units of MPS. I was never gifted any shares of MS or MPS or granted shares as part of my compensation for either firm.

8. On or about November 14, 2017, I was called into a meeting with the Management Committee of MPS and was informed that they were pushing to remove me as an employee and member of the firm. I was given a Memorandum, which is attached hereto as Exhibit 1, and a



proposed Severance Agreement and General Release, which is attached hereto as Exhibit 2. Both documents refer to the provisions in the original Operating Agreement of MPS dated September 29, 2009, because it was well known that I had previously (and somewhat outspokenly) refused to sign any subsequent amendments to the firm's Operating Agreement. I refused to sign the two proposed amendments because they attempted to reduce the required majority in interest for voting purposes from 75% to 66.67% and unfairly to treat the fair-market value and buy-out upon death more favorably for the managing member than minority members.

9. I retained counsel, David E. Rothstein, to help me negotiate an amicable separation of my employment from MPS, to be effective February 12, 2018, upon the exhaustion of my FMLA leave due to my chronic rheumatoid arthritis. As part of my separation agreement from MPS, the valuation of my financial interests in the firm was specifically reserved and was not part of the release. I signed the revised Severance Agreement and General Release on December 5, 2017.

10. As I understood the provisions of my Severance Agreement, the valuation of my membership units was supposed to be handled as described in Section 2(j): "The parties agree that Employee's dissociation from the Company shall be treated as a Proper Dissociation with no penalty or reduction on the value of her financial rights. The parties agree that the value of Employee's membership units shall be mutually determined in early 2018 following the close of YR2017, with Company providing access to all current and prior year financial reports, tax returns, and other financial information as requested by Employee's Counsel." Severance Agreement, at 2, ¶ 2(j) (emphasis added). This language tracks the valuation methodology from the Original Operating Agreement of MPS, which was specifically described in the Memo from the Management Committee dated November 14, 2017. (Exhibit 1, ¶ 7). I never agreed to submit the question of the



valuation of my shares to HDH Advisors or any other appraiser that was paid for solely by MPS.

11. I did agree in the Severance Agreement that MPS could use the provisions of the September 30, 2015 Amended and Restated Operating Agreement to govern the timing and logistics of the payments for my buy-out within the definition of "Proper Dissociation."

12. Shortly before my resignation date from MPS, I was diagnosed with breast cancer. My treatment and recovery for breast cancer caused a delay in my ability to evaluate and negotiate the valuation of my shares of MPS. In August 2018, my attorney made written requests for various financial information from MPS to enable my financial advisors and attorneys to assist me in determining and negotiating the fair market value for my units of MPS. Unfortunately, MPS refused to provide all of the financial information requested by my attorney.

13. On December 3, 2018, my attorney and MPS's attorney entered into a Tolling Agreement to preserve the status quo in the parties' negotiations for the value of my ownership interests in MPS, through and until February 1, 2019. A copy of the Tolling Agreement is attached hereto as Exhibit 3. The Tolling Agreement was subsequently extended to March 4, 2019, by written extension. A copy of the Extension of Tolling Agreement is attached hereto as Exhibit 4.

14. During our review of the partial financial information provided to my attorneys, we discovered some significant financial irregularities in the compensation and benefits that the Managing Members and the Executive Committee of the firm had authorized for themselves, as well as some of the details relating to the lease of the Spartanburg Office, which had never previously been disclosed to me as a member of the firm, nor had such information ever been presented to the full membership for consent as required by the 2009 Operating Agreement to provide a level of checks and balances on the Managing Members. I would not have agreed to the 2009 merger of the



two firms without that key provision which I understood at the time would prevent the Managing Members from compensating themselves at a rate disproportionate to the other minority members.

15. On January 14, 2019, my attorney sent a demand letter to MPS's attorney notifying him of some of the information we had uncovered and making a pre-suit demand that if we were not able to reach an amicable resolution of the purchase of my units, I intended to file a derivative shareholder action on behalf of the firm against the Managing Members and the COO. The monetary demand that my attorney made in his letter of January 14, 2019, was based on my expert's evaluation of the latest HDH Advisors' summary report, with adjustments made based on the limited information that we had at that time. I was not seeking any additional value or "premium" on the value of my shares to "purchase my silence" with respect to the possible derivative shareholder claim.

16. On Wednesday, February 20, 2019, I participated in an extensive mediation session with attorney Tom Traxler as the mediator, in a good-faith effort to resolve this case. I paid Mr. Traxler over \$3,750 as one-half of the mediation fee, not to mention the time I paid my attorney and expert witness to attend the mediation. Although I understand that I am not allowed to disclose the substance of anything that occurred during the mediation, I believe that I attended the mediation and participated in good-faith in attempting to resolve the case for substantially less than the January 14 demand letter that Mr. Rothstein had previously conveyed. At the end of the day of the mediation, the mediator indicated that he would not declare an impasse, but gave the parties until 5:00 p.m. on Friday, February 22, 2019 to consider a mediator's proposal.

17. According to the time-stamp on Plaintiff's Complaint in this case, the lawsuit was filed at 5:02 p.m. on Friday, February 22, 2019, more than a week before the extension to the Tolling



Agreement was to expire.

18. I do not harbor any animosity or ill will towards MPS or any of the minority shareholders of the firm for how I was treated in being forced out of the firm. In fact, I believe that my attorney and I were able to negotiate a fair and equitable resolution relating to the separation of my employment from the firm.

19. Throughout my employment with MPS, I have observed the Managing Members of MPS take advantage of minority members, such as my former colleague and friend, Brian Deichman, who undersold his rather substantial stake in the company (16,335 units) for a total of \$720,487.85 (or \$44.11 per unit) on July 31, 2015, with the effective date back-dated to December 31, 2014. That same year, HDH Advisors did a summary valuation report stating that each unit of MPS had a fair market value of \$63.01 per share as of January 1, 2015.

20. According to MPS's financial documents disclosed to my attorney in discovery in this case, Third-Party Defendant Chad Cousins was allowed to purchase 3,300 units of Mr. Deichman's shares in MPS on December 28, 2015, back-dated to be effective January 1, 2015, for \$63.01 per unit, or a total of \$209,823.30. Two other members of MPS's Executive Committee at the time, K.J. Jacobs and Karen Calhoun, were also given the opportunity to purchase some of Mr. Deichman's shares at the same per unit price at the same time. Neither I nor any existing minority member of MPS at the time was given an opportunity to purchase any of Mr. Deichman's redeemed shares.

21. According to the HDH Advisors's later report, the fair market value of each unit as of December 31, 2015 had grown to \$122.26 per unit, which was 3 days after Mr. Cousins signed to purchase his units at \$63.01 per unit.

22. Through the Derivative Action set forth in my Third-Party Complaint, I am seeking



to represent the interests of similarly situated minority shareholders in enforcing the rights of MPS in going after the Managing Members and COO (now CEO) Cousins for their unfair and deceptively concealed financial dealings with the firm.

23. In bringing this Derivative Action, I understand that I have a fiduciary duty to act in the interests of the firm and similarly situated minority members. I have conscientiously and diligently attempted to carry out my fiduciary obligations in this case by doing independent research on derivative actions and by personally attending every deposition and hearing in this case thus far.

