THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE COURT OF COMMON PLEAS
Thirteenth Judicial Circuit
Hon. R. Lawton McIntosh

Appellate Case No. 2021-000365
Civil Action No. 2019-CP-23-00998

McMillan Pazdan Smith, LLC, ...Respondent,

v.

Donza H. Mattison, ...Appellant.

RESPONDENT'S RETURN TO THE PETITION FOR STAY PENDING APPEAL OR FOR WRIT OF SUPERSEDEAS

Thomas H. Keim, Jr.
FORD HARRISON
100 Dunbar Street, Suite 300
Spartanburg, SC 29306
(864) 699-1100

A. Mattison Bogan
NELSON MULLINS RILEY & SCARBOROUGH, LLP
1320 Main St. / 17th Floor
Columbia, SC 29201
(803) 799-2000

Samuel W. Outten
Miles E. Coleman
NELSON MULLINS RILEY & SCARBOROUGH, LLP
2 W. Washington St., 4th Floor
Greenville, SC 29601
(864) 250-2300

Attorneys for Respondent McMillan Pazdan Smith, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Statutes

Other Authorities

SUMMARY OF THE ARGUMENT

Respondent McMillan Pazdan Smith, LLC ("MPS") submits this Return in opposition to Appellant Donza H. Mattison's ("Mattison") Petition for Stay Pending Appeal or for Writ of Supersedeas (the "Petition"). The judgment that Mattison seeks to stay is not automatically stayed pending appeal, and there is no basis for this Court to impose a discretionary stay. As an initial matter, the Court lacks jurisdiction to grant the stay Mattison seeks because the stay would award relief that was not sought or raised in her pleadings. Mattison concedes that the sole issue before the lower court (and this Court) is the amount of money she is owed for her membership units in MPS. Her Petition, however, raises all manner of other alleged rights, claims, and grievances in support of her request for a stay of the lower court's Order requiring her to tender her membership units. In essence, she wants to remain a member of MPS and receive distributions on her membership units during the pendency of the appeal. However, Mattison never asserted that right or requested that relief in her pleading. She cannot now, through an appellate motion, seek such relief, and this Court lacks jurisdiction to grant relief that was not pled below.

Even if the issues and relief raised in the Petition were properly before the Court, Mattison misapprehends the legal test for a stay pending appeal and fails even to attempt to explain how her Petition satisfies that test. Nor could she. She is unlikely to prevail on appeal; the absence of a stay will not cause her any cognizable harm; the imposition of a stay would cause MPS harm; and a stay would not promote the public interest. Furthermore, a stay is not necessary to preserve jurisdiction or to prevent the sole issue on appeal from becoming moot.

In addition to these substantive infirmities, the Petition is procedurally deficient, as it fails to satisfy the express requirements of Rule 241(d)(3), SCACR. For any or all of these reasons, the Court should deny the Petition.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

MPS is a regional architectural and interior design firm with offices in South Carolina, North Carolina, and Georgia. Mattison is a former employee and member of MPS, and worked as an architect in MPS's Spartanburg, South Carolina office. During Mattison's tenure at MPS, she opposed significant business decisions made by the otherwise unanimous vote of MPS's members.

She parted from the firm in 2017. Her separation was memorialized in a Severance Agreement and General Release, dated December 5, 2017, which was extensively negotiated by her counsel, and which specifically provided for how her 2% ownership of MPS would be valued and paid. All parties agree that the Severance Agreement is valid and enforceable, but when MPS offered to purchase her shares for the amount dictated by the Severance Agreement, she refused, demanding a price nearly four times higher and expressly threatening litigation if her demands were not met.

MPS filed a declaratory judgment action seeking a declaration of rights. MPS asked the court to declare that the Severance Agreement was a valid and enforceable contract and that MPS had properly followed the provisions regarding the valuation of Mattison's shares. Mattison answered, admitting the Severance Agreement was a valid and enforceable contract, but asserted counterclaims relating to the determination of the fair value of her distributional interest. *See* Mattison's Amended Answer ¶¶ 49, 61, 60–91, attached as **Exhibit A**.

Relevant to the pending Petition, on February 12, 2021, the circuit court granted summary judgment in MPS's favor on MPS's declaratory judgment claim relating to the valuation of Mattison's membership units in MPS. (The court had previously entered an Order granting MPS's Motion for Summary Judgment on another of Mattison's counterclaims. Mattison has appealed from that Order in a separate appeal pending before this Court.) The February 12 ruling also

resolved all of Mattison's remaining counterclaims, which related to the value of her units. *See* Order at 4 (Feb. 12, 2021), attached as **Exhibit B** (noting that the only "remaining issue before the Court, raised both in MPS's claim and in Mattison's counterclaims, is the value of Mattison's equity interest in MPS").

The Order answered the question of how the value of Mattison's membership units should be calculated. *Id*. at 9 ("[T]he value of Mattison's 2,035.34 membership units are to be determined by applying the per unit price from the 2017 valuation conducted by HDH."). The Order also established a clear deadline for Mattison to tender her membership units as she had agreed to do in a contract she concedes was valid and enforceable. It also set a deadline for MPS to pay her for them. *See id*. ("Mattison shall tender her membership units to MPS within ten (10) days of the date of this Order," and, within ten days after that, "MPS shall provide payment to Mattison for her membership units as instructed by this Order.").

Mattison failed to tender her membership units within ten days. Rather, ten days after the entry of the circuit court's Order, she filed a Motion to Alter or Amend or for Reconsideration of Summary Judgment Order on Plaintiff's Declaratory Judgment Action. The court denied Mattison's Motion to Reconsider by Form 4 Order on March 17, 2021. Accordingly, even assuming Mattison's Motion to Reconsider stayed the enforcement of the court's Order, and even assuming that a new ten-day window started to run on March 17, 2021, Mattison's deadline to comply with circuit court's direction to tender her shares expired on March 27, 2021.

Mattison did not tender her shares at that time or at any time thereafter. Accordingly, as of March 27, she was (and still is) in violation of the court's Order. MPS did not immediately move to compel or seek sanctions for her violation of the Order, however, because the parties had been engaged in discussions to comply with the court's Order and to arrange for Mattison to tender

her shares. Accordingly, it appeared to MPS that Mattison intended to comply with the Order and was taking steps to do so. Contrary to Mattison's false insinuation that these efforts were an underhanded attempt to dupe her into surrendering legal rights, *see* Mattison's Mem. in Supp. of Petition at 2–4, 7, MPS's counsel engaged in these efforts in a good-faith effort to effectuate the circuit court's Order and, in fact, *agreed* to the changes proposed by Mattison's counsel to resolve her concerns about the Membership Interest Purchase and Redemption Agreement.

On April 1, 2021, Mattison filed her Notice of Appeal. In communications with MPS's counsel, Mattison's counsel agreed that the appeal did not automatically stay the circuit court's judgment of February 12, 2021. *See* April 6, 2021 Email (attached to Mattison's Petition as Exhibit D.) These communications, along with Mattison's efforts to work with MPS for the tender and payment of her units, show that Mattison understood the Order was not stayed pending her appeal.

Nevertheless, on April 21, 2021—three weeks after she noticed her appeal and five weeks after the circuit court denied her Motion to Reconsider—Mattison filed a Motion to Stay, seeking a stay or a supersedeas of the court's February 12, 2021 Order. Mattison filed her Motion to Stay shortly after she learned that MPS would not be making membership distributions of profit in the first quarter of 2021.

