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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas, Business Court Program

R. Lawton McIntosh, Circuit Court Judge

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

McMillan Pazdan Smith, LLC, Plaintiff-Respondent,

v.

Donza H. Mattison, Defendant-Appellant.

FINAL BRIEF OF APPELLANT

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

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STATEMENT OF ISSUES ON APPEAL

(1) Did the circuit court err in refusing to stay proceedings on Respondent's declaratory judgment action pending the appeal of Appellant's derivative action claims where the value of Appellant's membership units is inextricably intertwined with the derivative action and where Appellant has challenged the inherent conflict of interest faced by Respondent's counsel in simultaneously representing both the Respondent LLC and the individuals who are the alleged wrong-doers in the derivative action?

(2) Did the circuit court disregard the key sentence in Appellant's Severance Agreement regarding the valuation of her ownership units, which clearly contemplated a two-step process: (1) full disclosure of all financial information about the company as requested by Appellant, followed by (2) a good-faith effort to mutually determine the value of Appellant's units, neither of which Respondent complied with?

(3) Did the circuit court err in refusing to allow Appellant to conduct critical discovery about the management committee's understanding of the Severance Agreement, the extensive negotiations that led up to the final language of the Severance Agreement, and the history of the management committee's using HDH Advisors to manipulate the unit price to serve the interests of the majority bloc of owners, before considering Respondent's motion for summary judgment?

(4) Did the circuit court improperly discount the value of Appellant's membership units for lack of control and marketability, because such discounts were not applied either when Appellant originally purchased her units or when the members unanimously approved the initial valuation of the membership units shortly after the merger?

(5) Did the circuit court err in failing to award pre-judgment interest to Appellant, whose ownership interests should have been purchased in early 2018 per the terms of the Severance Agreement and where Respondent has had use of those capital funds for over three additional years?

STATEMENT OF THE CASE

This is Appellant's second appeal in this lawsuit, which arises out of a dispute over the valuation of Appellant's ownership interests as a member of an architectural firm that is organized as a South Carolina Limited Liability Company, upon her voluntary departure as an employee of the firm in February 2018. The first appeal involves the dismissal of Appellant's Third-Party Complaint, which attempted to raise a derivative action against four of the largest owners of the Respondent LLC, challenging various self-dealing transactions that they authorized to benefit themselves personally at the expense of the company as a whole. Much of the Statement of the Case set forth below was included verbatim in Appellant's brief in the first appeal.

On February 22, 2019, Respondent, McMillan Pazdan Smith, LLC (hereinafter "MPS"), filed the underlying Complaint against Appellant, Donza H. Mattison (hereinafter "Ms. Mattison"), for declaratory judgment seeking a court order forcing the redemption of her membership units as of YE2017 for a price determined by a third-party consultant hired by MPS's management committee in early 2018.

Appellant filed a Verified Answer, Counterclaims and Third-Party Complaint on March 4, 2019, raising various affirmative defenses, asserting counterclaims against MPS for breach of contract, judicial valuation of her membership interest, an equitable accounting, and a declaratory judgment. Appellant also included in her Answer a Third-Party Complaint, pleaded as a derivative action on behalf of MPS, against MPS's three managing members, Rondald G. Smith (hereinafter

“R. Smith”), Joseph M. Pazdan (hereinafter “Pazdan”), and Brad B. Smith (hereinafter “B. Smith”), and the company’s COO, Chad C. Cousins (hereinafter “Cousins”), for breach of fiduciary duty and breach of the LLC’s operating agreement. Appellant asserted that the individual Third-Party Defendants approved excessive compensation, bonuses, perquisites and other employment-related benefits for themselves and their family members, and authorized related-party transactions that unfairly enriched themselves at the expense of the firm, well beyond the proportions of their ownership interest in the firm.

On March 11, 2019, Appellant’s counsel submitted a consent motion for case assignment to the Business Court Program for Region 1, which motion was granted by order of Chief Business Court Judge Roger M. Young on March 20, 2019. The case was assigned to the Hon. R. Lawton McIntosh, Circuit Court Judge for the Tenth Judicial Circuit in Anderson County.

On April 1, 2019, Respondent and Third-Party Defendants filed a motion under Rule 12(b)(6), SCRCF, seeking to dismiss Ms. Mattison’s Counterclaims and Third-Party Complaint for failure to state a claim. Respondent and Third-Party Defendants argued that the Counterclaims violated the covenant not to sue and the release contained in the Severance Agreement and General Release (hereinafter “Severance Agreement”) that Ms. Mattison signed on December 5, 2017, in connection with her voluntary separation of employment from MPS. Respondent and Third-Party Defendants also asserted that the Third-Party Complaint must be dismissed for failure to meet the heightened pleading requirements of Rule 23(b)(1), SCRCF, specifically that Ms. Mattison failed to make a valid pre-suit demand on MPS prior to filing the derivative action or to demonstrate the futility of such a demand. They also argued that Ms. Mattison cannot fairly and adequately represent the interests of other similarly situated members of MPS in enforcing the rights of the company.

On April 26, 2019, Appellant filed a motion to disqualify Respondent's counsel from continuing to represent both the Respondent LLC and the individual Third-Party Defendants simultaneously in this action because of the inherent conflict of interest presented. Appellant did not object to Respondent's counsels' continuing to represent just the individual Third-Party Defendants, but requested that independent counsel be hired to represent the Respondent LLC. Appellant also asserted that no financial resources of the Respondent LLC should be used to defend the individual Third-Party Defendants in the derivative action. Shortly before the scheduled hearing date of May 16, 2019 on all pending motions, Appellant agreed to withdraw the motion for disqualification, without prejudice, pending the Court's ruling on the motion to dismiss.

By Order dated July 2, 2019 (following a Form 4 Order on June 14, 2019), Judge McIntosh denied the motion to dismiss the Counterclaims, finding that the release and covenant not to sue in the Severance Agreement applied only to Ms. Mattison's potential employment-related claims, and that the Agreement expressly carved out the redemption of her ownership interests, as well as any potential claims relating to her financial interests as a member of MPS. With respect to the derivative action, Judge McIntosh ruled that a letter sent by Ms. Mattison's counsel to MPS's counsel on January 14, 2019 did not constitute a valid pre-suit demand under Rule 23(b)(1), SCRCF, as a prerequisite to bringing a derivative action, but was instead merely a negotiating position. Judge McIntosh dismissed the derivative action without prejudice, allowing Appellant 30 days to amend both her pre-suit demand and the derivative claims in her Third-Party Complaint. Judge McIntosh held in abeyance the issue of whether Ms. Mattison could fairly and adequately represent the interests of similarly situated members of MPS in enforcing the rights of the LLC, pending further discovery on this issue.

On June 18, 2019, the undersigned counsel for Appellant sent certified letters to the three managing members of MPS formally notifying them of Ms. Mattison's intent to pursue a derivative action on behalf of MPS if the firm did not take appropriate action by July 19, 2019. Thereafter, Ms. Mattison re-filed her Verified Amended Answer, Counterclaims, and Third-Party Complaint on July 30, 2019.

Respondent and Third-Party Defendants filed a second motion to dismiss under Rule 12(b)(6), SCRCP, on August 7, 2019, arguing that the derivative action raised in Appellant's Third-Party Complaint should be dismissed for the same reasons stated in their previous motion to dismiss. They argued that the new letter of June 18, 2019 from Appellant's counsel could not be considered a valid pre-suit demand because litigation between Ms. Mattison and MPS was already underway.

The second motion to dismiss was heard by Judge McIntosh on September 10, 2019. The court denied the motion to dismiss by formal Order on October 30, 2019 (following a Form 4 Order on October 10, 2019). The court ruled that the letter of June 18, 2019 was a valid pre-suit demand and that Appellant had properly pleaded the derivative action claims in her Amended Third-Party Complaint. The court reiterated its previous ruling that the issue of whether Ms. Mattison could be a fair and adequate representative in the derivative action could only be addressed after an opportunity for discovery.

