

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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Nov 28 2022

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

S.C. SUPREME COURT

J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2022-000285
Unpublished Opinion No. 2022-UP-022

H. Hughes Andrews, ...Respondent,

v.

Quentin S. Broom, Jr, ...Petitioner.

**APPENDIX
VOLUME VI**

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Hon. J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2018-002223

RECEIVED

Jul 31 2020

SC Court of Appeals

H. Hugh Andrews Respondent,

v.

Quentin S. Broom, Jr., ...Appellant.

CORRECTED RECORD ON APPEAL

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defendants because the plaintiff is the sole aggrieved shareholder and is suing all the remaining shareholders.” Id. at 44.

Setting forth its rationale, the New Hampshire Supreme Court explained:

The corporation here is typical of other close corporations in that the shareholders are few in number, know each other, and actively serve in the management of the business as officers or directors. Because the corporation's shares are not publicly traded, the plaintiff as a minority shareholder does not have the opportunity to extricate himself from the corporation by selling his shares on the open market. In addition, construing all reasonable inferences drawn from the well-pleaded facts below in the plaintiff's favor, we conclude for purposes of this analysis that the corporation's board of directors is not disinterested. In these circumstances, the formalities of the derivative proceeding may be impractical and unnecessary because the corporation does not have a disinterested board of directors and a multiplicity of suits is unlikely.

Id. at 45. Citing Thomas and relying on the ALI rationale the Court concluded:

We are persuaded that the derivative/direct distinction makes little sense when the only interested parties are two individuals or sets of shareholders, one who is in control and the other who is not. In this context, the debate over derivative status can become purely technical. In cases such as this one, where the principles underlying the derivative proceeding are not served, the trial court should have the discretion to allow the plaintiff to pursue a direct claim against the corporate officers. Courts that continue to require a derivative proceeding in this context generally do so to promote consistency and predictability in corporate law. While we agree that consistency in the law is important, we also recognize that the derivative proceeding involves burdensome, and often futile, procedural requirements when a minority shareholder seeks to redress wrongful behavior by the majority shareholders. Furthermore, any recovery from a derivative proceeding goes to the corporation and thus would be under the control of the alleged wrongdoers.

Id. at 46. (internal citations and quotations omitted).

Similarly, in W & W Equipment Co. v. Mink, 568 N.E.2d 564 (Ind. Ct. App. 1991) (App. A, #17), a shareholder in a closely held corporation brought a direct suit alleging a breach of fiduciary against the directors for wrongful termination, misrepresentation and extortion. Id. at 573. The court rejected the defendant's claim that

the plaintiff's suit had to be brought derivatively, concluding that "the reasons for requiring a derivative action are not present in this case." *Id.* at 571. The Court emphasized that there were only two shareholders, that the plaintiff was the sole injured shareholder, and there was "thus no potential for multiplicity of shareholder suits" *Id.* Further, "there [was] no evidence of any creditor in need of protection," nor was there "prejudice to other shareholders not a party to the suit since [the plaintiff was] the only injured shareholder" *Id.* Moreover, the plaintiff "would not be adequately compensated by a corporate recovery because [the corporation was] a close corporation with no ready market for the sale of [the plaintiff's] shares." *Id.*

Finally, in *Richards v. Bryan*, 879 P.2d 638, 641 (Kan. Ct. App. 1994) (App. A, #13), a minority shareholder in a close corporation brought a direct suit against the majority shareholders alleging that the defendants had effectively frozen out the plaintiff, denied the plaintiff a reasonable return on investment, and fraudulently induced the plaintiff to enter a formation agreement. *Id.* The Court permitted the plaintiff to bring a direct suit for the derivative claims explaining that the suit "will not expose [the corporation] to a multiplicity of actions or interfere with a fair distribution of recovery because the [plaintiff is] the only minority shareholder in the corporation." *Id.* at 648. Furthermore, the Court said, "there is no indication that resolution of [plaintiff's] claims will prejudice any creditors' interests." *Id.*

B. The ALI/Thomas Rational Applied to Andrews

In this case all the of the reasons for requiring derivative actions for losses suffered by the corporation set forth in *Thomas* and the ALI rationale are, in fact, absent. First, there is no need to prevent a multiplicity of lawsuits by shareholders. As in most

cases that apply the exception, all of the corporations' shareholders (Broom and Andrews) are involved in the action either as a plaintiff or defendant. A direct suit could not expose the corporation to a multiplicity of lawsuits because all the corporate participants are parties and before this Court. Second, no protection of corporate creditors is necessary as Andrews is the only potential creditor. Third, the need to protect the interests of "all shareholders" is non-existent. Again, Andrews and Broom are the only shareholders and Andrews is the sole aggrieved shareholder.

Finally, Andrews cannot be adequately compensated by an increase in the value of his shares for three reasons. First, presumably doing such would confer a benefit to Broom, the sole wrongdoer, in the form of an increase in the value of his shares as well. Cf. Lesesne, 307 S.C. at 67, 413 S.E.2d at 848 ("It is a well-settled equitable rule that anyone acting in a fiduciary relationship shall not be permitted to make use of that relationship to benefit his own personal interests. It is a doctrine repeatedly announced by the courts of this nation that courts of equity will scrutinize with the most zealous vigilance transactions between parties occupying confidential relations toward each other and particularly any transaction between the parties by which the dominant party secures any profit or advantage at the expense of the person under his influence.").

Second, an increase in the value of shares is of little or no benefit to Andrews as there is no open market for shares of a closely held corporation.

Finally, the plaintiff unilaterally shut the corporation down. Although it was viable at the time Andrews filed his original claims, Broom has allowed the corporation to be administratively dissolved.⁸ Thus, at this juncture, the corporation technically could

⁸ This matter is the subject of Defendant Andrews' Second Amended Answer, Counterclaim and Third-party Complaint, which incorporated herein by reference.

not recover the losses due to Broom's unilateral actions by his dissolving of the same. It would be the highest form of inequity to prevent Andrews from recovering for the wrongful acts of his partner Broom by rewarding Broom for closing the corporate door from which Andrews' recovery could be obtained. The current ruling of the court promotes this very result.

Further, as alleged in the pleadings, Broom was the primary operator, bookkeeper decision maker and Chief Executive Officer for Tri-Star and had control of Tri-Star's business relationships. (Amended Answer and Counterclaims, ¶¶ 15, 24 and 28). As such, Andrew is akin to a minority shareholder. As explained in Durham, a derivative proceeding under these circumstances would involve "burdensome, and often futile, procedural requirements" and "any recovery from a derivative proceeding ... would be under the control of the alleged wrongdoers." 871 A.2d at 46. Based on Broom's misconduct as the controlling shareholder, Andrews certainly could not expect recovery by and through the corporation and thus his only remedy was and is through direct action.⁹

Based on the foregoing, Andrews is allowed to maintain a direct action under the circumstances of this case. As a result, Andrews' counterclaims are properly pled and are sufficient withstand 12(b)(6) motion.

⁹ Broom unilaterally liquidated the company and its assets, over Andrews' objection. The only available claim is that which Andrews seeks for damages for Broom's payment of an unauthorized salary to himself and for the sale of the assets of the corporation over Andrew's objection.

III. NOVEL ISSUES OF LAW SHOULD NOT BE DECIDED IN MOTION TO DISMISS PURSUANT TO RULE 12(B)(6), SCRCF

If this court declines to apply the ALI/Thomas exception based on the decisions in Babb and Brown, it then remains one of novel impression that cannot be decided on a motion to dismiss pursuant to Rule 12(b)(6):

As a general rule, important questions of novel impression should not be decided on a Rule 12(b)(6), SCRCF, motion to dismiss. Instead, a novel issue is best decided in light of the testimony to be adduced at trial. However, where the dispute is not as to the underlying facts but as to interpretation of the law, and development of the record will not aid in the resolution of the issues, it is proper to decide even novel issues on a motion to dismiss for failure to state a claim.¹⁰

Evans v. State, 344 S.C. 60, 543 S.E.2d 547, 551 (2001) (App. A, #8); see also Unisys Corp. v. S.C. Budget and Control Bd., 346 S.C. 158, 551 S.E.2d 263 (2001) (novel questions not to be decided on motion to dismiss where development of record would aid in decision) (App. A, #16). Though it is quite clear that our courts have recognized the validity of the rationale in Thomas and express favorable treatment of the exception, they have not been presented with the proper factual scenario with which to conduct a definitive analysis. Such an analysis would require a review of the full facts and record of the case not allowed in a motion to dismiss on the pleadings. Accordingly, the issue remains undecided and should not have been decided on Brooms' Rule 12(b)(6) motion.

¹⁰ The pleadings on which the motion to dismiss is based were filed more than five years ago. Subsequent discovery has revealed substantial and additional evidence of Broom's misconduct and therefore development of the record will substantially aid the resolution of this issue.

IV. JUDICIAL ECONOMY SUPPORTS THE DENIAL OF PLAINTIFF'S MOTION TO DISMISS.

The court's order permits Andrews to recover for Broom's wrongful misconduct that results in an injury specifically to Andrews, but not to the corporation. Andrews has pled such action and injury. (Amended Answer and Counterclaims, ¶ 35) Importantly, the identical wrongful misconduct of Broom resulted in harm to Andrews, both as a creditor of Tri-Star and as a shareholder of Tri-Star Communications. The same evidence will be presented at trial to support both claims.

Because of this, at this juncture of the litigation, judicial economy is best served by permitting Andrews' claims on behalf of Tri-Star to proceed. The jury can be given special interrogatories to distinguish the various damage claims. The Court may revisit this issue post-trial without prejudice to either party. This way, in the event of an appeal, a second trial on the same facts is will not be required.

V. ISSUES WITH THE OCTOBER 7, 2011 FORM 4 AND THE COURT ORDER SIGNED ON BEHALF OF JUDGE HAYES

On October 7, 2011, the Court entered an order granting Plaintiff's motion in part and denying it in part. See Exhibit 1, Or. Grant. Broom's MTD (October 7, 2011). The Order reads in part:

[T]he Court finds that Rule 23 is applicable to the counterclaims and should have been followed. Thus, the claims related to Tri-Star are dismissed. While this Court has heard numerous motions and arguments previously by the parties, this particular motion is based on a review of the pleadings. Also, all claims brought by Andrews individually which overlap any claim made by Tri-Star for damages arising out of allegations of Broom's mismanagement or breach of duties arising out of the shareholder relationship between Andrews and Broom are dismissed, because these claims also require compliance with Rule 23.

If, however, Andrews shows that Broom engaged in wrongful conduct that caused a particular loss that is individual to Andrews, the liability of such wrongful conduct is an asset of Andrews. This type of individual claim is not subject to Rule 23 requirements and will not be dismissed on that basis. In reviewing the pleadings, this Court has read them in a light most favorable to Andrews, and in doing so, cannot determine with certainty, whether or not such claims exist.

The plaintiff's attorneys are asked to prepare a formal order granting its motion as outlined above, but plaintiff has liberty to fully address the motion to dismiss in the formal order, and is not limited to the verbiage expressed in this Form 4.

Id. (emphasis added). As requested, counsel for Broom prepared a "formal order" setting forth the Court's ruling as outlined in the Form 4. See Exhibit 2, Or. Grant. Broom's MTD (November 1, 2011). The Order was submitted to the Court and signed by the non-jury docket clerk on behalf of Judge Hayes.

Unfortunately, the order submitted by Plaintiff's counsel and subsequently entered by the Court exceeds the scope of the Form 4. The Form 4 allows Andrews to maintain claims for individual losses without the necessity of compliance with Rule 23. However, the November 1, 2011 Order submitted by Plaintiff's counsel undertakes a claim by claim analysis that disposes of all of Andrews' counterclaims on the basis that all of the individual claims overlap those of Tri-Star. It states, "[e]ven when viewed in the light most favorable to Andrews, each counterclaim seeks recovery for misappropriation of corporate property. Andrews was required to bring such claims in a derivative action." The Court in its Form 4 stopped short of such an analysis and presumably left the issue for determination by a jury. See Exhibit 1, Or. Grant. Broom's MTD (October 7, 2011) (This type of individual claim is not subject to Rule 23 requirements and will not be dismissed on that basis. In reviewing the pleadings, this

Court has read them in a light most favorable to Andrews, and in doing so, cannot determine with certainty, whether or not such claims exist.”)

The “formal order” submitted and signed is factually incorrect. Andrews’ Amended Answer, Counterclaim and Third-party Complaint sets out facts and claims for individual losses separate and distinct from that of Tri-Star which undeniably should survive the motion to dismiss. The following facts and allegations are set forth in the pleading:

23. Defendant Andrews has standing to bring this claim individually and on behalf of third-party Plaintiff for losses and damages sustained to both via the malfeasance and nonfeasance of the plaintiff in his dealings with and on behalf of Tri-Star.

25. Defendant Andrews loaned Tri-Star one hundred thirty thousand (\$130,000.00) on or before August 31, 2005.

26. Tri-Star purchased “Pot-O-Gold” video gaming machines (“Gaming Machines”) and other goods and services from Drews Distributing, Inc., a South Carolina corporation (“Drews, Inc.”) owned 100% by Defendant Andrews. Drews, Inc. distributed by assignment to Defendant Andrews all rights to payment from Tri-Star.

27. As of October 31, 2005, Tri-Star owed Defendant Andrews the sum of three million six hundred twenty-six thousand, three hundred ninety-three and 17/100ths dollars (\$3,626,393.17) for Gaming Machines and other goods and services sold to Tri-Star, of which one million one hundred ninety-four thousand three hundred sixty-two and 83/100ths dollars (\$1,194,362.83) is for the actual unpaid portion of the purchase price (the remaining amounts being accrued and unpaid finance charges).

34. Without informing, obtaining consent, and authority, Plaintiff sold, or caused to be sold, the equipment in the possession of DR Businesses to third parties for less than fair market value. Indeed, Defendant Andrews expressly informed the plaintiff not to do so without his prior approval or consent.

35. Without informing, obtaining consent, and authority, between January 1, 2005 and April 30, 2005, Plaintiff made distributions to himself from Tri-Star in the amount of five hundred twenty thousand dollars

(\$520,000.00). Said distributions were made at a time when Tri-Star owed Defendant Andrews substantial sums of money both as a shareholder, for a shareholder loan, and as a creditor of Tri-Star.

(Amended Answer and Counterclaim, ¶¶ 23, 25, 25, 27, 34 & 35).

Each of these paragraphs of Andrews' Amended Answer and Counterclaim allege specific individual losses separate and distinct from that of Tri-Star. For instance, in paragraphs 26 and 27, Andrews alleges that he was personally owed \$1,194,362.83 for the sale of gaming machines to Tri-Star. He alleges in subsequent paragraphs that Broom's malfeasance and misconduct as director caused non-payment of that debt owed to him personally, above and beyond what the money to which he was entitled as a shareholder.

Further, paragraphs 34 and 35 set forth facts and allegations that assert individual losses. Specifically, Andrews asserts that Broom made distributions to himself in the amount of \$520,000.00 despite owing Andrews substantial sums of money as a shareholder and creditor. This is clearly an individual loss to Andrews and is sufficiently pled as such.

Andrews' loss is akin to the shareholder loss recognized in Hite, 305 S.C. 358, 409 S.E.2d 340 (1991). The Hite court stated:

The gravamen of Hite's complaint is clearly a particular loss separate and distinct from that of the corporation. He alleges appellants' breach of a fiduciary duty to him as a minority shareholder and their negligent mismanagement resulted in a diminution in his percentage of corporate ownership from 33 1/3% to 11.5%. This alleged reduction in Hite's individual percentage of corporate control is separate and distinct from any general diminution in the value of corporate stock. We affirm the trial judge's ruling that the causes of action for breach of fiduciary duty and negligent mismanagement are properly brought in Hite's individual capacity.

Id. at 361-62, 409 S.E.2d at 342. Here, Broom's malfeasance and wrongful misconduct resulted not only in a diminution of ownership value, but resulted in Tri-Star's inability to pay Andrews as a creditor of Tri-Star. As discussed, such losses were sufficiently pled.

These allegations of individual harm are incorporated by reference into each and every cause action as if pled in that particular cause of action. (Id. ¶¶ 38, 44, 49, 54, 59, 65, 71, 78, & 88). As such, the Court's Order finding that individual injury was not pled in causes of action after the first (See Exhibit 2, Order at p.5) is factually not true.

The November 1, 2011 order states that Andrews did not sue Tri-Star as a creditor when finding no relief for his individual injury is available. This construction is in complete opposition to the established law. South Carolina courts, as well as every jurisdiction previously cited, recognize that a shareholder may maintain a direct action against the director or officer who has mismanaged the corporation that has caused individual harm to the shareholder. Here, Andrews alleges that, in addition to the harm he suffered as a shareholder, Plaintiff's actions caused the company not to be able to repay debts owed to him personally. The harm is to him personally. Plaintiff's liability is based on his misconduct as an officer, director and/or manager of the company. Accordingly, the direct action is actionable and has been clearly pled.

Finally, the order prepared by Plaintiff's counsel (and signed by the Court) tortures the construction of the Defendant's pleading to obtain a specific result finding no existing claim. This construction **directly** contradicts the standard of review applicable to a 12(b)(6) motion. See Charleston County School Dist. v. Laidlaw Transit, Inc., 348 S.C. 420, 424, 559 S.E.2d 362, 364 (1987) (a motion to dismiss a counterclaim pursuant to Rule 12(b)(6) must be based solely on the allegations set forth in the pleadings and

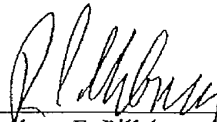
may not be sustained if facts alleged and inferences reasonably deducible therefrom would entitle the complainant to *any* relief on any theory of the case.) (emphasis added); see United Educational Distributors, LLC v. Educational Testing Services, 350 S.C. 7, 13, 564 S.E.2d 324, 327-28 (Ct. App. 2002). (a dismissal on the pleadings is considered a drastic procedure and therefore the pleadings should be construed liberally and presumed to be true as pled so that substantial justice is done between the parties) (emphasis added).

CONCLUSION

For the reasons set forth herein, Andrews' Supplemental Motion to Reconsider should be granted and Andrews should be allowed to proceed directly on the counterclaims asserted. Plaintiff's motion to dismiss should be **DENIED**.

Respectfully Submitted,

Pillsbury & Read, P.A.

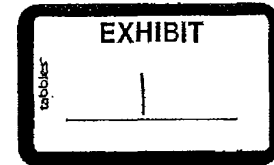


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HUGHES ANDREWS, and TRI-STAR
COMMUNICATIONS, INC. AS THIRD
PARTY PLAINTIFF**

November 11, 2011

5.



FORM 4

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL
CASE

COUNTY OF Spartanburg
IN THE COURT OF COMMON PLEAS

CASE NO. 2008-CP-42-3397

Quentin Broom

Ten State Street, LLP

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other

☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**

☒ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

This matter is before the court on the plaintiff's (Broom) SCRPC Rule 12 (b)(6) and Rule 12(c) Motion to Dismiss the defendant's (Andrews and Tri-Star) counterclaims.

Broom asserts that the counterclaims should be dismissed because the claims are corporate derivative actions and, as such, Andrews and Tri Star have not complied with SCRPC Rule 23, thus requiring dismissal.

It is not contested that SCRPC 23 was not complied with prior to the filing of the counterclaims. It is also not contested, if SCRPC rule 23 is applicable, that dismissal is the appropriate remedy. Thus, the detailed analysis found in *Carolina First v. Whittle* does not have to be made by this Court since no argument was presented that even an attempt was made to comply with Rule 23. Andrews and Tri-Star assert Rule 23 is not applicable to their claims.

This case has a long history before this Court. However, the issues of the counter claims by defendant Andrews and on behalf of Tri-Star have neither been visited nor addressed previously by this Court. After reviewing the briefs presented by the attorneys, considering the arguments of the attorneys, and reading Rule 23 and all of the case law offered, the Court finds that Rule 23 is applicable to the counter claims and should have been followed. Thus, the claims related to

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Tri-Star are dismissed. While this Court has heard numerous motions and arguments previously by the parties, this particular motion is based on a review of the pleadings. Also, all claims brought by Andrews individually which overlap any claim made by Tri-Star for damages arising out of allegations of Broom's mismanagement or breach of duties arising out of the shareholder relationship between Andrews and Broom are dismissed, because these claims also require compliance with Rule 23.

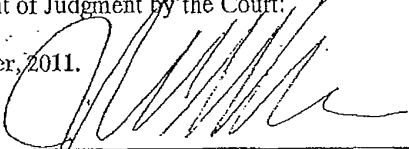
If, however, Andrews shows that Broom engaged in wrongful conduct that caused a particular loss that is individual to Andrews, the liability of such wrongful conduct is an asset of Andrews. This type of individual claim is not subject to the Rule 23 requirements and will not be dismissed on that basis. In reviewing the pleadings, this Court has read them in a light most favorable to Andrews, and in so doing, cannot determine with certainty, whether or not such claims exist.

The plaintiff's attorneys are asked to prepare a formal order granting its motion as outlined above, but plaintiff has liberty to fully address the motion to dismiss in the formal order, and is not limited to the verbiage expressed in this form 4.

IT IS ORDERED AND ADJUDGED:

- ☒ See attached order. (Formal order to follow)
☐ Statement of Judgment by the Court:

Dated at Spartanburg, South Carolina, this 7th day of October, 2011.


PRESIDING JUDGE

This judgment was entered on the 7 day of Oct 20 11, and a copy mailed first class this 7 day of Oct, 20 11 to attorneys of record or to parties (when appearing pro se) as follows:

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ATTORNEY(S) FOR PLAINTIFF

ATTORNEY(S) FOR DEFENDANT


CLERK OF COURT

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 OCT -7 PM 3:33
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

Quentin S. Broom, Jr.,)

Plaintiff,)

v.)

Ten State Street, LLP, Timothy D.)
Scrantom, Mark Broadwater, and H.)
Hugh Andrews,)

Defendants,)

of which,)

Defendant H. Hugh Andrews,)
Individually and on behalf of Tri-Star)
Communications, Inc., as a Third-Party)
Plaintiff,)

v.)

Quentin S. Broom, Jr.)

