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.

FINAL BRIEF OF RESPONDENT

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

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INTRODUCTION

Donza H. Mattison, a former employee and former member of the architectural firm McMillan Pazdan Smith, LLC ("MPS"), had for many years opposed nearly every business decision made by the otherwise unanimous vote of MPS's members. *See* Order (Feb. 12, 2021) at 2 (R. 39). She parted from the firm in early 2018. *Id.* 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. *Id.* at 2–3, 8 (R. 39–40). All parties agree that the Severance Agreement is clear, valid, and enforceable, but when MPS offered to purchase her shares for that amount, she refused, demanding a price nearly four times higher and expressly threatening that, if her demands for payment were not met, she would bring a shareholder derivative suit against MPS's majority members for their purported self-dealing in the administration of the firm. *Id.* at 3, 7 (R. 40, 44).

MPS filed a declaratory judgment action asking 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. *Id.* at 3 (R. 40). Mattison answered and asserted counterclaims and a third-party derivative claim. *Id.* at 4 (R. 41). The trial court granted MPS's Motion for Summary Judgment on the derivative claim. *Id.* Mattison appealed.

Mattison subsequently moved to stay further proceedings in the trial court pending her appeal of the Order granting summary judgment on her derivative claim. The trial court denied her motion, and Mattison neither moved for reconsideration nor appealed from that ruling. MPS moved for summary judgment on its declaratory judgment claim and on Mattison's counterclaims, all of which related to the valuation of her membership shares. *Id.* The trial court granted the motion, ruling that the parties' agreement was a clear, valid, enforceable contract; that the parties' claims presented questions of law on which extrinsic evidence was unnecessary; and that MPS had followed the parties'

agreed-upon process and method for valuing Mattison's shares. *Id.* at 7–9 (R. 44–46). The trial court denied her Motion to Alter or Amend, and Mattison appealed. Because the trial court's Orders were not automatically stayed, Mattison moved for a stay or supersedeas. The trial court denied her Motion. She petitioned this Court for a stay or supersedeas. The Court denied her Petition.

This Court should affirm the lower court's Orders on appeal for at least three reasons. *First*, and most fundamentally, the trial court correctly interpreted and applied the parties' agreement, and Mattison has not shown any error in the court's reasoning or ruling. Her appellate arguments misstate the applicable burden and legal standard; repeatedly rely on extrinsic evidence, which is irrelevant and impermissible when interpeting an unambiguous contract; purport to discern requirements not found in the agreement; ignore the limitations found in the agreement; and attempt unsuccesfully to disavow her contractual agreement that her dissociation and the valuation of her shares are to be determined according to MPS's 2015 Operating Agreement.

Second, Mattison fails to demonstrate any procedural error. For example, she argues that the trial court erred by denying her Motion to Stay, but she did not appeal from that Order, and this Court thus lacks jurisdiction to consider her argument. Similarly, she argues the trial court erred by failing to permit additional discovery, but longstanding and well-established precedent hold that discovery and extrinsic evidence are unecessary to decide a question of law such as the interpretation and application of a clear and unambiguous contract.

Third, Mattison failed to preserve her arguments that the trial court should have awarded her pre-judgment interest on the amount MPS is to pay for her shares and by allowing MPS to discount the value of her shares based on lack of marketability and control. Because she first raised those arguments in her Motion to Alter or Amend, they are not preserved for appellate review. Further, even if they were, they are meritless.

Accordingly, MPS respectfully requests this Court affirm the lower court's Orders.

COUNTER-STATEMENT OF THE ISSUE ON APPEAL

Did the trial court correctly grant MPS's Motion for Summary Judgment on its declaratory judgment claim and on Mattison's counterclaims?

COUNTER-STATEMENT OF THE CASE AND FACTS

MPS is a regional architectural and interior design firm with offices in South Carolina, North Carolina, and Georgia. *See* Compl. ¶¶ 5–6 (R. 62). Mattison is a former employee and former member of MPS, where she worked as an architect in MPS's Spartanburg, South Carolina office. *Id.* at ¶ 7 (R. 62). During Mattison's tenure at MPS, she opposed significant business decisions made by the otherwise unanimous vote of MPS's members. *See, e.g.*, Am. Answer ¶¶ 14–18, 48 (R. 102–03, 108). Mattison's employment with MPS ended on February 12, 2018. *See* Compl. ¶ 8 (R. 62).

I. Mattison signed a Severance Agreement that was negotiated by her counsel to memorialize her separation from MPS.

The parties memorialized Mattison's separation with a Severance Agreement and General Release. *See* Compl. ¶ 9 (R. 62); *see also* Severance Agreement (December 5, 2017) (R. 88). Mattison was represented by counsel in the discussions leading up to her separation from the Firm. *See* Mattison's Brief at 14. The terms of her separation, and the Severance Agreement that memorialized them, were negotiated by her counsel. *Id.* The Severance Agreement provided that Mattison's dissociation from MPS would be treated as a "Proper Dissociation," meaning there was no penalty or reduction in the value of her membership shares. *See* Severance Agreement ¶ 2(j) (R. 89). At the time of her separation from MPS, Mattison owned 2,035 membership units of MPS (approximately 2.2% of the firm), which made her the eighth-largest shareholder in the firm. *See* Mattison's Brief at 13.