The Motion was briefed, and the circuit court held a telephonic hearing on May 19, 2021. *See* Order Denying Stay (June 22, 2021) at 1 (attached to Mattison's Petition as Exhibit H). Following the hearing, the parties submitted supplemental briefing at the request of Mattison's counsel. *Id*. On June 22, 2021, the circuit court issued an Order denying the Motion to Stay. *See id*. The Order correctly articulated the applicable standard of review; correctly concluded that the relief Mattison sought in the stay was not raised by her pleadings and was not properly before the court and, thus, the court "is without jurisdiction to award relief Mattison never requested in her

pleadings"; and, further, correctly concluded that, in any event, there was no basis to issue a stay. *Id*. at 3–6.

The court's ruling denying Mattison's Motion to Stay again set a deadline for Mattison to tender her shares: "Mattison must tender her membership units to MPS within ten (10) days of the date of this Order." *Id*. at 6. Yet again, Mattison failed to comply with the circuit court's directive and, therefore, was (and still is) in violation of yet another court Order. Instead of complying with the court's Order or promptly seeking this Court's review, she waited 24 days before filing the pending Petition.

STANDARD OF REVIEW

Rule 241, SCACR, permits a party to move "for an order imposing a supersedeas of matters decided in the order, judgment, decree or decision on appeal after service of the notice of appeal." Rule 241(c)(1), SCACR; *see also* Rule 62(d), SCRCP ("When an appeal is taken, a party, by giving a supersedeas bond, may obtain a stay subject to the exceptions contained in . . . the South Carolina Appellate Court Rules."). A motion for a stay or supersedeas is directed to the trial court in the first instance. *See* Rule 241(d)(1), SCACR. After the lower court has ruled, a party may petition the appellate court where the appeal is pending. Rule 241(d)(2), SCACR.

"Whether to grant such a stay rests in the court's discretion[.]" *Stearns Bank Nat. Ass'n v. Glenwood Falls, LP*, 375 S.C. 423, 426, 653 S.E.2d 274, 276 (2007). The Court "should consider whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot." Rule 241(c)(2), SCACR. South Carolina's courts have provided little guidance as to how a court should exercise its discretion in considering these and other factors; therefore, the Court may look to federal law. *Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991) ("Since our Rules of Procedure are based on the federal

Rules, where there is no South Carolina law, we look to the construction placed on the Federal Rules of Civil Procedure."); *see also* Comments to Rule 62, SCACR (noting that "Rule 62 is drawn from the Federal Rule").

Federal courts analyze four factors when considering whether to grant a stay under the analogous subdivision of Rule 62, FRCP: (1) whether the movant has a substantial likelihood of success on the merits on appeal, (2) whether the movant will be irreparably injured absent a stay, (3) whether the non-movant will be substantially injured if a stay is granted, and (4) the public interest. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). "A stay of this kind is considered extraordinary relief for which the moving party bears a heavy burden." *George Sink Injury Lawyers v. George Sink II Law Firm LLC*, 2:19-cv-01206-DCN, 2019 WL 6318778, at *3 (D.S.C. Nov. 26, 2019) (quoting *Ohio Valley Envtl. Coal., Inc. v. Pruitt*, CIVIL ACTION NO. 3:15-01271, 2017 WL 1712527, at *2 (S.D. W. Va. May 2, 2017)).

ARGUMENT

I. The Court lacks jurisdiction to grant the stay Mattison seeks because it involves relief she did not request in her pleadings or raise as an issue in this litigation.

It is axiomatic that a court may not grant relief that was not requested in the pleadings and which goes beyond the scope of the issues raised in the proceeding. *See Ringer v. Graham*, 293 S.C. 238, 246, 359 S.E.2d 523, 527 (Ct. App. 1987) ("We agree with the trial court that the Ringers did not request the relief they seek on appeal. . . . We therefore hold that . . . they are not entitled to this relief.") (citations and internal quotation marks omitted); *Ro-Lo Enters. v. Hicks Enters., Inc*., 294 S.C. 111, 113, 362 S.E.2d 888, 889 (Ct. App. 1987) ("We cannot grant relief on issues argued for the first time on appeal. [] Hicks also may not predicate error on the failure of the trial court to grant relief which is not prayed for in its pleadings.") (citations omitted); *see also Richland Cnty. v. Kaiser*, 351 S.C. 89, 94, 567 S.E.2d 260, 262 (2002) (noting that while a party will be

given some latitude regarding "the *form* in which the request for relief was framed," the available relief is confined to "the *substance* of the requested relief") (emphasis added) (citations and internal quotation marks omitted).

The stay that Mattison seeks would award her relief on issues not raised in this litigation and not requested in her pleading. Specifically, despite having signed a Severance Agreement more than three years ago, she seeks to remain a member of the firm by staying the portion of the circuit court's Order "requiring her to tender her membership units to [MPS]." *See* Petition at 1; *see also* Mem. in Supp. of Petition at 9–10 (explaining Mattison wishes to remain a member of MPS and receive distributions pending the outcome of her appeal).

Mattison's pleading, however, never requested any relief relating to her continuing as a member of MPS, nor was her right to remain a member ever at issue in the litigation. Rather, the sole issue raised in MPS's Complaint and in Mattison's counterclaims relates to the valuation of her membership units.[1] *See* Mattison's Amended Answer at 25 (Prayer for Relief), attached as **Exhibit A**. She admits as much in her Petition and supporting Memorandum, both of which concede that the circuit court's February 12, 2021 Order and this appeal relate solely to the amount she should be paid for her membership units. *See* Petition at 2 ("[T]he appeal and continued proceedings in the case will merely determine exactly how much is owed to Appellant."); Mem. in Supp. of Petition at 9 (same); *see also* Order at 4 (Feb. 12, 2021), attached as **Exhibit B** (noting that the only "issue before the Court, raised both in MPS's claim and in Mattison's counterclaims, is the value of Mattison's equity interest in MPS"); Order Denying Stay (June 22, 2021) at 2 (same)

[1] Mattison's responsive pleading also asserted a baseless shareholder derivative claim. That claim and the circuit court's ruling on it are the subject of another appeal pending before this Court and have no bearing on the availability of the relief Mattison has belatedly sought through her request for a stay.

(attached to Mattison's Petition as Exhibit H); *id*. at 5 (The issues and relief sought by Mattison cannot be granted by this Court, by the [C]ourt of [A]ppeals, or any court as she failed to raise them in her complaint, never amended the complaint, and has therefore waived those claims.").

Mattison's Petition and supporting Memorandum, however, incorrectly suggest that there are all manner of other rights, claims, and grievances before the Court. Specifically, Mattison submits that the Court should stay the lower court's Order pending appeal because Mattison wishes to receive distributions on her membership units in MPS during the pendency of the appeal and have continued access to internal financial records of the company. These issues were not before the lower court and are not before this Court, and Mattison never requested in her pleading that she remain a member pending the final resolution of this litigation. She cannot now, through a Petition to Stay, seek relief she never sought in her pleading.

Mattison attempts to distract the Court from the narrow issue which will be decided on appeal—the proper valuation of Mattison's shares. There are only two possible outcomes of Mattison's appeal. This Court will either rule that the valuation ordered by the trial court was correct or was incorrect. If correct, MPS will not owe Mattison additional money for the membership units, and the matter will be concluded. If incorrect, MPS may owe Mattison additional money for her membership units. But there is no Court of Appeals' ruling that could result in her continuing as a member of MPS.