Third-party Defendant)

COURT OF COMMON PLEAS

2008-CP-42-3397

**MOTION TO AMEND and/or
SUPPLEMENT THE ANSWER AND
COUNTER CLAIMS OF DEFENDANT
AND THIRD-PARTY PLAINTIFF HUGH
ANDREWS, INDIVIDUALLY and on behalf
of TRI-STAR COMMUNICATIONS**

Pursuant to Rule 15(a) and (d) of the South Carolina Rules of Civil Procedure, Defendant H. Hughes Andrews, individually and on behalf of Tri-Star Communications, moves to amend his answer and counterclaims arising out the same transactions and occurrences at issue in Plaintiff's complaint, based upon information learned and/or events that have transpired since the filing of his Amended Answer and Counterclaims in May 2006. Defendant H. Hugh Andrews' proposed Second Amended Answer and Counterclaims is attached hereto and incorporated herein. Defendant Andrews files this motion to ensure that the pleadings reflect all facts and information currently known that arise under the same facts and circumstances alleged in Plaintiff's original complaint and are properly before the Court. The granting of Defendant

Andrews' motion will not hinder or delay the trial of this case because all causes of action are based upon the same facts and circumstances alleged in Plaintiff's original complaint.

Pursuant to Rule 11 of the South Carolina Rules of Civil Procedure, counsel for Defendant Andrews has consulted with counsel for the Plaintiff about the subject matter of this motion prior to filing the same and as of this writing has been unable to obtain his consent for the granting of the relief requested herein.

Respectfully submitted,

Pillsbury & Read, P.A.



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**ATTORNEYS for DEFENDANT H. HUGHES
ANDREWS, individually and on behalf of TRI-
STAR COMMUNICATIONS, INC. AS THIRD
PARTY PLAINTIFF**

November 10, 2011

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG)

Quentin S. Broom, Jr.,)
)
Plaintiff,)

C.A. No.: 08-CP-42-3397

v.)

**SECOND AMENDED ANSWER,
COUNTERCLAIMS and THIRD-
PARTY COMPLAINT OF DEFENDANT
H. HUGHES ANDREWS,
INDIVIDUALLY and on behalf of
TRI-STAR COMMUNICATIONS**

Ten State Street, L.L.P.)
Timothy D. Scrantom, Mark Broadwater,)
and H. Hughes Andrews,)

Defendants,)

of which,)

Defendant H. Hughes Andrews, Individually)
and on behalf of Tri-Star Communications,)
Inc., as a Third-party Plaintiff,)

v.)

Quentin S. Broom, Jr.,)

Third-party Defendant.)

**TO: PATRICK E. KNIE AND JAMES R. GILREATH, ATTORNEYS FOR
PLAINTIFF AND THIRD-PARTY DEFENDANT QUENTIN S. BROOM, JR.**

By and through their undersigned counsel, Defendant H. Hughes Andrews (hereinafter "Defendant Andrews") answering Plaintiff's Complaint, and brings this action on individually and on behalf of the Third-Party Plaintiff, Tri-Star Communications, Inc. ("Third-party Plaintiff Tri-Star"), allege and will show unto the Court the following:

For A First Defense
(By Way of a General Denial)

1. All allegations of Plaintiff's Complaint not admitted, qualified or explained are expressly denied.
2. As to Paragraphs 1 through 4 of Plaintiff's Complaint, Defendant Andrews is without sufficient information to admit or to deny the allegation as stated, and therefore demands strict proof thereof.
3. As to Paragraph 5 of Plaintiff's Complaint, Defendant Andrews admits the allegation stated therein to be true, to the best of his knowledge.
4. As to Paragraphs 6 through 17 of Plaintiff's Complaint, Defendant Andrews denies the allegations as stated therein, and demands strict proof thereof.
5. As to Paragraph 18 of Plaintiff's Complaint, Defendant Andrews is without sufficient information to admit or to deny the allegation as stated, and therefore demands strict proof thereof.
6. As to Paragraph 19 of Plaintiff's Complaint, Defendant Andrews admits the allegations set forth therein, with the exception that Drew's Distributing, Inc. sold the equipment to Tri-Star and the obligations of Tri-Star to Drew's Distributing Inc. were assigned to Defendant Andrews, of which Plaintiff received due notice.
7. As to Paragraph 20 of Plaintiff's Complaint, Defendant Andrews is without sufficient information to admit or to deny the allegation as stated, and therefore demands strict proof thereof.
8. As to Paragraphs 21 through 24 of Plaintiff's Complaint, Defendant Andrews denies the allegations as stated therein, and demands strict proof thereof.

9. As to Paragraphs 25 through 27 of Plaintiff's Complaint, Defendant Andrews is without sufficient information to admit or to deny the allegation as stated, and therefore demands strict proof thereof.

10. As to Paragraphs 28 through 32 of Plaintiff's Complaint, Defendant Andrews denies the allegations as stated therein, and demands strict proof thereof.

11. As to Paragraph 34 of Plaintiff's Complaint, Defendant Andrews is without sufficient information to admit or to deny the allegation as stated, and therefore demands strict proof thereof.

12. As to Paragraph 35 of Plaintiff's Complaint, Defendant Andrews admits the allegation stated therein to be true, to the best of his knowledge.

13. As to Paragraphs 36 through 38 of Plaintiff's Complaint, Defendant Andrews denies the allegations as stated therein, and demands strict proof thereof.

14. As to Paragraph 39 of Plaintiff's Complaint, Defendant Andrews is without sufficient information to admit or to deny the allegation as stated, and therefore demands strict proof thereof.

15. As to Paragraphs 40 through 78 of Plaintiff's Complaint, Defendant Andrews denies the allegations as stated therein, and demands strict proof thereof.

For A Second Defense
(Failure To State A Claim Upon Which Relief May Be Granted)

16. Defendant Andrews realleges each above paragraph, to the extent not inconsistent herewith, as if set forth fully hereunder.

17. Plaintiff's Complaint does not set forth sufficient facts and/or the requisite legal elements for the claims sought therein such that Plaintiff fails to adequately state a claim upon which relief may be given against this Defendant.

For A Third Defense
(Unclean Hands)

18. Defendant Andrews realleges each above paragraph, to the extent not inconsistent herewith, as if set forth fully hereunder.

19. To the extent Plaintiff's complaint seeks equitable relief, Plaintiff's Complaint is barred by the doctrine of unclean hands.

For A Fourth Defense and By Way of Defendant Andrew's
First Counterclaim Against the Plaintiff and
First Cause of Action by Third-Party Plaintiff Tri-Star
(Breach of Fiduciary Duty)

20. Defendant Andrews realleges each above paragraph, to the extent not inconsistent herewith, as if set forth *in toto* hereunder.

21. At all times relevant hereunder, Tri-Star Communications, Inc. ("Tri-Star") was a South Carolina corporation with its principal place of business in Spartanburg County, South Carolina. Defendant Andrews, at all times relevant herein, was a shareholder of and a creditor of Tri-Star.

22. Defendant Andrews has standing to bring this claim individually and on behalf of Third-party Plaintiff for losses and damages sustained to both via the malfeasance and nonfeasance of the plaintiff in his dealings with and on behalf of Tri-Star Communications.

23. Plaintiff was a director and a fifty percent (50%) owner of Tri-Star, Communications, Inc. Plaintiff further solely controlled the financial operations of Tri-Star.

As the dominant and controlling shareholder/partner, Plaintiff owed a fiduciary duty to the company and to Defendant Andrews to act in the best interest of the company and of Defendant Andrews at all times regarding the operations of Tri-Star Communications.

24. As a stockholder, Defendant Andrews loaned Tri-Star one hundred thirty thousand dollars (\$130,000.00) on or about August 31, 2005.

25. As the assignee of a debt, as of October 31, 2005, Tri-Star Inc. owed Defendant Andrews the sum of three million six hundred twenty-six thousand, three hundred ninety-three and 17/100ths dollars (\$3,626,393.17) for equipment (hereinafter "the equipment") sold to Tri-Star, of which one million one hundred ninety-four thousand three hundred sixty-two and 83/100ths dollars (\$1,194,362.83) is for the actual costs of equipment sold to Tri-Star.

26. Tri-Star sold and/or transferred a substantial amount of the equipment to a Worldwide Entertainment, S.A. ["Worldwide Entertainment"], a Dominican Republic corporation. Plaintiff was a manager of Worldwide Entertainment.

27. At all times relevant herein, Defendant Andrews owned an interest in Worldwide Entertainment, via his partial membership in and with Calum, LLC, the corporation which owned the majority of stock of Worldwide Entertainment.

28. Plaintiff failed to pay the taxes owed by Worldwide Entertainment.

29. Plaintiff refused to produce the financial statement of Worldwide Entertainment to Defendant Andrews.

30. In the summer and/or fall of 2004, Plaintiff and Defendant Andrews had a disagreement over the operations of Tri-Star and the operations in the Dominican Republic. Upon information and belief, Plaintiff undertook a concerted effort to liquidate the assets of Tri-

Star and convert the same for his personal use and benefit, without authority or consent of Andrews.

31. Towards that end, without the consent or authority of Defendant Andrews, Plaintiff paid himself a wage and/or salary in the amount of four hundred thousand (\$400,000.00) dollars December 15, 2004. Said distributions were made at a time when Tri-Star owed Defendant Andrews substantial sums of money both as a shareholder, for a shareholder loan, and as a creditor of Tri-Star.

32. Upon information and belief, Plaintiff used the fraudulent payment of wages to obtain a mortgage on a \$3.5 Million dollar home located at 6565 Allison Road, Miami Beach, Florida, 33141-4508. Upon information and belief, Plaintiff made a deposit in the amount of \$5,000.00 on or about January 24, 2005 and signed an "Agreement for Deed" on February 14, 2005 to purchase the same.

33. Further, without the consent or authority of Defendant Andrews, between January 1, 2005 and April 30, 2005, Plaintiff paid himself wages and/or salary distribution from Tri-Star, Inc. in the amount of five hundred twenty thousand dollars (\$520,000.00). Said distributions were made at a time when Tri-Star owed Defendant Andrews substantial sums of money both as a shareholder, for a shareholder loan, and as a creditor of Tri-Star.

34. Without consent or authority from Defendant Andrews, Plaintiff sold, or caused to be sold, the equipment in the possession of Worldwide Entertainment to third parties for substantially below market value. Indeed, when Plaintiff expressed his intention to sell Tri-Star's assets, Defendant Andrews expressly informed the plaintiff not to do so without his prior approval and consent. Plaintiff deliberately ignored Defendant Andrews' instruction.

35. Upon information and belief, Plaintiff converted essentially all of the assets of Tri-Star for his personal use and benefit. Upon information and belief, Plaintiff has received an estimated two million(\$2,000,000.00) dollars from the use of the assets that formerly belonged to Tri-Star since 2005, without the authority or consent from Andrews.¹ Said revenues were received by the plaintiff at a time when Defendant Andrews was owed millions of dollars for payment on the equipment.

36. At a time when Tri-Star owed Defendant Andrews substantial sums of money both as a shareholder, for a shareholder loan, and as a creditor of Tri-Star, Plaintiff paid hundreds of thousands of dollars to his relatives, ostensibly as loan repayments. Upon information and belief, said loans were not legitimate. Additionally, Plaintiff gave preference to paying monies to relatives over paying the debts owed to Defendant Andrews.

37. Thereafter, Plaintiff unilaterally, and without the consent or authority from Defendant Andrews, liquidated Tri-Star Communications. On August 13, 2009, Tri-Star was administratively dissolved by the South Carolina Secretary of State due to the failure of plaintiff in filing income tax returns and other required documents.

38. Plaintiff's actions rendered Tri-Star incapable of paying the monies owed to Defendant Andrews, all at a time when Plaintiff (and his relatives) were paid substantial sums of money.

39. Plaintiff materially and substantially breached his fiduciary duty to Defendant Andrews in one or more of the following particulars:

¹None of this information was available as of May 26, 2006, the date Defendant Andrews filed his First Amended Answer, Counterclaims and Third-party Complaint, because Plaintiff had not filed the income taxes where this income was reported.

- a. Paying himself a salary and/or distribution from Tri-Star at a time when Tri-Star owed Defendant Andrews substantial sums of money;
- b. Selling of the assets of Tri-Star Inc. at far below market value without authority or consent of Defendant Andrews;
- c. Converting Tri-Star's money and/or assets for Plaintiff's own use and benefit;
- d. Failing to exercise ordinary care and diligence commensurate with the standard of care applicable to similarly situated managers, officers and/or shareholders.

40. As a direct and proximate result, Defendant Andrews and Third-party Plaintiff Tri-Star Communications have been damaged, thereby entitling Defendant Andrews and Third-party Plaintiff Tri-Star to actual and punitive damages hereunder in an amount to be determined by the Court.

**For A Fifth Defense and By Way of Defendant Andrew's
Second Counterclaim Against the Plaintiff and
Second Cause of Action by Third-Party Plaintiff Tri-Star
(Breach of Contract)**

41. Defendant Andrews realleges each above paragraph, to the extent not inconsistent herewith, as if set forth *in toto* hereunder.

42. By and through the various contracts, agreements, Defendant Andrews contracted with the plaintiff to regarding the operations of Tri-Star and Worldwide Entertainment.

43. Without authority or consent from Defendant Andrews, Plaintiff disposed of the assets of Tri-Star at substantially below their market value.

44. Plaintiff did not use any of the proceeds to pay the loan given by Defendant Andrews or the monies owed to Defendant Andrews, by and through his creditor assignments.

45. At a time when Tri-Star owed Defendant Andrews substantial sums of money, without authority or consent from Defendant Andrews, Plaintiff paid himself approximately nine hundred twenty thousand (\$920,000.00) dollars in salary and/or distribution, within a four (4) month period of time. Additionally, Plaintiff distributed substantial sums of money to his relatives over repayment of monies owed to Defendant Andrews.

46. Plaintiff converted all of the assets of Tri-Star for his personal use and benefit and has received substantial sums of money since 2005.

47. Plaintiff's actions rendered Tri-Star incapable of repaying the monies owed to Defendant Andrews.

48. As a direct and proximate result, Defendant Andrews and Third-party Plaintiff Tri-Star Communications have been damaged, thereby entitling Defendant Andrews and Third-party Plaintiff Tri-Star to actual damages hereunder in an amount to be determined by the Court.

For A Sixth Defense and By Way of Defendant Andrew's
Third Counterclaim Against the Plaintiff and
Third Cause of Action by Third-Party Plaintiff Tri-Star
(Breach of Contract Accompanied by a Fraudulent Act)

49. Defendant Andrews realleges each above paragraph, to the extent not inconsistent herewith, as if set forth *in toto* hereunder.

50. Plaintiff breached his contract(s) with Defendant Andrews.

51. Plaintiff had a fraudulent intent relating to the breaching of the contract and not merely to its making.

52. Plaintiff's breach was accompanied by a fraudulent act, which can be characterized by dishonesty in fact, unfair dealing and/or the unlawful appropriation of Defendant Andrew's money by design.

53. As a direct and proximate result, Defendant Andrews and Third-party Plaintiff Tri-Star Communications have been damaged, thereby entitling Defendant Andrews and Third-party Plaintiff Tri-Star to actual and punitive damages hereunder in an amount to be determined by the Court.

For A Seventh Defense and By Way of Defendant Andrew's
Fourth Counterclaim Against the Plaintiff and
Fourth Cause of Action by Third-Party Plaintiff Tri-Star
(Breach of the Covenant of Good Faith and Fair Dealing)

54. Defendant Andrews realleges each above paragraph, to the extent not inconsistent herewith, as if set forth *in toto* hereunder.

55. There is an implied covenant of Good Faith and Fair Dealing in all contracts entered into or to be performed in the State of South Carolina.

56. Plaintiff's actions as alleged herein were unreasonable, willful, reckless, and unjustified, and amount to a breach of the implied In-Law duty of Good Faith and Fair Dealing inherent in all contracts.

57. As a proximate result, Defendant Andrews has suffered actual and consequential damages.

58. As a direct and proximate result, Defendant Andrews and Third-party Plaintiff Tri-Star Communications have been damaged, thereby entitling Defendant Andrews and Third-party Plaintiff Tri-Star to actual and punitive damages hereunder in an amount to be determined by the Court.

**For An Eighth Defense and By Way of Defendant Andrew's
Fifth Counterclaim Against the Plaintiff and
Fifth Cause of Action by Third-Party Plaintiff Tri-Star
(Conversion)**

59. Defendant Andrews realleges each above paragraph, to the extent not inconsistent herewith, as if set forth *in toto* hereunder.

60. Defendant Andrews had a right to possess monies and equipment belonging to Tri-Star Communications.

61. Without authority from Defendant Andrews, Plaintiff took possession of these monies and/or equipment, or alternatively, exercised a right of ownership over the same, all to the exclusion of the rights of Defendant Andrews.

62. Such actions constitute conversion of Defendant Andrews' money and/or property.

63. As a direct and proximate result, Defendant Andrews and Third-party Plaintiff Tri-Star Communications have been damaged, thereby entitling Defendant Andrews and Third-party Plaintiff Tri-Star to actual and punitive damages hereunder in an amount to be determined by the Court.

**For A Ninth Defense and By Way of Defendant Andrew's
Sixth Counterclaim Against the Plaintiff and
Sixth Cause of Action by Third-Party Plaintiff Tri-Star
(Violation of S.C. Code of Laws § 33-8-300)**

64. Defendant Andrews realleges each above paragraph, to the extent not inconsistent herewith, as if set forth *in toto* hereunder.

65. The actions of the plaintiff were not in good faith.

66. The actions of the plaintiff were not with the care an ordinarily prudent person in a like position would exercise under similar circumstances.

67. The actions of the plaintiff were not in a manner that a reasonable person could believe were in the best interests of the corporation and its shareholders.

68. Said actions constitute a violation of South Carolina *Code of Laws* § 33-8-300.

69. As a direct and proximate result, Defendant Andrews and Third-party Plaintiff Tri-Star Communications have been damaged, thereby entitling Defendant Andrews and Third-party Plaintiff Tri-Star to actual and punitive damages hereunder in an amount to be determined by the Court.

**For A Tenth Defense and By Way of Defendant Andrew's
Seventh Counterclaim Against the Plaintiff and
Seventh Cause of Action by Third-Party Plaintiff Tri-Star
(Violation of S.C. *Code of Laws* § 33-8-420)**

70. Defendant Andrews realleges each above paragraph, to the extent not inconsistent herewith, as if set forth *in toto* hereunder.

71. The actions of the plaintiff were not in good faith.

72. The actions of the plaintiff were not with the care an ordinarily prudent person in a like position would exercise under similar circumstances.

73. The actions of the plaintiff were not in a manner that a reasonable person could believe were in the best interests of the corporation and its shareholders.

74. Said actions constitute a violation of South Carolina *Code of Laws* § 33-8-420.

75. As a direct and proximate result, Defendant Andrews and Third-party Plaintiff Tri-Star Communications have been damaged, thereby entitling Defendant Andrews and Third-party Plaintiff Tri-Star to actual and punitive damages hereunder in an amount to be determined by the Court.

**For An Eleventh Defense and By Way of Defendant Andrew's
Eighth Counterclaim Against the Plaintiff
(Promissory Estoppel)**

76. Defendant Andrews realleges each above paragraph, to the extent not inconsistent herewith, as if set forth *in toto* hereunder.

77. At the time Defendant Andrews went into business with Plaintiff in the formation of Tri-Star Communications and its subsequent dealings with Worldwide Entertainment, Plaintiff promised Defendant Andrews that he would at in the best interest of Tri-Star and Defendant Andrews at all times regarding the management of the same.

78. This promise was unambiguous on its terms.

79. Defendant Andrews reasonably relied upon Plaintiff's promise.

80. Plaintiff expected and foresaw that Defendant Andrews would rely upon his promise.

81. Defendant Andrews was injured in reliance upon the promise by Plaintiff.

82. As a direct and proximate result, Defendant Andrews has been damaged as set forth fully hereunder, thereby entitling Defendant Andrews to actual and punitive damages in an amount to be determined by the Court.

**For A Twelfth Defense and By Way of Defendant Andrew's
Eighth Counterclaim Against the Plaintiff
(Fraud)**

83. Defendant Andrews realleges each above paragraph, to the extent not inconsistent herewith, as if set forth *in toto* hereunder.

84. Plaintiff represented to Plaintiff that he would manage the assets of Tri-Star and act in the best interest of Tri-Star and Defendant Andrews.

85. These representations were false.

86. These representations were material.
87. Plaintiff either knew the representations were false or made such representations with a reckless disregard of their truth or falsity.
88. Plaintiff intended Defendant Andrews to act upon Plaintiff's representations.
89. Defendant Andrews was ignorant of falsity of Plaintiff's representations.
90. Defendant Andrews relied upon the truth of Plaintiff's representations.
91. Defendant Andrews had a right to rely upon the truth of Plaintiff's representations.
92. As a direct and proximate result, Defendant Andrews was damaged, thereby entitling him to actual and punitive damages hereunder in an amount to be determined by the Court.

**For A Thirteenth Defense and By Way of Defendant Andrew's
Tenth Counterclaim Against the Plaintiff
(Negligent Misrepresentation)**

93. Defendant Andrews realleges each above paragraph, to the extent not inconsistent herewith, as if set forth *in toto* hereunder.
94. Plaintiff made a false representation to Defendant Andrews.
95. Plaintiff had a pecuniary interest in making these statements.
96. Plaintiff owed a duty of care to see that he communicated truthful information to Defendant Andrews.
97. Plaintiff breached that duty by failing to exercise due care.
98. Defendant Andrews justifiably relied on Plaintiff's representation.
99. Defendant Andrews suffered pecuniary loss as proximate result of his reliance upon that representation.

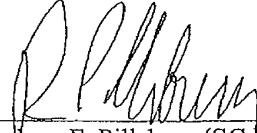
100. As a direct and proximate result, Defendant Andrews was damaged, thereby entitling Defendant Andrews to actual and punitive damages hereunder in an amount to be determined by the Court.