24. I have not directly spoken to any minority member of MPS about my claims since MPS filed its lawsuit against me on February 22, 2019, nor have I attempted to “recruit” any minority members to join my case, as falsely alleged by MPS’s attorneys. I did send text messages to two of my former colleagues asking them if they had actually read my Answer, Counterclaims, and Third-Party Complaint, but when they responded that they could not communicate with me further about the case, I respected their wishes.

25. On November 4, 2019, I submitted a Formal Protest at a Member Meeting called to elect members to MPS’s newly created Board of Directors. This was only the second Member Meeting for which I received formal notice from MPS since November 2017. The other Member Meeting I received notice of was the August 2019 meeting to vote on the newest version of the Operating Agreement, which meeting I did not attend. Attached hereto as Exhibit 5 is a copy of the protest statement I attached to my ballot at the November 2019 Member Meeting. I understand that a recording of the Member meeting was made, which will confirm that I acted in a professional and respectful manner, not with any malicious or vindictive behavior.

26. My intention in filing the Counterclaims against MPS is not to strip any current



shareholders or members of MPS of their partnership status. Although my research shows that Section 33-44-404(c)(7) requires unanimous consent of all members of an LLC to admit new members, **I have offered to sign whatever documents would be necessary to ratify the admission of any current members of MPS.** With respect to the newest two members of MPS—William Gray and Ben Thompson—I was never given notice of their proposed membership documents or an opportunity to vote on their admission to the firm. I have known Mr. Gray since he was a high school student, and I actually wrote a letter of recommendation on his behalf to be admitted to Clemson University. I do not know Ben Thompson personally, but I have no knowledge of any reason why he would not be an appropriate member of the firm.

27. The underlying purpose of my Counterclaims is to ensure that MPS follows its original Operating Agreement and the provisions of S.C. Code Ann. § 33-44-404(c). I do not see any conflict of interest in trying to seek the true fair market value of my membership interests in the firm and trying to ensure that some checks and balances exist over Third-Party Defendants' history of self-dealing in the operation and management of MPS.

28. The new, September 16, 2019 Operating Agreement contains a provision in Section 11.4, which reads as follows: "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 consistent with or in contravention of the Act." This is another example of how Third-Party Defendants have continued to try to modify the Operating Agreement to oppress or reduce the rights of minority members to challenge them in court in order to be assured of receiving fair market value for their units.

29. Based on the size of my current holdings in MPS (2.278% of the outstanding



membership units), I understand that for every \$100,000 I might recover for the firm in the Derivative Action, I would only personally benefit by approximately \$2,278.00.

30. Counsel for Third-Party Defendants and MPS have recently made two separate proposals seeking to have me drop the Derivative Action with prejudice in exchange for their agreement not to seek attorneys' fees in connection with defending that claim. I have directed Mr. Rothstein to reject their proposal on both occasions because my acceptance of such an agreement would do nothing to redress the wrongs I have alleged on behalf of the firm and the other minority members.

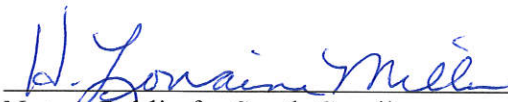
31. Because I am no longer a current employee of MPS and do not depend on my employment with the firm to earn a livelihood, I believe that I am the only minority member of the firm who is in a position to challenge the self-dealing transactions I have raised in my Third-Party Complaint.

FURTHER AFFIANT SAYETH NOT.

  
Donza H. Mattison

SWORN to and subscribed before me,

this 14<sup>th</sup> day of May, 2020.

 (L.S.)  
Notary Public for South Carolina



My Commission Expires: 5/28/2027



## **Exhibit 1**



memo

Date: November 14, 2017

To: Donza Mattison

From: Management Committee

RE: Some Key Provisions of Employment Association with Firm

This is not an exhaustive memo. I have attempted to provide you with a summary of some key provisions of our Operating Agreement and other documents.

1. We all entered a Confidentiality/Nonsolicitation Agreement as part of the merger, which is Exhibit A located at Tab 4 of our notebooks. Paragraph 5 of that Exhibit makes it clear that we are all at-will employees. In addition, the Agreement contains a number of confidentiality requirements and restrictions on solicitation following employment.
2. The Operating Agreement provides for dissociation without cause in Paragraph 10.1(d) of the Operating Agreement. Dissociation without cause occurs when there is an involuntary termination of a member's employment with the firm without cause as approved by the Management Committee and the "Required Interest" of the members.
3. In Article I, "Required Interest" of the members is defined to mean, at any particular time, the members holding at such time more than 66 percent of all the units issued and outstanding at such time.
4. Paragraph 10.2 indicates that the rights of a properly dissociating member shall be governed by Article XI.
5. Article XI provides the process by which the dissociating members' units shall be purchased.
6. Paragraph 11.3 entitled "Purchase Price" provides that the price of any membership interest sold under Paragraph 11.2 shall be the "Fair Market Value" of such membership interest.
7. Fair Market Value is defined in Article I. Article I contains definitions applicable to the Operating Agreement and the term Fair Market Value is defined to mean, with respect to a member's units, the value of the units as determined in accordance with the procedure set forth in the definition. First, the Seller and the Management Committee shall attempt to agree upon the value of the units. If the Seller and the Management Committee are unable to reach an agreement within 30 days, the value of the unit shall be determined as of the end of the fiscal year immediately preceding the date

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## memo

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.

8. Paragraph 11.4 provides that the purchase price shall be paid upon such terms as the parties may mutually agree.

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## **Exhibit 2**

Date This Agreement Received by Employee: November 14, 2017 (the "Offer Date")

### **SEVERANCE AGREEMENT AND GENERAL RELEASE**

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

**WHEREAS**, Employee and Company mutually agree that Employee's employment with the Company will end effective November 14, 2017 ("Effective Date");

**WHEREAS**, the Company and Employee do not anticipate that there will be any disputes between them or legal claims arising out of Employee's separation from employment, but nevertheless, desire to ensure a completely amicable parting and to settle fully and finally any and all differences or claims that might arise out of Employee's employment;

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

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

2. **Membership Interest.**

(a) In exchange for general release of claims and other good and valuable consideration and subject to the performance by Employee of the terms and provisions of this Agreement, the parties agree as follows:

(i) Defined terms in this section shall have the meaning ascribed to such terms in the Operating Agreement of the company dated September 29, 2009, as amended (the "Operating Agreement"), except where otherwise provided.

(ii) Effective as of the date of satisfaction of the conditions in the immediately following sentence, Employee does hereby sell, assign, transfer, and surrender to the Company for **\$240,821.43** Employee's entire Membership Interest in the Company (which employee acknowledges and agrees constitutes 2.28% of the total outstanding Membership Interest in the Company and which is referred to herein as the "Employee Membership Interest"). Such transfer shall be effected (i) after Company receives a fully-executed copy of this Agreement in unmodified form, without deletions, executed by Employee, and (ii) after the expiration of the seven-day revocation

period as described below. Employee acknowledges that the transfer of the Employee Membership Interest shall not be effected unless she executes and does not revoke this Agreement.