Mattison's arguments reveal her true motivation: to receive money from MPS while the appeal is pending, even though she executed a Severance Agreement over three years ago—an agreement she concedes is valid and enforceable, and which the circuit court has ruled must be enforced. Mattison alleges that "[t]hroughout this litigation, Appellant has conducted herself in a professional and courteous manner and has never attempted to disrupt the normal business

operations of the company." *See* Mattison's Mem. in Supp. of Petition at 11. Mattison's self-serving statement could not be further from the truth. In April 2021, Mattison informed MPS principal Ron Smith via text message that she intended to participate as a consultant on a potential errors and omissions claim against MPS. *See* Text Message, attached as **Exhibit C**. Based on Mattison's text message, she is acting contrary to the interest of MPS, while asking that she remain a member of the firm, receive distributions, attend meetings, etc.

In sum, the Court lacks jurisdiction to award relief not raised below. The Court should ignore Mattison's arguments regarding issues that are not before the Court and should deny her Petition. *See Goddard v. Fairways Dev. Gen. P'ship*, 310 S.C. 408, 412, 426 S.E.2d 828, 831 (Ct. App. 1993) ("Issues on which the trial judge never ruled and which were not raised in post-trial motion are not properly before [the Court of Appeals].").

II. Mattison has not even attempted to explain how her Petition satisfies the four-part standard governing a request for a stay or supersedeas pending appeal.

In addition to this Court's inability to grant the relief Mattison now seeks in her Petition, Mattison has not shown any good reason for a stay to be granted. Rule 241, SCACR, governs what Orders are stayed pending appeal. Because the circuit court's Order dated February 12, 2021 directs the tender of Mattison's shares (*e.g.*, the delivery of documents or personal property) in exchange for a payment of a sum affirmed by the Order (which is akin to a money judgment), it falls into the express exceptions listed in that Rule and thus is not automatically stayed. *See* Rule 241(b)(1)–(3), (8); *see also* S.C. Code Ann. §§ 18-9-130, -150, and -160.

These reasoning behind these exceptions is doubly true in the posture of this case. Mattison admits in her pleading that the Severance Agreement she signed when she separated from MPS is a valid and enforceable contract. *See* Mattison's Amended Answer ¶¶ 49, 61, attached as **Exhibit A**. It requires her to tender her membership shares, and it requires MPS to purchase them. The

dispute between the parties, which was resolved by the Court's February 12, 2021 Order, is the *amount* MPS must pay for those shares. In most appeals from an order to pay money, the appeal is brought by the party that was ordered to *pay* the money, not the party that is to *receive* it. Even in that situation—when a reversal on appeal could entirely undo the obligation to pay—there is no automatic stay because the payment of money, if reversed, can be set right by the repayment of money. Money is fungible, and, therefore, even if a money judgment is reversed, the parties can easily be placed in their correct positions through other payments or repayments.

This principle is even more true here because it is Mattison—the *recipient* of the payment ordered by the Court—who has appealed. The relief she seeks on appeal would not reverse or negate MPS's payment obligation, but, rather, would seek a *higher* payment. The relief she seeks will, if granted, necessarily be effectuated through additional monetary payments. The exceptions to the automatic appellate stay not only apply but they also illustrate why a stay is especially unnecessary here. In addition, as explained below, the Court should deny Mattison's Motion to Stay because (1) she is not likely to succeed on the merits of her appeal, (2) she will not be irreparably injured in the absence of a stay, (3) MPS will be substantially injured if a stay is granted, and (4) the public interest weighs against granting a stay.

A. Mattison misapprehends the relevant standard.

As an initial matter, Mattison misapprehends the relevance of federal case law discussing the analogous federal rule regarding stays. As explained in the Standard of Review above, South Carolina's Rule 62 is drawn from the Federal Rule, and it is appropriate to consider federal court precedent when applying the rule. Federal courts look to four factors when considering whether to grant a stay under the analogous subdivision of Rule 62, FRCP: (1) whether the movant has a substantial likelihood of success on the merits on appeal, (2) whether the movant will be

irreparably injured absent a stay, (3) whether the non-movant will be substantially injured if a stay is granted, and (4) the public interest. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). Because Mattison misapprehends the standard that applies, she made no effort to meet her required burden before the lower court, and she has not attempted to do so before this Court either. As a result, the record is devoid of argument from Mattison upon which the Court could conclude that this discretionary standard has been met.

Mattison argues at some length that *Hilton* and other federal cases are not applicable generally, and that federal cases discussing Rule 62(d) specifically are not analogous because that subsection relates to appeals from orders granting or denying injunctions. *See* Mattison's Mem. in Supp. of Petition at 7–9. Her argument is incorrect.[2] Historically, Federal Rule 62(d) dealt broadly with the stay of *any* order or judgment pending appeal, not just injunctions. *See, e.g.*, *Karahodzic v. JBS Carriers Inc*., C/A No. 12-cv-1040-DRH, 2016 WL 7179023, at *1 (S.D. Ill. Dec. 9, 2016) (quoting Rule 62(d) and applying it—including the same four-part test that MPS has cited in this suit—to determine whether to stay a money judgment pending appeal).

Mattison's confusion stems from the fact that Federal Rule 62 was amended and reorganized in 2018, including a rearranging of the order of its subsections. *See* Rule 62, Fed. R. Civ. P., Advisory Committee Notes to the 2018 Amendments; *see also* 16 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2905 (3d. ed.) ("Prior to 2018, Rule 62(d) permitted an appellant to obtain a stay by giving a supersedeas bond. Amendments to Rule 62 in 2018 moved that provision to a new subdivision[] (b)."). Both pre-2018 federal case law

[2] MPS already corrected Mattison's misunderstanding of this issue in briefing filed before the circuit court. Nevertheless, despite now knowing it to be incorrect, she persists in repeating the same debunked argument here, requiring MPS to correct it yet again, which needlessly elongates the briefing and unnecessarily expends the Court's time and counsels' efforts.

discussing the stay of an order or judgment under Rule 62(d) and post-2018 federal case law discussing stays under Rule 62(b) are relevant to guide the Court's discretion in analyzing Mattison's Motion to Stay.

Mattison's criticism of MPS's (and the circuit court's) reliance on persuasive federal precedent, including *Hilton v. Braunskill*, 481 U.S. 770 (1987), is similarly misplaced. Specifically, she argues that *Hilton* is distinguishable because it analyzed a motion to stay under Rule 23 of the Federal Rules of Appellate Procedure. *See* Mattison's Mem. in Supp. of Petition at 8. Again, her criticism is unfounded. The specific section of *Hilton* cited by MPS discusses not the specific standard applicable under Rule 23, but, rather, the more general "power of district courts and courts of appeals to stay an order pending appeal" under Rule 62, FRCP and Rule 8(a), FRAP. *See Hilton*, 481 U.S. at 776; *see also Nken v. Holder*, 556 U.S. 418, 434 (2009) (discussing the four "traditional stay factors" that apply to guide a trial court's discretion in a variety of situations in which a stay of a lower court's action is sought pending appeal, and noting that *Hilton* set out the "traditional test" for a court's discretionary power to issue stays, and "distilled" these "legal principles" into four factors).