WHEREFORE, having fully answered Plaintiff's Complaint, Defendant Andrews prays for the following relief:

- (a) that Plaintiff's complaint be dismissed with prejudice, with costs and attorney's fees awarded to Defendant Andrews;
- (b) that Judgment be entered against the plaintiff on all of Defendant Andrews' counterclaims, for actual and punitive damages, in an amount to be determined by the Court;
- (c) that Judgment be entered against the plaintiff on all of Third-party Plaintiff Tri-Star's causes of action, for actual and punitive damages, in an amount to be determined by the Court; and
- (d) whatever further and just relief the Court deems appropriate under the circumstances.

Respectfully submitted,

Pillsbury & Read, P.A.



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**ATTORNEYS for DEFENDANT H. HUGHES
ANDREWS, individually and on behalf of TRI-
STAR COMMUNICATIONS, INC. AS THIRD
PARTY PLAINTIFF**

November 11, 2011

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2008-CP-42-3397

Quentin S. Broom, Jr., ... Respondent,

v.

Ten State Street, LLP, Timothy D. Scranton,
Mark Broadwater, and H. Hugh Andrews, ... Defendants,

Of whom

H. Hugh Andrews, Individually
and on behalf of Tri-Star
Communications, Inc. is the, ... Appellant.

v.

Quentin S. Broom, Jr., ... Third-party Defendant.

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2008-CP-42-3397

Quentin S. Broom, Jr., ... Respondent,

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Ten State Street, LLP, Timothy D. Scranton,
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Of whom

H. Hugh Andrews, Individually
and on behalf of Tri-Star
Communications, Inc. is the, ... Appellant.

v.

Quentin S. Broom, Jr., ... Third-party Defendant.

BRIEF OF APPELLANT

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Attorneys for Appellant

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<i>Aurora Credit Servs., Inc. v. Liberty West Dev., Inc.</i> , 970 P.2d 1273 (Utah 1998)	8
<i>Bagdon v. Bridgestone/Firestone, Inc.</i> , 916 F.2d 379 (7th Cir. 1990)	7, 14
<i>Brehm v. Eisner</i> , 746 A.2d 244 (Del. 2000)	6
<i>Donahue v. Rodd Electrottype Co. of New England</i> , 328 N.E.2d 505 (Mass. 1975)	8
<i>Durham v. Durham</i> , 871 A.2d 41 (N.H. 2005)	8, 12
<i>Eye Site, Inc. v. Blackburn</i> , 796 S.W.2d 160 (Tex. 1990)	14
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<i>Johnson v. Gilbert</i> , 621 P.2d 916 (Ariz. Ct. App.1980)	8
<i>Jones v. H. F. Ahmanson & Co.</i> , 460 P.2d 464 (Cal. 1969)	6
<i>Noakes v. Schoenborn</i> , 841 P.2d 682 (Or. Ct. App. 1992)	9
<i>Norman v. Nash Johnson & Sons' Farms, Inc.</i> , 537 S.E.2d 248 (N.C. Ct. App. 2000)	7, 9

<i>Starrels v. First Nat. Bank of Chicago</i> , 870 F.2d 1168 (7th Cir. 1989)	12
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Allan B. Cooper et al., <i>Too Close for Comfort: Application of Shareholder's Derivative Actions to Disputes Involving Closely Held Corporations</i> , 9 U.C. Davis Bus. L.J. 171 (2009)	8, 12
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F. Hodge O'Neal & Robert B. Thompson, <i>O'Neal's Close Corporations</i> (rev. 3d ed. 2012)	8
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STATEMENT OF ISSUES ON APPEAL

- I. If a Corporation Only Has Two Shareholders and If One Suspects the Other Has Been Engaged in Self-dealing, Whether the Complaining Shareholder May Sue the Alleged Wrongdoer Directly, as Opposed to Bringing a Derivative Suit on Behalf of the Company.
- II. If Hugh Andrews Was Required to Bring His Claims in a Derivative Suit on Behalf of His Company, Whether the Circuit Court Erred in Dismissing the Claims Without Allowing Andrews the Opportunity to Amend Them.

STATEMENT OF THE CASE

This lawsuit arises out of a dispute between business partners. Hugh Andrews and Quentin Broom are the owners of Tri-Star Communications. They own equal shares in the company. At some point, says Andrews, Broom began to secretly pay himself an excessive salary. Broom also allegedly sold-off Tri-Star's inventory over Andrews' objection.

The primary issue in this appeal is whether Andrews may pursue a lawsuit directly against Broom for this alleged wrongdoing, or whether he must instead bring a shareholder derivative suit, which would be in Tri-Star's name. This question is significant because it implicates the pleading rules for derivative suits, and it also governs whether any money damages will go directly to Andrews, as opposed to Tri-Star.

Broom initiated this suit in September of 2005. In general, he alleged that he and Andrews were partners in several business entities and that Andrews conspired with a South Carolina law firm to reduce the value of some of Broom's business interests. Broom also alleged that he had been improperly charged for legal work done for Andrews individually. Broom named Andrews, the law firm, and two men who worked at the firm as defendants. See (R. p. 19). Andrews answered the complaint with a general denial. See (R. p. 36).

In May of 2006, Andrews asked to amend his answer. In the amended answer, Andrews alleged several counterclaims against Broom. He captioned most of them both as counterclaims and as third-party claims, and he purported to bring the third-party claims on Tri-Star's behalf. See (R. p. 53) (the motion to amend) and (R. p. 55) (the amended answer).

In September of 2006, Broom filed a reply to the amended answer. The reply alleged several defenses to the counterclaims and third-party claims, but none of those defenses are relevant to the issues in this appeal. (R. p. 69).

In September of 2011, Broom filed a motion to dismiss the counterclaims and the third-party claims. The grounds given to support the motion were that Andrews had not complied with the procedure for bringing a derivative suit; specifically, he never asked Tri-Star's board of directors to investigate any alleged wrongdoing, he never claimed such a request would be futile, he did not verify his counterclaims, and he did not allege that he could fairly represent the interests of Tri-Star's other shareholders. See (R. pp. 109-111).

Andrews opposed this motion, arguing that his claims were individual claims against Broom and that the rules for a derivative lawsuit did not apply. He also argued that if his claims fell technically within the definition of derivative claims, the court should follow the lead of several other jurisdictions that have allowed derivative claims to proceed as direct claims when the corporation in question is a small corporation with only a few shareholders. See (R. p. 135) (Andrews' memo in opposition).

In October of 2011, the circuit court conducted a hearing on the motion to dismiss. Shortly after the hearing, the court issued a form order that granted the motion. (R. p. 4). The court confirmed this ruling in a written order filed November 1, 2011. (R. p. 6).

The circuit court reasoned that all of Andrews' claims sought recovery for the misappropriation of corporate property. In the circuit court's view, such claims belonged in a derivative suit. (R. p. 10).

The circuit court also recognized that Andrews had claimed Broom caused Tri-Star to be unable to pay a debt the corporation owed Andrews personally, but the court dismissed this claim because Andrews did not name Tri-Star as a defendant. (R. p. 11).

The circuit court declined Andrews' request to relax the rule that derivative claims belong to the corporation and not to an individual shareholder. The court wrote that South Carolina courts had "rejected" this principle in the past and that "[t]his record" did not support the application of the exception some other jurisdictions have recognized.

Andrews asked the court to reconsider both the form order and the written order of dismissal. See (R. pp. 143, 145). He also requested leave to amend his answer a second time for the purpose of supplementing the factual allegations. See (R. p. 172). The court conducted a hearing on these motions in December of 2012.

On January 14, 2013, the circuit court issued a form order denying the motions to reconsider. (R. p. 15). On February 1, 2013, the court issued a written order confirming this ruling. (R. p. 17). Neither order expressly mentioned Andrews' motion to amend his answer, but the effect of the orders was to deny the motion.

On February 7, 2013, Andrews received written notice of the entry of the final order dismissing his claims. On March 8, 2013, Andrews initiated this appeal.

There is much more to the procedural history of this case, but this description is limited to that which is relevant to this appeal.

ARGUMENT

The first reason the Court should reverse is that Mr. Andrews' claims are not derivative. A hallmark of a derivative claim is that there is a class of shareholders who have suffered similar injuries as a result of the alleged wrongdoing. Such shareholders are "similarly situated," and one reason the law requires a derivative suit is that such a suit ensures all of the injured shareholders will enjoy the appropriate proportion of any recovery.

No one is similarly situated with Hugh Andrews. If Broom was stealing from Tri-Star, the only person he was stealing from was Andrews. When a corporation has only two shareholders, one's self-dealing necessarily correlates to the other's unique injury.

The second reason this Court should reverse is that the rules for derivative lawsuits cannot reasonably apply to these circumstances; the fact that this company has two equal owners results in too many oddities. Chief among these is the fact that it is impossible to ascertain Tri-Star's position in the case — one 50% owner thinks the company should sue the other. This is a classic case for relaxing the rules; applying them leads to absurd results. If the rules apply, Andrews must ask Broom to sue himself, Andrews must claim he can represent the interests of injured shareholders (he is the only one), and any money damages must go to Tri-Star, where they will be locked in a tug-of-war between equal shareholders.

The last reason this Court should reverse is that the law generally grants a party the chance to amend his pleadings if they are dismissed and the statute of limitations has expired. Again, this is a classic case for applying that principle. If the only defect in Mr. Andrews' claims is that he did not specifically state things that are obvious, he should be given the opportunity to amend his answer. In these circumstances, outright dismissal is unjust.

I. The Circuit Court Erred When it Held That Hugh Andrews Could Not Directly Sue His Business Partner for the Partner's Alleged Self-dealing.

The Court should hold that when a defunct corporation has two shareholders and one wishes to sue the other for alleged self-dealing, it is possible for those claims to be direct claims that belong to the complaining shareholder individually. Hugh Andrews is not really complaining about the depreciation of his stock value. Because Tri-Star is both defunct and caught between two shareholders who cannot agree, the company cannot function and effectively no longer exists. At its core, this is a dispute between Andrews and Broom individually; the claim is that when Broom stole from Tri-Star, he was stealing from no one else but Andrews. This view is supported by existing South Carolina law, and it is also supported by authority from other jurisdictions, which should be persuasive.

a. A Derivative Claim Involves a Corporate Injury; a Direct Claim Involves an Individual Injury.

If a stockholder brings a lawsuit concerning corporate mis-management, the stockholder is normally only a nominal party. Instead, the corporation is typically the real party in interest. The Supreme Court's decision in *Latimer v. Richmond & D.R. Co.* contains an early recognition of this principle, see 39 S.C. 44, 51-52, 17 S.E. 258, 260-61 (1893) (the "right of action" for mis-management "exists in the corporation itself"), and South Carolina courts have reiterated these principles on several other occasions. See, e.g., *Clearwater Trust v. Bunting*, 367 S.C. 340, 351, 626 S.E.2d 334, 339 (2006); *Davis v. Hamm*, 300 S.C. 284, 288, 387 S.E.2d 676, 678 (Ct. App. 1989); *Johnson v. Baldwin*, 221 S.C. 141, 149, 69 S.E.2d 585, 588 (1952).

Derivative suits are so-named because the plaintiff's standing derives from his status as a stockholder. The core of a derivative complaint thus does not allege a direct injury to the individual plaintiff; instead, it seeks redress for an injury to the corporation and, by extension, to *all* shareholders. This injury, the suit alleges, will not otherwise be redressed because the corporation's governing body is refusing to redress it. See *Jones v. H. F. Ahmanson & Co.*, 460 P.2d 464, 470 (Cal. 1969) (one definition of a derivative suit).

Special pleading rules apply to derivative suits because they represent a challenge to the principle that a corporation is primarily managed by its directors, not its shareholders. These rules include the requirement that the complaining shareholder verify the allegations of wrongdoing and describe the action he or she has taken to request that management remedy the problem. See Rule 23(b)(1), SCRCF; see also S.C. Code Ann. § 33-7-400 (2006). This Court explained the rationale for these rules in *Carolina First Corp. v. Whittle*, 343 S.C. 176, 185-88, 539 S.E.2d 402, 407-09 (Ct. App. 2000), and another jurisdiction has explained that state's rules, which are similar to South Carolina's, as being "designed to create a balanced environment" that deters wasteful litigation based only a suspicion of wrongdoing, but permits litigation if a plaintiff can raise reasonable doubt about whether the people who control the corporation have abdicated their duties. *Brehm v. Eisner*, 746 A.2d 244, 255 (Del. 2000) (quoting *Grimes v. Donald*, 673 A.2d 1207, 1216-17 (Del. 1996)).

When, however, corporate action results in a loss that is unique to one particular shareholder, a claim related to that loss is not derivative. This is because the complaining shareholder's injury is not common to other shareholders — no one else has suffered similar harm as a result of the conduct at issue.

The Supreme Court's decision in *Hite v. Thomas & Howard Co. of Florence, Inc.* concerned one such scenario. There, the owner of 1/3 of the business alleged that his percentage of ownership had been reduced as a result of the majority owner's self-dealing. See 305 S.C. 358, 360-61, 409 S.E.2d 340, 341-42 (1991).

Hite was partially overruled by *Huntley v. Young*, which held that the denial of a motion to dismiss is not immediately appealable, see 319 S.C. 559, 560, 462 S.E.2d 860, 860-61 (1995), but nothing suggests that *Hite*'s discussion of corporate law is invalid.

This Court's decision in *Brown v. Stewart* references, but does not apply, another feature of this principle. *Brown* instructs that a complaining stockholder has an individual claim if the wrongdoer owes him a fiduciary duty and if recovery to the corporation will not provide him with full relief. 348 S.C. 33, 50, 557 S.E.2d 676, 685 (Ct. App. 2001).

The features that distinguish a derivative claim from a direct claim are easy enough to describe. Indeed, almost every case states them the same way. But describing the rules is one thing. Faithfully applying them is something else.

b. It Can Be Difficult to Distinguish a Derivative Claim from a Direct Claim, and That Difficulty Increases as the Number of Shareholders Shrinks.

A variety of jurisdictions have recognized that a single series of events can give rise to both direct and derivative litigation. *Norman v. Nash Johnson & Sons' Farms, Inc.*, 537 S.E.2d 248, 253 (N.C. Ct. App. 2000); *Bagdon v. Bridgestone/Firestone, Inc.*, 916 F.2d 379, 381 (7th Cir. 1990); *Sutter v. General Petroleum Corp.*, 170 P.2d 898, 901 (Cal. 1946). In the same vein, cases from several jurisdictions have recognized that as the number of the shareholders in a corporation diminish, the difficulty of applying the direct/derivative

distinction increases. One common illustration includes reciting that while a corporation with a large number of shareholders generally has a clear distinction between ownership (the shareholders) and management (the board), this is often absent in a corporation with a very small number of shareholders. Instead, the shareholders are likely the same individuals who manage the business. See, e.g., *Durham v. Durham*, 871 A.2d 41, 45 (N.H. 2005); *Aurora Credit Servs., Inc. v. Liberty West Dev., Inc.*, 970 P.2d 1273, 1280-81 (Utah 1998).

Another common illustration, closely related to ownership, is that corporations with a small number of shareholders may operate more like partnerships than corporations. *Johnson v. Gilbert*, 621 P.2d 916, 918 (Ariz. Ct. App.1980); *Donahue v. Rodd Electrottype Co. of New England*, 328 N.E.2d 505, 512 (Mass. 1975). Several secondary authorities explore these issues in detail. See, e.g., Allan B. Cooper et al., *Too Close for Comfort: Application of Shareholder's Derivative Actions to Disputes Involving Closely Held Corporations*, 9 U.C. Davis Bus. L.J. 171 (2009); see also F. Hodge O'Neal & Robert B. Thompson, *O'Neal's Close Corporations*, §§ 1:02 & 9:22 (3d ed. 1994).¹

This should not be taken as an invitation to ignore the corporate form or disregard the fact that business partners have chosen to conduct business through a corporation. Far from it. Instead, this discussion observes the reality that unlike large corporations, corporations with a small number of shareholders often have no functional distinctions between ownership and management. Consider Tri-Star as an example. This corporation does not appear to have had a board of directors, and with ownership divided 50/50 between Broom and

¹Relevant sections in a more recent version of the *O'Neal* treatise include §§ 1:02, 9:2, and 9:26. O'Neal & Thompson, *O'Neal's Close Corporations* (rev. 3d ed. 2012)

Andrews, the corporation's management was tied directly to its ownership. Undoubtedly, there were some actions Tri-Star could not take if Broom and Andrews disagreed.

c. Faithfully Applying These Principles Leads to the Conclusion That Mr. Andrews' Claims Are Direct.

One defining characteristic of a derivative claim is that there is a class of shareholders who are similarly situated with the individual plaintiff. Because the injury is to the corporation in a derivative case, the injured shareholders find themselves in the same boat.

But when a company has only two shareholders and one alleges that the other has stolen from the business, the shareholders are *not* similarly situated. In this situation, the complaining shareholder has alleged a loss that is unique. This rule should control this case.

The complaining shareholder's loss is unique because he is the only party that has actually suffered a reduction in the value of his interest. If this case were a purported class action, Mr. Andrews would be a class of one. The alleged wrongdoer (Broom) has not suffered any injury, because while his stock may have decreased in book value, he has enjoyed the fruit of his alleged wrongdoing. This illustrates the absurdity of one of Rule 23's requirements and is one reason why that rule cannot apply: Rule 23 instructs that a plaintiff may not maintain a derivative suit if he does not fairly represent the interest of similarly situated shareholders. Here, there are no similarly situated shareholders. Other than Andrews, the only shareholder is Broom, and Broom is the alleged wrongdoer and defendant.

Other jurisdictions have applied this analysis to cases presenting similar circumstances. *Norman*, 537 S.E.2d at 260-61; *Noakes v. Schoenborn*, 841 P.2d 682, 687 (Or. Ct. App. 1992); *Yanow v. Teal Indus.*, 422 A.2d 311, 321-22 (Conn. 1979); *Funk v.*

Spalding, 246 P.2d 184, 187 (Ariz. 1952). This reasoning should be persuasive. The reason Mr. Andrews' claims should go forward is not because Tri-Star has not been injured — on paper, it has. The critical fact is that as compared to all other *shareholders*, Andrews is only shareholder bearing the alleged loss. O'Neal & Thompson, *supra* p.8, at §9.22 pp.115-117.

There do not appear to be any South Carolina cases illustrating a similar application of these principles, but that can only be because similar circumstances have not previously been present. On a number of occasions, South Carolina has recognized the “separate and distinct” rule — the rule allowing a direct suit against a manager if misconduct has caused a particular loss to an individual stockholder. *Hite*, 305 S.C. at 361-62, 409 S.E.2d at 342; *Ward v. Griffin*, 295 S.C. 219, 221, 367 S.E.2d 703, 704 (Ct. App. 1988). The general theory of Andrews' claims is that Broom has mis-managed the business, paid himself an excessive salary, and sold all of the inventory over Andrews' objection. While these would no doubt be derivative claims if Tri-Star was a large corporation with a clear division between ownership and management, it should be equally obvious that they are “separate and distinct” claims in the context of a corporation with only two owners. In such a situation, one shareholder's self-dealing will necessarily correspond to the other shareholder's unique loss.

None of this State's previous “close corporations” cases have presented this scenario.

Todd v. Zaldo involved a corporation with three shareholders, one of whom was not a party to the suit. The complaining party in *Todd* indicated that he believed his damages were personal because “my corporation is my money,” and this Court wrote in *Todd* that while this shareholder contended that the business operated as a partnership, “[the] record” did not support that contention. 304 S.C. 275, 403 S.E.2d 666 (Ct. App. 1991).

The present case cannot be fairly comparable. For one thing, there is no *record* to use in evaluating how this business operated. This Court's decision in *Todd* was the result of an appeal from a jury verdict, but in the present case, there not has been a trial. Here, the circuit court based its decision solely on the pleadings.

Other cases like *Brown v. Stewart* and *Clearwater Trust v. Bunting* are different for similar reasons. Like *Todd*, *Brown* presented a situation where the plaintiff's alleged injury was no different in character from that of a shareholder who was not a party to the lawsuit. *Brown*, 348 S.C. at 51, 557 S.E.2d at 685. Thus, the plaintiff's injury was not unique. In *Clearwater Trust*, there is no substantive discussion of whether any claims could have been brought directly. The court's opinion is silent as to whether all shareholders were parties and contains only a passing reference to the fact that in the normal case, a breach of fiduciary duty claim belongs in a derivative suit. 367 S.C. at 351, 626 S.E.2d at 339.

But when a business has only two shareholders, and when one alleges that the other has stolen from the business, all of the shareholders are not similarly situated. Because a complaining shareholder like Mr. Andrews has alleged a loss that is unique, this Court should reverse the circuit court's decision that he does not have standing to pursue his claim for corporate mis-management directly.

d. Even If Mr. Andrews' Claims Were Truly for a Corporate Harm, the Court Should Nevertheless Allow Him to Plead Those Claims Directly.

On at least four previous occasions, South Carolina's appellate courts have acknowledged that when the corporation in question has only a few shareholders, some foreign jurisdictions have applied an exception to the general rule that derivative claims

always belong to the corporation. From the oldest to the most recent, those cases are *Davis v. Hamm*, *Todd v. Zaldo*, *Babb v. Rothrock*, and *Brown v. Stewart*. None of these cases apply this exception and none of them reject this exception. Instead, they each observe that the circumstances of the case in question were not appropriate for relaxing the rule that claims for corporate injuries are derivative claims. These cases are listed in the Appendix at the end of this brief along with a brief paragraph describing each case's reasoning.

The American Law Institute proposed this exception in 1992, and one authority reported that as of 2009, 37 states had considered the exception with 16 states choosing to adopt it. Cooper et al., *supra* p.8, at 175, 182. The rationale of this exception is that when the purposes of a derivative suit are absent, proceeding derivatively forces litigants to comply with formalities that are cumbersome and futile. See *Principles of Corporate Governance: Analysis and Recommendations*, A.L.I., § 7.01(d), cmt. (e) (1994); *Durham*, 871 A.2d at 46.

For example, the demand requirement is designed to give the board of directors the first opportunity to redress a grievance. *Allison v. Gen. Motors Corp.*, 604 F. Supp. 1106, 1112 (D.Del. 1985). One jurist on the Seventh Circuit has described that “[t]he persuasive rationale for the demand requirement is that it allows directors to make a business decision about a business question: whether to invest the time and resources of the corporation in litigation.” *Starrels v. First Nat. Bank of Chicago*, 870 F.2d 1168, 1173 (7th Cir. 1989) (Easterbrook, J., concurring).