- (iii) Employee represents and warrants that she owns no other units, membership interests, shares, stock or other equity interests in the Company, or any securities or other instruments exercisable for or convertible into units, membership interests, shares, stock or other equity interests in the Company other than the Employee Membership Interest.
- (iv) Employee does hereby irrevocably constitute and appoint Ron Smith and Chad Cousins, and each of them individually, attorney in fact to transfer the said Employee Membership Interest on the books of the Company, with full power of substitution in the premises.
- (v) Employee hereby represents and warrants that (a) Employee is the sole owner of and has good and marketable title to the Employee Membership interest prior to the transaction contemplated in this Agreement and the Company will receive good and marketable title to the Employee Membership Interest as a result of the transactions contemplated in this Agreement; (b) the Employee Membership Interest is not subject to any lien, security interest, pledge, mortgage, encumbrance or the like or any restriction on transfer that would be violated by the sale of the Employee Membership Interest to the Company as contemplated herein, and the Company will receive the Employee Membership Interest free and clear of any and all liens, security interests, pledges, mortgages, encumbrances and the like; (c) the execution, delivery, and performance of this Agreement by Employee and the consummation of the transactions hereunder do not and will not: (A) require the consent, waiver, approval, license or authorization of any third party; (B) violate, with or without the giving of notice and/or the passage of time, any existing order, writ, injunction or decree of any court, administrative agency or governmental body to which Employee is subject; or (C) result in the creation of any lien, security interest, pledge mortgage, encumbrance or the like upon any of the Employee Membership Interest; (D) there is no proceeding or action of any type pending or, to Employee's knowledge, threatened that would limit or impair the power or authority of Employee to enter into and perform Employee's obligations under this Agreement, and Employee does not know of any basis for any such proceeding or action; and (E) Employee understands and agrees that the value of the Employee Membership Interest as of the date of this Agreement is uncertain

and that neither the Company nor any of its principals, affiliates, employees, agents or representatives represents or warrants that the purchase price is equal to the current fair market value of the Employee Membership Interest. This provision shall supersede any provisions of the Operating Agreement and any other agreements between the parties with respect to purchase of the Employee Membership Interest by the Company.

- (b) The Company agrees to pay Employee **\$36,709.20** as severance (and to support the restrictive covenants contained herein) and in full and final comprise settlement of all claims that Employee has raised or could have raised against the Company at any time, up to and including the present date, including, but not limited to, any claims for back pay, damages, court costs, attorneys' fees, or any other monetary or equitable relief. The Company agrees to pay the Employee in the payroll cycle following her execution of this Agreement (and the seven-day revocation period referenced below). Employee agrees this compensation is in excess of that which Employee is currently entitled. Employee will received accrued salary and PTO through November 14, 2017. Employee recognizes and agrees that Employee is solely responsible for any federal, state or other tax obligations, including, but not limited to, all reporting and payment obligations that could arise as a consequence of Employee's receipt of any payments or benefits pursuant to this Agreement.
- (c) Employee will be advised of her COBRA continuation rights through a separate communication sent by the Company's COBRA administrator. Employee should notify Jamie Kemp, HR Manager, if she does not get this notice. The Company agrees that it will reimburse the Employee for three (3) months of COBRA continuation coverage once the Employee affirmatively elects to continue her coverage. The Employee will not be covered under COBRA nor will the Company reimburse for COBRA unless the Employee actively makes her COBRA election within the prescribed 60-day election period. Should the Employee elect to opt out of this Agreement, she is still eligible for COBRA coverage while still in her 60-day election period, but the making of timely premium payments is solely her obligation.

3. **Cooperation.** Employee agrees to cooperate reasonably with the Company and all of its affiliates and/or the Released Parties, as defined below (including its and their outside counsel), in connection with the contemplation, prosecution, and defense of all phases of existing, past and future claims or litigation about which the Company believes the Employee may have knowledge or information. Employee further agrees to make herself available at mutually convenient times during and outside of regular business hours as reasonably deemed necessary by the Company's counsel. Employee agrees to appear without the necessity of a subpoena to testify

truthfully in any legal proceedings in which the Company calls her as a witness. Employee further agrees that she shall not voluntarily provide information to or otherwise cooperate with any individual or entity that is contemplating or pursuing litigation against any of the Released Parties or that is undertaking any investigation or review of any of the Released Parties' activities or practices; provided, however, that Employee may participate in or otherwise assist in any investigation or inquiry conducted by the Equal Employment Opportunity Commission or any analogous state agency.

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

- (a) Actual or alleged defamation, invasion of privacy, injury to credit, personal inconvenience, damage to Employee's personal reputation, outrage, distress, humiliation, loss of standing and prestige, personal injury, bodily injury, tort, loss of consortium, intentional or negligent infliction of emotional distress, abuse of process, retaliation, negligence, fraud, extortion, or other common law causes of action or other compensation for bodily injury.
- (b) Failure to provide benefits or pay wages or commissions, including actual or alleged violations of the South Carolina Human Affairs Law, the South Carolina Payment of Wages Act, common law and any and all other applicable state, county or local codes, statutes, ordinances or regulations.

- (c) Actual or alleged violations of discrimination, including, but not limited to, any and all claims of age, disability, race, color, sex, national origin, ancestry, religion, genetic information, or other discrimination, retaliation or harassment;
- (d) Actual or alleged violations of the federal Age Discrimination in Employment Act, as amended, the Civil Rights Acts of 1866, 1871, and 1964, Section 1981 of Title 42 of the U.S. Code, Title VII of the Civil Rights Act of 1964, as amended, the Civil Rights Act of 1991, all federal and state executive orders including Executive Order 11246, the Uniformed Services Employment and Reemployment Rights Act of 1994, the Equal Pay Act, the Americans with Disabilities Act of 1990, the Rehabilitation Act of 1973, the Family and Medical Leave Act, the Fair Labor Standards Act, the Genetic Information Nondiscrimination Act of 2008, the Worker Adjustment and Retraining Notification Act, the Pregnancy Discrimination Act, state and local wage-hour laws and regulations, and the federal Employee Retirement Income Security Act, including, but not limited to, claims under Company-sponsored severance and termination pay plans, if any;
- (e) Actual or alleged violations of any other federal or state codes, laws, ordinances, regulations or case law which prohibit employment discrimination, retaliatory termination of employment, wrongful discharge, and employment termination in violation of public policy;
- (f) Actual or alleged breach of express and implied contract, breach of contract accompanied by a fraudulent act, breach of implied covenant of good faith and fair dealing, interference with contract, promissory estoppel, and claims under the Operating Agreement or any other operating agreement, any employment agreement, handbook or policy; and
- (g) Actual or alleged violations of the National Labor Relations Act and the Labor Management Relations Act.

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

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

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

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

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

including, but not limited to, any such contractual or common law confidentiality obligations Employee owes to the Company.