When Mattison and MPS signed the Severance Agreement, the annual valuation of MPS had not yet been completed for 2017, and thus the agreement left open the amount that Mattison would be paid for her membership shares. The Severance Agreement, however, provided the method by which Mattison's ownership share of MPS would be valued and paid in accordance with MPS's 2015 Operating Agreement:

> 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. 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 ¶ 2(j) (R. 89). The 2015 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 (R. 616, 619–20). "Fair Market Value," in turn, is defined 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 Art. I (R. 598). The Operating Agreement further provides 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 . . . ." *Id.* at § 5.1(s) (R. 608).

The Operating Agreement further provides that if the parties are unable to agree on a price within 30 days, the value of the membership units will be determined by an appraiser selected by MPS's Management Committee:

> [T]he 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 Art. I (R. 598).

In the Severance Agreement, Mattison also released any claims she might have against MPS, including any she might bring in a representative capacity, in exchange for good and valuable consideration she received in the form of severance pay, FMLA leave, Paid Time Off, a 401(k) matching contribution, continued insurance benefits, and a $15,000 bonus. *See* Severance Agreement at ¶¶ 2, 4–5 (R. 88–92).

In early 2018, MPS retained HDH Advisors LLC ("HDH")—the same outside appraiser it had used in each of the preceding five years—to conduct a 2017 valuation of the firm. *See* Compl. ¶¶ 18–19 (R. 63). When Mattison and MPS were unable to agree on a price for Mattison's membership shares within 30 days after the execution of her Severance Agreement, the management committee elected to use HDH's 2017 valuation as provided in the agreement to determine a per unit price for Mattison's 2,035 membership units, and, pursuant to the terms of the agreement and MPS's 2015 Operating Agreement, offered to purchase her units for this amount. *Id.* at ¶ 20 (R. 63).

Mattison disputed the valuation and demanded a much higher per-unit price. *Id.* at ¶ 21 (R. 63). Specifically, she rejected MPS's offer of $267,647.21 and instead demanded $829,000 for her units. *See* Letter from Rothstein to Keim at 3 (Jan. 14, 2019) (R. 544). She further threatened that if her demands for payment were not met, she would file suit seeking a judicial valuation of her

shares and would also bring a shareholder derivative suit. *Id.* at 3 (R. 544) ("If we are unable to resolve this matter . . . , Ms. Mattison intends to file not only an action for judicial valuation of her shares but also a shareholder derivative action . . . .").

II. MPS filed suit seeking a judicial declaration that it had followed the agreed-upon method for valuing Mattison's membership shares.

Because Mattison refused the offered amount for her shares, 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 that, pursuant to the terms of that agreement, Mattison's membership units are to be valued in accordance with MPS's 2015 Operating Agreement. *See* Compl. (R. 61). MPS further asked the court to declare that MPS properly followed the Operating Agreement's provisions regarding the 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 its normal outside appraiser in early 2018. *Id.* at ¶ 25 (R. 64). The suit was subsequently assigned to the Business Court before the Honorable R. Lawton McIntosh. *See* Order (March 20, 2019) (R. 3).

Mattison filed an Answer, Counterclaims, and Third-Party Complaint on March 4, 2019. *See* Answer (R. 66). She admitted the Severance Agreement was a valid and enforceable contract, *see id.* at ¶ 61, but 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 declaratory judgment, *id.* at ¶¶ 60–91 (R. 76–81). In addition, she purported to assert a derivative cause of action against MPS's majority shareholders, alleging they had breached their fiduciary duties to MPS by receiving excessive compensation, bonuses, and fringe benefits for themselves and their spouses/family members. *Id.* at ¶¶ 92–110 (R. 82–85).

III. The trial court granted MPS's Motion for Summary Judgment on Mattison's third-party derivative claim; Mattison appealed.

Following the completion of discovery on the threshold matter of Mattison's inability to represent MPS's other members, MPS moved for summary judgment on Mattison's derivative claim. After receiving briefing and supplemental briefing, the trial court granting MPS's motion, ruling Mattison did not fairly and adequately represent MPS's members. *See* Form 4 Order (Aug. 4, 2020) (R. 6); Order (Sept. 30, 2020) (R. 9). The trial court subsequently denied Mattison's Motion to Alter or Amend, *see* Order (Nov. 9, 2020) (R. 26), and Mattison filed her Notice of Appeal from the trial court's dismissal of her derivative claim on December 9, 2020.

IV. The trial court granted MPS's Motion for Summary Judgment on the valuation of Mattison's shares.

During the hearing on Mattison's Motion to Reconsider the dismissal of her derivative claim, the trial court had raised the issue of whether MPS's remaining claim relating to the valuation of Mattison's equity in MPS would be stayed during the pendency of her appeal of the dismissal of her derivative claim. *See* Tr. (Oct. 26, 2020) at 53:17 to 55:19 (R. 165–67). The court subsequently asked the parties to submit briefing on this issue. In response, Mattison filed a Motion seeking to stay the remainder of the case pending the outcome of her appeal and requesting leave to conduct an inspection and appraisal of MPS's office in Spartanburg. *See* Mattison's Mot. to Stay and for Leave to Conduct Inspection (Dec. 11, 2020) (R. 263). MPS filed a memorandum in opposition, explaining that a stay was not warranted because the valuation of Mattison's shares was legally and factually distinct from the issue on appeal (namely, the trial court's threshold ruling that Mattison was not a fair and adequate representative to bring a derivative action); therefore, the question of the valuation of her shares was not affected by the appeal and should not be stayed. *See* MPS's Mem. in Opp. (Dec. 14, 2020) (R. 272). MPS further explained that the trial

court's dismissal of the derivative claim was unlikely to be overturned on appeal, but even if it were, the relief Mattison sought would still be available and thus she would not be prejudiced by proceeding with the valuation claim while her appeal regarding the derivative claim was pending. *Id.*