Nobody could seriously contend that there would be any point in asking Mr. Broom, in his capacity as a 50% owner of Tri-Star, to vote to sue himself. No one can expect Andrews to win the grant of that request.

Derivative cases often reference the need to raise doubts about whether the corporation's board can objectively decide whether to investigate the grievance or pursue a lawsuit. Many of these cases focus on asking if there is a reasonable question whether the challenged decision was tainted by board members looking out for their own self-interest. *Aurora Credit Servs.*, 970 P.2d at 1280; *Allison*, 604 F. Supp. at 1114, 1121 (1985).

That point has an interesting application to the circumstances of the present case. Here, there are *no* disinterested members of this corporation — one shareholder is the plaintiff, the other shareholder is the defendant. Tri-Star's official position is impossible to ascertain — it is a corporation in limbo. One 50% shareholder believes the corporation ought to sue the other shareholder. Not surprisingly, the alleged thief disagrees.

There are really two parts to the question whether to apply American Law Institute's proposed exception. The first is a pleading question. The second is a recovery question.

The pleading question should be easy to answer. The rules of civil procedure are designed to secure just and speedy outcomes, see Rule 1, SCRCRCP, and it seems odd to apply a rule for "class actions" to a lawsuit between 2 people. See Rule 23, SCRCRCP. Moreover, requiring Andrews to ask Broom to sue himself is, frankly, foolish. Decisions from other jurisdictions have recognized the futility of such a request. *Anderson v. Clemens Mobile Homes, Inc.*, 333 N.W.2d 900, 904 (Neb. 1983); *Funk*, 246 P.2d at 186. This point should not be controversial. When one partner alleges that the other is the wrongdoer, the claim for relief does nothing if it does not allege demand futility.

The Supreme Court of Texas took an interesting view of this question. It reasoned that when there is a derivative suit on behalf of a close corporation and all of the remaining

shareholders are named as defendants, that state's special pleading rules are deemed satisfied as a matter of law. *Eye Site, Inc. v. Blackburn*, 796 S.W.2d 160, 162-63 (Tex. 1990).

The recovery question posed by the ALI's exception is the question whether the money damages from the lawsuit should go to the corporation and its treasury, as opposed to the complaining shareholder personally. This question is harder to answer, and it may be impossible to answer it until later in the litigation. It may take discovery and a trial to determine whether the particular corporation has outside creditors who need to be protected or whether equity otherwise favors the corporation itself getting the recovery.

Concern for creditor's rights drove our Supreme Court's decision in *Babb*, but *Babb* differs from the present case because the Supreme Court had the benefit of reviewing a record that had been developed by a trial. 303 S.C. 462, 463, 401 S.E.2d 418, 419 (1991). This illustrates the error of the summary manner in which the circuit court rejected the ALI exception in the present case. The circuit court wrote that the "record" in this case did not support the application of the exception, see (R. p. 13), but at the 12(b)(6) stage, there is no substantive record. No one's *pleadings* will ever prove whether creditors need to be protected or whether the business, though a corporation on paper, ran as a partnership.

The argument for never allowing derivative suits to be brought directly is that the law prefers predictability and that a clean rule allows parties to avoid squabbles at the beginning of a suit. A well-written articulation of this reasoning can be found in the Seventh Circuit's decision in *Bagdon v. Bridgestone/Firestone, Inc.*. See 916 F.2d at 383-84.

The biggest problem with this view is that predictability proves to be an empty promise. Everyone agrees that corporate action can create both derivative and direct liability,

and there are plenty of cases, in this jurisdiction and others, that focus only the question whether the claims in a given case are truly derivative or direct. Predictability is not the ultimate goal — the law exists to vindicate the purposes behind the rules, not the rules themselves. One of the ultimate goals here is to protect the principle that a corporation is generally governed by its directors. Another goal is to limit the court system's role to adjudicating legitimate disputes. This is why derivative suits exist, and if these reasons do not exist in a particular case, the suit cannot legitimately be called derivative.

Hugh Andrews may not win any of his claims, but it ought to be obvious that he and his partner are embroiled in a non-trivial controversy. These men are 50/50 owners of the company in question, and unless they have a change of heart, no one but the court system can settle their dispute. This Court should accordingly reverse the decision dismissing Andrews' claims. The Court should explain that the requirements of Rule 23 either do not apply or have been functionally satisfied by the fact that Andrews named the only other shareholder as a defendant, and the Court should defer the question of whether the damages should be paid to Andrews personally, as opposed to Tri-Star, until after a record has been developed.

II. The Circuit Court Erred When it Dismissed Mr. Andrews' Claims Without Giving Him an Opportunity to Amend His Pleadings.

One of Andrews' claims arose out of a debt that Tri-Star allegedly owed him personally, and the circuit court dismissed this claim on the grounds that Andrews did not name Tri-Star as a defendant. See (R. p. 11).

In *Ward v. Griffin*, this Court wrote that “[a] stockholder may individually sue corporate directors, officers, or other persons when he has sustained a loss separate and

distinct from that of other stockholders generally.” 295 S.C. at 221, 367 S.E.2d at 704 (quoting 19 Am. Jur. 2d *Corporations* § 2245 (1986)). The circuit court’s order offers no authority for the proposition that in order to maintain this claim, Andrews had to sue Tri-Star instead of the officer who allegedly caused the debt to go unpaid. The reason why no authority is cited is that the proposition is not correct.

In *Spence v. Spence*, the Supreme Court instructed that “[w]hen a complaint is dismissed under Rule 12(b)(6) . . . [t]he plaintiff in most cases should be given an opportunity to file and serve an amended complaint.” 368 S.C. 106, 129, 628 S.E.2d 869, 881 (2006). *Spence* was a real estate case, and the issue of amended pleadings arose because the plaintiff asked for the chance to file an amended complaint before the trial court dismissed some of the parties with prejudice. *Id.* at 128, 628 S.E.2d at 880. The Court held that when the statute of limitations has expired, an appellate court which affirms a dismissal should grant a reasonable opportunity to amend the complaint if the aggrieved party presents additional allegations or a different theory of recovery which might state a claim upon which relief could be granted. *Id.* at 130, 628 S.E.2d at 881-82. The essence of this holding is that when the plaintiff shows that he or she can cure the defect that led to dismissal, the court should modify the dismissal to be without prejudice.

None of Broom’s arguments were directed to the merits of Andrews’ suit. Instead, they were all directed to the manner and sufficiency of pleading. Derivative cases inside and outside South Carolina reference parties having the opportunity to amend their pleadings. See *Carolina First Corp.*, 343 S.C. at 183, 539 S.E.2d at 406; *Allison*, 604 F.Supp. at 1119. Yet, when Andrews sought to amend his complaint, that request was denied.

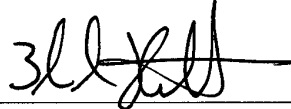
All of this has been so wasteful. Broom knows why Andrews never made a demand on Tri-Star's board of directors — there is no board. Broom knows why Andrews did not ask him to sue himself — the request would obviously have been futile. Broom knows that Andrews cannot and will not adequately represent the interests of all Tri-Star shareholders — Broom is the only other shareholder and he is the defendant. All of this is clear when everyone's pleadings are considered together, but if Andrews must specifically allege this in order for his claims to survive, *Spence* instructs that he should have that opportunity.

CONCLUSION

This Court should reverse the circuit court's decision and remand this case for proceedings consistent with the Court's decision.

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Respectfully submitted,



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APPENDIX

Davis v. Hamm,

300 S.C. 284, 387 S.E.2d 676 (Ct. App. 1989)

Appeal from damages award after a bench trial. The award was in favor of a former stockholder and against a corporate director. This Court noted some of the foreign decisions applying special rules to derivative suits involving close corporations, but ultimately declined to apply the rule because the plaintiff was not a stockholder at the time she brought the case. This was a classic derivative suit. The claim was that one of the president's decisions had caused a reduction in the price of the business' stock.

Todd v. Zaldo,

304 S.C. 275, 403 S.E.2d 666 (Ct. App. 1991)

Appeal of a jury verdict in favor of the majority stockholder and against one of the two minority stockholders. The third stockholder was not a party to the lawsuit. This Court wrote that there was "no indication in the record the companies operated as *de facto* sole proprietorships or partnerships," and that the record did not present "a factual scenario" for "ignoring" the fact that the claim for mis-management was a corporate claim.

Babb v. Rothrock,

303 S.C. 462, 401 S.E.2d 418 (1991)

Appeal from a master's judgment on claims for set-off and mis-appropriation in a suit involving the 4 shareholders of a bankrupt corporation. The Supreme Court dismissed the case, relying on the general rule that individual shareholders may not sue corporate directors for losses suffered by the corporation. The court rejected the application of special rules for close corporations, writing "[a]ssuming we should adopt the [] exception . . . the record discloses the presence of a reason compelling a derivative action, to wit, protection of corporate creditors."

Brown v. Stewart,

348 S.C. 33, 557 S.E.2d 676 (Ct. App. 2001)

Appeal of a jury verdict in favor of an individual shareholder. This Court wrote that the plaintiff "[could] not rely on [the exception for close corporations]," because allowing the plaintiff to maintain an individual action would not protect the interests of other shareholders who were not parties to the suit.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2008-CP-42-3397

Quentin S. Broom, Jr., ... Respondent,

v.

Ten State Street, LLP, Timothy D. Scranton,
Mark Broadwater, and H. Hugh Andrews, ... Defendants,

Of whom

H. Hugh Andrews, Individually
and on behalf of Tri-Star
Communications, Inc. is the, ... Appellant.

v.

Quentin S. Broom, Jr., ... Third-party Defendant.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that the *Brief of Appellant* and the
Reply Brief comply with the provisions of Rule 211(b), SCACR, and with the August 13,
2007, Supreme Court Order regarding personal data identifiers.

/Signature page attached

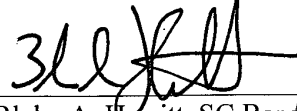
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SC Court of Appeals

November 22, 2013

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Blake A. Hewitt", written over a horizontal line.

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COUNTER-STATEMENT OF ISSUES ON APPEAL

- I. Did the circuit court properly determined that Hugh Andrews brought a derivative action when his third-party complaint asserted identical counterclaims both individually and on the behalf of Tri-Star Communications, Inc. against Quentin S. Broom, Jr., thereby triggering the procedural requirements of Rule 23, of the South Carolina Rules of Civil Procedure?
- II. Did Hugh Andrews waive his right to appeal the amendment to pleading issue when the circuit court never ruled on his Newmotion to amend, and Andrews failed to file a motion pursuant to Rule 59(e), of the South Carolina Rules of Civil Procedure, requesting that the circuit court issue a ruling?

COUNTER-STATEMENT OF THE CASE

Broom initiated a lawsuit on September 15, 2005, against Andrews, Ten State Street L.L.P., Timothy D. Scrantom, and Mark Broadwater. (R. 19-35). Defendant Andrews filed an Answer on November 16, 2005, generally denying Broom's allegations. (R. 36-39). The remaining Defendants answered separately on November 18, 2005. (R. 40-52). In May 2006, Andrews moved to amend his Answer to assert certain claims individually and on behalf of Third-Party Plaintiff, Tri-Star Communications, Inc. ("Tri-Star"). (R. 53-68).

Tri-Star was not named as a Defendant in the 2006 Amended Answer. (R. 55). However, Andrews alleged that Tri-Star failed to pay debts owed to Andrews (shareholder loan) and/or his company, Drews, Inc. (Gaming Machine financing). (R. 55)¹ Specifically, Andrews alleged the

¹ According to the 2006 Answer filed by Andrews, he loaned Tri-Star one hundred thirty thousand dollars (\$130,000) on or before August 31, 2005. (R. 59, ¶ 25). Tri-Star purchased "Pot-O-Gold" video gaming machines ("Gaming Machines") and other goods and services from Drews Distributing, Inc., a South Carolina corporation ("Drews, Inc.") owned 100% by Defendant Andrews. Drews, Inc. distributed by assignment to Andrews all rights to payments from Tri-Star. (R. 59., ¶ 26). According to the 2006 Answer, as of October 31, 2005, Tri-Star owed Andrews the sum of three million six hundred twenty-six thousand, three hundred ninety-three and 17/100ths dollars (\$3,626,393.17) for Gaming Machines and other goods and services sold to Tri-Star, of which one million one hundred ninety-four thousand three hundred sixty-two and 83/100ths dollars (\$1,194,362.83) is for the actual unpaid portion of the purchase price (the remaining amounts being accrued and unpaid finance charges). (R.59, ¶ 27).

distributions Broom made to himself were made at a time when Tri-Star owed Andrews substantial sums of money both as a shareholder, holder of a shareholder loan, and as a creditor of Tri-Star. (R. 59., ¶¶ 25-27, 35). On September 26, 2006, Broom filed a Reply to the 2006 Amended Answer with general denials to the counterclaims. (R. 69-89).

Pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure, the parties filed a Stipulation of Dismissal with regard to the entire case. (R. 1). On June 27, 2008, Broom restored the case by filing a Complaint within one year of the dismissal. (R. 90-108). Andrews never filed an answer, counterclaim and/or third-party claim with regard to the 2008 Complaint filed by Broom.²

On September 14, 2011, Broom filed a motion to dismiss the counterclaims by Andrews and the third-party claims by Tri-Star. (R. 109-134). On October 5, 2011, the circuit court conducted a hearing on the motion to dismiss. (R. 214-278). On October 7, 2011, the court issued a Form 4 order granting the motion, but requested submission of a formal written order from Broom's counsel. (R. 4-5). On October 24, 2011, Andrews filed a motion to reconsider, however, the court had not yet entered its formal, written Order. (R.135-144). On November 1, 2011, the circuit court entered the formal Order, dismissing all claims by Tri-Star and dismissing all overlapping claims by Andrews. (R. 6-14).

Ten causes of action are set forth in the 2006 Amended Answer: (1) Breach of Fiduciary Duty; (2) Breach of Contract; (3) Breach of Contract Accompanied by a Fraudulent Act; (4) Breach of the Covenant of Good Faith and Fair Dealing; (5) Conversion; (6) Violation of S.C. Code of Laws § 33-8-300; (7) Violation of S.C. Code of Laws § 33-8-420; (8) Promissory Estoppel; (9) Fraud; and (10) Negligent Misrepresentation. (R. 58-67).

² Pursuant to Rule 220(c), SCRAP, Andrews's failure to file could serve as an additional sustaining ground to affirm the circuit court.

Claims (1) through (7) were brought by Andrews as third-party claims on behalf of Tri-Star, and were brought as identical counterclaims on behalf of Andrews, individually. (R. 58-65, ¶¶ 21 to 70). For these claims, the circuit court found that:

“all claims brought by Andrews individually which overlap any claim made by Tri-Star for damages arising out of allegations of Broom’s mismanagement or breach of duties arising out of the shareholder relationship between Andrews and Broom are dismissed, because these claims also require compliance with Rule 23.”

(R. 5, 6)(emphasis added).

Claims (8) through (10) were brought solely in the name of Andrews. (R. 65-67, ¶¶ 71 to 95). These claims re-allege the mismanagement and dissipation of Tri-Star’s assets as set forth in the previous seven claims. (R. 67 at ¶¶ 71, 78, and 88). These “individual” claims clearly reference Tri-Star. (R. 65-66 at ¶ 72) (“Plaintiff promised Defendant Andrews that he would [act] in the best interest of Tri-Star and Defendant Andrews at all times regarding the management of the same”); (R. 66 at ¶ 79) (“Plaintiff represented to [Defendant] that he would manage the assets of Tri-Star and act in the best interest of Tri-Star and Defendant Andrews”); (R. 67 at ¶ 88) (“Defendant Andrews realleges each above paragraph . . .”).

The circuit court’s Order dismissed “all claims brought by Andrews individually which overlap any claim made by Tri-Star for damages arising out of allegations of Broom’s mismanagement or breach of duties arising out of the shareholder relationship between Andrews and Broom . . . because these claims are also require compliance with Rule 23.” (R. 6).

On November 11, 2011, Andrews filed a supplemental motion to reconsider the formal, written Order. (R. 143-171). On December 17, 2012, Broom filed an opposition to the supplemental motion to reconsider. (R. 190-213).

On November 14, 2011, Andrews filed a motion to amend and/or supplement the answer and counterclaims. (R. 172-189).

On December 17, 2012, the circuit court heard arguments from counsel with regard to Andrews's supplemental motion for reconsideration and his 2011 motion to amend the answer. (R. 279). On January 14, 2013, the circuit court issued a Form 4 order denying the supplemental motion for reconsideration. (R.15). On February 1, 2013, the circuit court issued a formal, written order denying the motion for reconsideration. (R. 17). On February 7, 2013, Andrews received written notice of the entry of the final order, and filed his Notice of Appeal on March 8, 2013.

The circuit court never ruled on Andrews's 2011 motion to amend his pleadings. Andrews never filed a motion requesting a specific ruling on the 2011 motion to amend.

COUNTER-STATEMENT OF FACTS

Tri-Star is a South Carolina corporation with its principal place of business in Spartanburg County, South Carolina. (R. 58). Andrews was a 50% shareholder and a creditor of Tri-Star. *Id.* Broom was a director, officer, and 50% owner of Tri-Star. (R. 58). Andrews alleged that he had "standing to bring [these] claims individually and on behalf of Third-party Plaintiff [Tri-Star] for losses and damages sustained to both via the malfeasance and nonfeasance of the plaintiff [Broom] in his dealings with and on behalf of Tri-Star." (R. 58).

There are no allegations in Andrews's 2006 Amended Answer that Tri-Star lacked outside creditors.³ Andrews's own pleading references debt owed to the Dominican Republic: "Plaintiff was reckless in the manner the [sic] Gaming Machines were imported, and such

³ Rule 210(c) of the South Carolina Rules of Appellate Practice states that the Record shall not include matter which was not presented to the lower court or tribunal. Despite this rule, Andrews seeks to insert "facts" or factual allegations that do not appear anywhere in his 2006 Amended Answer. For example, the 2006 Amended Answer does not allege that Tri-Star lacked a board of directors. (See Appellant's Initial Brief, pp. 5, 8).

importation was documented so as to place Tri-Star's Gaming Machines at grave risk of confiscation or penalties to be payable to the Dominican Republic governmental authorities by Tri-Star or the DR Businesses. Plaintiff has recklessly failed to cause the DR Businesses to pay all applicable charges to the Dominican Republic, which put Tri-Star's Gaming Machines at risk of confiscation" (R. 60).

STANDARD OF REVIEW

"In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCPP, the appellate court applies the same standard of review as the trial court." *Rice-Marko v. Wachovia Corp.*, 398 S.C. 301, 307, 728 S.E.2d 61, 64 (Ct. App. 2012). "In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint." *Id.*, 398 S.C. at 307, 728 S.E.2d at 64-65. "If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper." *Id.*

Although Broom denies all of the wrongful acts alleged in the 2006 Amended Answer and Counterclaims, a 12(b)(6) motion tests the legal sufficiency of the complaint (or counterclaim) on the assumption that all well-pled allegations are true. *Hambrick v. GMAC Mortg. Corp.*, 370 S.C. 118, 122, 634 S.E.2d 5, 7 (Ct. App. 2006). A motion under Rule 12(b)(6) or Rule 12(c) admits the well-pleaded facts in the complaint, but it does not admit the inferences drawn by the plaintiff from such facts, nor does it admit conclusions of law. *Carolina Winds Owners' Ass'n, Inc. v. Joe Harden Builder, Inc.*, 297 S.C. 74, 76, 374 S.E.2d 897, 899 (Ct. App. 1988), *rev'd on other grounds*, *Kennedy v. Columbia Lumber & Mfg. Co., Inc.*, 299 S.C. 335, 341, 384 S.E.2d 730, 734 (1989).

“[W]hen the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court,” the case should be dismissed. *Doe v. Marion*, 361 S.C. 463, 469, 605 S.E.2d 556, 559 (2004). Plaintiffs who fail to allege a legally recognized theory of causation or damages also subject their complaint to dismissal. See *id.* at 475, S.E.2d at 562 (affirming dismissal when plaintiff failed to allege any legal basis for damages); *Brown v. Theos*, 338 S.C. 305, 526 S.E.2d 232, (Ct. App. 1999) (upholding dismissal where the plaintiff failed to allege a valid theory of causation).

South Carolina law requires dismissal of a complaint for failure to satisfy the pleading requirements of Rule 23(b)(1), SCRPC: “[a] derivative action that does not meet the pleading requirements of Rule 23(b)(1), SCRPC, is properly dismissed pursuant to Rule 12(b)(6).” *Clearwater Trust v. Bunting*, 367 S.C. 340, 351, 626 S.E.2d 334, 339 (2006) (quoting *Carolina First Corp. v. Whittle*, 343 S.C. 176, 539 S.E.2d 402 (Ct. App. 2000)). A plaintiff who fails to satisfy the particularity requirements of Rule 23(b)(1), lacks standing. *Strickland v. Flue-Cured Tobacco Co-op. Stabilization Corp.*, 643 F. Supp. 310, 316 (D.S.C. 1986) (“Since the plaintiffs . . . have not complied with the requirements for a derivative action, they lack standing to bring the action before this Court.”).

ARGUMENTS

I. DISMISSAL OF TRI-STAR’S CLAIMS IS THE LAW OF THE CASE BECAUSE ANDREWS DID NOT CHALLENGE THAT RULING.

third-party claims were asserted on behalf of Tri-Star for injuries allegedly suffered by Tri-Star. (R. 58-65). In the proceeding below, Andrews offered no argument with regard to the dismissal of Tri-Star as a Third-Party Plaintiff, except to say that judicial economy would be served to allow Tri-Star’s claims to proceed. (R. 166). Andrews has not appealed the circuit court’s determination that Tri-Star’s claims were derivative. Andrews also did not appeal the

circuit court's dismissal of Tri-Star's Third-Party claims for failure to comply with Rule 23(b)(1), SCRCP.

It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling. *See Biales v. Young*, 315 S.C. 166, 432 S.E.2d 482 (1993); *Lindsay v. Lindsay*, 328 S.C. 329, 491 S.E.2d 583 (Ct. App. 1997). Failure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal. *Id.*

The Court of Appeals should affirm the dismissal of all third-party causes of action by Tri-Star for failure to meet the requirements of Rule 23 and/or for failure to plead with particularity the applicability of the exceptions to Rule 23(b)(1). (R. 58-65).