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

10. **Non-Disparagement.**

- (a) Employee agrees not to make any statements, written or verbal, or cause or encourage others to make any statements, written or verbal, including, but not limited to, any statements made via social media, on websites or in blogs, that defame, disparage or in any way criticize the personal or business reputation, practices, products, management or conduct of the Company, or any of the Released Parties, Employee acknowledges and agrees that this prohibition extends to statements, written or verbal, made to anyone, including, but not limited to, the news media, competitors, vendors, employees (past and present), customers, clients, governmental agencies, educational institutions, and associated professional organizations. Employee further understands and agrees that this paragraph is a material provision of this Agreement and that any breach of this paragraph shall be a material breach of this Agreement, and that the Company would be irreparably harmed by violation of this provision.
- (b) The Company agrees that its officers and Managers will not make any statements, written or verbal, or direct any third party to make any statements, written or verbal, including, but not limited to, any statements made via social media, on websites or in blogs, that defame or disparage the personal or business reputation, practices or conduct of the Employee. Nothing herein prevents disclosure, in the sole discretion of the Company and its management, of this Agreement and discussion of Employee's employment with and separation of employment from the Company and the circumstances regarding such separation from the Company (i) by and among employees and agents of Company and the Released Parties or (ii) to or in response to any governmental entity or in response to material provision of this Agreement and that any breach of this paragraph shall be a material breach of this Agreement, and that the Employee would be irreparably harmed by violation of this provision.

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

12. **Company Property.**

- (a) All records, files, lists, including computer-generated lists, data, drawings, documents, equipment, keys, building access or parking passes, credit card, and similar items relation to the Company's business that Employee generated or received from the Company remain the Company's sole and exclusive property. Employee agrees to promptly return to the Company all property of the Company in her possession. Employee further represents that she has not copied or caused to be copied, printed out, or caused to be printed out any documents or other material originating with or belonging to the Company. Employee additionally represents that she will not retain in her possession any such documents or other material originating with or belonging to the Company. Employee additionally represents that she will not retain in her possession any such documents or other materials. Employee agrees not to delete Company information or any other electronic information from Employee's computer or other devices belonging to the Company before or after the Effective Date. Employee further agrees not to access the Company's computer system or other electronic systems following the Effective Date.
- (b) Any and all social media and other online accounts and profiles created or used by Employee on behalf of Company or otherwise for the purpose of promoting or marketing Company or similar business purposes, including such profiles and accounts featuring or displaying Company's name and trademarks ("Company Social Media Accounts") belong solely to Company. As of the Effective Date, Employee agrees to cease accessing, using, updating or modifying any and all Company Social Media Accounts.
- (c) Upon the separation of Employee's employment, Company will retain ownership and control of all Company Social Media Accounts created or used during the course of Employee's employment with the Company, including all related data and information. Prior to the Effective Date, Employee agrees to provide to Company the log-in information, including usernames and passwords, for each Company Social Media Account that Employee created, used or managed. Employee also agrees to assist Company, both prior to and after the Effective Date (as may be necessary), with the transition and maintenance of each Company Social Media Account created or used by Employee during the course of her employment

with the Company, including providing information that may be necessary to ensure that Company is able to access the Company Social Media Accounts.

13. **No Other Compensation Due.** Employee acknowledges and agrees that neither the Company nor any of the Released Parties owes Employee any wages, salary, stock options, bonus, accrued vacation or sick leave, benefits, paid time off, notice pay, severance pay, commissions, equity or ownership, incentive pay, salary, reimbursement, expenses, deferred compensation, or other compensation in any amount whatsoever, including, but not limited to, any compensation or ownership interest pursuant to the Operating Agreement and any other agreement, other than as expressly agreed to herein. Employee agrees that to the extent that Employee is otherwise due any such amounts or compensation or expenses of any nature, the Company's obligation to pay these amounts is satisfied and subsumed in full by the Severance Pay. The parties shall each bear their own costs and their own attorney fees.

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

15. **No Assignment.** Employee hereby represents and warrants that Employee has not assigned, transferred or conveyed to any individual or entity any alleged right, claim or cause of action of any kind which is included within the above releases. Employee further represents and warrants that Employee is aware of no lien or other encumbrance on Employee's rights, claims, and causes of action, and that Employee is entitled to receive from the Company payment of the full amount of the proceeds due to Employee under this Agreement.

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

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

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

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

- (a) Throughout her employment, she was fully and appropriately compensated for all hours worked in accordance with the Fair Labor Standards Act and other applicable law, if any;
- (b) Employee has been provided with all leave to which she is entitled under the Company policy and applicable law including, but not limited to, the Family and Medical Leave Act;
- (c) Employee has carefully read and fully understands the comprehensive terms and conditions of this Agreement and the releases set forth herein;
- (d) Employee is executing this Agreement knowingly and voluntarily, without any duress, coercion or undue influence by the Company, its representatives or any other person;
- (e) Employee has consulted with legal counsel of her own choice before executing this Agreement;
- (f) Employee has pending no claim, complaint, grievance or any document with any federal or state agency or any court seeking money damages or relief against the Company;
- (g) The Severance Pay recited above constitutes good and valuable consideration;
- (h) Employee is fully satisfied with the terms and conditions of this Agreement including without limitation the consideration paid to her by the Company;
- (i) Employee has not made a claim for workers' compensation related to her employment with the Company, and that she is currently unaware of any injury or illness that would support such a claim; and
- (j) Employee is not waiting rights or claims that may arise after the date this Agreement is executed.

20. **Entire Agreement; Severability of Terms.** Employee agrees to refer all requests for employment references from the Company directly and exclusively to the Company's HR Manager. Employee further understands that in accordance with the Company's policy on

employment references, the Company will provide only the dates of Employee's employment and positions held by Employee.

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

- (a) This Agreement is written in layman's terms, and Employee hereby represents to the Company that Employee understands and comprehends its terms;
- (b) Employee is hereby advised, and has had an opportunity, to consult with an attorney to review this Agreement prior to executing it.
- (c) This Agreement specifically refers to rights and claims arising under the Age Discrimination in Employment Act;
- (d) Employee does not waive any rights or claims that result from events occurring after the date this Agreement is executed by Employee;
- (e) Employee hereby acknowledges that Employee is receiving consideration beyond anything of value to which Employee already is entitled;
- (f) Employee has twenty-one (21) days from Employee's receipt hereof (the Offer Date) to consider this proposed Agreement. Employee's failure to accept this proposed Agreement by close of business on the twenty-first day following Employee's receipt of this Agreement may be deemed rejection off its terms; and
- (g) Employee has the right to revoke this Agreement for seven (7) days following Employee's signing of this Agreement, and after the expiration of that seven (7) days the executed Agreement shall be of full validity, force, and effect. To exercise this right, Employee is required to deliver written notice to the Company prior to expiration of this right to revoke, and such revocation is not valid or effective unless and until the written notice of same is received by the Company, at the address or facsimile number specified at the end of this Agreement, within the revocation period. Otherwise, such revocation shall be invalid and ineffective and this Agreement shall be deemed accepted.

22. **Neutral Reference.** Employee agrees to refer all requests for employment references from the Company directly and exclusively to the Company's HR Manager (currently Jamie Kemp). Employee further understands that, in accordance with the Company's policy on

employment references, the Company will provide only the dates of Employee's employment, positions held, and the salary earned by Employee.