Appellant resumed her discovery on the derivative action shortly after the hearing on the second motion to dismiss. On September 23, 2019, Appellant's counsel re-issued six subpoenas duces tecum to third-parties, seeking documents and financial records relating to both Appellant's counterclaims and the derivative action. On October 2, 2019, Respondent and Third-Party Defendants filed a motion for a protective order and to quash the non-party subpoenas. The court

scheduled a hearing on this discovery motion for November 6, 2019.

On October 24, 2019, Appellant filed a Renewed Motion for Disqualification of Plaintiff's Counsel following the entry of the court's Form 4 Order announcing its decision on Respondent's and Third-Party Defendants' motion to dismiss the derivative action. Thereafter, Respondent's counsel specifically requested that the motion for disqualification not be heard during the upcoming hearing on November 6, 2019 because of the serious and consequential nature of the motion. The court scheduled a hearing for December 13, 2019 on the disqualification motion.

During the hearing on November 6, 2019 regarding the non-party subpoenas, the court sua sponte issued a ruling limiting discovery in the case to the issues of valuation of Appellant's ownership interests (including potential normalization of the alleged self-dealing and insider transactions) and whether Appellant could be a fair and adequate representative for the alleged derivative action. The court directed Respondent's counsel to prepare a formal written order, which was apparently signed by Judge McIntosh on November 22, 2019, but was not actually filed until on January 23, 2020.

On December 2, 2019, Respondent's counsel informed Appellant's counsel that Respondent had recently obtained written statements from all of the members of MPS (other than Ms. Mattison) expressing opposition to the derivative action and refusing to support the derivative action. Respondent's counsel provided copies of the statements to Appellant's counsel on December 3, 2019, only after Appellant's counsel agreed that Respondent's counsel could mark the statements as "Confidential." Later on December 3, 2019, Appellant's counsel prepared and served notice of the depositions of six of the minority members of MPS who had signed the member statements. Appellant's counsel scheduled the depositions for three consecutive days (December 17-19, 2019),

the earliest possible dates given the 10-day notice provision of Rule 30(b)(1), SCRCF.

In response to the notice of depositions, Respondent's counsel filed a motion for protective order on December 11, 2019, asserting that the sole purpose of the six depositions was to subject members of MPS to annoyance, embarrassment, oppression, and undue burden and expense. Appellant's counsel filed a brief in opposition to the motion for protective order on December 12, 2019, and offered to waive the 10-day notice requirement under Rule 6(d), SCRCF, so the court could take up the motion for protective order during hearing on the motion for disqualification of counsel, which was already scheduled for the following day, December 13, 2019, at 2:00 p.m.

On the morning of December 13, 2019, the court requested that counsel for the parties be available for an off-the-record telephone conference to discuss the case. During the call, Judge McIntosh indicated that he believed the motion for disqualification of counsel was premature until the court first determined whether Ms. Mattison could fairly and adequately represent the interests of similarly situated members of the LLC in the derivative action. Judge McIntosh did indicate that he would allow the depositions of the six members of the LLC to proceed, but left it to the attorneys to work out the scheduling of the depositions. The court limited the depositions to the subjects previously announced in the court's sua sponte ruling during the hearing on November 6, 2019. At the court's invitation, Appellant's counsel submitted a letter to Judge McIntosh on December 16, 2019, memorializing the court's rulings for the record, since no court reporter was present during the informal telephone conference on the morning of December 13, 2019. Judge McIntosh responded by email on December 17, 2019, stating that Appellant's counsel's summary of the court's rulings during the telephone conference was accurate. The court canceled the hearing scheduled for December 13 based on the telephone conference.

It took over two months to complete the first three depositions of minority members of MPS, because of logistical disputes with Respondent's counsel over where and when the depositions would occur and how long they would be allowed to last. The first three depositions were taken on January 17, 2020, January 29, 2020, and February 19, 2020. After Appellant's counsel requested deposition dates for the three additional minority members from the original notice of December 3, 2019, Respondent filed two motions on February 21, 2020, two days later, seeking to prevent Appellant's derivative action from proceeding further: (1) a motion for protective order to preclude Appellant from conducting any further discovery in the derivative action, specifically including depositions of any other members of MPS and a requested inspection of MPS's office in Spartanburg, SC under Rule 34, SCRCF; and (2) a motion summary judgment and for attorney's fees and costs with respect to the derivative action.

The Court held a hearing on these motions May 12, 2020, via video conference because of the restrictions caused by the COVID-19 pandemic. Prior to the hearing, Appellant's counsel filed an Affidavit under Rule 56(f), SCRCF, requesting additional discovery before the summary judgment motion was considered. On May 15, 2020, the Court entered a Form 4 order holding the motion for summary judgment on the derivative action in abeyance, pending the taking of three additional depositions of minority members of MPS who were among the six witnesses originally noticed in December 2019. During the summary judgment hearing on May 12, 2020, the Court, again sua sponte, further limited any additional depositions to the issues of whether the minority members even wanted a derivative action to proceed and, if so, whether they wanted Ms. Mattison to be the representative of MPS in such action.

Following the three additional depositions of minority members, which were held on June

17, June 22, and July 10, 2020, Respondent's counsel submitted the full depositions transcripts to the court by email on July 20, 2020. Thereafter, Appellant's counsel requested 30 days to submit supplemental briefing on summary judgment to discuss the new deposition testimony, but Respondent's counsel objected to any further briefing. On July 21, 2020, Judge McIntosh emailed counsel with his decision to allow supplemental briefing within 10 days, with the briefs limited to 20 pages and no exhibits unless approved by the court in advance. In his email of July 21, Judge McIntosh also requested that Respondent's counsel prepare a statement of attorneys' fees and costs associated with defending the derivative action, but the court specifically instructed counsel not to brief the issue of whether an award of attorney's fees was even appropriate at this juncture of the case.

Both sides filed supplemental briefs on Friday, July 31, 2020. On Tuesday, August 4, 2020, the Court entered a Form 4 Order granting summary judgment in favor of Respondent and Third-Party Defendants on the derivative action and directing Respondent's counsel to prepare a proposed order, including a provision requiring Appellant to pay Respondent's attorneys' fees and costs relating to defending against the derivative action, but leaving the amount of fees to be determined. Respondent's counsel submitted the proposed order on August 11, 2020. Thereafter, Appellant's counsel sent a letter to Judge McIntosh objecting to the proposed order on August 12, 2020, including the attorney's fee award, which the court had previously instructed the parties not to brief.

Judge McIntosh sent an email to counsel on August 13, 2020, allowing both sides to submit briefs within 10 days on the issue of the propriety of an award of attorneys' fees under either the South Carolina Rules of Civil Procedure or the contractual documents at issue in the case. Respondent's counsel filed their attorneys' fee brief on Friday, August 21, 2020, and Appellant's

counsel filed his attorneys' fee brief on Monday, August 24, 2020.

On September 22, 2020, the Court entered an order vacating its prior decision to award attorneys' fees and costs in favor of Respondent and Third-Party Defendants.

On September 25, 2020, Respondent's counsel submitted a second proposed order on their motion for summary judgment regarding the derivative action, omitting the award of attorneys' fees. The Summary Judgment Order was signed and filed on September 30, 2020.

Appellant timely filed a Motion to Alter or Amend or for Reconsideration of Summary Judgment Order on Monday, October 12, 2020, pursuant to Rule 59(e), SCRC. The circuit court scheduled a hearing on the motion for October 26, 2020. The court requested briefs to be filed by Friday, October 23, 2020, which were timely filed by both sides. At the conclusion of the hearing on October 26, 2020, the court requested Respondent's counsel to prepare a proposed order denying the motion for reconsideration. Respondent's counsel submitted the proposed order on October 30, 2020. The court signed the Order on November 9, 2020, denying Appellant's Rule 59(e) motion.

Appellant timely served and filed the first Notice of Appeal on December 9, 2020.

On December 11, 2020, Appellant then filed a motion to stay proceedings on the remainder of the case while the appeal was pending, because the outcome of the derivative action was necessary to accurately and completely value Appellant's ownership shares in the LLC, because the same transactions challenged in the derivative action would also need to be considered in the valuation action through the process of normalizing the excessive payments to the majority owners, and because of the conflict of interest faced by Respondent's counsel that was raised in the first appeal.