MPS filed a Motion for Summary Judgment on its declaratory judgment claim relating to the value of Mattison's membership shares. *See* Mot. for Summ. J. (Dec. 14, 2020) (R. 281). Mattison filed a memorandum in opposition accompanied by her affidavit and an affidavit from her counsel. *See* Mem. in Opp. (Jan. 13, 2021) (R. 387).

Mattison also filed a Motion to Compel MPS to produce a valuation of the Firm as of year-end 2019 performed by AEC Advisors, LLC, which was finalized and first presented to MPS's members on December 22, 2020. *See* Mattison's Mot. to Compel (Jan. 4, 2021) (R. 284). Mattison argued that this valuation was relevant both to her derivative claim and to the valuation of her membership shares. *Id.* MPS filed a memorandum in opposition, explaining that further discovery on the derivative claim was improper while it was pending on appeal; that a 2019 valuation was not relevant to the value of Mattison's equity in 2017; and that Mattison had already received MPS's 2019 financial and compensation information. *See* MPS's Mem. in Opp. (Jan. 11, 2021).

The trial court held a hearing on the then-pending motions on January 14, 2021. *See* Tr. (Jan. 14, 2021) (R. 169). The court subsequently issued a Form 4 Order denying Mattison's Motion to Stay; granting her Motion to Compel an inspection of MPS's Spartanburg office; denying her Motion to Compel production of AEC Advisor's 2019 valuation (but noting it should be provided to her as a member of the LLC); and granting MPS's Motion for Summary Judgment. *See* Form 4 Order (Jan. 25, 2021) (R. 31). The court later issued formal written orders consistent with its prior

Form Order. *See* Order on Mot. to Compel (Feb. 9, 2021) (R. 34); Order Denying Mot. to Stay (Feb. 9, 2021) (R. 36); Order Granting Mot. for Summ. J. (Feb. 12, 2021) (R. 38).

The Order granting summary judgment answered the question of how the value of Mattison's membership units should be calculated. *See* Order Granting Mot. for Summ. J. at 9 (Feb. 12, 2021) (R. 46) ("[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 and for MPS to pay her for them. *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 moved for reconsideration of the Order granting Summary Judgment. *See* Mot. to Alter or Amend or for Reconsideration (Feb. 22, 2021) (R. 458). She did not seek reconsideration of the Order denying her Motion to Stay or of the Order denying her Motion to Compel. MPS filed a memorandum in opposition to reconsideration. *See* MPS's Mem. in Opp. (March 1, 2021) (R. 462). The trial court held a virtual hearing, *see* Tr. (March 16, 2021) (R. 233), and subsequently issued a Form 4 Order denying reconsideration. *See* Order (March 17, 2021) (R. 47).

V. Mattison filed a second appeal, and both the trial court and Court of Appeals denied her post-appeal Motions for Stay or Supersedeas.

Following the trial court's denial of the Motion for Reconsideration, the parties engaged in discussions to comply with the court's Order requiring Mattison to tender her shares and MPS to pay for them. On April 1, 2021, Mattison served and filed a Notice of Appeal from the Order granting summary judgment and the Order denying reconsideration. In subsequent communications with MPS's counsel, Mattison's counsel agreed that the appeal did not

automatically stay the trial court's judgment of February 12, 2021. *See* April 6, 2021 Email (attached as Exhibit A to MPS's Mem. in Opp. to the Mot. to Stay (May 6, 2021)) (R. 483). And although the ten-day deadline set by the court passed without Mattison's tendering her shares, these communications, along with Mattison's efforts to work with MPS for the tender and payment of her units, show that Mattison understood that the Order was not stayed pending her appeal and that she intended to comply with the Order and was taking steps to do so.

Nevertheless, on April 21, 2021—three weeks after she noticed her appeal and five weeks after the trial court denied her Motion to Reconsider—Mattison filed a Motion to Stay, seeking a stay or a supersedeas of the trial court's Order granting summary judgment and requiring her to tender her shares. *See* Mot. to Stay (April 20, 2021) (R. 468). Mattison filed her Motion to Stay shortly after she learned that MPS would not be making membership distributions of profit for the first quarter of 2021. MPS filed a memorandum in opposition explaining that the Order was not automatically stayed by the appeal and that there was no basis to issue a discretionary stay. *See* MPS's Mem. in Opp. (May 6, 2021) (R. 470).

The trial court held a telephonic hearing on May 19, 2021. Following the hearing, the parties submitted supplemental briefing at the request of Mattison's counsel. *See* Mattison's Mem. in Supp. (May 26, 2021) (R. 484); MPS's Reply in Opp. (June 3, 2021) (R. 525). The trial court issued a Form 4 Order denying the Motion on June 7, 2021, and subsequently issued a formal, written Order denying the Motion. *See* Form 4 Order (June 7, 2021) (R. 50); Order (June 22, 2021) (R. 53). The Order concluded that the relief Mattison sought in the Motion to Stay—an order allowing her to remain a member of MPS during the pendency of her appeal—was not raised by her pleadings and was not properly before the court and, thus, the court was "without jurisdiction

to award relief Mattison never requested in her pleadings," and, further, concluded that, in any event, there was no basis to issue a stay. *See* Order at 3–6 (June 22, 2021) (R. 55–58).