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

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

**THIS IS A LEGALLY ENFORCEABLE AGREEMENT.**

**Dated:** \_\_\_\_\_

**Witness** \_\_\_\_\_

**EMPLOYEE – DONZA H. MATTISON**

**Dated:** \_\_\_\_\_

**McMILLAN PAZDAN SMITH, LLC**

**By:** \_\_\_\_\_

**Name:** \_\_\_\_\_

**Title:** \_\_\_\_\_

**Address:** \_\_\_\_\_

**E-mail:** \_\_\_\_\_

WSACTIVELLP:9321318.1

## **Exhibit 3**

STATE OF SOUTH CAROLINA    )  
                                                           )     TOLLING AGREEMENT  
 COUNTY OF GREENVILLE     )

This Tolling Agreement ("Agreement") is entered into by and between Donza H. Mattison (hereinafter "Mattison") and McMillan Pazdan Smith, LLC (hereinafter "MPS"), by and through their respective, undersigned counsel, as follows:

WHEREAS, on or about December 5, 2017, Mattison and MPS entered into a Severance Agreement and General Release to resolve any claims Mattison might have relating to her employment with MPS, specifically reserving any and all issues relating to her Proper Dissociation from MPS;

WHEREAS, pursuant to the Severance Agreement and General Release, Mattison submitted her voluntary resignation from MPS on February 12, 2018;

WHEREAS, a dispute has arisen between the parties hereto with regard to the valuation of Mattison's membership units in MPS;

WHEREAS, Mattison and MPS desire to continue their settlement discussions and negotiations regarding this matter, but without prejudice to Mattison by any further delay in the filing of any legal claims she might have; and

WHEREAS, the parties hereto desire to enter into this Tolling Agreement to toll the running of any statute of limitations, statute of repose, contractual or equitable limitations provision, or other legal or equitable time-related defense in order to explore possible settlement of any claim relating to this matter;

NOW, THEREFORE, in consideration of the mutual covenants and promises as set forth in this Agreement and for other good and valuable consideration, the receipt and sufficiency of which



is hereby expressly acknowledged, Mattison and MPS covenant and agree as follows:

1. Effective December 3, 2018, through and including February 1, 2019, the running of any and all limitations or time periods within which Mattison is or was required by applicable law (whether a statute of limitations, statute of repose, or contractual or equitable limitations provision) to bring, file, commence, continue, pursue or otherwise assert any and all legal actions, lawsuits, grievances, or formal claims or demands that she has or may have against MPS resulting from or relating to her Proper Dissociation from MPS is hereby TOLLED AND SUSPENDED.

2. In consideration of this Tolling Agreement, Mattison expressly agrees to forebear commencing any legal claim against MPS at the present time, in order to explore the possibility of settling all disputes between her and MPS.

3. The parties may extend the foregoing tolling period by executing a written extension.

4. At the expiration of this Agreement as provided for in Paragraph No. 1 above, or after any extension as provided for in Paragraph No. 3 above, the parties shall have all of the same rights, remedies, defenses, interests, duties, obligations, liabilities, and other responsibilities that they had as of the effective date of this Agreement, except as modified herein or by subsequent agreement.

5. This Agreement neither constitutes nor shall be construed as an admission of any fact or liability by any party regarding the matter stated herein, but shall only serve to preserve the status quo of all matters referred to in this Agreement as of the effective date.

6. The parties hereto and their respective officers, directors, members, managers, employees, agents, servants, successors, heirs and assigns, as applicable, shall be entitled to rely upon the covenants and agreements set forth herein. Furthermore, the terms and conditions of this Agreement shall be binding upon and inure to the benefit of the undersigned parties, their officers,

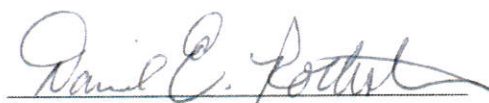
directors, members, managers, employees, agents, servants, successors, heirs and assigns.

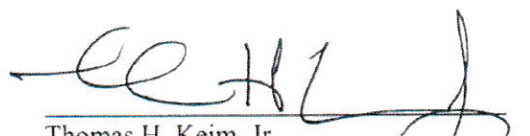
7. This Agreement contains the entire agreement of the parties with respect to the matters addressed herein and may not be changed or amended except by subsequent written agreement by the undersigned parties.

8. Whenever possible, each provision of this Agreement shall be interpreted in a manner so as to be effective and valid under the applicable law; but if any provision of this Agreement is subsequently prohibited or invalidated, such prohibition or invalidation shall not affect the remaining provisions of this Agreement.

9. The undersigned counsel represent that they have the authority to bind their respective clients, Mattison and MPS.

IN WITNESS WHEREOF, the undersigned have set their hands and seals hereto this 3<sup>rd</sup> day of December, 2018.

  
David E. Rothstein  
Attorney for Donza H. Mattison

  
Thomas H. Keim, Jr.  
Attorney for McMillan Pazdan Smith, LLC

## **Exhibit 4**

STATE OF SOUTH CAROLINA     )  
                                                   )  
 COUNTY OF GREENVILLE     )     EXTENSION OF TOLLING AGREEMENT

This Extension of Tolling Agreement ("Extension") is entered into by and between Donza H. Mattison (hereinafter "Mattison") and McMillan Pazdan Smith, LLC (hereinafter "MPS"), by and through their respective, undersigned counsel, as follows:

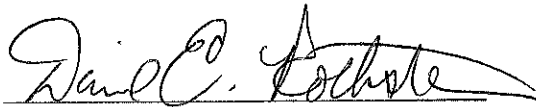
WHEREAS, on or about December 3, 2018, counsel for Mattison and MPS signed a Tolling Agreement to preserve the status quo from December 3, 2018 to February 1, 2019, while the parties continued to negotiate the terms of MPS's purchase of Mattison's ownership interest in MPS pursuant to her Proper Dissociation from MPS; and

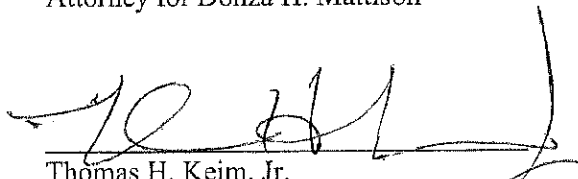
WHEREAS, Paragraph 3 of the Tolling Agreement expressly provided, "The parties may extend the foregoing tolling period by executing a written extension";

NOW, THEREFORE, in consideration of the mutual covenants and promises as set forth in this Extension, Mattison and MPS covenant and agree as follows:

1. The Tolling Agreement is hereby extended for an additional 30 days, or until Monday, March 4, 2019, at 5:00 p.m., EST.

IN WITNESS WHEREOF, the undersigned have set their hands and seals hereto this 22nd day of January, 2019.

  
 David E. Rothstein  
 Attorney for Donza H. Mattison

  
 Thomas H. Keim, Jr.  
 Attorney for McMillan Pazdan Smith, LLC

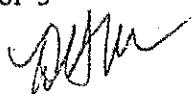
## **Exhibit 5**

**Formal Protest of Nov. 4, 2019 Member Meeting by Donza H. Mattison**

Having dedicated over 20 years of my life to this firm, I feel like I have earned the right to be treated fairly and respectfully. So, thank you in advance for giving me a few minutes of everyone's time.

First, I would like to take this opportunity to clear up some potential misinformation about the lawsuit currently pending between McMillan Pazdan Smith, LLC and myself in the Greenville County Court of Common Pleas. I did not start this lawsuit. This past February, my lawyer and I were trying to negotiate in good faith to reach an amicable and fair resolution on the value of my units subsequent to my dissociation the prior year. MPS sued me first seeking a court order to force me to accept what I—and my financial expert—believe was a low-ball offer at a fraction of their true worth. If you haven't already done so, I would encourage each of you to read my Amended Answer, Counterclaims, and Third-Party Complaint filed on July 30 of this year, as it will explain in great detail what this case is really about.