Lower federal courts—and at least one South Carolina circuit court (in addition to the circuit court in this proceeding)—have likewise specifically ruled that the four-part test cited by the lower court in its Order denying Mattison's Motion to Stay is the proper test to guide a court's discretion in deciding whether to grant a stay of a judgment or order. *See Karahodzic*, 2016 WL 7179023, at *1 (applying the four-part test to analyze a motion to stay a money judgment pending appeal); *Endress + Hauser, Inc. v. Hawk Measurement Sys. Pty. Ltd.*, 932 F. Supp. 1147, 1148–49 (S.D. Ind. 1996) (same); *Venus Lines Agency v. CVG Industria Venezolana De Aluminio, C.A.*, 210 F.3d 1309, 1313–14 (11th Cir. 2000) (quoting the then-existing Rule 62(d) and reciting the

four-part test to guide a court's discretion in applying that rule to a judgment ordering the attachment of an asset); *see also Ballard v. Roberson*, C/A No. 2008-CP-23-05739, 2014 WL 12734971 (S.C. Ct. Comm. Pls., March 27, 2014) (Hon. Edward W. Miller) (applying the four-factor test and denying a Motion to Stay in a case that, like this one, involved a business valuation and an order for one party to purchase the ownership interest of another party).

The circuit court properly considered and applied the four-factor test—a test that Mattison has not attempted to (and cannot) satisfy. Each of the four factors is discussed in turn below.

B. Mattison is not likely to succeed on the merits of her appeal.

A stay of the lower court's judgment is unnecessary because Mattison is unlikely to prevail on appeal. This circuit court properly granted MPS's Motion for Summary Judgment based on well-established principles of contract law in South Carolina. *See* Order at 7–9 (Feb. 12, 2021), attached as **Exhibit B**. The Order presents a narrow ruling that enforces the clear and unambiguous terms of the Severance Agreement—an agreement Mattison concedes is valid and enforceable and which dictates the valuation procedure for her membership units. In granting MPS's Motion for Summary Judgment, the court determined that the Severance Agreement is unambiguous, and, therefore, it establishes the procedure for valuing Mattison's membership units.

Crucially, Mattison did not argue (and has not argued in her appellate brief, filed July 21, 2021) that the Severance Agreement was ambiguous. "The judicial function of a court of law is to enforce contracts as made by the parties and not to re-write or distort, under the guise of judicial construction, the terms of an unambiguous contract." *Dobyns v. S.C. Dept. of Parks, Recreation & Tourism*, 325 S.C. 97, 103, 480 S.E.2d 81, 84 (1997). Here, the circuit court enforced the Severance Agreement as drafted by the parties' counsel, including the portion that plainly provides the method for the valuation of Mattison's membership interest in MPS. Mattison's arguments to

the contrary were unavailing, and she has not identified any error or misapprehension of the facts or the law in the Order granting summary judgment. Mattison cannot succeed on appeal. Accordingly, the Court should deny her Petition to Stay.

C. Mattison will not be irreparably injured if a stay is not issued.

If the Court does not enter a stay, Mattison will not be injured, much less irreparably so. The sole issue left unresolved by the Severance Agreement—which is also the sole issue resolved by the Court's February 12, 2021 Order and the sole issue on appeal—is the value of Mattison's membership units. Therefore, the only remaining dispute between the parties, and the only issue ruled on below, is the amount of money Mattison is owed for her membership units. This is a paradigmatic example of a ruling that need not be stayed on appeal.

If the Court denies the Petition to Stay, Mattison must tender her membership units to MPS, and MPS must pay Mattison for her membership units now. Alternatively, if the Court grants Mattison's Petition to Stay, Mattison will retain her membership units for the duration of the appeal, and regardless of the outcome of the appeal, MPS will pay Mattison for her membership units at some point after the appeal. Under either scenario, it is inevitable that (1) Mattison will be required to tender her membership units to MPS, and (2) MPS will then pay her for those membership units. There is no need to delay this process, and there is no scenario in which Mattison will not be required to tender the shares and MPS will not be required to pay her for them. Even if this Court were to reverse the Order granting summary judgment, Mattison can be made whole by further proceedings at the trial court regarding the value of her membership units and by the payment of additional money under the revised valuation method decided by the court. Stated differently, if Mattison is required to tender her membership units to MPS now and accept payment for the membership units, and if she wins her appeal, the consequence is that she may be

entitled to receive additional money from MPS. This is certainly not an injury, much less the sort of irreparable injury that warrants a stay pending appeal.

In Mattison's Petition to Stay, she argues that a stay is necessary to protect her rights to receive distributions from MPS, to preserve her investment in MPS, to vote of matters affecting the management of MPS, and to request and receive financial information about MPS. *See* Petition at 9–11. None of these constitute an injury warranting a stay. None of them are issues that she can raise on appeal, because they were not the subject of any appealable ruling. Even if they were issues that could be considered on appeal, the first two involve merely the payment of money, which could be set right later on if needed, and the final two merely seek to prolong her disruptive and distracting involvement in the internal operations of MPS—the denial of which can hardly be considered an irreparable injury to her.

In addition, she argues it is not "fair" for MPS to retain her capital investment in the company unless she continues to receive distributions during this litigation. *See*, *e.g.*, Petition at 10; *see also id*. at 5 (arguing she is "unfairly" being required to pay income tax on MPS's profits in proportion to her share of ownership of the firm). This injury, even assuming it is one, is of her own making. MPS has repeatedly offered and attempted to return her capital investment by redeeming her membership units. She has steadfastly refused. She cannot now claim her own recalcitrance is a cognizable injury to her.

The other harms she alleges are likewise facially implausible. For example, she argues that if the Court does not grant a stay and she subsequently wins on appeal, "it would be very difficult (if not impossible) to calculate the losses that [she] would have sustained in the interim because of missed distributions." *See id*. at 10–11. Not so. Her status as a member of MPS or her right to receive distributions was not before the lower court and is not before this Court, and there is no

scenario in which this Court's ruling would touch on those issues. In addition, she argues that if she prevails on appeal and thus postpones the date of her buy-out, that later date could expose her to substantial tax consequences. *Id*. at 11. But that is not a plausible injury to her. If anything, it counsel *against* granting a stay, for the sooner she tenders her shares, the sooner she eliminates the potential tax liability borne by members of the firm.

In addition, this Court should not ignore that the obvious intent of the Severance Agreement was to set forth the conditions of her separation from MPS. Mattison should not be allowed to accept all of the financial benefits under this agreement, then ignore the provisions regarding the valuation of her membership units, and attempt to remain a member. There is no credible argument that the intent of the Severance Agreement is for her to remain a member.

Rather than demonstrating any substantial, irreparable injury, Mattison's arguments illustrate her true purpose in seeking to prolong this litigation. Following entry of the court's February 12, 2021 Order, the parties were working to comply with the Order. Mattison only changed course after she was informed that MPS would not be making membership distributions of profit in the first quarter of 2021. Accordingly, her Petition to Stay should be denied.

D. MPS will be substantially injured if a stay is entered.

If the Court grants Mattison's Petition to Stay and enters a stay or supersedeas in this matter, MPS will be substantially injured. As stated above, Mattison remaining a member is contrary to the letter and spirit of the Release and Severance Agreement, and the Order directing the tender of her shares. Further, a stay will hinder and disturb MPS's operations for even more years while awaiting the outcome of the appeal.