The trial court's ruling denying Mattison's Motion to Stay again set a ten-day deadline for Mattison to tender her shares. *Id.* at 6 (R. 58). Mattison failed to comply with the court's directive and, instead, waited 24 days before filing a Petition for Stay or Supersedeas with the Court of Appeals on July 16, 2021. MPS filed a Return to the Petition on July 26, 2021, and the Court denied the Petition in an Order dated August 16, 2021.

STANDARD OF REVIEW

"The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder." *Prince v. Liberty Life Ins. Co.*, 390 S.C. 166, 169, 700 S.E.2d 280, 281 (Ct. App. 2010). "When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP," and summary judgment "is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law." *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002) (citing Rule 56(c), SCRCP). "'The construction and enforcement of an unambiguous contract is a question of law for the court, and thus can be properly disposed of at summary judgment.'" *Thalia S. v. Progressive Select Ins. Co.*, 401 S.C. 395, 399, 736 S.E.2d 863, 865 (Ct. App. 2012) (quoting *Hansen v. United Servs. Auto. Ass'n*, 350 S.C. 62, 67, 565 S.E.2d 114, 116 (Ct. App. 2002)).

ARGUMENT

I. The trial court correctly granted MPS's Motion for Summary Judgment.

MPS's declaratory judgment claim and Mattison's counterclaims all require the court to determine whether MPS's efforts to value and redeem Mattison's membership shares complied with the process and method the parties had agreed to in the Severance Agreement and the 2015

Operating Agreement it expressly incorporated by reference. The trial court correctly concluded that the agreements were clear, valid, and enforceable, and that MPS had complied with the process and method that the parties had chosen.

A. The trial court correctly interpreted and applied the parties' agreement.

The parties all agree that the resolution of their claims relating to the valuation of Mattison's shares turns on the interpretation and application of Section 2(j) of the Severance Agreement. *See* Mattison's Brief at 23 ("There is no dispute that the applicable provision of the Severance Agreement is Section 2(j)."); Mattison's Mem. in Opp. (Jan. 13, 2021) at 4 (R. 390) (same). Section 2(j) provides as follows:

> 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. 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 ¶ 2(j) (R. 89).

The trial court correctly concluded that the Severance Agreement is a valid and enforceable contract. *See* Order (Feb. 12, 2021) at 7 (R. 44). Neither party argued otherwise, *see id.*, and Mattison conceded that the Severance Agreement, which her counsel had negotiated, was valid, enforceable, and clear. *See* Am. Answer ¶¶ 49, 61 (R. 109, 110); *see also* Tr. (Jan. 14, 2021) at 41:19–20 (R. 209) (Mr. Rothstein: "[T]here's no question that the agreement is valid and enforceable."); Tr. (March 16, 2021) at 27:11–13 (R. 259) (Mr. Rothstein: "And when Mr. Outten says that the agreement is clear, I agree with him about that.").

The trial court concluded that the clear, valid, and enforceable language of Section 2(j) of the Severance Agreement spelled out the procedure and methodology by which the parties had agreed to value Mattison's shares. *See* Order (Feb. 12, 2021) at 7 (R. 44). Specifically, the court concluded that the three sentences of Section 2(j) collectively indicate that Mattison's Proper Dissociation from MPS—including the method by which the parties would "mutually determine[]" the value of her membership shares—"'will be done in accordance with the September 30, 2015 Operating Agreement.'" *Id.* (quoting Severance Agreement, § 2(j)) (R. 44).[1]

The 2015 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 (R. 616, 619–20). "Fair Market Value" is defined 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 Art. I (R. 598). Section 5.1(s), in turn, empowers the Management Committee to "determine the per unit price of any Membership Interest or Units for purposes of Section 11.3 . . . ." *Id.* at § 5.1(s) (R. 608).

The Operating Agreement further provides that if the parties are unable to agree on a price within 30 days, the value of the membership units will be determined by an appraiser selected by MPS's Management Committee:

> [T]he seller [*i.e.*, 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

[1] Mattison's brief incorrectly implies that the Order misquoted the language of Section 2(j). *See* Mattison's Brief at 15 n.2. Not so. The Order she cites is an earlier Order granting summary on her derivative claim. *See* Order (Sept. 30, 2020) (R. 9). The trial court's inadvertent omission of a word in *that* Order is immaterial to the review of *this* Order. Indeed, it was immaterial even to the Order in which it occurred, since that ruling was not interpreting or applying Section 2(j), but, rather, decided the threshold question of whether Mattison fairly and adequately represented MPS's other members for purposes of bringing a derivative claim.

> 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 Art. I (R. 598).