Second, I am not suing Ron, Joe, Brad, and Chad in my personal capacity. Instead, in what is called a derivative action, I am seeking to represent the interests ALL minority members and the firm itself. I have actually filed legal claims on behalf of MPS to recover what I have alleged in my Third-Party Claims to be years of self-dealing transactions by the four individuals in charge of the firm, who have approved substantial increases in their pay and benefits that have far out-paced the increases in compensation and benefits that other members of the firm have received. The way the MPS Operating Agreement was originally set up, manager compensation was supposed to be disclosed to the full membership with an opportunity to vote on it. That never happened. Our



Managing Principals and COO have not been forthcoming to us about their total compensation or about the details of lease agreements, particularly for the Spartanburg office. In the legal world, the term for their actions is "self-dealing." You should know that if the Derivative Action claim is successful, any monies relating to the self-dealing and recovered through judgment by the Court would not go to me directly; instead, they are required to be returned to this firm.

Third, in my opinion, no firm resources should be spent to defend Ron, Joe, Brad, and Chad personally from allegations. If these allegations are proven true, they have unfairly and perhaps unlawfully enriched themselves at our expense, in breach of their fiduciary duty and duty of loyalty to the firm and to us as minority members. Now that the Court has denied their attorneys' motions to dismiss my counterclaims and Third-Party Complaint, my attorney has filed a motion asking the Court to require MPS to have independent legal counsel from the lawyers who are also currently representing Ron, Joe, Brad, and Chad individually. You should all make sure that whoever ends up representing MPS should be looking out only for MPS's best interests, not the best interests of the people who have been making the financial decisions for MPS since the merger.

Fourth, I would like to state my opinion that the proposed Board of Directors will not change who is still in control of the decisions affecting the financial interests of the firm. Four of the eight proposed Board Members—exactly half of the proposed Board—are the same four individuals who have been making the decisions for the firm since the beginning, with Chad joining the firm in 2013 as COO and member. The so-called "independent" board member, Todd Mitchell, was hired by Chad as a consultant in 2014 or 2015 in an attempt to justify a huge increase in the compensation and bonuses that Chad and the Managing Members received at that time. That is 5 of the 8 members of the Board—a majority of the votes—who would have the power to approve whatever they want to



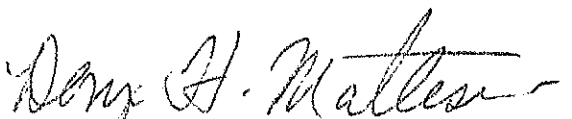
pass.

Fifth, Section 4.2(d) of the original MPS Operating Agreement requires that any amendments affecting any financial or voting rights of members must be approved by all of the members. In other words, such amendments must be unanimously approved to have any effect. I believe the proposed Amendments to the Operating Agreement would affect my financial or voting rights. I have never consented or approved of any amendments to the original Operating Agreement. I object to this meeting and vote as being contrary to the original Operating Agreement.

Finally, I would like to formally protest the proxy solicitation of today's meeting. The proxy solicitation did not provide sufficient information about each of the proposed Board members, such as disclosing Mr. Mitchell's prior involvement with the firm and his hiring by Chad Cousins, to enable members to make a reasonably informed decision about his selection to the Board. In addition, any matters not specifically included in the Notice of this Meeting should not be approved using proxy votes, since there is no disclosure of material facts concerning such items. The Operating Agreement prohibits any secret agenda items from being approved by proxy.

I request that a copy of my objections and this written statement of protest be included in the minutes of this meeting and that it be filed with the firm's corporate records.

Respectfully submitted,

  
Donza H. Mattison

Dated: 11.4.2019

**From:** Bobbie Schilder <bobbie.schilder@nelsonmullins.com> on behalf of Sam Outten <sam.outten@nelsonmullins.com>  
**Sent:** Monday, July 20, 2020 9:48 AM  
**To:** 'McIntosh, Lawton'; 'McIntosh, Lawton Law Clerk (Jordan Thayer)'; 'McIntosh, Lawton Secretary (Tammy Jennings)'  
**Cc:** drothstein@rothsteinlawfirm.com; 'Tom Keim'; Sam Outten; Katie Towery  
**Subject:** McMillan Pazdan Smith, LLC v. Donza H. Mattison; C.A. No.: 2019-CP-23-00998  
**Attachments:** love, donald-6-17-20.pdf; Donnie Love - Depo Excerpts - 4816-0571-5395 1.pdf; pitts,richard-6-22-20.pdf; Cullen Pitts - Depo Excerpts - 4811-0239-8915 1.pdf; ballard,harry-7-10-20.pdf; Dave Ballard - Depo Excerpts - 4830-7455-5843 1.pdf

Dear Judge McIntosh,

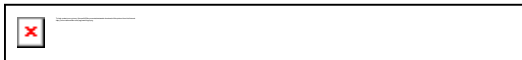
Pursuant to your direction at the hearing held Tuesday, May 12, 2020, the depositions of Donnie Love, Cullen Pitts and Dave Ballard were taken.

Attached to this email are the complete transcripts of each of these depositions. MPS respectfully submits to the Court that there was no testimony in any of these three depositions which would suggest support from the Minority Members for the derivative action, or for Ms. Mattison serving as the representative of the Minority Members. In addition to the deposition transcripts, we have attached excerpts from the depositions which testimony clearly expresses these Minority Members' opposition to the derivative action.

If you have any questions or need additional information, please let us know.

Respectfully,

Sam Outten



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SAMUEL W. OUTTEN **PARTNER**

[sam.outten@nelsonmullins.com](mailto:sam.outten@nelsonmullins.com)

GREENVILLE ONE | SUITE 400

2 W. WASHINGTON STREET | GREENVILLE, SC

T 864.373.2299 F 864.373.2925

[NELSONMULLINS.COM](http://NELSONMULLINS.COM)

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Nelson Mullins is continuing to monitor developments related to COVID-19, including guidance from the Centers for Disease Control and various health officials; and federal, state, and local government authorities. The firm has implemented precautionary measures and plans to ensure the continuation of all firm services to clients from both in office and remote work arrangements across our 25 geographically dispersed offices. [Click here to visit the Nelson Mullins Coronavirus Resources page](#). Information described therein is subject to change.

**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.

## Lorry Miller

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**From:** McIntosh, Lawton <lmcintoshj@sccourts.org>  
**Sent:** Tuesday, July 21, 2020 10:52 AM  
**To:** Sam Outten; David Rothstein  
**Cc:** McIntosh, Lawton Law Clerk (); McIntosh, Lawton Secretary (Tammy Jennings); Tom Keim; Katie Towery; Lorry Miller  
**Subject:** RE: McMillan Pazdan Smith, LLC v. Donza H. Mattison; C.A. No.: 2019-CP-23-00998

Gentlemen, I'm going to allow briefing—briefs shall be limited to 20 pages—no exhibits unless approved by me in advance. Also I request that Mr. Outten prepare a statement of attorney's fees and cost associated with defending defendant's derivative claim. I request that neither party address the issue of attorney's fees and cost in their briefing. I do request that Mr Rothstein after having an opportunity to review Plaintiff's attorney's fee statement to advise whether or not he wishes to cross examine Mr Outten regarding the amount being claimed. If the derivative action is allowed to proceed and attorney's fees are not awarded Mr Rothstein obviously will not need to advise whether or not he wishes to cross examine Mr Outten.