On December 14, 2020, Respondent file a motion for summary judgment on its own claim for declaratory judgment, despite the fact that almost all of the discovery conducted in this case thus

far related almost entirely to the derivative action and specifically to the issue of whether Appellant could fairly and adequately represent the interests of similarly situated minority owners in pressing the derivative claims on behalf of the company. Respondent did not submit a single affidavit in support of its summary judgment motion, nor did it rely on any testimony in the record from a single party or witness in the case.

On January 4, 2021, Appellant filed a motion to compel seeking information relating to a valuation that Respondent had hired a consulting firm from New York called AEC Advisors to perform for the company as of December 31, 2019. Although Appellant had previously requested the information in discovery, Respondent's counsel had indicated, as late as May 29, 2020, that the valuation report had not been completed. The AEC Advisors report was presented to Respondent's members at a specially called meeting on December 22, 2020, which Appellant attended virtually via videoconference. During the meeting, a representative from AEC Advisors presented a summary of the valuation report. Significantly, one of the slides in the presentation indicated that the report was initially dated May 18, 2020, which was almost two weeks before Respondent's counsel had last indicated that the report still had not been completed. Incidentally, the circuit court held the first hearing on Respondent's motion for summary judgment on the derivative action on May 12, 2020, less than a week before the AEC Advisors report was first presented to Respondent's management committee, all of whom who are also the individual Third-Party Defendants in Appellant's derivative action.

Because of Respondent's deliberate withholding of the AEC Advisors' valuation report, Appellant was deprived of the opportunity to review the report or conduct any discovery on the report prior to the lower court's decision on summary judgment in both the derivative action case

and Respondent's claim for declaratory judgment.

On January 13, 2021, Appellant's counsel filed a brief in opposition to Respondent's motion for summary judgment, including a Rule 56(f) Affidavit of Appellant's Counsel and a second Affidavit signed by Ms. Mattison.

The circuit court held a hearing on all pending motions on January 14, 2021, via virtual courtroom because of the COVID-19 protocols. On January 25, 2021, the court entered a Form 4 order denying Appellant's motion for stay pending appeal, denying Appellant's motion to compel relating to the AEC Advisors' report,¹ and granting summary judgment in favor of Respondent on its claim for declaratory judgment. The court instructed Respondent's counsel to prepare a proposed order. On February 12, 2021, the court entered a formal order, as submitted by Respondent's counsel, granting summary judgment in favor of Respondent.

On February 22, 2021, Appellant filed a Motion to Alter or Amend or for Reconsideration of Summary Judgment Order on Respondent's Declaratory Judgment Action. The circuit court held a hearing on this motion on March 16, 2021, again via virtual courtroom. On March 17, 2021, the court entered a Form 4 order denying the motion for reconsideration, indicating that no formal order would be entered unless requested by counsel for either side.

On April 1, 2021, Appellant timely served the notice of appeal in this matter to the South Carolina Court of Appeals, which notice was filed in the court of appeals by mail on April 2, 2021, and stamped received by the court of appeals on April 5, 2021.

¹The court did order Respondent to provide a copy of the valuation final report of AEC Advisors to Ms. Mattison based on her statutory right as a member of the LLC to request financial information about the company; however, the court's order was much narrower than the information Appellant had previously requested in discovery.

FACTS

The facts relevant to this second appeal overlap substantially with the facts underlying the derivative action at issue in the first appeal. Portions of the Statement of Facts from the first appeal relevant to the declaratory judgment action are reproduced here, sometimes verbatim.

Appellant, Donza Mattison, has been a licensed architect in South Carolina since September 17, 1991. She had worked for the Spartanburg firm of McMillan Smith & Partners Architects, PLLC (hereinafter “MS”) since approximately September 1994 and had been a partner in that firm since January 1, 1997. (Amended Answer, at 9, ¶ 44) (R. p. 108). MPS was formed at the end of September 2009, upon the merger of the MS firm with the Greenville firm of Pazdan-Smith Group, Inc. (Id. at ¶ 45) (R. p. 108). At the time of the merger, Ms. Mattison’s membership interest in MPS was 3.883%, making her (tied with three of her colleagues from MS) the fifth largest owner of the firm. Currently, she holds 2,035 membership units of MPS, which makes her the eighth largest owner among approximately two dozen current members. (Id. at ¶ 46) (R. p. 108). Of the members of MPS, only eleven individuals hold 2% or more of the outstanding membership units. Another eleven members of MPS hold less than one-tenth of 1% (< 0.10%) of the outstanding membership units of the firm, generally having been granted their units as a component of their compensation, rather than actually buying into the firm as Ms. Mattison and some of her colleagues had done. At the time of Ms. Mattison’s departure from the firm in February 2018, the three managing members and COO owned approximately 75.67% of MPS’s outstanding membership units. (HDH Report, YE2017) (R. p. 883).

Upon the closing of the merger in September 2009, the members of MPS all signed an Operating Agreement dated September 25, 2009 (hereinafter “MPS Operating Agreement”), to

govern the business of MPS and to set forth the rights, obligations, and relations of the members and managing members of the firm. Although MPS attempted on several occasions to amend the MPS Operating Agreement, including on or about September 30, 2015, no subsequent amendment has ever received the unanimous consent of all members. The original MPS Operating Agreement provides as follows: “Notwithstanding anything herein to the contrary, the following decisions shall require the approval of all of the Members: (I) any amendment of . . . this Agreement which affect[s] the financial or voting rights of a Member.” (MPS Operating Agreement, at 8, ¶ 4.2(d)(I)) (R. p. 556). Ms. Mattison refused to sign the proposed Amended and Restated Operating Agreement in September 2015, primarily because it would have reduced the “required interest of the members,” i.e., the supermajority of the firm’s membership needed to approve certain company matters, from 75% to 66.67%. (Amended and Restated Operating Agreement of MPS (Sept. 30, 2015), at 6, Art. I) (definition of “Required Interest of the Members”)) (R. p. 599).

In mid-November 2017, the leadership of MPS began efforts to force Ms. Mattison out of the firm for what she believed to be unlawful and improper reasons. On November 14, 2017, the Management Committee of MPS met with Ms. Mattison and presented to her a memorandum outlining provisions from the Operating Agreement regarding a member’s dissociation from the firm. (Mattison Affidavit, Ex. 1) (R. pp. 711-712) Shortly thereafter, Ms. Mattison hired the undersigned counsel, who assisted her in negotiating an amicable separation of her employment from MPS. The negotiations regarding Ms. Mattison’s employment with MPS culminated in the Severance Agreement, which was signed on December 5, 2017. (Severance Agreement) (R. pp. 127-138).

The parties’ negotiations leading up to the Severance Agreement and the language of the Agreement itself made it clear that Ms. Mattison’s employment-related matters were to be treated

separately from her financial rights as a member of MPS. The Severance Agreement expressly provides, “nothing in this Agreement shall have any effect on [Mattison’s] rights and remedies relating to her dissociation from the Company.” (Severance Agreement at 5, ¶ 4) (R. p. 131). The Severance Agreement also provides, “Nothing in this Agreement is intended to have any effect on Employee’s ownership rights or interests upon dissociation.” (*Id.* at 8, ¶ 13) (R. p. 134) (emphasis added). Furthermore, the Severance Agreement provides, “Employee is not waiving rights or claims that may arise after the date this Agreement is executed, nor is Employee waving any rights or claims relating to her financial interests as a member or owner of the Company.” (*Id.* at 10, ¶ 19(j)) (R. p. 136) (emphasis added).

With respect to the redemption of Ms. Mattison’s membership interests in MPS upon her proper dissociation from the firm, the Severance Agreement provides as follows: “The parties agree that the value of Employee’s membership units shall be mutually² 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 [Mattison’s] counsel.” (*Id.* at 2, ¶ 2(j)) (R. p. 128) (emphasis added).