This procedure was followed. *See* Order (Feb. 12, 2021) at 3 (R. 40); *see also* Compl. ¶¶ 18–20 (R. 63); Am. Answer. ¶¶ 19–21, 55–56 (R. 103–04, 109–10). The appraiser was HDH—the same outside appraiser MPS had used in each of the preceding five years. *See* Order (Feb. 12, 2021) at 3 (R. 40); Compl. ¶¶ 18–19 (R. 63); Am. Answer. ¶¶ 20, 56 (R. 104, 109). MPS used HDH's valuation to determine a per unit price, and made an offer to Mattison on August 3, 2018 to purchase her membership units at this amount. *See* Order (Feb. 12, 2021) at 3 (R. 40); Compl. ¶ 20 (R. 63); Am. Answer. ¶¶ 21, 56 (R. 104, 109).

The trial court concluded that MPS had followed the procedure and methodology set out in the 2015 Operating Agreement (which Mattison had agreed in the Severance Agreement would control her dissociation from MPS) when, after more than 30 days had passed without the parties reaching agreement on the shares' value, the Management Committee relied on the outside appraisal performed by the same appraiser MPS had used for years. *See* Order (Feb. 12, 2021) at 8–9 (R. 45–46). Accordingly, the trial court granted summary judgment in MPS's favor. *Id.* at 9. This ruling comports with longstanding and well-established precedent honoring parties' clear agreements:

> 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)). *See also Messer v. Messer*, 359 S.C. 614, 621, 598 S.E.2d 310, 314 (Ct. App. 2004) ("In the enforcement of an agreement, the court does not have the authority to modify terms that are clear and unambiguous on their face."); *Dobyns v. S.C. Dept. of Parks, Recreation & Tourism*, 325 S.C. 97, 103, 480 S.E.2d 81, 84 (1997) ("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.").

Because under the clear, valid, and enforceable language of the parties' agreement, MPS was entitled to the declaration it sought, and because Mattison could not, therefore, succeed on any of her counterclaims, the trial court properly granted summary judgment in MPS's favor.

B. Mattison has failed to show any error in the trial court's reasoning or ruling.

On appeal, Mattison asserts a number of arguments alleging error in the trial court's ruling. Some of them involve procedural matters and are discussed and rebutted in later sections of this Brief. Her arguments regarding the substance of the trial court's ruling are discussed immediately below. None of them demonstrate any error.

First, Mattison launches her attack on the trial court's ruling by misstating the applicable burden. Specifically, she argues that MPS's claim was subject to a "preponderance of the evidence" burden that could be overcome by a "mere scintilla" of evidence. *See* Mattison's Brief at 22. She is incorrect. The preponderance burden and the cases she cites are relevant only to claims arising from disputed *facts*, not claims presenting questions of *law*. *See Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009) (reciting the "mere scintilla" rule in a slip-and-fall case arising from disputed facts); *Menne v. Keowee Key Property Owners' Ass'n,*

Inc., 368 S.C. 557, 564, 629 S.E.2d 690, 694 (Ct. App. 2006) (reciting the preponderance burden in a case seeking to invalidate a restrictive covenant based on a change of conditions).

MPS's claim and Mattison's counterclaims present questions *of law* that require only the interpretation of an unambiguous contract. These claims do not permit the consideration of extrinsic evidence or the weighing of evidence or disputed facts. Accordingly, they are not subject to the preponderance burden. *See Thalia S.*, 401 S.C. at 399, 736 S.E.2d at 865 (Ct. App. 2012) ("'The construction and enforcement of an unambiguous contract is a question of law for the court.'") (citation omitted); *Williams v. Gov. Employees Ins. Co.*, 409 S.C. 586, 594, 762 S.E.2d 705, 710 (2014) (same); *Hunt v. Forestry Commission*, 358 S.C. 564, 569, 595 S.E.2d 846, 848 (Ct. App. 2004) ("'[I]f the language of the deed is unambiguous, then its interpretation is a question of law to be resolved by the reviewing court without resort to extrinsic evidence.'") (citation omitted) (alteration in original); *Valley Pub. Serv. Auth. v. Beech Island Rural Cmty. Water Dist.*, 319 S.C. 488, 493, 462 S.E.2d 296, 299 (Ct. App. 1995) ("In determining the intent of the parties, the court looks to the language of the contract and if this language is unambiguous, it *alone* determines the contract's force and effect.") (emphasis added).

No South Carolina case has applied the preponderance of evidence standard to a summary judgment ruling on a question of law. Accordingly, Mattison's repeated argument that the trial court erred by failing to consider and weigh extrinsic evidence of the parties' intent and the contract's meaning, *see* Mattison's Brief at 22–23, 26, 28–30, is incorrect and provides no basis for reversal.

Second, Mattison's arguments rely on the wrong legal standard. Specifically, she argues that this Court is required to construe the facts and inferences in her favor. *See* Mattison's Brief at 22 (quoting *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991));