Briefs are due within ten (10) days. No response briefs, correspondence or e-mails are allowed with regard to the other party's brief unless approved by me in advance.

Lawton

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**From:** Bobbie Schilder <bobbie.schilder@nelsonmullins.com> **On Behalf Of** Sam Outten  
**Sent:** Monday, July 20, 2020 11:56 AM  
**To:** David Rothstein <drothstein@rothsteinlawfirm.com>; McIntosh, Lawton <lmcintoshj@sccourts.org>  
**Cc:** McIntosh, Lawton Law Clerk () <lmcintoshlc@sccourts.org>; Sam Outten <sam.outten@nelsonmullins.com>; McIntosh, Lawton Secretary (Tammy Jennings) <lmcintoshsc@sccourts.org>; Tom Keim <tkeim@fordharrison.com>; Katie Towery <katie.towery@nelsonmullins.com>; Lorry Miller <lmiller@rothsteinlawfirm.com>  
**Subject:** RE: McMillan Pazdan Smith, LLC v. Donza H. Mattison; C.A. No.: 2019-CP-23-00998

\*\*\* **EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. \*\*\*

Judge McIntosh,

MPS objects to further briefing from Ms. Mattison, as she has already been given a full opportunity to brief this issue in response to MPS and the Third-Party Defendants' Motion for Summary Judgment.

Our understanding was that Your Honor directed the depositions be taken to see whether the deponents would offer testimony in support of Ms. Mattison serving as a representative of the minority members and whether they support the derivative action. If Mr. Rothstein believes that these witnesses provided such testimony then it should be submitted to this Court as Your Honor directed.

Respectfully,  
Sam Outten



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SAMUEL W. OUTTEN PARTNER

[sam.outten@nelsonmullins.com](mailto:sam.outten@nelsonmullins.com)

GREENVILLE ONE | SUITE 400

2 W. WASHINGTON STREET | GREENVILLE, SC

T 864.373.2299 F 864.373.2925

[NELSONMULLINS.COM](http://NELSONMULLINS.COM)

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**From:** David Rothstein <[drothstein@rothsteinlawfirm.com](mailto:drothstein@rothsteinlawfirm.com)>

**Sent:** Monday, July 20, 2020 10:33 AM

**To:** McIntosh, Lawton <[lmcintoshj@sccourts.org](mailto:lmcintoshj@sccourts.org)>

**Cc:** McIntosh, Lawton Law Clerk (Jordan Thayer) <[lmcintoshlc@sccourts.org](mailto:lmcintoshlc@sccourts.org)>; Sam Outten <[sam.outten@nelsonmullins.com](mailto:sam.outten@nelsonmullins.com)>; McIntosh, Lawton Secretary (Tammy Jennings) <[lmcintoshsc@sccourts.org](mailto:lmcintoshsc@sccourts.org)>; Tom Keim <[tkeim@fordharrison.com](mailto:tkeim@fordharrison.com)>; Katie Towery <[katie.towery@nelsonmullins.com](mailto:katie.towery@nelsonmullins.com)>; Lorry Miller <[lmiller@rothsteinlawfirm.com](mailto:lmiller@rothsteinlawfirm.com)>

**Subject:** Re: McMillan Pazdan Smith, LLC v. Donza H. Mattison; C.A. No.: 2019-CP-23-00998

Judge McIntosh. I do not agree with Mr. Outten's characterization of these three depositions. On behalf of Ms. Mattison, I would request an opportunity to submit additional briefing on the impact of these depositions on the issue of Ms. Mattison's ability to serve as a fair and adequate representative of similarly situated shareholders in enforcing the rights of the company through her derivative action. This is a much more nuanced analysis than Mr. Outten is suggesting. I would respectfully request 30 days for either side to submit supplemental briefing. Thanks you.

David E. Rothstein  
Rothstein Law Firm, PA  
1312 Augusta Street  
Greenville, SC 29605  
(864) 232-5870  
[drothstein@rothsteinlawfirm.com](mailto:drothstein@rothsteinlawfirm.com)  
[www.rothsteinlawfirm.com](http://www.rothsteinlawfirm.com)

On Jul 20, 2020, at 9:48 AM, Sam Outten <[sam.outten@nelsonmullins.com](mailto:sam.outten@nelsonmullins.com)> wrote:

Dear Judge McIntosh,

Pursuant to your direction at the hearing held Tuesday, May 12, 2020, the depositions of Donnie Love, Cullen Pitts and Dave Ballard were taken.

Attached to this email are the complete transcripts of each of these depositions. MPS respectfully submits to the Court that there was no testimony in any of these three depositions which would suggest support from the Minority Members for the derivative action, or for Ms. Mattison serving as the representative of the Minority Members. In addition to the deposition transcripts, we have attached excerpts from the depositions which testimony clearly expresses these Minority Members' opposition to the derivative action.

If you have any questions or need additional information, please let us know.

Respectfully,

Sam Outten



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SAMUEL W. OUTTEN **PARTNER**

[sam.outten@nelsonmullins.com](mailto:sam.outten@nelsonmullins.com)

GREENVILLE ONE | SUITE 400

2 W. WASHINGTON STREET | GREENVILLE, SC

T 864.373.2299 F 864.373.2925

[NELSONMULLINS.COM](http://NELSONMULLINS.COM)

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Nelson Mullins is continuing to monitor developments related to COVID-19, including guidance from the Centers for Disease Control and various health officials; and federal, state, and local government authorities. The firm has implemented precautionary measures and plans to ensure the continuation of all firm services to clients from both in office and remote work arrangements across our 25 geographically dispersed offices. [Click here to visit the Nelson Mullins Coronavirus Resources page](#). Information described therein is subject to change.

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<love, donald-6-17-20.pdf>

<Donnie Love - Depo Excerpts - 4816-0571-5395 1.pdf>

<pitts,richard-6-22-20.pdf>

<Cullen Pitts - Depo Excerpts - 4811-0239-8915 1.pdf>

<ballard,harry-7-10-20.pdf>

<Dave Ballard - Depo Excerpts - 4830-7455-5843 1.pdf>

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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

August 12, 2020

VIA EMAIL ONLY (lmcintoshj@sccourts.gov)

Hon. R. Lawton McIntosh
Circuit Court Judge
P.O. Box 8002
Anderson, SC 29622

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

Dear Judge McIntosh:

I am writing to respond to the proposed Order Granting Motion for Summary Judgment as to Amended Third-Party Complaint and Awarding Attorneys' Fees, which Mr. Outten submitted to the Court yesterday for consideration. As an initial matter, on prior occasions where you have directed me to prepare a proposed order, I have circulated it to opposing counsel for review and comment prior to submitting it to the Court. For whatever reason, Mr. Outten did not follow that precedent, but submitted the proposed order directly to you, copying me on the same email, without providing my any preview or opportunity for comment.

Although I expressly reserve Ms. Mattison's right to appeal the Court's ruling on the summary judgment motion, I have the following comments on the proposed order:

–Page 2, first paragraph: The second sentence should clarify that Ms. Mattison is a current member of MPS. The word “former” should only modify employee. I think the word “current” needs to be added before the phrase “member of MPS.”