Pursuant to the Severance Agreement, Ms. Mattison voluntarily resigned her employment with MPS effective February 12, 2018, following the exhaustion of her FMLA leave. Shortly thereafter, she continued her medical treatments for breast cancer, which had been diagnosed in early January 2018, before the effective date of her resignation. (Amended Answer, at 10, ¶¶ 51-52) (R. p. 109). On August 3, 2018, Mattison’s counsel notified MPS’s counsel that Ms. Mattison had

²Significantly, the circuit court’s first order granting summary judgment in favor of Respondent and Third-Party Defendants on the derivative action incorrectly omitted the word “mutually” in the quotation of this provision. (Summary Judgment Order #1, at 2).

finished her cancer treatments and was ready to resume discussions about the buy-out of her interests in the company. (Amended Answer, at 10, ¶ 55) (R. p. 109).

On August 3, 2018, MPS, through its counsel, made an offer to purchase Ms. Mattison's ownership units based on a purported "valuation" prepared by a third-party appraisal that MPS's management committee had commissioned in early 2018, notwithstanding the terms of the Severance Agreement regarding the "mutual" valuation of her membership units. In January 2018, MPS hired firm from Atlanta—HDH Advisors (hereinafter "HDH")—to perform a valuation of the company as of YE2017. HDH had performed various calculations of the value of MPS for internal purposes since mid-2013, but such reports usually were not completed until well into the third quarter of each year, after the prior year's financial statements and tax returns had been completed. The HDH valuation for YE2017 was completed on or before April 12, 2018, as MPS's counsel provided a copy of that report to the undersigned counsel for Appellant on that date. (Amended Answer, at 10, ¶ 53) (R. p. 109).

Ms. Mattison, through her undersigned counsel, rejected MPS's offer from August 3, 2018 and formally requested additional financial information from the firm that she, her counsel, and her financial expert believed was necessary to calculate the fair market value of her membership units. Ms. Mattison's counsel had previously requested certain financial information from Respondent's counsel on several other occasions, but not nearly all of the information requested had been provided. (Amended Answer, at 10-11, ¶¶ 56-59) (R. pp. 109-110).

Before MPS would provide additional financial information about the firm to Ms. Mattison or her counsel, MPS's counsel insisted on having Ms. Mattison, her attorney, and financial expert to sign a Confidentiality and Non-disclosure Agreement, which was signed on October 18, 2018.

(Confidentiality and Non-disclosure Agreement) (R. pp. 537-540).

On December 3, 2018, Mattison and MPS entered into a Tolling Agreement to allow the parties to preserve the status quo while they continued their negotiations and discussions about the fair value of Ms. Mattison's membership units in MPS. (Mattison Aff., at 4, ¶ 14) (R. p. 704). The Tolling Agreement itself acknowledged that the Severance Agreement "specifically reserv[ed] any and all issues relating to her Proper Dissociation from MPS" and that "a dispute has arisen between the parties hereto with regard to the valuation of Mattison's ownership units in MPS." (Tolling Agreement, at 1) (R. p. 727). After an unsuccessful mediation on February 20, 2019, MPS filed a lawsuit against Ms. Mattison two days later, on February 22, 2019, less than ten minutes after the deadline the mediator had established to notify the mediator confidentially about whether or not the parties would accept the mediator's proposal about the fair value of Ms. Mattison's membership interests in the LLC. In addition, MPS's lawsuit was filed more than ten days prior to the deadline agreed to under a written Extension to the Tolling Agreement, which extended the status quo through March 4, 2019. (Mattison Affidavit, at 4, ¶ 13) (R. p. 704); (Extension of Tolling Agreement) (R. p. 731).

Once Ms. Mattison and her counsel had received and reviewed the limited financial information from MPS as part of the valuation process agreed to in the Severance Agreement, Ms. Mattison discovered that the managing members and COO of MPS had approved substantial increases in their salary, bonuses, and benefits (not only for themselves, but also for certain non-employee spouses) that had never been approved by other members of MPS as required by the Operating Agreement. In addition, Ms. Mattison received for the first time details about the lease of MPS's office in Spartanburg, which was owned by a company called C & P of Spartanburg, LLC

(hereinafter “C & P”), an entity that was owned by the wives of two of the founding partners of MS (and the two largest shareholders of MPS at the time of the merger in September 2009). (Mattison Aff., at 4-5, ¶ 14) (R. p. 704-705) This information formed the basis for Ms. Mattison’s derivative action lawsuit, which is currently on appeal.

Ms. Mattison also observed, based on the financial information provided to her following her acceptance of the Severance Agreement, that the managers or executive committee members of MPS had appeared to use HDH’s valuations of the firm since 2013 to manipulate the price for membership units in the company to benefit only those in control of the firm, including COO and Third-Party Defendant Cousins. (Mattison Aff., at 6, ¶¶ 19-21) (R. p. 706). In fact, the initial offer that was made to buy out Ms. Mattison in mid-November 2017 was based on the valuation report for YE2016 by HDH Advisors dated July 6, 2017. Tellingly, according to the 2016 valuation report, the unit price of MPS dropped from \$122.26 per unit for YE2015 to \$118.32 per unit for YE2016. (HDH Advisors Reports, 2015 and 2016) ((R. pp. 815, 846). The 2015 valuation was based on MPS earning projected revenues of \$38.91 million in 2016, or 16.4% growth over the prior year. (HDH Advisors 2015 Report, Exhibit 2) (R. p. 831). In fact, MPS earned actual revenues of over \$41.77 million in 2016, or a 25% growth over the 2015 revenue figure. (HDH Advisors 2016 Report, Exhibit 2) (R. p. 864). Appellant was never able to conduct discovery on the issue of how the valuation of MPS could drop by almost \$4.00 per unit, or a loss of approximately 3.2%, from 2015 to 2016, when the company’s revenues beat their projections by almost nine percentage points during the same time. Significantly, Ms. Mattison was the only member of the LLC for whom the management committee expected to have her membership units redeemed in 2017, using the 2016 valuation. Ms. Mattison’s initial meeting with the leaders of MPS about her separation from the firm

occurred on November 14, 2017, about four months after the HDH Advisors report for 2016 was completed.

The parties agreed to participate in pre-litigation mediation on February 20, 2019, in an effort to resolve the disputes between them without resorting to the judicial system. At the end of the all-day mediation, the mediator proposed that he would not declare an impasse, but would instead leave the mediation open until Friday, February 22, 2019, at 5:00 p.m. for the parties to consider a confidential mediators' proposal. (Mattison Aff., at 5, ¶ 16) (R. p. 705). MPS filed its lawsuit against Ms. Mattison at 5:10 p.m. on February 22, 2019, per the time-stamp on the Complaint, a mere ten minutes after the deadline established by the mediator expired. (Complaint) (R. p. 61). MPS's lawsuit seeks a declaratory judgment forcing Ms. Mattison to sell her membership interests back to MPS for the price calculated by HDH as of December 31, 2017.

ARGUMENTS

1. THE CIRCUIT COURT ERRED IN REFUSING TO STAY PROCEEDINGS ON RESPONDENT'S DECLARATORY JUDGMENT ACTION PENDING THE APPEAL OF APPELLANT'S DERIVATIVE ACTION CLAIMS WHERE THE VALUE OF APPELLANT'S MEMBERSHIP UNITS IS INEXTRICABLY INTERTWINED WITH THE DERIVATIVE ACTION AND WHERE APPELLANT HAS CHALLENGED THE INHERENT CONFLICT OF INTEREST FACED BY RESPONDENT'S COUNSEL IN SIMULTANEOUSLY REPRESENTING BOTH THE RESPONDENT LLC AND THE INDIVIDUALS WHO ARE THE ALLEGED WRONG-DOERS IN THE DERIVATIVE ACTION.

As an initial matter, the circuit court should have declined to consider Respondent's motion for summary judgment, which was filed after Appellant had filed her Motion for Stay Pending Appeal of Derivative Action and for Leave to Conduct Rule 34 Inspection of Plaintiff's Spartanburg

Office to Preserve Evidence, on December 11, 2020. The court should have stayed further proceedings on the merits of the underlying case because the issues surrounding the valuation of Appellant's ownership interests in MPS are inextricably intertwined with the issues raised in the earlier appeal of the derivative action. The remainder of the case is clearly not a "matter not affected by the appeal" under Rule 241(a), SCACR, for which the circuit court could have continued to retain jurisdiction after the appeal.