Mattison's employment with MPS ended in February 2018—over three years ago. Since leaving employment with MPS, Mattison has wrongfully refused to accept the valuation of her

membership units upon which she had agreed. She has insisted on participating in and prolonging unnecessary litigation and has continued to disrupt the operations of MPS. She is serving as a consultant on a potential errors and omissions claim against MPS. *See* Text Message, attached as **Exhibit C**. Mattison's disruptive and litigious behavior has caused injury to MPS, and it should be put to a stop. Mattison should not be permitted to continue to benefit from her behavior by retaining possession of her membership units. Accordingly, the Court should deny Mattison's Petition to Stay.

E. The public interest is best served by denying Mattison's request for a stay and by enforcing the lower court's February 12, 2021 Order.

The public interest is best served by denying the Petition to Stay. In this case, there is no question that MPS must pay Mattison for her membership units. The only issue is the amount of that payment, *i.e.*, the value of her membership interest. In the context of Mattison's history of delaying proceedings, failing to comply with court orders, and doing everything in her power to harm MPS, it is apparent that Mattison's Petition to Stay is merely another attempt to delay the final disposition of this matter. Delaying MPS's payment to Mattison does not support the public interest and is not a sufficient reason to stay execution.

Stated differently, the public interest is not served by allowing Mattison, who has been determined to be in the wrong, to use the legal process to repeatedly delay resolution of that wrong. Mattison's motivation for filing the instant motion is to allow her to continue to receive distributions from MPS, which she has been receiving throughout the pendency of this action. Her financial incentives to remain a member of MPS are self-serving and do not serve the public interest. For all these reasons, Mattison's Petition to Stay should be denied.

III. Enforcement of the lower court's Order will not divest the appellate court of jurisdiction or moot any issue.

Rule 241(c)(2), SCACR, states that the Court should consider whether a stay is necessary "to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot." Neither of these factors weigh in favor of entering a stay in this case. This Court will not lose jurisdiction over the appeal if a stay is not entered. In addition, the issues will not become moot if a stay is not entered. Mattison challenges the valuation of her membership interest, and the lower court's ruling that she has appealed ruled on that issue. She does not need to retain possession of her membership units to continue challenging the value of those units, nor does the appealability of that ruling depend on her possession of the units. If MPS pays Mattison for her membership units now, Mattison will still be permitted to challenge the value of those units. Acceptance of MPS' payment does not mean that Mattison concedes the valuation is correct. That is why money judgments are expressly exempted from the automatic appellate stay. *See* Rule 241(b)(1), SCACR. The payment or receipt of money ordered by a judgment that has been appealed is not a concession by either party that the judgment is correct and it does not deprive them of their appellate rights. Therefore, a stay is not necessary to preserve jurisdiction or prevent a contested issue from becoming moot, and the Court should deny Mattison's Motion to Stay

Mattison contends that a stay is necessary to prevent the issue of the valuation of her shares from becoming moot on the basis that the Redemption Agreement that was being negotiated by the parties would have stripped Mattison of her appellate rights in this case. *See* Mattison's Mem. in Supp. of Petition at 2–3, 7. This argument is inapposite and overstates the effect of the language from the initial proposed Redemption Agreement that she quotes. "A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Decker v. Northwest Envtl. Def. Ctr.*, 568 U.S. 597, 609 (2013). The language in the proposed

Redemption Agreement referenced by Mattison addresses the ownership and title to the membership units. Further, as demonstrated by Exhibits B through E, attached to Mattison's Memorandum in Support, the parties discussed the effect of the referenced language, and MPS disagreed with Mattison's interpretation. When Mattison's counsel proposed certain revisions to MPS's counsel as to the Redemption Agreement, MPS accepted those revisions. *See* Mattison's Mem. in Supp. of Petition, Ex. E. Enforcement of the circuit court's February 12, 2021 Order will not render the issue on appeal moot. Accordingly, a stay is not required to prevent the issue in this case from becoming moot, and the Court should deny Mattison's Petition to Stay.

IV. Mattison's Petition is procedurally deficient for failing to comply with the requirements of Rule 241, SCACR.

In addition to its many substantive deficiencies noted above, Mattison's Petition cannot, as filed, be granted because it is noncompliant with the requirements of Rule 241, SCACR, in at least three ways. Subsection (d) of that rule governs the procedure for seeking a stay or supersedeas pending appeal, and it expressly requires that a person seeking such relief from this Court (1) "must file a written petition verified by the client," (2) "must contemporaneously file a certified copy of the order, judgment, decree or decision of the lower court or administrative tribunal," and (3) must contemporaneously file "a copy of the notice of appeal with its proof of service." *See* Rule 241(d)(3), SCACR.

Mattison's Petition does not comply with these three requirements. It is not verified by Mattison. It was not accompanied by a contemporaneous filing or exhibit including the lower court's Order that she seeks to stay. And it was not accompanied by a contemporaneous filing or exhibit including her Notice of Appeal with proof of service. Because the Petition does not comply with the Rule's requirements, it should not be granted.

CONCLUSION

The stay Mattison seeks would grant her relief not sought in her pleadings and which relates to matters not at issue in this litigation. A stay is not necessary to preserve jurisdiction or to prevent the sole issue on appeal—the calculation of the exact amount of money to be paid—from becoming moot. There are no reasons justifying a discretionary stay, and the Petition is procedurally deficient. For these reasons, the Court should deny Mattison's Petition for Stay Pending Appeal or for Writ of Supersedeas.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

Samuel W. Outten
SC Bar No. 4295
E-Mail: sam.outten@nelsonmullins.com
Miles E. Coleman
SC Bar No. 78264
E-Mail: miles.coleman@nelsonmullins.com
2 W. Washington St. / Fourth Floor
Post Office Box 10084 (29603-0084)
Greenville, SC 29601
(864) 250-2300

A. Mattison Bogan
SC Bar No. 72629
E-Mail: matt.bogan@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

FORD HARRISON

Thomas H. Keim, Jr.
SC Bar No. 10244
E-Mail: tkeim@fordharrison.com
100 Dunbar Street, Suite 300
Spartanburg, SC 29306
(864) 699-1100

Attorneys for Respondent

July 26, 2021
Greenville, South Carolina

McMillan Pazdan Smith, LLC v. Donza H. Mattison

In the South Carolina Court of Appeals
Appellate Case No. 2021-000365
Civil Action No. 2019-CP-23-00998

Exhibit A

to Respondent's Return to the Petition for Stay
Pending Appeal or for Writ of Supersedeas

Mattison's Amended Answer, Counterclaims, and
Third-Party Complaint (filed July 30, 2019) (sans exhibits)

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

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

FOR A FIRST DEFENSE
(General Denial)

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

2. Defendant admits the allegations of Paragraph 1.

3. Defendant admits the allegations of Paragraph 2.

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

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

6. Defendant admits the allegations of Paragraph 5.

7. Defendant admits the allegations of Paragraph 6.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FOR A SECOND DEFENSE
(Failure to State a Claim)

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

FOR A THIRD DEFENSE
(Waiver)

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

FOR A FOURTH DEFENSE
(Estoppel)

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

FOR A FIFTH DEFENSE
(Unclean Hands)

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

FOR A SIXTH DEFENSE
(Fraud in the Inducement)

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

FOR A SEVENTH DEFENSE
(Prior Breach of Agreement)

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

FOR AN EIGHTH DEFENSE
(Failure of Consideration)

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

COUNTERCLAIMS AND THIRD-PARTY CLAIMS

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

Parties, Jurisdiction, and Venue

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

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

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

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

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

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

Committee of MPS.