id. at 31. The trial court articulated and applied that standard, *see* Order (Feb. 12, 2021) at 6 (R. 43), but this Court need not do so. When, as here, a case involves questions of law, a reviewing court is not required to construe the facts and inferences in favor of the non-movant. *See Rodarte v. Univ. of S.C.*, 419 S.C. 592, 600 and n.11, 799 S.E.2d 912, 916 and n.11 (2017) ("Because this case requires us to answer a question of law . . . we apply a different standard of review than in the typical fact-based challenge to summary judgment. In *those* situations, we . . . [are] required to view 'the evidence and all inferences . . . in the light most favorable to the nonmoving party," but the "interpretation of an unambiguous [text] is a question of law and the Court has a broader scope of review in those instances than when it reviews questions of fact.") (citations omitted) (emphasis and alterations added); *Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 198, 821 S.E.2d 667, 669 (2018) (discussing the appellate standard of review of a grant of summary judgment and noting that because interpretations of "contracts and statutes are questions of law, we do not view the evidence in any particular light. Rather, we read the contract or statute to determine if its meaning is clear and unambiguous.") (citation omitted); *PCS Nitrogen, Inc., v. Continental Casualty Co.*, 429 S.C. 30, 38, 837 S.E.2d 662, 666 (Ct. App. 2019) (same); *see also Marshall v. Dodds*, 426 S.C. 453, 461, 827 S.E.2d 570, 574 (2019); *Nelson v. Piggly Wiggly Central, Inc.*, 390 S.C. 382, 388, 701 S.E.2d 776, 779 (Ct. App. 2010); *Middleborough Horizontal Prop. Regime Council of Co-Owners v. Montedison S.p.A.*, 320 S.C. 470, 477, 465 S.E.2d 765, 770 (Ct. App. 1995).

Third, Mattison argues that the trial court erred in its interpretation and application of the Severance Agreement by failing to discern the supposedly rigid, mechanical sequence of events she believes is mandated by the language of Section 2(j). *See* Mattison's Brief at 23–24. Specifically, she argues MPS was required to attempt to mutually determine the value of her shares

before it could hire a third-party appraiser to value the company. *See id.* In her view, MPS violated the agreement (and thus released her from it) when it "skipped" the mutual determination and "rush[ed] out and hire[d]" its normal outside appraiser in early 2018 to perform the annual appraisal for YE2017. *Id.* Mattison's argument fails for a number of reasons. For one, nothing in Section 2(j) or the 2015 Operating Agreement prohibits MPS or its Management Committee from retaining an outside appraiser whenever they wish or from using an outside appraisal as a starting point for the parties' mutual attempt to determine the value of a member's shares. In addition, Mattison concedes that MPS *did* attempt to mutually determine the value of her shares, and that any delay in beginning that process was at *her request* while she dealt with personal health issues in early 2018. *See* Mattison's Brief at 15–17; *see also* Am. Answer ¶¶ 51–55 (R. 109). Accordingly, the trial court did not err by ruling that MPS efforts to value and redeem Mattison's shares complied with the Severance Agreement and Operating Agreement.

Fourth, Mattison argues the trial court erred by failing to conclude that MPS deviated from the procedure set out in the Severance Agreement by declining to provide her with all the financial information she requested. *See* Mattison's Brief at 25. Contrary to her argument, MPS did, in fact, provide Mattison with extensive financial information before and during the time the parties were attempting to mutually determine the value of her membership shares. Mattison concedes this in the affidavit submitted by her counsel in opposition to MPS's Motion for Summary Judgment. *See* Rothstein Affidavit (Jan. 12, 2021) ¶¶ 12, 13, 16, 23, 26 (R. 403, 404, 406).[2] MPS provided her with outside auditors reports, financial reviews, tax returns, the general ledger, loan terms, lines of credit, balance sheets, income statements, and profit and loss statements, the records

[2] This affidavit was attached to Mattison's Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment, which she filed on January 13, 2021.

of rent payments for the buildings Mattison inquired about, information about members' life insurance policies, HDH's valuations and invoices, communications with HDH, and information provided to HDH.

Further, any remaining information that MPS supposedly refused to provide falls outside the scope of Section 2(j). That section of the Severance Agreement contemplates the exchange of financial documents and information from the "current and prior year" (*i.e.*, 2016 and 2017) that is relevant to the valuation. *See* Severance Agreement ¶ 2(j) (R. 89). Mattison's brief does not identify the documents she believes were wrongly withheld, but the Record reveals that her information requests were far broader than what was envisioned by Section 2(j), seeking documents dating back to 2009 that, contrary to her assertions, are irrelevant to the 2017 value of her shares. *Compare* Rothstein letter to Keim (Aug. 16, 2018) at 1–2 (R. 423–24) (listing 21 categories of financial information that Mattison sought, the majority of which sought information dating back to 2009) *with* Rothstein email to Keim (Nov. 5, 2018) at 1–2 (R. 437–38) (identifying which of the 21 categories of information had not yet been received, most of which involved requests for information dating back to 2009); *see also* Keim email to Rothstein (Nov. 7, 2018) (R. 441–42) (noting that MPS had already provided extensive information in response to the requests and was compiling additional information to provide in response to other requests).[3]

Fifth, Mattison's reliance on the 2009 Operating Agreement and on an initial memorandum predating the Severance Agreement are misplaced. *See* Mattison's Brief at 26–27. The trial court correctly determined that the terms of the 2009 Operating Agreement (and Mattison's refusal to sign the 2015 Operating Agreement) are irrelevant because Mattison expressly agreed in the Severance

[3] These letters and emails were attached to the affidavit of Mattison's counsel, which was attached to Mattison's Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment, which she filed on January 13, 2021.

Agreement that her dissociation would be controlled by the 2015 Operating Agreement. *See* Tr. (Jan. 14, 2021) at 13:22 to 17:12 (R. 181 to 185). Likewise, the trial court determined that the initial memorandum discussing Mattison's separation that MPS's Marketing Committee provided to her on November 14, 2017 is irrelevant because it was expressly superseded by the Severance Agreement, which contains a merger clause and comprises the parties' entire agreement. *See id.* at 28:3–7 (R. 196). The 2009 Operating Agreement and the November 2017 memorandum were irrelevant to the trial court's analysis, and they are irrelevant to this Court's review and analysis.