Appellant served a Notice of Appeal on December 9, 2020, appealing the circuit court's Orders of September 30, 2020 and November 9, 2020, which dismissed Appellant's derivative claims on summary judgment. Appellant asserted that the service of the Notice of Appeal automatically stayed Respondent's original claims and Appellant's counterclaims, under Rule 241(a), SCACR, because the valuation of Ms. Mattison's membership interests in MPS is inextricably intertwined with the allegations raised in the derivative action claims that are on appeal. Out of an abundance of caution, Appellant filed a separate motion for stay to the extent that the circuit court could have determined that Respondent's original claims and Appellant's counterclaims might fall within the last sentence of Rule 241(a), which provides, "The lower court . . . retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal." Rule 241(a), SCACR.

The primary dispute in this case involves the valuation of Ms. Mattison's ownership interests as a member of MPS. The derivative action, which is now on appeal to this Court, is indispensable to conducting a complete and accurate valuation of Appellant's membership interests in MPS because the proceeds of the derivative action, if successful, would be an asset of the LLC that would need to be added back to the firm before any determination of the fair value of the firm could be

determined. In addition, there is extensive overlap between the allegations of self-dealing raised in the derivative action and the normalization process that would be required to conduct an accurate valuation of the company to account for the self-dealing transactions. See, e.g., Blackburn v. TKT & Assocs., Inc., 378 S.C. 589, 596, 693 S.E.2d 919, 922-23 (2010) (“Because the [business appraiser’s] Report did not make any allowance for Respondent’s excessive salaries, it failed to comply with the ‘income approach’ by failing to ‘normalize’ earnings of the corporation.”). As a matter of judicial economy, the circuit court should have delayed making a dispositive ruling on these issues until after this Court rules on whether the derivative action can go forward.

In Grosshuesch v. Cramer, 377 S.C. 12, 659 S.E.2d 112 (2008), the South Carolina Supreme Court stated, “while an appeal is pending, a lower court cannot act on matters affecting the issue on appeal.” Id. at 31, n.7, 122, n.7 (citing Rules 205 and 225, SCACR (now Rule 241, SCACR)); see also Johnson v. Brandon Corp., 69 S.C. 160, 164, 69 S.E.2d 594, 595 (1952) (“It is well established that ‘an appeal from an intermediate or interlocutory order does not divest the trial court of jurisdiction to proceed in matters not involved in the appeal.’”) (quoting 3 Am. Jur., Appeal and Error, § 534, at 195)). Because there is substantial overlap between the allegations raised in Ms. Mattison’s derivative action and the remainder of the underlying case, the circuit court should have stayed the entire action pending a decision on the appeal.

In addition, Appellant’s first appeal has challenged the inherent conflict of interest in having the Nelson Mullins and FordHarrison law firms represent MPS, the individual Third-Party Defendants in the derivative action, and the minority shareholders of MPS all simultaneously in the same litigation. The circuit court should not have taken any action in this case that could continue to prejudice Ms. Mattison’s rights, as a current member of MPS, to ensure that the firm is

represented by non-conflicted counsel and that the company's financial resources are properly marshaled for the benefit of the company as a whole, not just for those in charge of the company. By allowing the remainder of the underlying case to continue while the appeal is pending, the circuit court effectively foreclosed Appellant from enforcing the important protection not to have conflicted counsel affect the outcome of this action.

Accordingly, the circuit court erred in refusing to grant Appellant's motion for stay pending appeal.

2. THE CIRCUIT COURT DISREGARDED THE KEY SENTENCE IN APPELLANT'S SEVERANCE AGREEMENT REGARDING THE VALUATION OF HER OWNERSHIP UNITS, WHICH CLEARLY CONTEMPLATED A TWO-STEP PROCESS: (1) FULL DISCLOSURE OF ALL FINANCIAL INFORMATION ABOUT THE COMPANY AS REQUESTED BY APPELLANT, FOLLOWED BY (2) A GOOD-FAITH EFFORT TO MUTUALLY DETERMINE THE VALUE OF APPELLANT'S UNITS, NEITHER OF WHICH RESPONDENT COMPLIED WITH.

On appeal from the circuit court's grant of summary judgment in favor of Respondent on the company's own claim for declaratory judgment, this Court conducts a de novo review and must apply the same standard that the circuit court should have applied. Respondent, as the party bringing the declaratory judgment action "bears the burden of proof by the preponderance of the evidence." Menne v. Keowee Key Property Owners' Ass'n, Inc., 368 S.C. 557, 564, 629 S.E.2d 690, 694 (Ct. App. 2006) (quoting Martin v. Cantrell, 225 S.C. 140, 144, 81 S.E.2d 37, 38-39 (1954)). In Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 673 S.E.2d 801 (2009), the South Carolina Supreme Court held that "in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Id. at 330, 673 S.E.2d at 802. Of course, in considering a motion for summary

judgment the court must construe all of the facts and inferences in the record in the light most favorable to the non-moving party, here Ms. Mattison. See Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991).

Respondent's motion for summary judgment was based solely on the uncorroborated arguments of Respondent's counsel, with no supporting testimony in the record. By contrast, Appellant submitted two substantive affidavits in opposition to the motion, plus Appellant's Amended Answer and Counterclaims was verified by her, which is the equivalent of an affidavit for purposes of a summary judgment motion. Dawkins v. Fields, 354 S.C. 58, 67, 580 S.E.2d 433, 438 (2003). Accordingly, the only factual matter in the record about the intent of the Severance Agreement, other than the document itself, comes from Appellant.

The circuit court adopted Respondent's sole argument for summary judgment in its favor, that the plain reading of the Severance Agreement requires Ms. Mattison to accept the purported valuation of MPS performed by HDH Advisors in March 2018. Nothing could be further from the truth, especially when the Court is considering Respondent's motion for summary judgment on an issue for which Respondent bears the burden of proof. A careful reading of the actual language of the Severance Agreement—not Respondent's counsel's repeated misinterpretation of the language—is crucial. There is no dispute that the applicable provision of the Severance Agreement is Section 2(j), which provides, in relevant part, "The parties agree that the value of Employee's membership units shall be mutually determined in early 2018 following the close of YR2017, with Company providing access to all current and prior year financial reports, tax returns, and other financial information as requested by Employee's Counsel." (Severance Agreement, at 2, ¶ 2(j)) (R. p. 128) (emphasis added). The circuit court's ruling completely ignores the two underlined phrases immediately above

from the first sentence of Paragraph 2(j).

The Severance Agreement simply did not give MPS the right unilaterally to rush out and hire a third-party firm to perform the valuation. According to the Severance Agreement, the valuation of Ms. Mattison's shares was to be "mutually determined" in early 2018, after the full and complete disclosure of all financial information requested by Mattison's counsel. In other words, the parties specifically envisioned a two-step process for the valuation of the shares: first, MPS was to make full disclosure of all financial-related information requested by Mattison's counsel; second, after Ms. Mattison had received sufficient information to enable her expert determine the valuation of her shares, the parties were supposed to engage in good-faith negotiations to "mutually" determine the value of the shares.

Instead of engaging in this two-step process, immediately after the close of the calendar year (and before MPS's books were even closed for 2017), Respondent's COO contacted HDH Advisors to request a rush job on the 2017 valuation of the firm because of the anticipated departure of Appellant from the company. (R. p. 456). Respondent skipped right over the two-step, valuation process mandated by the Severance Agreement and instead invoked a twisted reading of the final sentence of Paragraph 2(j), which provides, "The Proper Dissociation will be handled separately from this Agreement and will be done in accordance with the September 30, 2015 Operating Agreement." (Severance Agreement, at 2, ¶ 2(j)) (R. p. 128). Of course, the circuit court ultimately accepted this approach in granting summary judgment in favor of Respondent.