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

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

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

Facts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

membership meetings since November 15, 2017;

2. by failing or refusing to provide Defendant the opportunity to vote on matters presented to Plaintiff's membership regarding the operation of the company since November 15, 2017;

3. by failing or refusing to include Defendant in any and all distributions for members after the close of FY2017;

4. by failing or refusing to provide in a timely manner all material, financial information about Plaintiff's operations as requested by Defendant's Counsel;

5. by utilizing a valuation method that deliberately and systematically underestimates the true, fair market value of the company in several respects, including by failing to make normalizing adjustments to account for managing members' excessive compensation, benefits, and self-interested, related-party transactions; and

6. by failing to negotiate in good faith for the purchase of Defendant's membership units as a Proper Dissociation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FOR AN ELEVENTH DEFENSE AND BY WAY OF THIRD COUNTERCLAIM

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

used for personal entertainment, meals, and travel.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* * *

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

Respectfully submitted,

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

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

July 30, 2019

Greenville, SC.

McMillan Pazdan Smith, LLC v. Donza H. Mattison

In the South Carolina Court of Appeals
Appellate Case No. 2021-000365
Civil Action No. 2019-CP-23-00998

Exhibit B

to Respondent's Return to the Petition for Stay
Pending Appeal or for Writ of Supersedeas

Order Granting Summary Judgment on MPS's claim and
on Mattison's Counterclaims (entered February 12, 2021)

STATE OF SOUTH CAROLINA) COUNTY OF GREENVILLE	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT
McMillan Pazdan Smith, LLC, Plaintiff/Counter-Defendant, vs. Donza H. Mattison, Defendant/Counterclaimant.	Civil Action No. 2019-CP-23-00998 **ORDER GRANTING MOTION FOR SUMMARY JUDGMENT**
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") filed a Motion for Summary Judgment on December 14, 2020 as to MPS's declaratory judgment claim relating to the valuation of Defendant Donza H. Mattison's ("Mattison") equity in MPS. The Motion was fully briefed and came before the Court for hearing on January 14, 2021. Samuel W. Outten and Katie E. Towery appeared on behalf of MPS. David E. Rothstein appeared on behalf of Mattison. For the reasons explained more fully below, the Court deems the pending Motion to seek summary judgment in MPS's favor both on MPS's claim and on Mattison's counterclaims, all of which are issues ripe for determination. Having heard the arguments and reviewed the submissions of the parties, MPS's

Motion for Summary Judgment is hereby GRANTED, and summary judgment shall be entered in MPS's favor as to MPS's claim for declaratory judgment and Mattison's counterclaims.

FACTUAL AND PROCEDURAL BACKGROUND

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

The parties memorialized Mattison's cessation of employment in a Severance Agreement and General Release ("Severance Agreement") dated December 5, 2017. The Severance Agreement provides that Mattison's dissociation from MPS will be treated as a "Proper Dissociation," meaning that there was no penalty or reduction in the value of her financial rights. The Severance Agreement provides: "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." (*See* Severance Agreement ¶ 2(j).)

MPS's 2015 Operating Agreement (the "Operating Agreement"), which Mattison agreed in the Severance Agreement would control her dissociation from MPS, provides that a properly dissociating member will be paid "Fair Market Value" for her membership interest. (*See* Operating Agreement §§ 10.2, 11.3.) Fair Market Value is defined in the Operating Agreement as "the value of the Units as determined by the Management Committee in accordance with the procedure set

forth in Section 5.1(s)…." (*Id.* at Article I.) Pursuant to Section 5.1(s), the Management Committee "shall have the power and authority on behalf of the Company to: … determine the per unit price of any Membership Interest or Units for purposes of Section 11.3…." (*Id.* at § 5.1(s).)

The Operating Agreement further provides that "the seller [in this case, Mattison] 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." (*Id.* at Article I.)

MPS retained HDH Advisors LLC ("HDH") to conduct a 2017 valuation of the company in early 2018. After MPS and Mattison were unable to reach agreement on the value of her Units within 30 days after the event giving rise to the sale and purchase, MPS used HDH's 2017 valuation to determine a per unit price, and made an offer to Mattison on August 3, 2018 to purchase her membership units for this amount. (Am. Answer ¶ 56.) Mattison, however, contested this valuation and demanded a much higher per unit price. (*See id.* at ¶ 57.)

MPS filed a Declaratory Judgment Action on February 22, 2019, asking the Court to declare that the Severance Agreement is a valid and enforceable contract and Mattison's membership units are to be valued in accordance with the terms of the Operating Agreement. (*See* Compl.) MPS further asked the Court to declare that MPS had followed the Operating Agreement's provisions regarding the annual valuation of the company, and, therefore, the value

of Mattison's membership units should be determined by applying the per unit price from the company's 2017 valuation conducted by HDH. (*Id.*)

Mattison filed an Answer, Counterclaims, and Third-Party Complaint on March 4, 2019, and filed an Amended Answer, Counterclaims, and Third-Party Complaint on July 30, 2019. Mattison asserted counterclaims for breach of contract, judicial determination of the fair value of her distributional interest, an accounting and order compelling production of MPS's financial records, and for declaratory judgment. (*See* Am. Answer.) Mattison also asserted a derivative cause of action against Ron Smith, Joseph Pazdan, Brad Smith, and Chad Cousins for breach of fiduciary duty and breach of the Operating Agreement. (*Id.*) The derivative action was dismissed by Order dated September 30, 2020. Thus, the remaining issue before the Court, raised both in MPS's claim and in Mattison's counterclaims, is the value of Mattison's equity interest in MPS.

MPS filed a Motion for Summary Judgment on December 14, 2020 asking the Court to find that the Severance Agreement is a valid and enforceable contract that binds the parties and prescribes the method by which Mattison's equity must be valued, and thus to grant summary judgment on its declaratory judgment claim. Because MPS's declaratory judgment claim rests on the same transactions, occurrences, documents, rights, and obligations that underly Mattison's four counterclaims, and because a ruling in MPS's favor on its declaratory judgment claim necessarily forecloses Mattison's ability to prevail on her counterclaims, the Court deems the issues pending before it to include a request for summary judgment in MPS's favor both on MPS's claim and on Mattison's counterclaims.[1] *See generally Midsouth Steel, Inc. v. DPR Construction, Inc.*, 225 F.

[1] The Court notes that the parties' written and oral arguments presented at or in anticipation of the January 14 hearing likewise understood that MPS's claim and Mattison's counterclaims are two sides of the same coin, and that a ruling in MPS's favor on the former would necessitate a ruling in MPS's favor on the latter and would thus dispose of all claims pending before the Court.

Supp. 3d 542, 544¬45 (D.S.C. 2016) (noting a court may of its own volition grant summary judgment on a claim when doing so is simply a restatement of the court's ruling granting a motion for summary judgment on another claim and when the two rulings reach the same conclusion); *Rouse v. Nielsen*, 851 F. Supp. 717, 737 (D.S.C. 1994) (noting that as long as the parties were given a chance to be heard, there is no error or prejudice in a court's *sua sponte* grant of summary judgment); *Horne v. Beason*, 285 S.C. 518, 331 S.E.2d 342 (1985) (upholding trial court's *sua sponte* grant of summary judgment).