II. THE CIRCUIT COURT CORRECTLY HELD THAT HUGH ANDREWS'S CLAIMS WERE PLED AS DERIVATIVE CLAIMS, AS OPPOSED TO DIRECT CLAIMS.

As the circuit court found in its Order, "[i]t is not contested that SCRCP 23 was not complied with prior to the filing of Andrews's counterclaims. It is also not contested, if Rule 23, SCRCP, is applicable, that dismissal is the appropriate remedy . . . no argument was presented that even an attempt was made to comply with Rule 23." (R. 4). Andrews does not appeal these findings by the circuit court. Instead he argues that Rule 23 is not applicable to his counterclaims because those claims are direct, as opposed to derivative.

South Carolina adheres to the internal affairs doctrine and applies the law of the state of incorporation to disputes involving relations among shareholders, directors, and officers of a corporation. *See* S.C. Code § 33-15-105(c) (2006) (providing that this title "does not authorize this State to regulate the organization or internal affairs of a foreign corporation authorized to transact business in this state"). As the Official Comment to Section 33-15-105(c) of the South

Carolina Code notes, this section “preserves the judicially developed doctrine that internal corporate affairs are governed by the state of incorporation even when the corporation's business and assets are located primarily in other states.”

Because Tri-Star is a South Carolina corporation with its principal place of business in Spartanburg County, the law of South Carolina governs. *Id.* (R. 58). Andrews’s alleged injury flows not from what happened to him, but from what happened to Tri-Star.

A. Derivative Action: the General Rule in South Carolina

South Carolina adheres to the general rule that individuals may not sue corporate directors or officers for losses suffered by the corporation. *See Brown v. Stewart*, 348 S.C. 33, 51, 557 S.E.2d 676, 686 (Ct. App. 2001). This prohibition on individual suits for damages suffered by the corporation is a central tenet of corporate law. *See Fletcher*, Cyclopedic of Corporate Law § 5912 (stating the general rule and observing that “a diminution in the value of corporate stock resulting from some depreciation or injury to corporate assets is a direct injury only to the corporation; it is merely an indirect or incidental injury to an individual shareholder,” even if “the act complained of was done with the specific intent of injuring plaintiff as a shareholder.”).

Andrews’s counterclaims represent an attempt to recover individually for an injury that was admittedly suffered by Tri-Star. Broom and Andrews chose the corporate structure and form to establish and operate Tri-Star. Andrews strategically determined the course of litigation by asserting identical claims in his name and on behalf of Tri-Star in the 2006 Amended Answer. (R. 58-66).

South Carolina law restricts shareholders from suing corporate directors or officers directly for losses suffered by the corporation. *Babb v. Rothrock*, 303 S.C. 462, 464, 401 S.E.2d

418, 419 (1991). “A corporation is a distinct legal entity.” *Todd v. Zaldo*, 304 S.C. 275, 278 403 S.E.2d 666, 668 (Ct. App. 1991). “[A] cause of action for recovery of an asset of a corporation belongs to the corporation as opposed to the individual shareholders.” *Id.* A plaintiff may not avoid the demand requirement of a derivative suit by merely styling his suit as an individual. *Id.* Characterizing an injury as personal does not make it so. It is the nature of the wrong alleged which controls whether the suit asserts a derivative or individual claim. *Id.*

A derivative action is brought when a corporation suffered an injury from actionable wrongs committed by its officers and directors. *Ward v. Griffin*, 295 S.C. 219, 221, 367 S.E.2d 703, 704 (Ct. App. 1988). The corporation or its shareholders can bring the cause of action on the corporation’s behalf, so long as they comply with the applicable rules. *Id.* If any relief is granted, it goes to the corporation; shareholders cannot recover the damages in their individual capacities because their loss is the indirect result of the injury to the corporation. *Id.*

Where there are no allegations of a distinct injury to the shareholder, *Ward*, 295 S.C. at 221, 367 S.E.2d at 704, or where there is an action for misappropriation of corporate property, *Davis v. Hamm*, 300 S.C. 284, 291-92, 387 S.E.2d 676, 680 (Ct. App. 1989), the action is derivative.

“A shareholder may maintain an individual action only if his loss is separate and distinct from that of the corporation.” *Hite v. Thomas Howard Company of Florence, Inc.*, 305 S.C. 358, 361, 409 S.E.2d 340, 342 (1991) (emphasis added), *rev'd on other grounds*, *Huntley v. Young*, 319 S.C. 559, 462 S.E.2d 860 (1995).

B. Application of South Carolina Law to Andrews’s Counterclaims Leads to the Conclusion That His Claims Are Derivative.

A careful review of Andrews’s 2006 Amended Answer shows that Andrews did not allege that his loss was separate and distinct from the injury allegedly sustained Tri-Star.

Therefore, as a matter of law, the claims alleged individually by Andrews are derivative and should have complied with the requirements of Rule 23(b)(1), SCRCPP.

Paragraphs 23, 25, 26, 27, 34, and 35 of Andrews's Amended Answer do not reveal any particular loss suffered by him. (R. 58-61). Rather they clearly allege, in part, that Tri-Star owed money to Andrews; however Andrews did not sue Tri-Star to recover debts and cannot legally sue Broom individually for such debt. *See* S.C. Code Ann. §33-6-220 and §33-44-303 (2006) (explaining South Carolina provides by statute that an owner of a corporation or limited liability company is not personally liable for the acts or debts of the corporation or LLC). (R. 58-61).

Paragraphs 26 and 27 of the Amended Answer allege Tri-Star owed Andrews \$1,194,362.83 for the sale of gaming machines. (R. 58). If the allegations were accepted as true, the only reason Tri-Star did not pay this debt is because it suffered a loss in corporate assets, allegedly at the hands of Broom. This conduct, if true, harmed Tri-Star directly, and its investors and creditors derivatively. *See In re Granite Partners, L.P.*, 208 B.R. 332, 344 (Bankr. S.D.N.Y. 1997) ("Claims of mismanagement, waste and breach of fiduciary duty describe conduct which harms an entity directly, and its investors and creditors derivatively The investors and creditors suffer an indirect injury because the wrongful conduct erodes the entity's assets, making it less likely that it will be able to pay creditors and distribute profits to investors.")(emphasis added). Tri-Star and Andrews allegedly suffered the same loss of money. This overlapping loss therefore is not separate and distinct

Further, paragraphs 34 and 35 allege that Broom made distributions to himself in the amount of \$520,000.00 despite the fact that Tri-Star owed Andrews substantial sums of money as a shareholder and creditor. (R. 59-60). This alleged conduct harmed Tri-Star directly, and its

investors and creditors derivatively. The corporation and Andrews suffered the same loss of money.

A claim-by-claim analysis further demonstrates the overlap between Andrews and Tri-Star.

Claim No. 1 (breach of fiduciary duty): Andrews and Tri-Star allege they were injured by Broom “(1) paying himself from Tri-Star without consent or authority from Andrews; (2) selling substantially all of the assets of Tri-Star at below market value and without authority or consent of Andrews; and (3) converting Tri-Star’s money and/or assets for Broom’s own use and benefit.” (R. 60) (emphasis added).

Claim No. 2 (breach of contract): Andrews and Tri-Star allege they were injured when Broom (1) “disposed of the assets of Tri-Star at substantially below their market value,” and “paid himself approximately five hundred twenty thousand (\$520,000) dollars in salary and/or distribution [from Tri-Star’s assets].” (R. 62) (emphasis added).

Claim No. 5 (conversion): Andrews and Tri-Star allege they were injured when Broom took possession of “monies and equipment belonging to Tri-Star.” (R. 64) (emphasis added).

Claim No. 3 (breach of contract accompanied by a fraudulent act), Claim No. 4 (breach of the covenant of good faith and fair dealing), Claim No. 6 (violation of S.C. Code 33-8-300), Claim No. 7 (violation of S.C. Code 33-8-420): Andrews and Tri-Star simply re-allege the mismanagement and dissipation of Tri-Star’s assets as alleged in the prior derivative claims. (R. 62-65) (emphasis added).

Claim No. 8 (promissory estoppel), Claim No. 9 (fraud), and Claim No. 10 (negligent misrepresentation): Andrews, individually, asserts these claims. However, there are no allegations within these causes of action that Andrews suffered a particular loss that is separate

or different from the losses suffered by Tri-Star. These claims merely re-allege the mismanagement and dissipation of Tri-Star's assets as set forth in the previous claims. (R. 65-67) (emphasis added).

The crux of Andrews's argument is that he has suffered a personal loss; however characterizing an injury as "personal" does not make it so in South Carolina. As discussed above, each of Andrews's alleged "losses" were first and foremost losses to Tri-Star because it allegedly was unable to repay Andrews due to alleged dissipation of assets caused by Broom.

In *Todd v. Zaldo*, the counterclaim plaintiff "characterized the damages as personal because Georganne Apparel Company, Inc. and MIV Textile Sales, Inc. were small closely held corporations" and, as Mr. Zaldo put it, "[m]y corporation is totally my money" *Todd*, 304 S.C. at 277, 403 S.E.2d at 668. The *Todd* court stated the, "Mere characterization of damages by Zaldo as personal versus corporate does not prove their true nature." *Id.* The Court of Appeals analyzed the categories of claimed damages and found them to be "clearly corporate in nature." *Id.* 304 S.C. at 278, 403 S.E.2d at 668. This analysis and determination applies equally to the case at hand since Tri-Star's assets are corporate assets, not personal assets.

It is not uncommon for a court to label a claim "derivative," where a general partner or LLC manager is alleged to have (1) paid itself payments to which it was not entitled, (2) failed to monitor the operations of the business, (3) sold business assets to itself or an affiliate for less than fair market value, (4) made sweetheart deals with its affiliates, (5) mismanaged funds, (6) failed to perform obligations imposed in the partnership or operating agreement, (7) used firm assets as security for personal loans, (8) paid to itself an improperly high price when selling assets to the entity, or (9) failed to properly investigate a business opportunity.⁴

⁴ See, e.g., *Litman v. Prudential-Bache Props., Inc.*, 611 A.2d 12, 16 (Del. Ch. 1992) (holding that failure to investigate and monitor partnership investments and placing interest in general partnership fees above

Based on the foregoing reasons, this court should affirm the circuit court's ruling that the claims alleged by Andrews are derivative in nature, thus requiring Andrews to comply with the pleading requirements of Rule 23(b)(1), SCRCF.

C. Rule 23, SCRCF Applies in Non-Class Action Settings.

Andrews asked the circuit court to find that Rule 23, SCRCF, is intended to apply to class actions only. None of the cases cited by Andrews actually hold that the derivative action requirements of Rule 23, SCRCF, must be applied only to class action cases. To the contrary, the Supreme Court of South Carolina has already applied the pleading and demand requirements of Rule 23 to a non-class case involving a closely held corporation. *See Clearwater Trust*, 367 S.C. at 351, 626 S.E.2d at 339 (dismissing an unjust enrichment claim brought by shareholder of closely held corporation for failure to comply with the pleading requirements of Rule 23(b)(1), SCRCF).

interests of limited partners, which reduced value and payout, stated a derivative claim); *Lenz ex rel. Naples Tennis Resort v. Associated Inns & Rests. Co. of Am.*, 833 F. Supp. 362, 380 (S.D.N.Y. 1993) (finding that misconduct and misappropriation of funds which reduce partnership's income and distributions states derivative claim); *P'ship Equities, Inc. v. Marten*, 443 N.E.2d 134, 138-39 (Mass. App. Ct. 1982) (stating that all limited partners and creditors have an interest in a claim that the general partner has prematurely reimbursed itself or engaged in other mismanagement, negligently diverted assets, acted beyond authority, or failed to perform partnership obligations); *Kenworthy v. Hargrove*, 855 F. Supp. 101, 105-06 (E.D. Pa. 1994) (holding that claim of improper governmental seizure of bank owned by partnership is a derivative claim under Pennsylvania law), *aff'd*, 27 F.3d 557 (3d Cir. 1994); *Re v. Weksel*, 515 N.Y.S.2d 568 (App. Div. 1987) (holding that claim for recovery of funds belonging to partnership is a derivative claim); *Larson v. First Interstate Bank of Kalispell*, 786 P.2d 1176, 1179-80 (Mont. 1990); *Caley Invs. Inc. v. Lowe Family Assoc.*, 754 P.2d 793, 795 (Colo. Ct. App. 1988); *Thomasson v. Mfrs. Hanover Trust Co.*, 657 F. Supp. 448, 453-54 (S.D. Tex. 1987) (applying Texas law in bankruptcy context), *aff'd*, 845 F.2d 1020 (5th Cir. 1988); *Hauer v. Bankers Trust N.Y. Corp.*, 509 F. Supp. 168, 175 (E.D. Wis. 1981), *aff'd*, 671 F.2d 1020 (7th Cir. 1982); *Field Enters. v. Gresser*, No. 89-1234, 1990 WL 262001, at *8 (Wis. Ct. App. Dec. 27, 1990) (holding that limited partners in an Illinois limited partnership may only sue derivatively for breaches of duties owed to partners or the partnership).

South Carolina and other jurisdictions apply Rule 23 derivative suit requirements to non-class cases involving partnerships with as few as three, four or five members.⁵

As other jurisdictions note, the number of shareholders is irrelevant. *Morris v. Hennon & Brown Properties, LLC*, 1:07CV780, 2008 WL 2704292 (M.D.N.C. July 3, 2008) (“But, if the plaintiff shareholder in a closely held corporation owns a 50% interest in the stock, then such shareholder would not be allowed to bring an individual action and can only bring a derivative action.”).

D. Even if the ALI /Thomas Exception Were Adopted in South Carolina, It Would Not Be Applicable Under the Facts of This Case.

Andrews argues that some foreign jurisdictions have applied an exception to the general rule that derivative claims always belong to the corporation. (Andrews’s Initial Brief, pp. 11-12)

⁵ *Ono v. Itoyama*, 884 F. Supp. 892, 895 (D.N.J. 1995) *aff’d sub nom*; *Keiko Ono v. Itoyama*, 79 F.3d 1138 (3d Cir. 1996); *Executive Leasing Company, Inc. v. Leder*, 191 A.D.2d 199, 200, 594 N.Y.S.2d 217 (1993) (“[W]here there are only two stockholders each with a 50% share, an action cannot be maintained in the name of the corporation by one stockholder against another with an equal interest and degree of control over corporate affairs; the proper remedy is a stockholder’s derivative action.”); *L.W. Kent and Co., Inc. v. Wolf, et al.*, 143 A.D.2d 813, 533 N.Y.S.2d 119, (1988) (holding where a president and 50% shareholder initiates corporate lawsuit against other 50% shareholder, presumption of president’s authority to initiate corporate lawsuit does not apply and appropriate avenue of relief is a derivative action); *Abelow v. Grossman*, 91 A.D.2d 553, 554, 457 N.Y.S.2d 30 (1982) (“[A]n action could not be maintained in the name of the corporation, where brought by one stockholder against another with an equal stock interest and degree of control over corporate affairs. The appropriate remedy in such a case is a stockholder’s derivative action.”); *Blasberg v. Oxbow Power Corp.*, 934 F. Supp. 21 (D. Mass. 1996) (two partners: sole limited partner brought claims against sole general partner); *Cabrini Dev. Council v. LCA-Vision, Inc.*, 197 F.R.D. 90 (S.D.N.Y. 2000) (involving three LLC members); *Golden Tee, Inc. v. Venture Golf Sch., Inc.*, 969 S.W.2d 625 (Ark. 1998) (dismissing complaint by four partners against the fifth, who had control of the partnership, for failure to bring action as a derivative suit); *N.Y. Life Ins. Co. v. Ramco Holding Corp.*, 938 F. Supp. 754 (N.D. Okla. 1996) (involving three partners; noting that complaining limited partner owning 96.5% of the partnership); *Whalen v. Connelly*, 545 N.W.2d 284 (Iowa 1996) (involving three partners; dismissing one of the limited partner’s claims (brought directly) because he had failed to make demand on the general partner (defendant)), *aff’d*, 593 N.W.2d 147 (Iowa 1999); *S.B. McLaughlin & Co., Ltd. v. Cochrane*, No. C4-92-2081, 1993 WL 231672 (Minn. Ct. App. June 29, 1993), *aff’d*, *Cochrane v. Tudor Oaks Condominium Project*, 529 N.W.2d 429 (Minn. Ct. App. 1995); *Chamarac Props., Inc. v. Pike*, No. 86 Civ. 7919, 1992 WL 332234 (S.D.N.Y. Nov. 12, 1992) (three partners); *Burstin Investors, Inc. v. K.N. Investors, Ltd.*, 657 N.Y.S.2d 743 (App. Div. 1997) (involving two partners).

First, the exceptions referenced by Andrews are applicable only when the claims at issue are deemed derivative. Therefore, an argument by Andrews that an exception applies is a concession that the circuit court properly found that the claims were derivative, but improperly failed to consider whether an exception to the general rule applied.

When Andrews raised this issue with the circuit court, he relied on *Thomas v. Dickson*, 250 Ga. 772 (1983). ((R. 156-163). In *Thomas*, the Supreme Court of Georgia allowed minority shareholders in closely held corporations to pursue direct actions against majority shareholders for injuries done to the corporation strictly in “exceptional situations.” *Id.* at 774. According to *Thomas*, a shareholder in a closely held corporation may bring a direct action when the four reasons for requiring a derivative suit do not apply: (1) preventing a multiplicity of lawsuits; (2) protecting corporate creditors by putting the proceeds of the recovery back in the corporation; (3) protecting the interests of all shareholders by increasing the value of their shares; and (4) adequately compensating the injured shareholder by increasing the value of their shares. *Id.* If none of these reasons are applicable, the shareholder may circumvent the requirements of a derivative action and bring a direct action, which tenders any recovery to the shareholder alone rather than to the corporation which has suffered the harm.

While the court allowed a direct action in *Thomas*, it specifically did so because of evidence indicating that the corporation has been paying its debts as they became due and that there was no outstanding or dissatisfied creditor. However, the Georgia Supreme Court expressly disapproved of permitting direct actions if allowing this course “does not consider the possibility of prejudice to other interested parties, such as creditors,” and ruled that “if such a possibility [of prejudice to creditors] exists, a direct recovery should not be allowed.” *Id.* at 775. (emphasis added). Thus, the *Thomas* court strictly construed the corporate creditor factor and

made clear Georgia's policy favoring priority recovery to corporate creditors as opposed to corporate shareholders, like Andrews. The *Thomas* court held that if “a possibility exists” of prejudice to other interested parties such as “outstanding or dissatisfied creditors” then “a direct recovery should not be allowed.” *Thomas* at 775.

There are no allegations in Andrews’s 2006 Amended Answer that Tri-Star lacked outside creditors. Andrews’s own pleading references debt owed to the Dominican Republic: “Plaintiff was reckless in the manner the [sic] Gaming Machines were imported, and such importation was documented so as to place Tri-Star’s Gaming Machines at grave risk of confiscation or penalties to be payable to the Dominican Republic governmental authorities by Tri-Star or the DR Businesses. Plaintiff has recklessly failed to cause the DR Businesses to pay all applicable charges to the Dominican Republic, which put Tri-Star’s Gaming Machines at risk of confiscation” (R. 60). Andrews asserts in his Initial Brief that “[it] may take discovery and a trial to determine whether the particular corporation has outside creditors who need to be protected or whether equity otherwise favors the corporation itself getting the recovery.” Andrews, as a 50/50 shareholder, knows whether Tri-Star has outside creditors. It is disingenuous to allege that discovery is needed on that fact when Andrews’s own pleadings reference outside creditors.

Because the four corners of the Andrews’s own pleading show a possibility of prejudice to outstanding or dissatisfied creditors, the *Thomas* exception is inapplicable even if this Court chose to adopt the exception.

South Carolina has a similar policy of favoring priority recovery to corporate creditors as opposed to corporate shareholders. *See, e.g.*, S.C. Code Ann. § 33-6-400(c) (2006) (stating no distribution may be made corporate shareholders if “[t]he corporation would not be able to pay

its debts as they become due in the usual course of business” or “the corporation's total assets would be less than the sum of its total liabilities . . .”). *See also Babb*, 303 S.C. at 464-65, 401 S.E.2d at 418 (1991) (finding a direct action was disallowed in a lawsuit involving misappropriation of corporate property; where corporation had disposed of its assets and was bankrupt, assuming the *Thomas v. Dickson* exception to derivative actions was applied, “[t]he claims of corporate creditors may be jeopardized if individual shareholders are permitted to satisfy their personal debts by raising a claim which can only be asserted by the corporation. As between creditors and shareholders, the interest of the creditors must prevail”).

“Because a corporate recovery in a derivative action will benefit creditors while a direct recovery by a shareholder will not, the protection of creditors principle could well be implicated in a shareholder suit against a closely held corporation with debt.” *Barth v. Barth*, 659 N.E. 2d 559, 562 (Ind. 1995) (“Barth II”); *Barth v. Barth*, 693 N.E.2d 954 (Ind. App. 1998) (“Barth III”) (holding the trial court properly dismissed direct action brought by shareholder for misappropriation of assets of closely held corporation; complaint seeking corporate dissolution and asking that damages be paid to corporate shareholder, not to creditors, could result in “potentially prejudice” to creditors); *Maki v. Estate of Ziehm*, 55 A.D.2d 454 (N.Y. App. Div. 1977) (refusing to permit 50% shareholder of dissolved corporation to bring direct action for misappropriation of corporate assets; “[p]etitioner may not be permitted to circumvent the rights of creditors by maintaining a direct action, the potential benefits of which would inure solely to himself”).

E. The ALI Exception Has Not Been Adopted in South Carolina.

Allowing an exception challenges the fundamental operation of the corporate form in South Carolina. While Andrews raises interesting policy concerns, there are serious ramifications for allowing such a relaxed standard for pleadings, as suggested by the ALI

exception, when bringing derivative actions. Our current rule exists for the purpose of protecting the rights of all entities that place a trust in a business, be it customers, shareholders, creditors, officer, etc.