Importantly, however, the only sentences in the entire Severance Agreement that mention the word "value" or "valuation" are the first two sentences of Paragraph 2(j): "The parties agree that Employee's dissociation from the Company shall be treated as a Proper Dissociation with no penalty

or reduction on the value of her financial rights. The parties agree that the value of Employee's membership units shall be mutually determined in early 2018 following the close of YR2017, with Company providing access to all current and prior year financial reports, tax returns, and other financial information as requested by Employee's Counsel." (Id.) (R. p. 128). Because Respondent disregarded both of these critical steps in the valuation of Appellant's shares, it violated the express terms of the Severance Agreement.

MPS breached the first step in Paragraph 2(j) of the Severance Agreement by failing or refusing to provide all financial-related information requested by Appellant's counsel surrounding the valuation process, despite numerous explicit requests. MPS's failure or refusal to provide all of the requested information deprived Appellant of her ability to "mutually" determine the fair value of her shares with Respondent following the effective date of her resignation. In other words, Respondent's prior breach of the Severance Agreement in failing to provide the information requested relieved Ms. Mattison from any further obligations under the contract. See Willms Trucking Co. v. JW Const. Co. Inc., 314 S.C. 170, 178, 442 S.E.2d 197, 201 (Ct. App. 1994) (recognizing that "where a contract is not performed, the party who is guilty of the first breach is generally the one upon whom all liability for the nonperformance rests").

MPS also never engaged in a good-faith effort with Ms. Mattison to "mutually determine[]" the value of her membership interests as required by the second step of Paragraph 2(j). Respondent's argument regarding the value of Ms. Mattison's units is based solely on the HDH Advisors report, which was actually ordered by Mr. Cousins before the effective date of Ms. Mattison's resignation from the firm. (Cousins email to HDH Advisors, Jan. 4, 2018) (R. p. 456).

The circuit court accepted Respondent's argument that relied entirely on the last sentence of

Section 2(j): “The Proper Dissociation will be handled separately from this Agreement and will be done in accordance with the September 30, 2015 Operating Agreement.” (Severance Agreement, at 2, ¶ 2(j)) (R. p. 128). The phrase “proper dissociation” does not mean “valuation,” under either the MPS Original Operating Agreement from September 20, 2009 or under the purported 2015 Amendments that Ms. Mattison never signed.

In the 2009 Operating Agreement, the defined term “Fair Market Value” includes a procedure that is almost identical to that contained in Section 2(j) of the Severance Agreement:

“Fair Market Value” shall mean, with respect to a Member’s Units, the value of the Units as determined in accordance with the procedure set forth in this paragraph. First, the seller and the Management Committee shall attempt to agree upon the value of the Units as soon as practicable after the occurrence of the event giving rise to a purchase and sale under Article XI.

(MPS Operating Agreement (Sept. 20, 2009), at 2) (R. p. 550). This is the same procedure that the MPS Management Committee originally described to Ms. Mattison when they met with her on November 14, 2017, and presented to her the Memo with the subject line “Some Key Provisions of Employment Association with Firm.” In paragraph 7 of that Memo, the Management Committee quotes from the above provision of the 2009 Operating Agreement, with an initial attempt by both parties to agree upon the value of the units, followed by an appraisal by a qualified appraiser paid for 50/50 between seller and the company. (Memo of Nov. 14, 2017) (R. pp. 711-712).

The term “Proper Dissociation” is defined in Article X of the original MPS Operating Agreement, to be dissociation based on death, disability, permanent retirement over age 55 on 2-years notice, or involuntary termination without cause. (R. pp. 567-568). Here, the Severance Agreement stipulated that Ms. Mattison’s voluntary resignation was a “proper dissociation” as that term is used in the Operating Agreement.

The 2015 Amended and Restated Operating Agreement contains a materially different definition of “Fair Market Value,” which allows the Management Committee to determine the stated value each year in accordance with Section 5.1(s). (R. pp. 598, 609). This is clearly not the procedure referenced in the Management Committee’s Memo to Ms. Mattison on November 14, 2017, nor was such procedure contemplated by Ms. Mattison when she signed the Severance Agreement.

Although the circuit court appropriately stated that no portion of the Severance Agreement can be viewed in isolation, but must be considered in context by looking at the Severance Agreement as a whole, the court unfortunately focused entirely on the third sentence of Paragraph 2(j), which does not use the term “value” or “valuation” at all.

It is undisputed that Ms. Mattison never signed or ratified the 2015 Amended and Restated Operating Agreement of MPS to indicate her consent to amend the Operating Agreement. The reference in Paragraph 2(j) of the Severance Agreement to the term “proper dissociation” was merely intended to incorporate the procedural mechanism for redeeming Ms. Mattison’s shares—such as the definition of proper dissociation, the timing of the redemption payments, and the accrual of interest—not the actual valuation of those units. The intent of the parties in signing the Severance Agreement is made clear elsewhere in the document, which expressly states, “Nothing in this Agreement is intended to have any effect on Employee’s ownership rights or interests upon dissociation.” (Severance Agreement, at 8, ¶ 13) (R. p. 95). Ms. Mattison never agreed to have the value of her shares determined by HDH Advisors without any input by her into the process.

The circuit court also improperly accepted Respondent’s strained argument under Article I of the 2015 Amended and Restated Operating Agreement, which provides a valuation procedure only

where the Management Committee has not made a new determination of value for two consecutive years. The Management Committee's right to select its own qualified appraiser if no agreement as to price is reached with the dissociating member within 30 days after her departure, as provided for in definition of "Fair Market Value," is triggered only "in the event that the Management Committee does not make such determination of the value of the Units for two (2) consecutive years." (2015 Amended and Restated Operating Agreement, at 5) (R. p. 598). The Severance Agreement clearly contemplated that Ms. Mattison's units would be valued by a different procedure, which was anticipated to have occurred months before the Management Committee's normal engagement of HDH Advisors.

The circuit court also disregarded four contemporaneous or subsequent documents that support Ms. Mattison's interpretation of Section 2(j) of the Severance Agreement regarding the valuation of her membership units. First of all, the original memo provided to Ms. Mattison by the members of the Executive Committee on November 14, 2017, which explains the valuation process, quotes from the original 2009 Operating Agreement, not from the 2015 Amended and Restated Operating Agreement. (R. pp. 711-712) All of the members of MPS knew that Ms. Mattison had refused to sign the 2015 Amended and Restated Operating Agreement, which rendered that document void to the extent that it purported to affect any member's voting or financial interests. The original memo clearly references the provision from the original Operating Agreement that the parties will attempt to mutually determine the value of the shares, and if such effort is not successful, the parties will split the costs of an independent valuation performed by a third-party expert selected by MPS's managing members. (R. pp. 711-712)

Second, the version of the Severance Agreement that was originally proposed to Ms.

Mattison prior to her retaining counsel, along with the Memorandum of November 14, 2017, specifically references the original Operating Agreement dated September 29, 2009, not the Amended and Restated Operating Agreement from September 2015. (Proposed Severance Agreement) (R. p. 714). Again, all of the members of MPS knew that Ms. Mattison had not adopted the attempted revisions to the Operating Agreement in 2015, which per the Operating Agreement and the LLC statute rendered such amendments ineffective to affect the voting or financial rights of the members of MPS.

Third, on October 18, 2018, the parties signed a Confidentiality and Non-Disclosure Agreement, which MPS insisted on receiving before it would agree to disclose the financial information Appellant's counsel requested as the initial step of the valuation process. (R. p. 537). Again, this was in mid-October 2018, more than six months after the HDH Advisors valuation report had been completed. If, as Respondent argued to the circuit court, the HDH Advisors' report was conclusive of valuation per the 2015 Amended and Restated Operating Agreement, there would be no need for MPS to disclose the financial information to Ms. Mattison at all. At the time the Severance Agreement was signed, the parties clearly did not intend for the Severance Agreement to delegate the valuation matter unilaterally to HDH Advisors.

Similarly, the parties' Tolling Agreement, which was signed on December 3, 2018 (and later extended for another 30 days on or about January 21, 2019 through March 4, 2019), recognized in the recitals that "a dispute has arisen between the parties hereto with regard to the valuation of Mattison's membership units in MPS" and that the parties wished "to continue their settlement discussions and negotiations regarding this matter, but without prejudice to Mattison by any further delay in the filing of any legal claims she might have." (R. p. 727). If the valuation of Ms.