STANDARD OF REVIEW

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP. The party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact, *Trivelas v. S.C. Dep't of Transp.*, 348 S.C. 125, 558 S.E.2d 271 (Ct. App. 2001), a burden it may satisfy by demonstrating the claims at issue rest on the interpretation of clear and unambiguous contractual language, *see infra*; *see also First-Citizens Bank & Tr. Co. v. Conway Nat'l Bank*, 282 S.C. 303, 305, 317 S.E.2d 776, 777 (Ct. App. 1984) ("Where a motion for summary judgment presents a question as to the construction of a written contract, the question is one of law if the language employed by the agreement is plain and unambiguous. [] In such a case, summary judgment is proper and a trial unnecessary where the intention of the parties as to the legal effect of the contract may be gathered from the four corners of the instrument itself.") (citations omitted). Once the moving party has met that burden, the burden shifts to the party opposing summary judgment, who must show the Court the existence of a genuine issue of material fact. *Dyer v. Moss*, 284 S.C. 208, 211, 325 S.E.2d 69, 70 (Ct. App.

1985). "In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 378–79, 534 S.E.2d 688, 692 (2000).

Claims that, like those pending before the Court, rest on the interpretation and application of contractual language may be resolved by summary judgment because the meaning and effect of an agreement's language is a question of law for the Court. *See First-Citizens Bank & Tr. Co.*, 282 S.C. at 305, 317 S.E.2d at 777; *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009) (noting that summary judgment is appropriate when a claim involves the construction of an unambiguous, written contract, because the intent of the parties can be gathered from the four corners of the instrument); *Preservation Capital Consultants, LLC v. First Am. Title Ins. Co.*, 406 S.C. 309, 751 S.E.2d 256 (2013) (upholding trial court's grant of summary judgment when the contractual language was unambiguous).

The claims before the court are ripe for adjudication because their determination rests solely on the interpretation of the clear and unambiguous language of the parties' agreements. *See Whitlock v. Stewart Title Guar. Co.*, 399 S.C. 610, 615, 732 S.E.2d 626, 628 (2012) ("Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect."); *Black v. Freeman*, 274 S.C. 272, 273, 262 S.E.2d 879, 880 (1980) (noting that when the terms of a contract are clear and unambiguous, the resolution of claims arising from the construction of that contract is a matter of law to be decided by the court); *Moser v. Gosnell*, 334 SC. 425, 430, 513 S.E.2d 123, 125 (Ct. App. 1999) ("When the language of a contract is clear, explicit, and unambiguous, the language of the contract alone determines the contract's force and effect and the court must construe it according to its plain, ordinary, and popular meaning.").

RULING

The parties' claims, and the Court's ruling, relating to the valuation of Mattison's equity in MPS depend on the validity, enforceability, interpretation, and application of the Severance Agreement and Operating Agreement insofar as they relate to the method of calculating and valuing a member's equity. As explained more fully below, the Court concludes both the Severance Agreement and the Operating Agreement are valid and enforceable and lead inevitably to the conclusion that MPS has established its entitlement to the declaratory judgment it seeks, and Mattison has not (and cannot) recover under her counterclaims.

As an initial matter, the Court finds that the Severance Agreement is a valid and enforceable contract. Neither party contests the enforceability of the Severance Agreement. (*See* Am. Answer ¶¶ 49, 61.) Furthermore, the Court finds that the Severance Agreement prescribes the methodology by which to value Mattison's membership units. Specifically, Section 2(j) provides that Mattison's "Proper Dissociation will be handled separately from this Agreement and will be done in accordance with the September 30, 2015 Operating Agreement." And while that section of the Severance Agreement states the parties will "mutually determine[]" the value of Mattison's equity, that statement does not—as Mattison argues—stand alone or leave Mattison free to select whatever means and method of valuation she likes, nor does it give her liberty to dispute the means and method used by MPS. Rather, the very next sentence of section 2(j) identifies the specific way in which that mutual determination must be reached, namely "in accordance with the September 30, 2015 Operating Agreement." The Court finds the Severance Agreement to be clear and unambiguous. The parties agreed that Mattison's membership units would be valued according to the provisions of the Operating Agreement.

In reaching this conclusion, the Court notes that MPS and Mattison signed this Severance Agreement after several weeks of negotiation and with both parties being represented by counsel. The Court is unpersuaded by counsel for Mattison's argument that the Court should judicially value Mattison's membership units. When the terms and provisions of an agreement are clear and unambiguous, the Court should enforce the parties' contract. Here, it is clear that the parties agreed Mattison's units would be valued pursuant to the Operating Agreement. The Severance Agreement does not provide that the value of Mattison's units should be determined by a judicial valuation, and pursuant to the plain meaning of the contract that is unmistakably not what the parties intended.

As the South Carolina Supreme Court has stated:

> It is elementary… that the function of the courts is to adjudge and enforce contracts as they are written and entered into by the parties. The court cannot make them for the parties. When such contracts are capable of clear interpretation, the court cannot exercise its discretion as to the wisdom of such contract or substitute its own for that which was agreed upon where its provisions are clear, unambiguous and free from doubt.

Mid-Continent Refrigerator Co. v. Dean, 256 S.C. 99, 101, 180 S.E.2d 892, 893–94 (1971) (quoting *Charles v. Canal Ins. Co.*, 238 S.C. 600, 121 S.E.2d 200 (1961)).

The Court further finds that MPS followed the Operating Agreement's provisions in determining the Fair Market Value of Mattison's membership units. The Operating Agreement is clear that when Mattison and the Management Committee did not reach an agreed-upon valuation within the first 30 days after the event giving rise to the purchase and sale, the value of her shares "*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." (Operating Agreement at Article I; *see also id.* § 5.1(s) (noting that the Management Committee "shall have the power and authority on behalf of the Company to: … determine the per

unit price of any Membership Interest or Units for purposes of Section 11.3....").) The Management Committee hired HDH as a qualified third-party appraiser to determine the value of the firm consistent with the method outlined in the Operating Agreement. Thus, the value of Mattison's 2,035.34 membership units are to be determined by applying the per unit price from the 2017 valuation conducted by HDH.

For the reasons set forth above, MPS's Motion for Summary Judgment is hereby granted. The Court is enforcing the unambiguous terms of the parties' Severance Agreement and MPS's Operating Agreement. This ruling necessarily means Mattison cannot succeed on her counterclaims alleging MPS's valuation breached the parties' contract, seeking a judicial determination of the value of her equity, requesting an accounting or production of records, or seeking a contrary declaratory judgment. Accordingly, summary judgment is granted in MPS's favor on Mattison's counterclaims. The Court has carefully weighed and considered each of Mattison's allegations, claims, and arguments asserted in her written submissions and oral arguments but finds them unpersuasive or legally incorrect. This ruling disposes of all the remaining causes of action in this matter. Mattison shall tender her membership units to MPS within ten (10) days of the date of this Order. Within ten (10) days of Mattison tendering her units, MPS shall provide payment to Mattison for her membership units as instructed by this Order.

AND IT IS SO ORDERED.