Sixth, Mattison argues that the trial court erred by relying on the third sentence of Section 2(j), which incorporates the provisions of the 2015 Operating Agreement, to determine that MPS complied with the parties' agreed-upon valuation process. *See* Mattison's Brief at 25–27. That sentence states that 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 ¶ 2(j) (R. 89). The 2015 Operating Agreement, in turn, states that if the parties are unable to reach agreement on the value of a departing member's share, MPS's management committee may retain an outside appraiser to perform a valuation. *See* 2015 Operating Agreement, Art. I (R. 598).

Mattison, however, argues that the final sentence of Section 2(j) is irrelevant to the question of the valuation of her shares because (according to her) "the phrase 'proper dissociation' does not mean 'valuation,'" and the reference in Section 2(j) to "proper dissociation" and the 2015 Operating Agreement was merely meant to provide a "procedural mechanism" for the timing, interest, and logistics of the redemption of her shares. *See* Mattison's Brief at 25–27. The trial court correctly rejected this argument:

> THE COURT: All right. Thank you, sir. Let me -- let me ask you one thing about the term "proper dissociation." Isn't that actually a valuation term?

> MR. ROTHSTEIN: It -- it is not. . . .
>
> THE COURT: It is, in fact, a valuation term because if it's improper, then you don't get the full value of your equity, where if it's proper you do, so it is valuation.

Tr. (Jan. 14, 2021) at 46:13 to 47:1 (R. 214–15). The first sentence of Section 2(j) likewise rebuts Mattison's argument by expressly linking the proper dissociation and the value of her shares. *See* Severance Agreement § 2(j) (R. 89) (specifically stating that Mattison's dissociation from MPS "shall be treated as a Proper Dissociation with no penalty or reduction on *the value* of her financial rights") (emphasis added). Accordingly, the trial court did not err in concluding that MPS complied with the procedure and valuation method set out by Section 2(j) and the 2015 Operating Agreement.

II. The trial court correctly determined that MPS's Motion for Summary Judgment was ripe for consideration.

Mattison argues that the trial court erred by declining to stay the proceedings on MPS's declaratory judgment claim pending her appeal of the derivative claim and by declining to permit additional discovery before ruling on MPS's Motion for Summary Judgment. *See* Mattison's Brief at 19–22, 30–34. Both arguments are incorrect.

A. The trial court correctly ruled that further discovery was unnecessary before considering and ruling on MPS's Motion for Summary Judgment.

The trial court correctly rejected Mattison's argument that MPS's Motion for Summary Judgment was premature because more discovery was needed. *See* Order (Feb. 12, 2021) at 6 (R. 43). When (as here) contract language is clear and unambiguous, the contract's language alone determines its meaning, force, and effect, with no need to resort to extrinsic evidence. *Hunt v. Forestry Commission*, 358 S.C. 564, 569, 595 S.E.2d 846, 848 (Ct. App. 2004); *Valley Pub. Serv. Auth. v. Beech Island Rural Cmty. Water Dist.*, 319 S.C. 488, 493, 462 S.E.2d 296, 299 (Ct. App. 1995). Mattison's counsel participated in the negotiation and drafting of the Severance

Agreement; Mattison conceded in her pleading that the agreement is valid and binding; and her counsel conceded to the trial court that the agreement is clear. *See* Am. Answer ¶¶ 49, 61 (R. 109, 110); Tr. (Jan. 14, 2021) at 41:19–20 (R. 209); Tr. (March 16, 2021) at 27:11–13 (R. 259). Accordingly, the trial court did not err by concluding that discovery as to the parties' supposed intent was unnecessary before considering and ruling on MPS's Motion for Summary Judgment.

B. The trial court's Order refusing to stay the case is not before this Court and, in any event, was not erroneous.

As an initial matter, this Court lacks jurisdiction to consider Mattison's argument that the trial court erred by denying her Motion to Stay. *See generally* Mattison's Brief at 19–22. Mattison did not appeal from that Order. *See* Notice of Appeal (April 1, 2021). Because she did not appeal from the Order denying her Motion to Stay, she cannot argue the trial court erred by denying it or by refusing to stay the proceedings on MPS's declaratory judgment claim and her related counter-claims pending her appeal of the derivative action. *See* Rules 203(d)(1)(B)(ii) and 203(e)(1)(c), SCACR.

Even if this Court had jurisdiction to consider the Order denying the Motion to Stay, the trial court did not err by denying that motion and granting summary judgment because, as the court noted, the equity claim is not affected by the appeal of the derivative claim. *See* Order (Feb. 9, 2021) at 2 (R. 37); *see also* Rules 205 and 241, SCACR. The appeal of the derivative claim asks whether the trial court correctly decided the threshold question that Mattison could not fairly and adequately represent the members of MPS. In contrast, the declaratory judgment claim and Mattison's counterclaims involve completely different issues—namely, how the parties agreed in the Severance Agreement that Mattison's equity would be valued and the method of valuation provided by the September 30, 2015 Operating Agreement. Those issues are distinct from and will not be affected by the outcome of the appeal of the derivative claim.