Mattison's interests were conclusively determined by HDH Advisors' report of March 29, 2018, as Respondent argued to the circuit court (and which argument the circuit court accepted), there would have been no need for the parties to enter into either the Confidentiality and Non-Disclosure Agreement or either of the two Tolling Agreements.

The cardinal rule a court must apply in interpreting a contract "is to ascertain and give effect to the intention of the parties." South Carolina Dep't of Trans. v. M & T Enterprises of Mt. Pleasant, LLC, 379 S.C. 645, 655, 667 S.E.2d 7, 12 (Ct. App. 2008). Of course, the court must first look to the actual language of the contract, id.; however, the Court must consider the entire contract as a whole and cannot take one provision out of context or to the exclusion of other provisions in the contract. The only way to harmonize the three sentences in Paragraph 2(j) is the construction suggested by Appellant—that valuation of her shares was substantially different than the process for proper dissociation set forth in the 2015 Amended and Restated Operating Agreement, which plainly does not require disclosure of financial information or a mutual effort by both MPS and the departing member to determine the value of the shares.

The circuit court improperly accepted Respondent's "straw-man" argument that Ms. Mattison's counterclaims seek a judicial valuation of her shares, which is not mentioned at all in the Severance Agreement. Appellant has never argued that the Severance Agreement expressly provides for a judicial valuation of her units. Rather, judicial valuation is the default remedy in the LLC Statute for valuation when a redeeming member and the LLC cannot agree on the value of the shares or there is no specific formula provided for valuing the shares. S.C. Code Ann. §§ 33-44-701(d) & (e) and -702. Here, Respondent first breached the Severance Agreement by failing or refusing to provide the financial information requested by Appellant's counsel. Second, Respondent breached

the Severance Agreement by not engaging in a good-faith effort to negotiate the value of Ms. Mattison's shares, which is required by both the Severance Agreement and the duty of good faith and fair dealing, which is implied in every contract and expressly retained by the LLC statute. See S.C. Code Ann. § 33-44-103(b)(4) (stating that an operating agreement may not "eliminate the obligation of good faith and fair dealing under Section 33-44-409(d)"). Once Respondent breached the terms of the Severance Agreement, Appellant had the right to bring a claim (or here, a counterclaim) for judicial valuation of her shares within 120 days of Respondent's failure to purchase her distributional interest, S.C. Code Ann. § 33-44-701(d), which deadline was extended by the parties' tolling agreements through 5:00 p.m. on March 4, 2019. (Extension to Tolling Agreement) (R. p. 731). Ms. Mattison timely filed her counterclaim seeking judicial valuation of her shares at 5:01 p.m. on March 4, 2019. (Answer, Counterclaim, and Third-Party Complaint) (R. p. 66).

Accordingly, under a correct reading of the Severance Agreement, taking all facts and inferences in the records in the light most favorable to Appellant, Respondent is not entitled to an award of summary judgment on its declaratory judgment claims.

3. THE CIRCUIT COURT ERRED IN REFUSING TO ALLOW APPELLANT TO CONDUCT CRITICAL DISCOVERY ABOUT THE MANAGEMENT COMMITTEE'S UNDERSTANDING OF THE SEVERANCE AGREEMENT, THE EXTENSIVE NEGOTIATIONS THAT LED UP TO THE FINAL LANGUAGE OF THE SEVERANCE AGREEMENT, AND THE HISTORY OF THE MANAGEMENT COMMITTEE'S USING HDH ADVISORS TO MANIPULATE THE UNIT PRICE TO SERVE THE INTERESTS OF THE MAJORITY BLOC OF OWNERS, BEFORE CONSIDERING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT.

Respondent's motion for summary judgment was premature. As set forth in the second Rule 56(f) Affidavit of Defendant's Counsel, Appellant did not have a sufficient opportunity to complete

discovery necessary to address the issues raised in Respondent's motion for summary judgment regarding the interpretation of the Severance Agreement. As detailed in the Statement of the Case above, the circuit court strictly limited the scope of discovery in this case to the preliminary "fair and adequate representation" issue in the derivative action. Counsel for Respondent thwarted Ms. Mattison's legitimate efforts to conduct necessary discovery in this matter on the underlying declaratory judgment action and on Appellant's counterclaims.

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

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

Here, Appellant requested additional time to conduct discovery in this case on the issues of the valuation of her membership interests in MPS, including some of the same self-dealing transactions committed by the managing members and COO of the firm as alleged in the derivative action, which transactions must be normalized to reflect a true fair value of the company. In the second Rule 56(f) Affidavit, Appellant's counsel detailed his good-faith efforts to conduct discovery in this case and the repeated stone-walling Appellant has encountered from Respondent and its counsel to date. (R. pp. 400-410). Clearly, Appellant diligently attempted to pursue discovery related to the issues presented in the summary judgment motion; however, counsel for Respondent unfairly impeded discovery at every turn.

Additionally, there is a strong likelihood that additional discovery would have uncovered additional evidence relevant to the fair valuation of Ms. Mattison's shares and the misinterpretation of the Severance Agreement advanced by Respondent's counsel. At a minimum, the circuit court should have allowed Appellant an opportunity to take depositions of Respondent's managing members and COO, who negotiated and signed the Severance Agreement on behalf of MPS, to inquire about why MPS refused to provide numerous items in Ms. Mattison's repeated requests for financial information and why MPS refused to engage in a "mutual" effort thereafter to determine the value of Ms. Mattison's units. In addition, Appellant should have been allowed to conduct discovery on the compelling pattern of MPS's management committee's history of using HDH Advisors to manipulate the share price of the company since 2013 or 2014.

Because Appellant did not have a sufficient opportunity to conduct discovery in this case, the circuit court should have either denied the motion for summary judgment, without prejudice, or should have postponed consideration of the motion until Appellant had a fair and reasonable

opportunity to engage in such discovery.

4. THE CIRCUIT COURT IMPROPERLY ALLOWED RESPONDENT TO INCLUDE A DISCOUNT IN THE VALUE OF APPELLANT'S MEMBERSHIP UNITS FOR LACK OF CONTROL AND MARKETABILITY, BECAUSE SUCH DISCOUNTS WERE NOT APPLIED EITHER WHEN APPELLANT ORIGINALLY PURCHASED HER UNITS OR WHEN THE MEMBERS UNANIMOUSLY APPROVED THE INITIAL VALUATION OF THE MEMBERSHIP UNITS IN EARLY 2010, SHORTLY AFTER THE MERGER.

In accepting the HDH Advisors valuation as the redemption price for Appellant's shares, the circuit court approved arbitrary discounts of 10% for lack of control and 20% for lack of marketability, which when applied consecutively led to an effective discount of 28% from the fair market value of total equity of the firm. (HDH Advisors 2017 Report, at 11) (R. p. 892). When Appellant originally purchased her shares in MPS's predecessor, MS, on January 1, 1997, and later purchased additional shares from a departing partner, her purchase price was not discounted for either lack of control or lack of marketability. (Mattison Aff., at 2, ¶ 5) (R. p. 702).

In the first quarter of 2010, the members of the newly formed MPS held a member meeting and unanimously agreed that the fair market value of one membership unit was \$108.00 per share, again without including any discounting for lack of control or lack of marketability. (MPS Member Meeting Minutes Mar. 5, 2010) (R. p. 738) ("Given the recent valuation of the company associated with the merger, the members agreed to use that valuation as the basis for the unit value. (One unit is worth \$108.00)."). The members also unanimously agreed at that time to use the \$108.00 per unit value (undiscounted) for the admission of three new minority members, whose twenty shares were purchased from one of the founding members from bonus money given to the members for that purpose. (*Id.*). These transactions set precedent for MPS not to discount the unit values for lack of

marketability or control.