–Page 2, first paragraph: The last sentence in that paragraph should add the following after the date February 12, 2018: “. . . with her voluntary resignation from the firm.”

–Page 2, second paragraph: The last sentence of that paragraph provides an interpretation of the Severance Agreement that Defendant vigorously disputes. Rather than paraphrasing or interpreting the language of the Severance Agreement, which is not at issue in the Motion for Summary Judgment, the Court should quote the actual language of the Severance Agreement, which provides in relevant part, “The parties agree that Employee’s dissociation from Company shall be treated as a Proper Dissociation with no penalty or reduction on the

value of her financial rights. The parties agree that the value of Employee's membership units shall be mutually determined in early 2018 following the close of YR2017, with Company providing access to all current and prior year financial reports, tax returns, and other financial information as requested by Employee's Counsel. The Proper Dissociation will be handled separately from this Agreement and will be done in accordance with the September 30, 2015 Operating Agreement."

--Page 2, third paragraph: The first sentence has a typo about the date of the HDH Advisors' valuation, which occurred early 2018, not 2017.

--Page 3, first full paragraph: The last sentence needs to include the following at the end of the sentence: "and by engaging in a related-party transaction for the lease of MPS's Spartanburg office, which building is owned by an LLC in which Third-Party Defendant Ron Smith's wife is the principal owner."

The largest issue I have with the proposed order is the award of attorney's fees. Defendant has never been given an opportunity to brief this issue. In the email of July 21, 2020, which allowed supplemental briefing on the Motion for Summary Judgment following the three additional depositions, the Court specifically stated, "I request that neither party address the issue of attorney's fees and costs in their briefing." The Proposed Order appears to base the award of attorney's fees and costs on Rule 11, SCRPC; however, the Court's previous comments about attorney's fees appear to have been based on the Court's impression that the award of attorney's fees is a matter of contract.

During the hearing on November 6, 2019, the Court first mentioned attorney's fees and costs, but only if discovery is being used vexatiously or abusively, neither of which has occurred in this case. (Nov. 6, 2019 Tr., at 15, ll. 8-10) ("And I'm not above issuing sanctions by way of costs and fees or otherwise if I feel like [the discovery process is] being abused, okay?"). No allegation has been raised under Rule 37(b), SCRPC, about any discovery following the Court's comment during the November 6 hearing.

The next mention of attorney's fees occurred during the conference call on December 13, 2019, in advance of the hearing scheduled for later that afternoon on Defendant's Motion for Disqualification of Counsel and on Plaintiff's Motion for Protective Order Regarding Depositions of Minority Members. Although no transcript was made of that phone conference, my contemporaneous notes from the call reflect that the Court indicated its belief that there was an attorney's fee provision in the Severance Agreement or the Operating Agreement that might shift fees in the derivative action to the losing party. I believe that Mr. Outten indicated during the call that the Operating Agreement does have such a provision for attorney's fees. The Court indicated that if there was such a provision, that whoever loses the derivative action would be facing a pretty big burden at the end of the case.

I have reviewed the Operating Agreement several times and have not found such an attorney's fee provision. In fact, Section 4.3(b) of the Operating Agreement states, "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." (MPS Operating Agreement, at 8, ¶ 4.3(b) (emphasis added)). The only specific attorney's fee provision I could find in the Operating Agreement relates to remedies against a Managing Member for breach of the covenants applicable to Managers. (MPS Operating Agreement, at 15, ¶ 6.7) ("[I]n 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.") (emphasis added). Ms. Mattison has never been a manager of MPS, so this provision is not applicable.

The Severance Agreement likewise does not provide for an award of attorney's fees in the Derivative Action by Ms. Mattison, which is a separate action from Plaintiff's declaratory judgment action under the Severance Agreement. Section 5 of the Severance Agreement provides, in relevant part, that "[i]f Employee breaches this covenant not to sue, she hereby agrees to pay all of the reasonable costs and attorney's 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." (Severance Agreement, at 5, ¶ 5) (emphasis added). Ms. Mattison's Derivative Action is clearly not a breach of the covenant not to sue because the Derivative Action is not one of the claims released and forever discharged by the Severance Agreement. In addition, Section 17 of the Severance Agreement provides, "If either party brings a claim for breach of the terms of this Agreement, the prevailing party shall be entitled to its reasonable attorney fees and expenses incurred in prosecuting or defending such an action." (Severance Agreement, at 9, ¶ 17) (emphasis added). Ms. Mattison's Derivative Action is not a claim for breach of the Severance Agreement; in fact, as discussed by Defendant's counsel in detail before, her rights as a member of MPS were expressly carved out of the release in the Severance Agreement in at least three separate places. (See Severance Agreement, at 2, ¶ 2(j); at 5, ¶ 4 ("*... provided, however, that nothing in this Agreement shall have any effect on Employee's rights and remedies relating to her dissociation from the Company.*") (bold and italics in original); and at 10, ¶ 19(j) ("Employee is not waiving rights or claims that may arise after the date this Agreement is executed, nor is Employee waiving any rights or claims relating to her financial interests as a member or owner of the Company." (emphasis added)).

Finally, there is nothing in the South Carolina Uniform Limited Liability Company Act that would authorize an award of fees against Ms. Mattison for pursuing the Derivative Action claim here. The fee-shifting provision of the Derivative Action Article only authorizes an award of

reasonable expenses and attorney's fees to a successful plaintiff in a derivative action case; it does not provide that an unsuccessful derivative action plaintiff can be responsible for the defendant's attorney's fees and costs. S.C. Code Ann. § 33-44-1104.

Neither Ms. Mattison's actions in verifying the Third-Party Complaint and the Amended Third-Party Complaint nor her counsel's actions in filing or continuing the Derivative Action in this case would constitute a violation of Rule 11, SCRPC. All of the pleadings and motions in this case were filed in good faith and with a reasonable belief that the Derivative Action was supported by good grounds both factually and legally. In fact, the Court specifically allowed Ms. Mattison to re-plead the Derivative Action after amending and re-sending the pre-suit demand, and the Court denied Third-Party Defendants' second Motion to Dismiss Under Rule 12(b)(6), SCRPC. Defendant's counsel's refusal to accept, at face value, the unsworn, conclusory statements from all of the other minority members of MPS as dispositive of the merits of the Derivative Action was simply not a violation of Rule 11.

At a minimum, the Court should have given Defendant an opportunity to brief this issue before sua sponte ruling that an award of attorney's fees and costs is justified in this case. If the Court continues to believe that an award of attorney's fees and costs is merited, Defendant's counsel would absolutely want an opportunity to cross examine Plaintiff's counsel, at a hearing or deposition, about the amount of fees and costs his firm has charged in defending the Derivative Action and about whether MPS is even the real party in interest on the fee issue in light of the Directors and Officers Liability Policy that has been produced during discovery in this case.

Thank you for your time in reviewing and considering this important matter. If you have any questions or need any additional information, please let me know.

Sincerely yours,

A handwritten signature in black ink, appearing to read "David E. Rothstein", with a stylized flourish at the end.

David E. Rothstein

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

RECEIVED

Jun 10 2021

SC Court of Appeals

CERTIFICATE OF APPELLANT'S COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

May 28, 2021

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