R. Lawton McIntosh, Presiding Judge
Tenth Judicial Circuit

Anderson, South Carolina

2-9, 2021

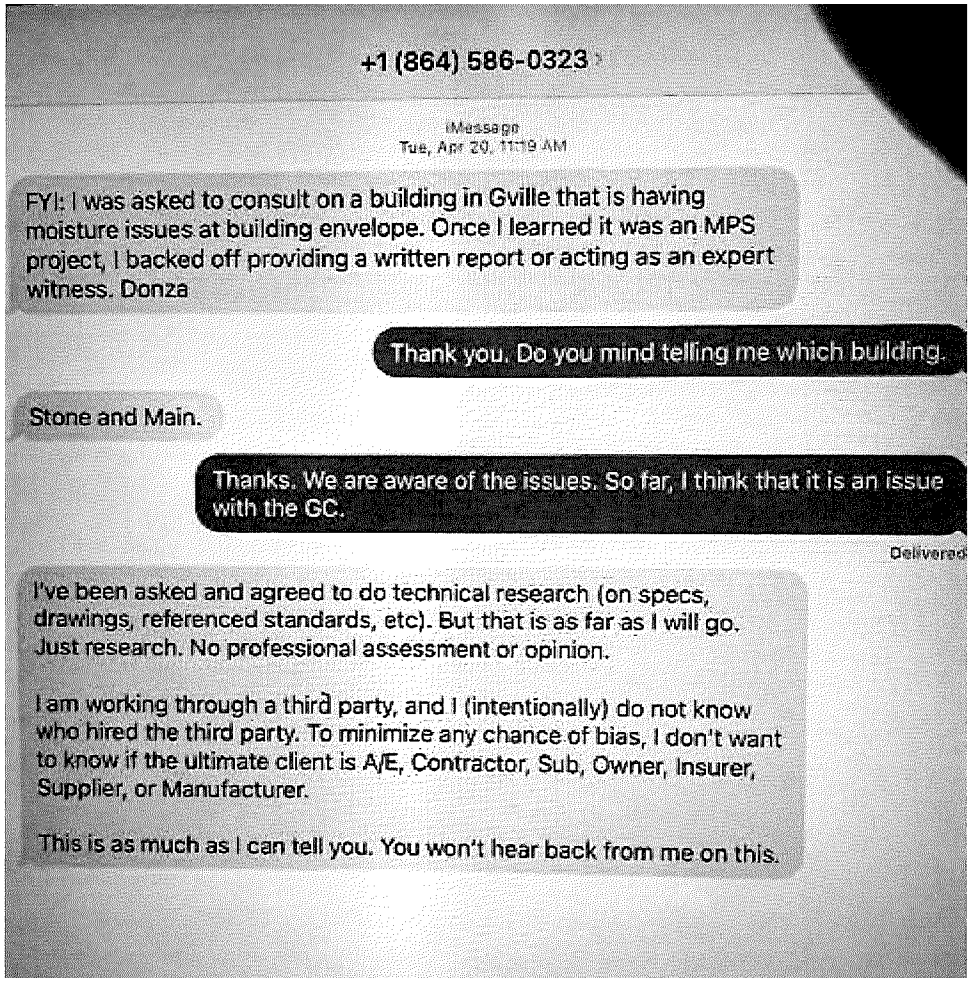
McMillan Pazdan Smith, LLC v. Donza H. Mattison

In the South Carolina Court of Appeals
Appellate Case No. 2021-000365
Civil Action No. 2019-CP-23-00998

Exhibit C

to Respondent's Return to the Petition for Stay
Pending Appeal or for Writ of Supersedeas

Text Messages from Donza Mattison to Ron Smith (sent April 20, 2021)


+1 (864) 586-0323
iMessage
Tue, Apr 20, 11:19 AM
FYI: I was asked to consult on a building in Gville that is having moisture issues at building envelope. Once I learned it was an MPS project, I backed off providing a written report or acting as an expert witness. Donza
Thank you. Do you mind telling me which building.
Stone and Main.
Thanks. We are aware of the issues. So far, I think that it is an issue with the GC.
Delivered
I've been asked and agreed to do technical research (on specs, drawings, referenced standards, etc). But that is as far as I will go. Just research. No professional assessment or opinion.
I am working through a third party, and I (intentionally) do not know who hired the third party. To minimize any chance of bias, I don't want to know if the ultimate client is A/E, Contractor, Sub, Owner, Insurer, Supplier, or Manufacturer.
This is as much as I can tell you. You won't hear back from me on this.

RECEIVED
Jul 26 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE COURT OF COMMON PLEAS
Thirteenth Judicial Circuit
Hon. R. Lawton McIntosh

Appellate Case No. 2021-000365
Civil Action No. 2019-CP-23-00998

McMillan Pazdan Smith, LLC,. .....Respondent,

v.

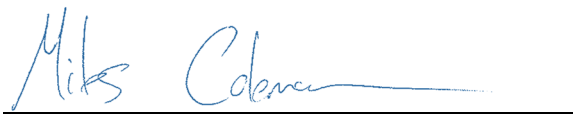
Donza H. Mattison, ...Appellant.

PROOF OF SERVICE

Pursuant to Section g(3) of Chief Justice Beatty's Amended Order dated May 29, 2020, undersigned counsel hereby certifies I have served a copy of Respondents' Return to the Petition for Stay Pending Appeal or for Write of Supersedeas on counsel of record by electronic mail (see attached sent email):

Counsel Served:

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

By: 
Miles E. Coleman

Attorney for Respondent McMillan Pazdan Smith, LLC

July 26, 2021
Greenville, South Carolina

Miles Coleman

From: Miles Coleman
Sent: Monday, July 26, 2021 2:59 PM
To: 'drothstein@rothsteinlawfirm.com'
Cc: Sam Outten; Matt Bogan (matt.bogan@nelsonmullins.com); 'Tom Keim'
Subject: MPS v. Mattison -- MPS's Return to the Petition for Stay
Attachments: 2021.7.26 -- MPS v. Mattison -- MPS's Return to Mattison's Petition for Stay.pdf

David — please find attached for electronic service a copy of MPS's Return to the Petition for Stay, which we will be filing with the Court of Appeals shortly.

Miles

NELSON MULLINS

MILES COLEMAN PARTNER
miles.coleman@nelsonmullins.com
GREENVILLE ONE | SUITE 400
2 W. WASHINGTON STREET | GREENVILLE, SC 29601
T 864.373.2352 F 864.373.2925
NELSONMULLINS.COM VCARD VIEW BIO

NELSON MULLINS

NELSON MULLINS RILEY & SCARBOROUGH LLP
ATTORNEYS AND COUNSELORS AT LAW

Miles E. Coleman
T 864.373.2352 F 864.373.2925
miles.coleman@nelsonmullins.com

2 W. Washington Street | Fourth Floor
Greenville, SC 29601
T 864.250.2300 F 864.232.2925
www.nelsonmullins.com

July 26, 2021

Via electronic mail
The Honorable Jenny Abbott Kitchings
Clerk of Court
The South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: Respondent's Return to the Petition for Stay
McMillan Pazdan Smith, LLC v. Donza H. Mattison
Appellate Case No. 2021-000365
Civil Action No. 2019-CP-23-00998
Our File No. 058964/01500

Dear Ms. Kitchings:

Please find enclosed for filing in the above-referenced matter Respondent's Return to the Petition for Stay Pending Appeal or for Writ of Supersedeas. Also enclosed is a Proof of Service of the same. We ask that you file the Return and exhibits thereto, at your convenience, return an electronic version to us bearing the Court's file stamp.

Pursuant to Chief Justice Beatty's Amended Order dated May 29, 2020, we are serving and filing this Return by electronic mail only. Please do not hesitate to contact us with any questions.

Very truly yours,

Miles E. Coleman
Counsel for Respondent

CC: Samuel W. Outten, Esq.
A. Mattison Bogan, Esq.
Thomas H. Keim, Jr., Esq.
David E. Rothstein, Esq.