MPS first hired HDH Advisors in mid-2013 to perform a valuation of the company as of July 31, 2013, which HDH calculated to be \$63.00 per share. (R. p. 757). This was around the same time that one of the original founding partners of the former MS firm, Brian Deichman, who held the second largest percentage ownership in the LLC at the time, was being bought out by MPS. (Mattison Aff., at 6, ¶ 19) (R. p. 706). HDH Advisors also performed a valuation of the company as of December 31, 2014, which established the value of the company's shares at \$63.01, only one cent higher than the HDH Advisors valuation from 17 months before. (R. p. 786). In other words, from March 5, 2010, when the members agreed to use the valuation of \$108.00 per unit, to December 31, 2014, when the HDH Advisors valuation was \$63.01 per unit, the value of each unit purportedly dropped by \$44.99 per unit, or a decline in value of over 41.6%. During the same period, MPS's annual gross revenues actually increased from approximately \$20 million in 2010 to \$21.2 million in 2014, or an increase of approximately 6% over those four years. Furthermore, between 2013 and 2014, MPS's gross annual revenues increased from \$20.59 million to \$22.63 million (an increase of 9.9%), and the number of outstanding units dropped from 100,000 to 94,269.38; yet the HDH valuation increased by only \$0.01 per unit. (HDH Advisors Report, 2013, 2014) ((R. pp. 773, 802, 761, 790).

According to the documents disclosed by MPS both before the complaint in this case was filed as well as during discovery, Mr. Deichman's units were actually purchased for \$44.11 per unit on July 31, 2015, and back-dated to be effective as of December 31, 2014. (Mattison Aff., at 6, ¶ 19) (R. p. 706). The only existing members of the LLC at the time who were offered the opportunity to purchase any of Mr. Deichman's redeemed units were COO Chad Cousins and two other members

of the MPS Executive Committee. Mr. Cousins was authorized to purchase 3,300 units of Mr. Deichman's redeemed shares, which he purchased on December 28, 2015, retroactively effective to January 1, 2015. (Mattison Aff., at 6, ¶ 20) (R. p. 706). In mid-2016, HDH Advisors performed another valuation of the company as of December 31, 2015, and the unit value had increased to \$122.26 per unit. (HDH Report, 2015) (R. p. 815). Mr. Cousins and his colleagues on the executive committee thereby effectively realized a return of approximately 94% in three days based on their purchase of the former Deichman units by purchasing units for \$63.01 per unit on December 28, 2015, which purportedly increased in value to \$122.26 per unit as of December 31, 2015. (Mattison Aff., at 6, ¶ 21) (R. p. 706). The buyers from the Executive Committee had extensive knowledge of the dramatic increase in the anticipated value of MPS's units. No members of MPS who were not then on the Executive Committee were offered an opportunity to purchase any of Mr. Deichman's redeemed units for this sweetheart deal. (Mattison Aff., at 6, ¶ 20) (R. p. 706).

At a minimum, the circuit court should have allowed Appellant to conduct discovery regarding the managing members' apparent history of manipulation of the unit price of the LLC's membership units to favor the COO and other members of the Executive Committee of the firm. Appellant was never allowed to take depositions of Mr. Cousins, any other managing members of the firm, or Mr. Deichman, nor was Appellant allowed to subpoena documents directly from HDH Advisors or take the depositions of the individuals from HDH Advisors who contributed to the valuation reports. The circuit court's premature grant of summary judgment to Respondent deprived Appellant of that opportunity to further develop these critical facts underlying her counterclaims in this action.

5. THE CIRCUIT COURT ERRED IN FAILING TO AWARD PRE-JUDGMENT INTEREST TO APPELLANT, WHOSE OWNERSHIP INTERESTS SHOULD HAVE BEEN PURCHASED IN EARLY 2018 PER THE TERMS OF THE SEVERANCE AGREEMENT.

Finally, the circuit court erred in refusing to award pre-judgment interest to Appellant from the time her membership interests should have been redeemed until the date the circuit court ordered them to be redeemed. Appellant's voluntary retirement from MPS occurred effective February 12, 2018, per the terms of the Severance Agreement. The redemption of Appellant's membership interests was supposed to be effective as of December 31, 2017. Under the South Carolina Uniform Limited Liability Company Act, Respondent should have delivered a purchase offer to Ms. Mattison, along with the additional financial information specifically set forth in the statute, within 30 days of the effective date of her retirement, or no later than March 14, 2018. S.C. Code Ann. § 33-44-701(b). The statute further provides that if the agreement to purchase the distributional interests is not made within 120 days after the triggering date of the dissociation, the dissociating member has the right to bring an action for judicial valuation of the units. S.C. Code Ann. § 33-44-701(d).

Here, the purchase of Ms. Mattison's units should have occurred no later than June 12, 2018, which is 120 days from the February 12, 2018 retirement date. As noted above in the Statement of the Case, Ms. Mattison had significant health challenges in early 2018, which initially prevented her from focusing on the valuation of her shares. Additionally, as discussed above, Respondent refused to provide all of the financial information requested by Appellant's counsel, which ultimately led to the parties' entering into a Tolling Agreement and subsequent extension of any deadlines through March 4, 2019, at 5:00 p.m. (Verified Amended Answer, Counterclaims, and Third-Party

Complaint, at 14, ¶ 75) (R. p. 113).

Respondent has enjoyed the use of Appellant’s capital investment in MPS in the interim and throughout the course of this litigation, from what otherwise should have been the effective date of her dissociation. The circuit court should have required Respondent to pay to Appellant pre-judgment interest to compensate her for Respondent’s use and availability of Appellant’s funds longer than Respondent had a lawful right to do. Section 33-44-702(e) of the South Carolina Code provides, “Interest must be paid on the amount awarded from the date determined under Section 33-44-701(a) to the date of payment.” S.C. Code Ann. § 33-44-702(e). In addition, the MPS Operating Agreement expressly provides for the payment of interest to a properly dissociating member, at the prime rate published in the Wall Street Journal on the day prior to the date of closing, if the purchase obligation is secured by a note payable to the dissociating member. (MPS Operating Agreement, at 23-24, § 11.4(b)) (R. pp. 571-572).³

Here, no note was provided by MPS to Ms. Mattison to secure the payment for her shares, so Respondent should not receive the benefit of the lower interest rate provide for in the Operating Agreement. There is no other express provision setting forth the interest rate that should apply; accordingly, the court should have used the statutory rate of 8.75% as set forth in S.C. Code Ann. § 31-34-20(A). The standard for an award of pre-judgment interest is well established under South Carolina law: “The law allows prejudgment interest on obligations to pay money from the time when, either by agreement of the parties or operation of law, the payment is demandable, if the sum is certain or capable of being reduced to certainty. The fact that the sum due is disputed does not

³Section 11.4(b) of the 2015 Amended and Restated Operating Agreement is identical. (Amended and Restated Operating Agreement of MPS, at 27, § 11.4(b)) (R. p. 620).

render the claim unliquidated for the purposes of an award of prejudgment interest. The proper test for determining whether prejudgment interest may be awarded is whether or not the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose.” Babb v. Rothrock, 310 S.C. 350, 353, 426 S.E.2d 789, 791 (1993) (internal citations omitted).

Because the value of Appellant’s membership units in MPS was fixed by conditions that existed at the time of her retirement and proper dissociation from MPS on February 14, 2018, Appellant is entitled to receive prejudgment interest on the amount of the redemption of her shares from that date until it is finally paid by Respondent in full. The circuit court erred in eliminating this valuable portion of the redemption of Appellant’s membership units in MPS.

CONCLUSION

For all of the foregoing reasons, Appellant respectfully requests that this Court reverse the circuit court’s order granting summary judgment in favor of Respondent on its own declaratory judgment action and against Appellant on her counterclaims. In the alternative, Appellant requests that the Court eliminate any discounting for lack of control and marketability in the determination of the fair value of Appellant’s membership interests and award pre-judgment interest to her from February 12, 2018, until the entire purchase of her units is fully completed.

CERTIFICATION OF APPELLANT’S COUNSEL

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

Respectfully submitted,



David E. Rothstein, SC Bar No. 66295

Rothstein Law Firm, PA

1312 Augusta Street

Greenville, SC 29605

drothstein@rothsteinlawfirm.com

(864) 232-5870

Attorney for Appellant

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