In *Davis v. Hamm*, the Court of Appeals expressly refused to apply an exception to the general rule concerning when a claim must be brought derivatively. *Davis*, 300 S.C. at 288, 387 S.E.2d at 678. Two years later, the Court of Appeals again had an opportunity to adopt this exception for closely held corporations, and in declining to do so, the court stated as follows:

As an additional theory, Zaldo argues he may recover damages personally because Georganne Apparel Company, Inc. was a close corporation with only three stockholders. He seeks to have Georganne Apparel viewed more as a partnership than a corporation. *See Johnson v. Gilbert, Davis v. Hamm*. This record does not support application of these principles. Mr. Zaldo did business in the corporate form. He testified the business operated as a corporation. He recognized it was owned by the shareholders. This record does not present a factual scenario sufficient to ignore the corporate nature of Georganne Apparel, Inc.

Todd, 304 S.C. at 279, 403 S.E.2d at 668-69 (internal citations omitted).

In the years since the *Davis* and *Todd* cases, our appellate courts have consistently rejected exceptions to the general rule, even when those cases involved closely held corporations. *See Babb*, 303 S.C. at 464, 401 S.E.2d at 419-20; *Brown*, 348 S.C. at 51, 557 S.E.2d at 685.

This record does not present a factual scenario sufficient to ignore the corporate nature of Tri-Star. As such, this case does not support the application of any exception for closely held corporations.

III. THE CIRCUIT COURT DID NOT RULE ON ANDREWS'S MOTION TO AMEND SUCH THAT THERE IS NO ERROR TO REVIEW.

A. This Issue Was Not Preserved For Appellate Review

On November 14, 2011, Andrews filed a motion to amend and/or supplement the answer and counterclaims. (R. 172-189). The circuit court never ruled on that motion to amend, and Andrews failed to obtain a ruling.

Where a party raises an issue, but the issue is never ruled on by the circuit court, and the party fails to attempt to obtain a ruling on the issue by way of a motion to alter or amend, the issue is not preserved for appellate review. *On, L.C.C. v Town of Mt. Pleasant*, 338 S.C. 406, 421-22, 526 S.E.2d 716, 724 (2000) (“An appellate court may not, of course, reverse for any reason appearing in the record. The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred.”). Andrews has waived his right to appeal this issue because the circuit court never ruled on his 2011 motion to amend his pleadings. *See Harkins v. Greenville County*, 340 S.C. 606, 533 S.E.2d 886 (2000) (holding an issue not ruled upon by the trial judge is not preserved for appeal).

B. Even If Andrews Had Not Waived This Issue, The Argument Fails On The Merits.

Andrews cites *Spence v. Spence*, 368 S.C. 106, 628 S.E.2d 869 (2006), and requests that this Court grant him the opportunity to amend his pleadings. (Andrews's Initial Brief, at p. 16). In *Spence*, the plaintiff appealed the lower court's denial of plaintiff's request to amend her complaint. *Spence*, 368 S.C. at 128, 628 S.E.2d at 880. Before affirming the lower court's dismissal with prejudice, the South Carolina Supreme Court noted that, when affirming a motion to dismiss with prejudice, appellate courts have the discretion to allow the plaintiff to amend his

complaint. *Id.* at 130, 628 S.E.2d at 881. Furthermore, the Supreme Court noted that an appellate court should follow the “procedure when the plaintiff presents additional factual allegations or an alternative theory of recovery which, taken as true in a well-pleaded complaint, may state a claim upon which relief may be granted.” *Id.* at 130, 628 S.E.2d at 881-82. Finding that the appellant had not alleged sufficient facts to state a cause of action, the Supreme Court affirmed the lower court's dismissal with prejudice. *Id.*

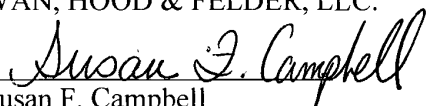
If this Court disagrees on preservation, Broom contends that the Supreme Court's holding in *Spence* cautions against granting Andrews the right to amend his pleadings. Andrews has failed to suggest any additional facts that, if alleged, would properly support a direct action against Broom. His allegations continue to support a loss suffered by Tri-Star. An attempt to re-file for the purposes of styling the claim solely in Andrews's name does not negate the fact that the alleged harm was a corporate loss, thus still causing Andrews's claims to be subject to a derivative action. *Todd*, 304 S.C. at 278, 403 S.E.2d at 668. Therefore, the circuit court should be affirmed.

CONCLUSION

For the reasons stated, this Court should affirm the judgment of the circuit court.

Respectfully submitted

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In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

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Quentin S. Broom, Jr., ... Respondent,

v.

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OF WHOM

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v.

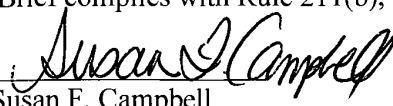
Quentin S. Broom, Jr., ... Third-party Defendant.

CERTIFICATE OF COUNSEL

The undersigned counsel certified that this Final Brief complies with Rule 211(b), SCACR.

November 21, 2013

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In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

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Lower Court Case No. 2008-CP-42-3397

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies the Petition for Rehearing was made and ruled upon by the court of appeals on February 19, 2015.

QUESTIONS PRESENTED FOR REVIEW

- I. Whether the court of appeals erred in remanding this case to the circuit court when the issue being remanded was unpreserved for appellate review.
- II. Whether the Supreme Court should grant a writ of certiorari because clarifying the application and scope of issue preservation is a question of significant importance to South Carolina courts and practitioners.

STATEMENT OF THE CASE

The writ of certiorari seeks a review of the court of appeals' decision to remand this matter. The court of appeals' decision allows the circuit court to address an unpreserved motion. (App. p. 1). By doing so, the court of appeals ignores this Court's firmly established rules of issue preservation and allows the circuit court to rule on an issue it previously heard, but did not rule on, prior to the notice of appeal being filed.

The procedural history of this case is lengthy and convoluted. For the purpose of this petition, H. Hugh Andrews was a named defendant in the underlying action brought by Petitioner. (App. p. 30). Andrews counterclaimed on behalf of himself and Tri-Star Communications, LLC, in which he was a member with Petitioner. (App. p. 76). Petitioner filed a motion to dismiss the counterclaims by Andrews and the purported third party claims by Tri-Star for failure to properly plead a derivative action. (App. p. 130, 133-155). The circuit court granted the motion to dismiss. (App. p. 4-5).

Following the circuit court's dismissal, Andrews, individually and on behalf of Tri-Star, filed two motions: (1) a motion for reconsideration and (2) a motion to amend Andrews' answer and counterclaims. (App. p. 164-192, App. p. 193-234). The circuit court heard arguments on both motions in the same hearing, with each motion being argued by separate trial counsel. (App. p. 236-299, App. p. 300-317). On February 1, 2013, the circuit court entered a written order denying only the motion to reconsider. (App. p. 38). The February 1, 2013 order did not address the November 14, 2011 motion to amend. (App. p. 38-39). Andrews' counsel timely filed a notice of appeal that was limited to the circuit court's order on the motion for reconsideration.

On appeal, Andrews argued the circuit court erred in failing to allow him to amend his pleadings. Specifically, Andrews explained:

On January 14, 2013, the circuit court issued a form order denying the motions to reconsider. [App. p. 36]. On February 1, 2013, the court issued a written order confirming this ruling. [App. p. 38]. Neither order expressly mentioned Andrews' motion to amend his answer, but the effect of the orders was to deny the motion.

(App. p. 323). In response, Petitioner argued the issue was unpreserved because the circuit court failed to make a ruling prior to Andrews' filing of the notice of appeal. (App. p. 374).

In his Reply Brief, Andrews states:

[Petitioner] is right about the court's order. It never mentions the motion to amend. See [App. p. 38]. But the obvious import of the order is to deny the motion. [Petitioner] had argued that the court could grant the amendment only if the court changed the order dismissing the case. The only rational view of the court's decision is that it agreed. In deciding not to alter the order that dismissed Andrews claims, the circuit court necessarily rejected Andrews request that he be allowed to amend his claims. Nothing else is possible.

There is no cogent justification for denying the motion to amend.

(App. p. 388).

After briefing and oral argument, the court of appeals entered an unpublished opinion on January 14, 2015, remanding the case to the circuit court for a ruling on the motion to amend. (App. p. 1). Petitioner filed a Petition for Rehearing, which was denied on February 19, 2015. (App. p. 4-12).

ARGUMENTS

I. THE COURT OF APPEALS ERRED IN REMANDING THIS CASE TO THE CIRCUIT COURT WHEN THE ISSUE BEING REMANDED WAS UNPRESERVED FOR APPELLATE REVIEW.

By remanding this case to the circuit court, the court of appeals ignored the general rules of issue preservation. Andrews took the position throughout his brief and oral argument that the issue of amending his pleadings was impliedly preserved. When the court of appeals determined

that the issue was never ruled upon, the general rules of issue preservation should have controlled. Those rules instruct the court of appeals to (1) rule on the remaining issues and (2) to find the issue on amending the pleadings unpreserved for review.

“It is well settled that, but for a very few exceptional circumstances, an appellate court cannot address an issue unless it was raised to and ruled upon by the trial court.” *Chastain v. Hiltabidle*, 381 S.C. 508, 514-15, 673 S.E.2d 826, 829 (Ct. App. 2009) (citing *Lucas v. Rawl Family Ltd. P’ship*, 359 S.C. 505, 510–511, 598 S.E.2d 712, 715 (2004)). This case does not qualify for any of the exceptions to issue preservation recognized by South Carolina appellate courts: (1) subject matter jurisdiction, (2) rights of minors, (3) additional sustaining grounds, (4) judicial economy, nor (5) waiver of counsel. See *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005); *Ex parte Morris*, 367 S.C. 56, 624 S.E.2d 649 (2006); *I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000); *Jeter v. S.C. Dept. of Transp.*, 369 S.C. 433, 633 S.E.2d 143 (2006); *State v. Rocheville*, 310 S.C. 20, 25, 425 S.E.2d 32, 35 (1993). As such, this issue could only have been preserved if Andrews had raised this unanswered issue in a separate 59(e) motion specific to the Rule 15 motion. See *Wilder Corp. v. Wilke*, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (noting that proper use of a Rule 59(e) motion is to preserve issues raised to but not ruled upon by the trial court); *Walsh v. Woods*, 371 S.C. 319, 325, 638 S.E.2d 85, 88 (Ct. App. 2006) (finding issue on appeal was not preserved because the trial court did not rule on the issue and it was not raised in a Rule 59(e) motion). Andrews’ failure to obtain a ruling should control. *Power v. Allstate Ins. Co.*, 312 S.C. 381, 383, 440 S.E.2d 406, 407 (Ct. App. 1994) (holding an issue was not preserved because the trial court did not address it in its order and the party did not request the trial court to rule upon it in any motion).

Andrews' reliance on an implied preservation was misplaced. The motion required a ruling. No futility existed in seeking a ruling of the Rule 15 motion. A plain reading of the order demonstrates that the circuit court never attempted to encompass a decision of the Rule 15 motion in that order. (App. p. 38). Andrews should have made a 59(e) motion to obtain a ruling, but did not. Remanding this case for a ruling was an error. (App. p. 1).

II. THE SUPREME COURT SHOULD GRANT CERTIORARI BECAUSE CLARIFICATION AND APPLICATION OF ISSUE PRESERVATION IS A QUESTION OF SIGNIFICANT IMPORTANCE.

Pursuant to Rule 242, SCACR, this Court has the discretion to grant a writ of certiorari for "special and important reasons." In this case, a determination of the applicability and scope of issue preservation is of significant importance. This issue is imperative not only to Petitioner, but to all South Carolina courts and practitioners. Addressing this issue will add indispensable clarity to the preservation rules that define the scope of appellate practice in this state.

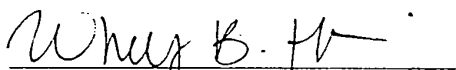
This Court went to great lengths in *I'On* to address both the procedural and practical implications of issue preservation. *I'On*, 338 S.C. 406, 526 S.E.2d 716. Since that time, *I'On* has frequently been cited for the general proposition that an issue raised but not ruled upon is unpreserved for appellate review. *Id.* The court of appeals' reasoning in this case signals a departure from the *I'On* rule, and therefore necessitates review by this Court. (App. p. 1). This case is representative of the ongoing misapplication of preservation rules by South Carolina courts. A certification here, grounded only in preservation, provides the opportunity for this Court to once again clarify preservation rules in South Carolina without being entangled with other issues.

CONCLUSION

For the reasons set forth herein, Petitioner respectfully asks this Court to grant this writ of certiorari and review the court of appeals' decision to remand this matter to the circuit court.

Respectfully submitted,

March 20, 2015


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MAY - 5 2015

THE STATE OF SOUTH CAROLINA
In The Supreme Court

S.C. Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Op. No. 2015-UP-030 (S.C. Ct. App. filed Jan. 14, 2015)

Quentin S. Broom, Jr., ... Petitioner,

v.

Ten State Street, LLP, Timothy D. Scranton,
Mark Broadwater, and H. Hugh Andrews, ... Defendants,

Of whom

H. Hugh Andrews, Individually
and on behalf of Tri-Star
Communications, Inc. is the, ... Respondent,

v.

Quentin S. Broom, Jr., ... Third-party Defendant.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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John S. Nichols # 4210 PILLSBURY & READ
BLUESTEIN NICHOLS
THOMPSON & DELGADO

Attorneys for Respondent

Other Counsel of Record:

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Whitney B. Harrison	PATRICK E. KNIE LAW	THE GILREATH LAW FIRM
MCGOWAN HOOD & FELDER	OFFICES	

Attorney for Petitioners

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Did the Court of Appeals err when it remanded this case for the trial court to decide a motion that—on the petitioner’s best day—is <i>still pending</i> rather than “unpreserved” for review?	
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QUESTION PRESENTED

The respondent proposes the following as the single question presented:

Did the Court of Appeals err when it remanded this case for the trial court to decide a motion that—on the petitioner’s best day—is *still pending* rather than “unpreserved” for review?

(This encompasses the petitioner’s questions 1 and 2)

STATEMENT OF THE CASE

The respondent in this case is Hugh Andrews. He generally agrees with the petitioner’s Statement of the Case but would add the following as additional background information.

First, this case is a dispute between business partners, and at its core, the case is about a business that is divided against itself. Tri-Star Communications is a corporation that is locked in limbo. It cannot function because its two (2) equal shareholders—the petitioner and the respondent—are suing each other.

Second, the circuit court’s order of dismissal is based on a pleading defect that nobody can seriously contend was prejudicial. If a shareholder of a corporation wishes to file a derivative lawsuit, he must comply with special pleading rules like verifying the complaint, alleging that he will fairly represent the interests of other affected shareholders, and explaining that he has asked the board of directors to satisfy his concerns or that such a demand would be futile. These rules are contained in Rule 23, SCRCP, and everyone agrees that the purpose of these rules is to ensure that corporate assets are not wasted on defending frivolous lawsuits. See generally (App. pp. 332, 388-390) (from the briefs filed below).

The petitioner litigated Mr. Andrews' counterclaims for over five (5) years before he raised an issue about whether the counterclaims were "derivative" and whether Mr. Andrews should have followed Rule 23. The petitioner knows that the counterclaims are not frivolous grievances—when the two owners of a company are suing each other, they need a third party like the court to settle their differences. The argument about defective pleadings is a ploy. The motion to dismiss was designed to stop legitimate claims from going to trial.

Finally, while Mr. Andrews believes that the only logical implication of a circuit court order that dismisses a case "with prejudice" is that any motion to amend is being denied as well, a possible explanation—if not the probable explanation—of the circuit court's failure to specifically mention the motion to amend is that the petitioner told the circuit court the motion to amend was improper because Mr. Andrews' counterclaims had already been dismissed. (App. p. 315, ll. 2-16). The petitioner said that Mr. Andrews "will not be prohibited before the appellate courts if that's where this is headed from making the arguments that are contained within this proposed [filing] . . . [but] you can't amend something that doesn't exist." *Id.* Thus, when the petitioner says Mr. Andrews' argument about being denied the chance to amend his complaint is not preserved, it looks an awful lot like the petitioner is taking a position that is contrary to the position he took below.

ARGUMENT

The petitioner is not raising a novel issue. There was no disagreement among the members of the panel at the Court of Appeals, the decision of the Court of Appeals does not conflict with prior decisions of this Court, and this case does not involve a constitutional

question. See Rule 242, SCACR (describing some of the considerations that this Court may deem relevant in deciding a request for a writ of certiorari).

The Court of Appeals remanded this case because it took the view that the motion to amend had never been decided. That disposition follows this Court's precedent, which seems to counsel that the service of a notice of appeal does not deprive the lower court of jurisdiction to consider pending motions as long as the motions are timely.

One of the principal cases on this topic is *Hudson v. Hudson*, a case that involves post-trial motions that are filed pursuant to Rule 59. Hudson explains that in the event post-trial motions are filed, either simultaneously with or after the filing of a notice of appeal, the proper approach is to dismiss the appeal without prejudice. See 290 S.C. 215, 216, 349 S.E.2d 341, 341 (1986). This is because the lower court retains jurisdiction to decide a motion that is properly filed.

That process is the functional equivalent of the process the Court of Appeals used here. The Court of Appeals did not dismiss this appeal, but it accomplished the same end by way of a remand. The variance in verbiage between a dismissal and a remand would not seem to make any sort of a meaningful difference, and this Court is familiar with the principle that "whatever doesn't make any difference, doesn't matter." *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987).

The ultimate problem with the petitioner's position is that he cannot honestly contend that there is a legitimate justification for the circuit court to deny the motion to amend. The rules of civil procedure "shall be construed to secure the just, speedy, and inexpensive" decision of every action, Rule 1, SCRCP, and leave to amend pleadings "shall be freely given

when justice so requires and does not prejudice the other party.” Rule 15(a), SCRC. The upshot is that either way, the petitioner loses. Either the petitioner loses because the circuit court’s rejection of the motion to amend is clearly erroneous, or the petitioner loses because the circuit court did not decide the motion to amend and the motion is still pending. It is hard to see why the debate matters when both vehicles are defensible.

Even if the petitioner was right about error preservation, the law seems to suggest that the petitioner would still lose. Let us assume that the petitioner is right about Mr. Andrews’ pleadings being defective. This Court’s decision in *Spence v. Spence* explains that when a plaintiff’s claim is dismissed based on a pleading defect, the plaintiff should generally be given an opportunity to cure defects in his pleadings, even if the statute of limitations has expired. 368 S.C. 106, 129-131, 628 S.E.2d 869, 881-82 (2006). When the plaintiff is denied this opportunity, an appellate court has the discretion to affirm the order of dismissal but modify the order to find that the dismissal is without prejudice. *Id.* at 130, 628 S.E.2d at 881. *Spence* appears to say that most parties should get at least one chance to fix a defective pleading.

Nobody could seriously contend that this approach would not apply to the present case. Hugh Andrews believes that his business partner is a thief. He admitted that he did not follow Rule 23—Mr. Andrews did not ask the petitioner to sue himself, Mr. Andrews is the only similarly situated shareholder, and any demand for relief is obviously futile because the corporation in question is locked in a tug-of-war between its two owners. If all of this procedural fencing is over whether Mr. Andrews should have verified his complaint, let the case be remanded so that the complaint can be verified and this case can be tried.

CONCLUSION

The Court of Appeals has reached a defensible result that furthers the ends of justice.

It was appropriate to remand. This Court should deny the petition.

Respectfully submitted,



May 5, 2015

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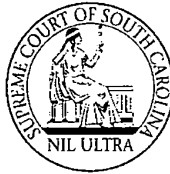
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The Supreme Court of South Carolina

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December 3, 2015

The Honorable M. Hope Blackley
PO Box 3483
Spartanburg SC 29304-3483

REMITTITUR

Re: Quentin S. Broom, Jr. v. Ten State Street (H. Hugh Andrews)
Lower Court Case No. 2008-CP-42-03397
Appellate Case No. 2015-000583

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,

CLERK



cc: John S. Nichols, Esquire
Blake Alexander Hewitt, Esquire
Patrick E. Knie, Esquire
James R. Gilreath, Esquire
Susan Foxworth Campbell, Esquire
Whitney Boykin Harrison, Esquire
Rodney F. Pillsbury, Esquire

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD
NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY
PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

Quentin S. Broom, Jr., Petitioner,

v.

Ten State Street, LLP, Timothy D. Scranton, Mark
Broadwater, and H. Hugh Andrews, Defendants,

Of whom H. Hugh Andrews, Individually and on behalf
of Tri-Star Communications, Inc., is the Respondent,

v.

Quentin S. Broom, Jr., Third-party Defendant.

Appellate Case No. 2015-000583

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Spartanburg County
The Honorable J. Mark Hayes, II, Circuit Court Judge

Opinion No. 2015-MO-057
Submitted September 22, 2015 – Filed September 30, 2015

REVERSED

James R. Gilreath, of The Gilreath Law Firm, PA, of Greenville; Patrick E. Knie of Patrick E. Knie, PA, of Spartanburg; Susan Foxworth Campbell, of McGowan Hood & Felder, LLC, of Georgetown; and Whitney Boykin Harrison of Columbia for Petitioner.

John S. Nichols and Blake Alexander Hewitt, of Bluestein Nichols Thompson & Delgado, LLC, of Columbia; and Rodney F. Pillsbury, of Pillsbury Law Firm, LLC, of Greenville, for Respondent.

PER CURIAM: Petitioner seeks a writ of certiorari to review the Court of Appeals' decision in *Broom v. Ten State Street LLP*, Op. No. 2015-UP-030 (S.C. Ct. App. filed January 14, 2015). We grant the petition, dispense with further briefing, and reverse the Court of Appeals' decision.

Petitioner filed his original suit against defendants alleging various causes of action related to a joint business venture between petitioner and respondent. Respondent answered and raised counterclaims against petitioner. On petitioner's Rule 12(b)(6), SCRCP, motion, the trial judge dismissed respondent's counterclaims, finding they did not comply with the pleading requirements in Rule 23(b)(1), SCRCP, for derivative actions by shareholders. Thereafter, respondent filed a motion to reconsider pursuant to Rules 52 and 60, SCRCP, and a motion to amend the pleadings pursuant to Rule 15, SCRCP. Following a hearing on the motions, the trial judge denied respondent's motion to reconsider, but did not rule on respondent's motion to amend the pleadings.