In addition, a stay is not warranted because the derivative claim and the equity valuation claims are legally and factually distinct. The claims have different elements; different burdens; rely on different precedent; and seek different relief. Further, as the trial court correctly concluded, even assuming Mattison could prevail on one or both of her appeals, she is capable of receiving complete relief even if the claims proceed separately but simultaneously. *See* Order (Feb. 9, 2021) at 1 (R. 36). Accordingly, Mattison was not prejudiced by the declaratory judgment claim continuing because the relief she seeks in the derivative action will still be available no matter what the outcome of the declaratory judgment claim regarding the value of her equity. Resolution of the equity claim simply involves Mattison receiving payment for the value of her equity interest in MPS. Resolution of that claim has no effect on the relief that Mattison seeks in the derivative action. The reverse is also true: Any relief she might receive from the appeal of her derivative claim will be available to her regardless of whether the declaratory judgment claim has already been disposed of.

In sum, even if this Court had jurisdiction to review a ruling that Mattison did not appeal, the trial court did not err in denying Mattison's Motion to Stay and proceeding to consider and rule on MPS's Motion for Summary Judgment.

III. Mattison's arguments regarding the discounting of her shares and the availability of pre-judgment interest are unpreserved do not warrant any relief.

Mattison argues that the trial court erred by failing to award her pre-judgment interest on the amount MPS was to pay her for her shares and by allowing MPS to discount the value of her shares for lack of control and marketability. *See* Mattison's Brief at 34–39. She never raised either of these arguments to the trial court prior to its ruling. Accordingly, they are not preserved for appellate review. *See Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009) ("An issue may not be raised for the first time in a motion to reconsider."); *Dixon v. Dixon*,

362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005) (holding an issue raised for the first time in a Rule 59, SCRCP motion is not preserved for appellate review).

Neither Mattison's Memorandum in Opposition to MPS's Motion for Summary Judgment nor her arguments presented at the hearing on that motion discussed the discounting of her shares' value for lack of marketability and control. It appears the only time she even mentioned the topic during this litigation was in her affidavit earlier in the case opposing MPS's Motion for Summary Judgment on her derivative claim. Even then, however, she noted that when she and others purchased shares in MPS's predecessor in 1997, those shares were not discounted for lack of marketability or control. *See* Mattison Affidavit (May 14, 2020) at ¶ 5 (R. 702). She did not state in her affidavit that MPS's third-party appraiser's valuation of her shares erred by discounting them for lack of marketability and control, nor did her affidavit even mention any recent discounting of her shares. Rather, she first raised the argument in her Motion to Alter or Amend. Arguments first raised in a Motion to Alter or Amend, of course, are not preserved for appellate review. *Johnson*, 381 S.C. at 177, 672 S.E.2d at 570; *Dixon*, 362 S.C. at 399, 608 S.E.2d at 854.

Similarly, neither in her Memorandum in Opposition to MPS's Motion for Summary Judgment nor in the arguments presented at the hearing on that motion did Mattison request or raise the issue of pre-judgment interest. Rather, she first raised the issue in her Motion to Alter or Amend. Accordingly, it is not preserved for appellate review. *Johnson*, 381 S.C. at 177, 672 S.E.2d at 570; *Dixon*, 362 S.C. at 399, 608 S.E.2d at 854.

Even if these arguments were preserved, they fail. As to Mattison's argument about the discounting of her shares, she agreed in the Severance Agreement (which her counsel negotiated and participated in drafting) to a valuation by an outside appraiser. Nothing in that agreement prohibits the common practice of discounting the price of shares in a closely held corporation for

lack of marketability or control. The fact that when Mattison originally purchased her shares more than 24 years ago the price was not discounted for lack of marketability or control, *see* Mattison's Brief at 34, is irrelevant to the question of whether such discounting may be applied today. Likewise, the fact that in 2010, prior to MPS's hiring of HDH Advisors as an outside appraiser, MPS's members agreed to a non-discounted share value for three new minority members, *see id.*, is irrelevant to the question of whether such discounting is permissible in a different factual context involving a valuation performed by a different, outside, highly-regarded appraiser.

Likewise, Mattison's argument that, despite losing below, she should receive prejudgment interest is utterly lacking in merit. MPS has repeatedly attempted to pay her the fair value of her membership shares. She has repeatedly refused. As a result of her refusal, she has for the past three years continued to receive membership distributions while she delayed her separation from MPS. Her argument that the delay that she caused *also* entitles her to pre-judgment interest during that time period lacks any basis in law or logic. She should not be rewarded for her own recalcitrance.

CONCLUSION

For the foregoing reasons, Respondent McMillan Pazdan Smith, LLC respectfully requests that this Court affirm the Order of the Circuit Court granting summary judgment on MPS's declaratory judgment claim and on Mattison's counterclaims and affirm the Order of the Circuit Court denying Mattison's Motion for Reconsideration of the same.

[*SIGNATURE PAGE ATTACHED*]

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 McMillan Pazdan Smith, LLC

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Greenville, South Carolina

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. 20021-000365
Civil Action No. 2019-CP-23-00998

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

v.

Donza H. Mattison, ... Appellant.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the Final Brief of Respondent McMillan Pazdan Smith, LLC complies with Rule 211(b), SCACR.

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 McMillan Pazdan Smith, LLC

January 20, 2022
Greenville, South Carolina