Respondent filed a notice of appeal from the order denying his motion for reconsideration. On appeal, respondent raised two issues: (1) whether the trial judge erred in dismissing respondent's counterclaims for failure to comply with the pleading requirements of Rule 23(b)(1); and (2) whether the trial judge erred in dismissing respondent's counterclaims without allowing him to amend his pleadings. Petitioner argued the latter was not preserved for review because the trial judge did not rule on respondent's motion to amend. The Court of Appeals did not address these issues and, instead, remanded the case to the circuit court so the trial judge could rule on respondent's Rule 15, SCRCP, motion to amend the pleadings.

We find Court of Appeals erred in remanding the case for a ruling on respondent's Rule 15, SCRCP, motion because the issue on appeal—whether the trial judge erred in dismissing respondent's counterclaims without allowing respondent to amend his pleadings—was not preserved for review. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (noting that in order for an issue to be properly preserved for appeal, it must have been both raised to and ruled on by the trial court). Because respondent did not seek a ruling on the motion to amend, the Court of Appeals should not have addressed the motion, even if only for the sole purpose of remanding for a ruling. *See Noisette v. Ismail*, 304 S.C. 56, 58, 304 S.E.2d 122, 124 (finding the issue was not properly before the Court of Appeals and should not have been addressed where the record reflected the circuit court did not explicitly rule on the argument and the petitioner failed to show it made a Rule 59(e), SCRCP, motion to amend or alter the judgment on that ground).

Accordingly, the decision of the Court of Appeals is hereby

REVERSED.

TOAL, C.J., PLEICONES, BEATTY and KITTREDGE, JJ., concur.
HEARN, J., not participating.

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Quentin S. Broom, Jr., Respondent,

v.

Ten State Street, LLP, Timothy D. Scranton, Mark
Broadwater, and H. Hugh Andrews, Defendants,

Of whom H. Hugh Andrews, Individually and on behalf
of Tri-Star Communications, Inc., is the Appellant,

v.

Quentin S. Broom, Jr., Third-party Defendant.

Appellate Case No. 2013-000514

Appeal From Spartanburg County
J. Mark Hayes, II, Circuit Court Judge

Unpublished Opinion No. 2015-UP-030
Heard September 11, 2014 – Filed January 14, 2015

REMANDED

John S. Nichols and Blake Alexander Hewitt, both of
Bluestein Nichols Thompson & Delgado, LLC, of
Columbia, and Rodney F. Pillsbury, of Pillsbury & Read,
PA, of Greenville, for Appellant.

James R. Gilreath, of the Gilreath Law Firm, PA, of Greenville; Patrick E. Knie, of Patrick E. Knie, PA, of Spartanburg; Susan Foxworth Campbell and Whitney Boykin Harrison, both of McGowan Hood & Felder, LLC, of Georgetown and Columbia, respectively; all for Respondent.

PER CURIAM: This is an appeal from the trial court order dismissing H. Hugh Andrews's amended complaint pursuant to Rule 12(b)(6), SCRCP. The trial court found Andrews's claims were derivative in nature; therefore, it ruled his failure to comply with the requirements of Rule 23(b)(1), SCRCP, was grounds for dismissal. On appeal, Andrews argues the trial court erred in finding that all his claims were derivative. He maintains that he appropriately maintained certain claims in his individual capacity, and, therefore, Rule 23(b)(1), SCRCP, did not apply to them. Andrews also contends that even if all his claims are derivative, he should not be required to follow the procedures set forth in Rule 23(b)(1), SCRCP. Finally, Andrews contends the trial court erred in failing to grant his motion to amend his pleadings to comply with Rule 23(b)(1), SCRCP. We remand.

After the trial court dismissed Andrews's claims, Andrews filed two motions: a motion for reconsideration and a motion to amend his answer and counterclaims. The court heard arguments on these motions in the same hearing. During the hearing, Andrews requested the trial court allow him to amend his pleadings because he wanted to

bring the factual allegations of the complaint current to information that was learned from discovery so that in the event that there would be an appeal, the appellate court would be looking at the information that was known to the parties because it's a 12(B)(6) motion and it's not a summary judgment motion.

Broom argued that because the trial court dismissed the counterclaims, Andrews was "asking to be permitted to amend something that does not exist." Following the hearing, the trial court denied the motion to reconsider but did not rule on the motion to amend.

Because the record indicates the trial court never ruled on the motion to amend, we remand to the trial court for a ruling on this motion. On remand, the trial court is instructed to consider whether justice requires the amendment and whether Broom will be prejudiced by the amendment. *See* Rule 15(a), SCRCP (stating leave to amend shall be freely given when justice requires and does not prejudice any other party); *Stanley v. Kirkpatrick*, 357 S.C. 169, 174, 592 S.E.2d 296, 298 (2004) (recognizing "the party opposing the motion has the burden of establishing prejudice").¹

REMANDED.

FEW, C.J., and THOMAS and LOCKEMY, JJ., concur.

¹ In light of our decision, we decline to reach the remaining issues.



BLUESTEIN · NICHOLS · THOMPSON · DELGADO LLC
ATTORNEYS AT LAW

December 10, 2015

RECEIVED

DEC 10 2015

VIA HAND DELIVERY

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

S.C. SUPREME COURT

RE: Quentin S. Broom, Jr., v. Ten State Street (H. Hugh Andrews)
Lower Court Case No. 2008-CP-42-03397
Appellate Case No. 2015-000583

Dear Mr. Shearouse:

I am writing in light of this Court issuing the remittitur, which I received 3 days ago.

My client was the appellant in the Court of Appeals. He argued 2 issues: (1) whether the trial judge erred in dismissing his counterclaims; and (2) whether the trial judge should have allowed him to amend his pleading.

The Court of Appeals only addressed the second issue. My opponent argued the motion to amend had never been ruled on. The Court of Appeals agreed but remanded for a ruling.

This Court has reversed the Court of Appeals, reasoning the court could not examine the motion to amend because it was never decided. No appellate court has decided my client's first issue on appeal. I believe normal procedure would be to remand to the Court of Appeals.

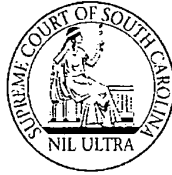
I am writing solely to prevent any argument that I failed to alert this Court to my client's first issue on appeal. I contemplated filing a motion for clarification, but the appellate process ended with the remittitur. I know of nothing to do other than file this letter.

Since my client's motion to amend his pleading remains pending, it is completely possible there will be no need for a further appeal, of either issue. If the circuit court grants the amendment, both issues may be moot. I am hopeful this will occur. I imagine all parties were long ago ready to move this case towards trial.

Yours sincerely,

Blake Hewitt

cc: All appellate counsel of record
R. Davis Howser, Esquire (attorney for parties not participating in the appeal)
The Honorable M. Hope Blackley



The Supreme Court of South Carolina

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CLERK OF COURT

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January 6, 2015

Blake Alexander Hewitt, Esquire
PO Box 7965
Columbia SC 29202

Re: Quentin S. Broom, Jr. v. Ten State Street (H. Hugh Andrews)
Appellate Case No. 2015-000583

Dear Mr. Hewitt:

This responds to your letter dated December 10, 2015. With the sending of the remittitur on December 3, 2015, appellate jurisdiction ended over this case. *Wise v. S.C. Dept. of Corr.*, 372 S.C. 173, 642 S.E.2d 551 (2007).

Very truly yours,

CLERK

cc: John S. Nichols, Esquire
Patrick E. Knie, Esquire
James R. Gilreath, Esquire
Susan Foxworth Campbell, Esquire
Whitney Boykin Harrison, Esquire
Rodney F. Pillsbury, Esquire

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
	)	Civil Action No. 2008-CP-42-3397
Quentin S. Broom, Jr.,	)	
	)	
Plaintiff,	)	PLAINTIFF
v.	)	QUENTIN S. BROOM, JR.'S
	)	SUPPLEMENTAL MOTION
Ten State Street, L.L.P., Timothy D.	)	AND MEMORANDUM IN SUPPORT
Scrantom, Mark Broadwater, and H. Hughes	)	OF HIS SECOND AMENDED
Andrews,	)	MOTION TO DISMISS AND/OR
Defendants,	)	STRIKE COUNTERCLAIMS AND
of whom,	)	THIRD-PARTY COMPLAINT
	)	
H. Hughes Andrews, Individually and on	)	
behalf of Tri-Star Communications, Inc., is	)	
the	)	
	)	
Counter-Claimant/	)	
Third-Party Plaintiff.	)	
	)	

Plaintiff Quentin S. Broom, Jr., through his attorneys, respectfully submits this Supplemental Motion and Memorandum of Law in Support of his previously filed Second Amended Motion to Dismiss and/or Strike Defendant H. Hughes Andrews' Amended Counterclaims and Amended Third-Party Complaint.

As explained herein, the law of the case doctrine and res judicata are absolute bars to Andrews' counterclaims and third-party claims because (1) Andrews voluntarily abandoned his appeal of this Court's November 1, 2011 Order dismissing with prejudice Andrews' direct claims that overlap with the derivative claims by failing to move the Supreme Court to recall the remittitur and (2) Andrews never appealed this Court's November 1, 2011 Order dismissing with prejudice all derivative claims by Tri-Star. In an attempt to get around this deficiency and revise his claims he asserts derivative claims, which are nothing more than the identical claims previously

dismissed.¹ As a result, this Court's November 1, 2011 Order remains the law of the case on both rulings: (1) Andrews cannot assert derivative claims against Broom in the amended counterclaims and third-party claims and (2) Andrews cannot assert direct claims that overlap the claims that have been dismissed with prejudice. Accordingly, whether the ruling was right or wrong, the claims previously dismissed with prejudice prohibit Andrews' repeated attempt to assert the same claims against Broom and Broom's motion to dismiss must be granted.

FACTUAL AND PROCEDURAL BACKGROUND

This litigation arises out of a business dispute between two shareholders and equal business partners, Andrews and Broom, in the operation of Tri-Star Communications, Inc. In 2005, Broom initiated the underlying lawsuit to which Andrews asserted counterclaims individually and a third-party complaint against Broom on behalf of Tri-Star.² Following a Rule 40(j) dismissal Broom filed an amended complaint and a motion to dismiss the counterclaims and the third-party claims. After a hearing, this Court granted the motion to dismiss with prejudice. **Exhibit 1**, November 1, 2011 Order. Specifically, this Court dismissed with prejudice "all claims of Tri-Star and all claims brought by Andrews individually that overlap with any alleged injuries suffered by Tri-Star" with prejudice. **Exhibit 1** at 8. In its ruling, the Court provided a claim-by-claim analysis explaining that Andrews failed to allege facts sufficient to show he had standing because all recoveries were to be paid to Tri-Star. *Id.* at 4. Notably, the Court held "this record does not present a factual scenario sufficient to ignore the corporate nature of [Tri-Star]." *Id.* at 8. Accordingly, all claims

¹ This motion and memorandum serve merely as a supplement to the arguments previously raised in the Second Amended Motion to Dismiss.

² In the interest of brevity, Broom incorporates by reference his prior filings, including Memorandum in Opposition to Andrews' Second Motion to Amend Answer and Counterclaims for a full recitation of this case's protracted litigation.

as to Andrews individually and all claims on behalf of Tri-Star were dismissed with prejudice. Andrews filed a motion to reconsider, which was denied; and he appealed.

On appeal, Andrews raised only two issues: (1) whether the trial court erred in dismissing his direct claims and (2) whether the trial court erred in dismissing his counterclaims without allowing him to amend his pleadings. **Exhibit 2**, Andrews' Appellate Brief. The court of appeals declined to address the issues raised, and instead remanded the matter to allow this Court to rule on an outstanding Rule 15, SCRCP, motion. *Broom v. Ten State St., LLP*, No. 2015-UP-030, 2015 WL 164429, at *1 (S.C. Ct. App. filed Jan. 14, 2015).

Broom petitioned the Supreme Court for a writ of certiorari to review the court of appeals opinion, arguing the second issue—whether the trial court erred in dismissing the counterclaims without allowing Andrews to amend his pleadings—was unpreserved for appellate review and thus an improper basis for the court of appeals to remand for a ruling. The Supreme Court reversed, finding the issue was not preserved because Andrews failed to obtain a ruling on that issue, thereby upholding the trial court's ruling that Andrews' pleadings could not be amended. **Exhibit 3**, *Broom v. Ten State St., LLP*, No. 2015-000583, 2015 WL 5728106, at *1 (S.C. Sept. 30, 2015). Andrews petitioned for rehearing, claiming that the Supreme Court's decision would "send the case back to the [c]ourt of [a]ppeals because the [c]ourt of [a]ppeals explained in footnote 1 that it did not consider all the case's issues." While Andrews acknowledged the court of appeals' decision was incorrect, he urged the Supreme Court to end the appeal and allow him to amend his pleadings. **Exhibit 4**, Andrews' Petition for Rehearing. The Supreme Court expressly rejected Andrews requests to end appellate review and to allow him to amend his pleadings by denying his petition. **Exhibit 5**, December 3, 2015 Order Denying Petition for Rehearing; **Exhibit 6**, Remittitur.

Following the issuance of the remittitur, Andrews' counsel wrote a letter to the Supreme Court acknowledging the end of the appeal and that Andrews failed to obtain a ruling on the first issue he had appealed. **Exhibit 7**, December 10, 2015 Letter from Andrews' Counsel. Counsel explained his intent after the appeal had ended was to try to address the prior motion to amend in trial court, despite the denial of his petition for rehearing, and his hope to eliminate any need for further appeal. *Id.* The Supreme Court responded with a form letter citing *Wise v. South Carolina Department of Corrections*, 372 S.C. 173, 174, 642 S.E.2d 551, 551 (2007), which holds an appellate court has no jurisdiction following the issuance of the remittitur unless the sending of the remittitur is by mistake. **Exhibit 8**, January 6, 2015 Letter from Supreme Court.

Andrews subsequently filed a second motion to amend his answer, asserting identical counterclaims and third-party complaint. Broom opposed the motion. This Court granted the motion under Rule 15, SCRCF. Following the amendment of the pleadings, Broom filed this motion to dismiss.

STANDARD OF REVIEW

Under Rule 12(b)(6), SCRCF, a party may move to dismiss a complaint or counterclaims based on a failure to state facts sufficient to constitute a cause of action. *Spence v. Spence*, 368 S.C. 106, 116–17, 628 S.E.2d 869, 874 (2006). A motion to dismiss under Rule 12(b)(6) should be granted if the facts alleged and inferences provide no available relief. *Gentry v. Yonce*, 337 S.C. 1, 522 S.E.2d 137 (1999).

DISCUSSION

- I. **The Law of the Case Doctrine Bars Andrews' Same Counterclaims and Third-Party Claims.**
 - i. **Andrews' Direct Claims became Law of the Case when he Voluntarily Abandoned his Appeal.**

Andrews invites this Court to revisit the same claims it already dismissed in direct contravention of this Court's own rulings. In his appeal, Andrews raised the issue of whether it was error to dismiss his direct claims. The Supreme Court declined to rule on this argument and instead issued the remittitur. Although Andrews would treat the silence as a loophole in which to revive his case, his failure to obtain a ruling is affirmance under the law of the case doctrine; and he is prohibited from re-litigating these issues.

The law of the case doctrine prohibits issues that have been decided in a prior appeal from being re-litigated. *Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997); *see also Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 573, 776 S.E.2d 397, 404 (Ct. App. 2015) ("The policy behind the law of the case is to promote the finality and efficiency of the judicial process by protecting against the agitation of settled issues.") (internal citation omitted). The law of the case applies to issues explicitly decided and to those that are necessarily involved in the appellate court's ruling. *Id.* It also forbids a party from "re-litigating issues decided in a lower court, when the party voluntarily abandons its appeal of that order." *Hudson ex rel. Hudson v. Lancaster Convalescent Ctr.*, 407 S.C. 112, 119–20, 754 S.E.2d 486, 490 (2014).

The law of the case doctrine equally applies to a remittitur. *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("The doctrine of the law of the case applies to an order or ruling which finally determines a substantial right."). A party is required to file a motion for reinstatement (to recall the remittitur) if a remittitur is sent by mistake or in error. Rule 221, SCACR. This allows an appellate court to consider the motion despite the well-settled finality of a remittitur. *Wise v. S.C. Dep't of Corr.*, 372 S.C. 173, 174, 642 S.E.2d 551, 551 (2007) (citing *State v. Keels*, 39 S.C. 553, 17 S.E. 802 (1893)). A motion for reinstatement is the appropriate means for an appellate court to determine whether the remittitur was "sent down by

mistake, error[,] or inadvertence.” *Id.*; see also *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) (“Under the law-of-the-case doctrine, a party is precluded from re-litigating, after an appeal, *matters that were either not raised on appeal, but should have been*, or raised on appeal, but expressly rejected by the appellate court.”) (emphasis added).

The law is clear on this issue. Andrews declined to file a motion for reinstatement (to recall the remittitur) following the Supreme Court’s issuance of the remittitur and this effectively settled all attendant issues by automatically affirming them. Nothing remains for this Court to consider. Attempts to raise the same claims in an amended complaint cannot conceal the procedural bar that prohibits further consideration of his allegations. *Argoe v. Three Rivers Behavioral Health, LLC*, No. 2014-001511, 2017 WL 1293986, at *5 (S.C. Ct. App. Apr. 5, 2017).

To avoid this result, Andrews suggests his amended counterclaims are derivative as opposed to direct in nature. Yet a comparison of the 2006 and 2016 pleadings reveal the counterclaims are identical and contain the same factual allegations with nothing adduced to convert his pleadings to derivative claims pursuant to Rule 23, SCRPC. Instead, Andrews’ counterclaims continue his efforts to relitigate the dismissal with prejudice after an unsuccessful appeal and to circumvent the corporate form and nature of the claims. For example, in the breach of fiduciary claim, breach of contract claims, and breach of contract accompanied by a fraudulent act claims, Andrews continues to argue the loss is suffered by him individually not Tri-Star. See ¶ 37 (“Plaintiff gave preference monies to relatives over paying the debts owed to Andrews.”); ¶ 38 (“Plaintiff’s actions rendered Tri-Star incapable of paying the monies owed to Andrews”); ¶ 45 (“Additionally, Plaintiff distributed substantial sums of money to his relatives over repayment of monies owed to Andrews.”); ¶ 47 (“Plaintiff’s actions rendered Tri-Star incapable of repaying the monies owed to Andrews.”); ¶ 52 (“Plaintiff’s breach was accompanied by a

fraudulent act, which can be characterized by dishonesty in fact, unfair dealing and/or the unlawful appropriation of Andrew's money by design.”). This Court has already dismissed these same claims with prejudice and that dismissal, right or wrong, is the law of the case.

ii. Dismissal with Prejudice of the Third-Party Claims was Not Appealed, and the Ruling is the Law of the Case.

Similarly, Andrews is barred from reviving his third-party claims because he failed to challenge this Court's dismissal of those claims with prejudice. A review of Andrews' motion to reconsider and his court of appeals' brief illustrates he only appealed the ruling on the direct claims. **Exhibit 2** at 1. The ruling as to the third-party claims is now law of the case with the practical effect of foreclosing the third-party complaint.

An unappealed ruling is the law of the case. *Shirley's Iron Works, Inc.*, 403 S.C. at 573, 743 S.E.2d at 785. “Thus, should the appealing party fail to raise all of the grounds upon which a lower court's decision was based, those unappealed findings—whether correct or not—become the law of the case.” *Dreher v. S.C. Dep't of Health & Envtl. Control*, 412 S.C. 244, 249–50, 772 S.E.2d 505, 508 (2015) (citing *Judy*, 381 S.C. at 458, 674 S.E.2d at 153 (“Under the law-of-the-case doctrine, a party is precluded from re-litigating . . . , [*inter alia*,] matters that were [] not raised on appeal, but should have been . . . ”)).

This Court's November 1, 2011 Order expressly dismissed “all claims of Tri-Star and all claims brought by Andrews individually that overlap with any alleged injuries suffered by Tri-Star” with prejudice. **Exhibit 1** at 8. As discussed *supra*, this Court explained that because the alleged loss was to the corporation, the claims were derivative in nature. *Id.* at 4. On appeal, Andrews did not argue that the Court erred in dismissing the derivative claims; rather he argued that it was an error to not allow him to bring the claims directly. **Exhibit 2**. Andrews is

accordingly precluded from re-litigating the derivative claims, which remain barred by the law of the case doctrine.

II. Res Judicata Prohibits Andrews' Counterclaims and Third-Party Claims

To the extent Andrews would argue he is initiating a new cause of action within his amended complaint, his counterclaims and third-party claims are barred by the doctrine of res judicata.

Res judicata defines the effect a final order may have on subsequent litigation between the same parties. *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999). "Res judicata ends litigation, promotes judicial economy and avoids the harassment of re-litigation of the same issues." *Id.* The purpose of res judicata is to ensure that no one is subject to the same cause of action twice. *Judy v. Judy*, 393 S.C. 160, 173, 712 S.E.2d 408, 414 (2011). Res judicata bars parties from bringing subsequent actions on either the adjudicated issues or any issues that might have been raised in the first suit. *Plum Creek Dev. Co.*, 334 S.C. at 34, 512 S.E.2d at 109.

Res judicata may be applied if (1) the identities of the parties are the same as in the prior litigation, (2) the subject matter is the same as in the prior litigation, and (3) there was a final adjudication on the matter. *Catawba Indian Nation v. State*, 407 S.C. 526, 538, 756 S.E.2d 900, 907 (2014).

Here, all three elements of res judicata have been met. First, the parties are identical. These parties have been the sole parties for over ten years of litigation and are in the exact position as fellow shareholders and directors, in which they organized and conducted their joint venture.

Second, the subject matter is the same subject matter as in the prior litigation. In both sets of counterclaims, Andrews alleged the following identical claims against Broom: (1) Breach of Fiduciary Duty; (2) Breach of Contract; (3) Breach of Contract Accompanied by a Fraudulent Act;

(4) Breach of the Covenant of Good Faith and Fair Dealing; (5) Conversion; (6) Violation of S. C. Code of Laws §33-8-300; (7) Violation of S.C. Code of Laws §33-8-420; (8) Promissory Estoppel; (9) Fraud; and (10) Negligent Misrepresentation. A comparison between the 2006 pleading and the 2016 are identical in causes of actions, allegations, and parties except for a few factual details. See 2016 pleadings, ¶¶ 22, 31, 32, 34-39, 43, 45-47.

Third, there has been final adjudication of the claims, which led to Andrews' appeal. The prior litigation in this matter conclusively held that all of Andrews' counterclaims, individually and on behalf of Tri-Star, were dismissed with prejudiced. **Exhibit 1.** Specifically, Andrews failed to obtain a ruling by the court of appeals on his direct claims and did not appeal the ruling as to the derivative claims. See *Johnson v. Bd. of Comm'rs of Police Ins. & Annuity Fund of State*, 221 S.C. 23, 32, 68 S.E.2d 629, 633 (1952) ("An order not appealed from is binding on all parties before the Court, constitutes the law of the case, and, when questioned, is res judicata . . ."). For these reasons, all claims now asserted by Andrews have had a final determination by the courts and are barred by res judicata. See *Lowe v. Clayton*, 264 S.C. 75, 82, 212 S.E.2d 582, 585-86 (1975) (all questions which were actually litigated in the prior action and determined by the judgment are conclusive in any subsequent action between the parties, or their privies, regardless of whether the subsequent action involves the same or a different cause of action.").

CONCLUSION

Based on the forgoing reasons, this Court should grant Broom's motion to dismiss.

Signature page to follow

RESPECTFULLY SUBMITTED,

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May 16, 2017
Columbia, SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
	)	Civil Action No. 2008-CP-42-3397
Quentin S. Broom, Jr.,	)	
	)	
Plaintiff,	)	<u>PRIORITY MATTER</u>
v.	)	
	)	<u>EXPEDITED HEARING REQUESTED:</u>
Ten State Street, L.L.P., Timothy D.	)	<u>7 BUSINESS DAYS UNTIL TRIAL</u>
Scrantom, and H. Hughes Andrews,	)	
Defendants,	)	
of whom,	)	PLAINTIFF QUENTIN S. BROOM, JR.'S
	)	MOTION FOR SUMMARY JUDGMENT
H. Hughes Andrews, is the	)	ALL COUNTERCLAIMS
	)	
Counter-Claimant.	)	
_____	)	

Plaintiff Quentin Broom, Jr., by and through undersigned counsel, respectfully submits this summary judgment motion and requests an expedited hearing pursuant to Rule 40(h) of the South Carolina Rules of Civil Procedure. Broom requests this immediate review and priority hearing due to the limited time between filing and the current trial date. Broom believes addressing the issues raised herein will provide an opportunity to significantly narrow the issues to be addressed by the Court, the parties, and the witnesses. For these reasons, Broom requests a hearing no later than June 22, 2017. *See* Rule 6, SCRCP (allowing the court to modify the standard time for responding to or hearing a motion).

As to the merits of this motion, summary judgment should be granted on Andrews counterclaims for six reasons:

- (1) Andrews has failed to provide and does not have any evidence to support his alleged counterclaims.

- (2) Collateral estoppel bars any derivative claim based on Tri-Star's alleged debt owed to Andrews, which is completely barred by the statute of limitations.
- (3) The common law claims are abrogated by the statutory provisions for directors and officers, pursuant to sections 33-8-300(e) and 33-8-420 of the South Carolina Code. Additionally, on the merits under either provision Andrews' claims are barred by the business judgment rule.
- (4) The claims for promissory estoppel, fraud, and negligent misrepresentation are not derivative claims and are thus barred under this Court's November 1, 2011 Order and June 2, 2017 Order.
- (5) All counterclaims, including the derivative claims, are barred by the law of the case doctrine and res judicata.
- (6) Andrews' third party complaint violates Rule 7 and Rule 14(a), SCRCF, and is not properly before the Court.

Accordingly, summary judgment should be granted on all counterclaims, including the derivative claims.

FACTUAL & PROCEDURAL HISTORY

I. Background: Formation of Tri-Star and the 1999 Promissory Note Payable to Drew's Distributing

In the late 1990s, Broom and Andrews began working together on several business ventures, which included owning and operating video gaming machines. In the video gaming venture, they were equal shareholders of Tri-Star Communications, Inc., a South Carolina corporation. Andrews and Broom agreed Broom would be the sole officer overseeing and running the business operations. (Exhibit 1, Andrews Depo. 8/30/07, at 21) Because of the governmental

ban on video gaming in South Carolina in 2000 and then in the Dominican Republic in 2005, Tri-Star was forced to cease operations and liquidate in 2005.

In addition to this joint venture, Andrews was separately engaged in a business, Drew's Distributing, which sold video gaming machines. Tri-Star was a client of Drew's and purchased hundreds of gaming machines. In connection with this transaction, Broom, Andrews, and Tri-Star executed a Promissory Note and a Purchase Money Security Agreement, dated December 21, 1999 ("Note") (Exhibit 2), and made payable to Drew's. Tri-Star's first payment to Drew's on the Note was due on January 1, 2000.

Tri-Star may have made a few payments to Drew's initially, but by the end of 2000 Tri-Star had ceased making payments to Drew's. (Exhibit 3, Transcript of Bench Trial (Vol. 2) at 266, 271 (Testimony of Andrews' bookkeeper, Claudia Humphries) in *IGT v. Hugh Andrews II*, 7:03-1407 (D.S.C. Mar. 29, 2006)) By 2002, Tri-Star had been in default on the 1999 Note payable to Drew's, and Andrews knew it was in default and that he would not be getting repaid. (Exhibit 4, Transcript of Bench Trial (Vol. 1) at 106-07, 116-17, 127-28 in *IGT v. Hugh Andrews II*, 7:03-1407 (D.S.C. Mar. 28, 2006)). On November 11, 2002, Drew's assigned its receivables to Andrews, individually. (Exhibit 5, Assignment of Drew's Receivables to Andrews) At the same time, Andrews "wrote the debt off" because he knew there was no money in Tri-Star to pay the receivable. (Exhibit 1, at 116;¹ see also Exhibit 6, Brown depo July 12, 2007, at 25-26 & 30)

¹ Q: And you certainly took the refund and deposited it into your personal accounts once it came back, whatever refund you got as a result of that write off?

A: She [Claudia Humphries, my bookkeeper] probably did, yes.

...

Q: So you wrote this debt off when in fact it was collectible, did you not?

A: No, it wasn't. The – ***I wrote the debt off*** to take advantage of a tax situation at a time for tax reasons. I still fully intended to try to collect the debt. There was no – the money – was there two or three million dollars in Tri-Star to go – no sir, there wasn't.

Exhibit 1 at 115-116 (emphasis added).

II. **Background: Shift in the Business Model**

In the summer of 2000, in reaction to enacted South Carolina legislation banning video gaming machines, Tri-Star was forced to change its business model to stay in business and have any chance of remaining profitable. (Exhibit 1, at 26-27; Exhibit 4, at 105-06) Specifically, between 2001 and 2002, Tri-Star sold its machines to Calum, LLC, which Andrews and Broom have an economic interest through membership shares in Akilah, Ltd. (Exhibit 7, Structure of Calum) Calum relocated the machines to the Dominican Republic for gaming use with its subsidiary World Wide Entertainment. (Exhibit 8, Transnational Sales Agreements between Calum and Tri-Star) World Wide was run by Frank Dillashaw and partnered with Jackpot, PA and its Dominican directors to operate gaming in the Dominican Republic.

Under this new model, Tri-Star supplied consultants, like Broom, to World Wide. (Exhibit 9, Consultant Agreement between World Wide and Tri-Star) Tri-Star's consultants assisted Calum with marketing, set up and lay out, and provided general direction and instruction on the gaming operations.

Andrews retained Ten State Street, LLP and attorney Timothy D. Scrantom (collectively "Ten State Street") to assist in establishing the international business structure and entities, as well as assist with the transition of Tri-Star operations to the Dominican Republic and to providing consulting services.

During the transition of gaming operations to the Dominican Republic, Tri-Star experienced a significant reduction in revenues. This is evidenced by Tri-Star's 1999 income of approximately \$2.27 million, as compared to Tri-Star's 2000, 2002, and 2003 income of approximately half with reported other income of \$1.1, \$1.3, and \$1.4 million, respectively.

(Exhibit 10, Tri-Star Form 1120S for 1999, 2000,² 2002, and 2003 (with 2003 also showing \$1.6 million in phantom income from Andrews' unilateral cancellation of notes payable, including the Note, from Tri-Star to Drew's and Andrews)) It is undisputed Andrews was aware of Tri-Star's financial circumstances in 2002 and specifically that it had no money to pay the 1999 Note. Andrews cancelled the note payable to Drew's after having it assigned to him in 2002. (Exhibit 5, Assignment; Exhibit 11, Tri-Star Adjusting Journal Entries for 2003 and Statement 1 Form 1120S)

Tri-Star's operation mainly as a consulting business remained intact until 2005. On June 27, 2005, without notice, the Attorney General of the Dominican Republic gave a directive that video gaming machine operators had forty-eight hours to remove all machines from the Dominican Republic market, i.e. ensure the machines were not available to consumers on the street. (Exhibit 12, news articles from the Dominican Republic) He further advised that any machines left in the stream of commerce would be confiscated and destroyed. (*Id.*) Because of this governmental action, Tri-Star, through the efforts of Broom and the Dominican directors, managers, and employees of World Wide, undertook to assemble and marshal most of the machines to a warehouse and completed that task on June 30, 2005.³ (Exhibit 13, 2005 Knie Letters) Andrews did not help.

Just days later, on July 4, 2005, the Dominican Attorney General issued another directive to all video operators that the machines had to be "retired" or removed from the Dominican Republic within twenty days. (*Id.*) Initially, Tri-Star was hopeful that operations could be resumed and did everything within its resources to manage the situation and improve the political situation, including keeping Andrews informed and asking for his help. (Exhibit 13) Andrews was kept

² Tri-Star earned only \$215,915 in commissions in 2001. (Exhibit 10, Tri-Star Form 1120S for 2001)

³ This was a huge undertaking. Unfortunately, some of the machines were confiscated.

apprised of the situation on a regular basis through attorneys for Broom and Andrews. (*Id.*) Broom made requests for capital contributions to Andrews in order to carry the business through this transition period. (Exhibit 13)

Andrews refused to provide capital contributions for Tri-Star. Without the financial resources to maintain the business under the circumstances of the ban and campaign to confiscate all video gaming machines, Tri-Star made the only decision an ordinarily prudent business person would make under similar circumstances. (Exhibit 13) Broom reasonably believed the business decision to sell and liquidate its remaining inventory of video gaming machines was in the best interests of the corporation and its shareholders, and he informed Andrews and his advisors. (*Id.*)

Andrews admits he saw the letters from Broom's attorney Pat Knie in August and September 2005, explaining the risks and challenges in the Dominican Republic and describing his plan for liquidation. (Exhibit 1, at 73-75) Upon the liquidation of the machines and payment of loan and equity payments to Andrews, Tri-Star effectively ceased operations and was administratively dissolved on August 13, 2009.

III. Background: Andrews, the U.S. Bankruptcy Court, and the IGT Supplemental Proceedings in U.S. District Court

On December 7, 2005, Andrews filed an involuntary petition in the U.S. Bankruptcy Court for relief against Tri-Star under Chapter 11 of the Bankruptcy Code. (Exhibit 14, Petition for Involuntary Relief). In his bankruptcy filings, Andrews made only one claim for \$130,000 business loan he made to Tri-Star. *Id.* ¶ 5. Notably, the debt also appeared on Tri-Star's September 30, 2005 balance sheet.

Tri-Star's general ledgers indicated the \$130,000 owed to Andrews and a similar amount owed to Broom's company. *Id.* ¶ 7. Broom had checks issued to Andrews pre-petition, which

were refused and then again post-petition to satisfy his petition debt claim along with two checks in the amounts of \$25,000 and \$60,000, “representing Andrews’ equity in Tri-Star after liquidation of assets.” (Exhibit 15, Tri-Star checks deposited by Andrews) Moreover, the Bankruptcy Court found no evidence that Tri-Star owed any debt to Andrews, other than the amounts that had already been paid in March 2006. (Exhibit 16, Order Denying Petition for Involuntary Relief, *In re: Tri-Star Communications, Inc.*, 05-45299-hb, at 12 (Bankr. D.S.C. Nov. 22, 2006); *see also* Exhibit 17, Spreadsheet showing promissory note payables to Andrews and Broom from 2002 through liquidation of Tri-Star in 2005).

The Bankruptcy Court determined:

the primary reason [Broom had requested a] capital contribution [from Andrews was] protection of [Tri-Star’s] assets and ongoing operating expenses.”⁴ **There is no mention of any outstanding and unpaid debts** and further the focus is on maintaining the value of Tri-Star’s assets for the equity holders, not on repaying debt.” ... **While Andrews has shown a reduction of assets by Tri-Star and the winding down of that business, he has failed to meet his burden of proving that as of December 7, 2005, Tri-Star was not paying its debts as they came due.** Rather, the evidence indicates that the assets of the business were liquidated, relevant debts paid and Broom thereafter distributed funds that were sufficient to make a distribution to equity holders with a few thousand dollars remaining in the bank. Liquidation of assets resulting in payment of debt, whether voluntary or economically unavoidable, is not the equivalent of a failure to meet creditor obligations as they come due.

⁴ The Bankruptcy Court also held: “Andrews points to a request for a capital contribution from shareholders to meet obligations prior to December 7 as evidence that Tri-Star was not paying debts as they became due. However, the reason for the request as stated in the correspondence is as follows: ‘Tri-Star is in dire need of capital. It is recommended that the principals contribute \$20,000 each immediately in order to maintain the operation of the business and our position in the Dominican Republic for thirty (30) additional days. . . . Worldwide immediately needs \$20,000 for expenses related to the protection of its assets as well as Tri-Stars, including but not limited to, warehouse rental, security for the equipment, Franks living expenses, insurance, fuel, legal, accounting, vehicles, and phones, etc In summary, time is of the essence. We could lose all of our assets in the Dominican Republic if immediate action is not taken on these issues.’” Order Denying Petition for Involuntary Relief, at 12 (quoting excerpt from Knie letter dated September 30, 2005).

Exhibit 16, at 14 (emphasis added). Because Andrews in 2002 had previously cancelled the Tri-Star 1999 Note payable to Drew's and then Andrews, he never made any claim for the cancelled debt in his bankruptcy petition for relief against Tri-Star.

At some point in an arbitration over a contract dispute, Drew's had been ordered to pay IGT \$780,000. Andrews transferred all assets, namely receivables, from Drew's to himself on November 11, 2002. IGT commenced supplemental proceedings in U.S. District Court in Spartanburg against Andrews to pierce the corporate veil of Drew's and to set aside the Assignment of receivables as fraudulent. A bench trial was held March 28-29, 2006. Andrews and his bookkeeper and other employees testified about the Note and other matters relevant to his counterclaims in this case.

IV. Relevant Procedural History

During the turmoil and uncertainty after the Dominican Republic banned video gaming machines, Broom filed this lawsuit against Andrews and Ten State Street. Broom alleged various causes of action related to the international transactions and structure for the gaming operations in the Dominican Republic. In May 2006, Andrews moved to amend his answer to assert these counterclaims against Broom.

On November 1, 2011, this Court dismissed with prejudice all of Andrews' counterclaims.⁵ After an appeal, on July 8, 2016, Andrews filed the Second Amended Answer and Counterclaims, asserting the same counterclaims that were originally filed in 2006 and dismissed with prejudice in 2011. In an Order dated June 2, 2017, this Court "adhere[d] to its previous ruling that the claims presented by Andrews are derivative" but allowed allegations of direct claims by Andrews,

⁵ Broom incorporates by reference the factual and procedural history of Andrews' prior appeals as discussed in his Supplemental Motion to Dismiss and Motion for Reconsideration.

individually, to remain in the pleading only so that Andrews could “preserve his ability to make a future argument that a direct recovery was appropriate.” *Id.* For sake of brevity and in light of this ruling, Broom incorporates by reference all prior arguments on the direct *versus* derivative nature of the counterclaims, to the extent it is required.

This motion for summary judgment is being filed to eliminate all counterclaims for which Broom is entitled to judgment as a matter of law and to narrow the issues for trial.

LEGAL STANDARD

Pursuant to Rule 56, SCRCF, summary judgment is appropriate whenever “there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.” Rule 56(c), SCRCF; *Baughman v. American Telephone & Telegraph Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991). In considering a motion for summary judgment, the Court must view the evidence in the light most favorable to the nonmoving party. The nonmoving party, however, must “do more than simply show that there is some metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial.” *Baughman* 410 S.E.2d at 545 (internal quotation omitted).

DISCUSSION

Despite a lengthy procedural history and complicated facts, this case is quite simple. Andrews has failed to provide any evidence to support his alleged counterclaims. Andrews’ counterclaims, asserting mismanagement by Broom, hinge on five factual allegations that are unsupported by any evidence in the record. This deficiency is systemic, permeating every counterclaim. This lack of evidentiary support alone warrants the grant of summary judgment on all counterclaims.

Moreover, the derivative counterclaims are barred on the basis of collateral estoppel, statute of limitations, and improper pleading pursuant to Rule 7 and Rule 14 (a), SCRCF. As to the direct counterclaims, summary judgment is proper because the common law claims are

abrogated by the statutory provisions for officers and directors and are barred by the statute of limitations on the underlying 1999 Note. The counterclaims for mismanagement are also barred by the business judgment rule. Additionally, the claims for promissory estoppel, fraud, and negligent misrepresentation are not properly pled as derivative claims and summary judgment should be granted for this independent basis. Further, both the derivative and direct counterclaims are barred by the law of the case doctrine and res judicata.

I. Rule 201(d), SCRE, Necessitates the Court Take Judicial Notice of the Underlying Filings and Orders Related to Andrews and the Prior Testimony, Factual Findings, and Adjudication on Matters in the Courts of South Carolina.

Pursuant to Rule 201(d) of the South Carolina Rules of Evidence, Broom requests the Court take notice of the orders, filings, and all records related to Andrews' bankruptcy petition and proceedings and the IGT litigation. These materials include factual and legal issues Andrews now seeks relief on in direct contradiction to prior testimony and judicial findings. Rule 201(d), SCRE ("A court shall take judicial notice if requested by a party and supplied with the necessary information."); *Doe v. Bishop of Charleston*, 407 S.C. 128, 135, 754 S.E.2d 494, 498 (2014) (noting under the federal rules, courts may consider facts subject to judicial notice, including orders and records in the underlying cases); *General Time Corp. Bulk Materials Inc.*, 826 F. Supp. 471, 473 (M.D. Ga. 1993) (consent order); *Stahl v. U.S. Dept. of Agriculture*, 327 F.3d 697, 700 (8th Cir. 2003) (contract documents). The documents for judicial notice are attached to this filing as exhibits or incorporated by reference, and discussed herein.

II. An Examination of Andrews' Factual Allegations Demonstrate the Pleadings are Unsupported by Any Evidence

For more than a decade, Andrews has adamantly asserted in his counterclaims that Broom committed corporate malfeasance to the detriment of Tri-Star and himself, all of which stems from

five factual allegations. These five factual allegations are: an unpaid/unsatisfied debt arising from the 1999 Note between Tri-Star and Drew's; Broom's decision to take a deferred salary; the liquidation of Tri-Star; Broom's earnings from other businesses after Tri-Star's liquidation; and loan repayments to Broom's father or other family members. When these factual allegations are examined it becomes evident that Andrews' assertions are unfounded and are unsupported by evidence in the record. In fact, they are repeatedly contradicted by a myriad of evidence including Andrews' own sworn testimony and prior findings by other courts. As discussed herein, Andrews' failure to provide a mere scintilla of evidence to support these allegations against Broom entitles Broom to summary judgment as a matter of law.

A. The 1999 Note is Obsolete

Andrews has continuously suggested the linchpin of his counterclaims is an unsatisfied debt derived from the 1999 Note that is he now entitled to collect from Broom. This contention, however, is misplaced for three reasons. First, any right to collect on the 1999 Note is barred by the statute of limitations. Andrews' bookkeeper confirmed no payments were made after 2000, and it was not raised until 2006. Second, Andrews canceled the 1999 Note in 2002 by claiming the loss as bad debt, thereby benefitting him in the IGT litigation and with a significant personal income tax break. This is clearly evidenced by the deduction of the bad debt on Andrews' personal income taxes and his sworn testimony in the IGT litigation. Third, the U.S. Bankruptcy Court did not identify the 1999 Note as debt, and Andrews did not claim it as a creditor. Therefore, he is now barred from asserting such a debt against Broom.

Any potential claim based on the 1999 Note is barred by the statute of limitations. *See* S.C. Code § 15-3-530(1). Here it is undisputed the 1999 Note was entered into between Tri Star and Drew's in 1999, and Andrews took assignment in 2002. (Exhibit 1, at 41; Exhibit 2). Because no payments were made after 2000, the right to enforce the debt expired in 2003. *See generally* S.C. Code Ann. § 36-9-404. (*see also* Exhibit 16 (Bankruptcy Court holding "there was no evidence

presented that any demand was being made for payment for any debt as of the petition date December 8, 2005, and there is no indication from the evidence that any debt of Tri-Star had been outstanding for any length of time or that Tri-Star experienced any inability to meet large debt obligations.” This alone forecloses any right of recovery by Andrews.

Second, Andrews’ Note payable had already been canceled, and he claimed the amount realized for the loss as a bad debt and sought a deduction in 2002. *See generally*, sec. 1.166–1(c), Income Tax Regs. This fact is undisputed. Andrews repeatedly stated in his deposition that “for tax purposes” he wrote the note off, and by doing so he received “a large income tax refund.” (Exhibit 1 at 41-42; *Id.* at 116) Moreover, he conceded once the Drew’s obligation was assigned to him it was written off. (*Id.* at 44-45; *see also* Exhibit 18, Russell Depo. at 21 (testifying that the Drews’ debt from Tri-Star was a bad debt)).

Third, the U.S. Bankruptcy Court proceedings demonstrate the debt was canceled before 2005. At the time of the petition, Andrews did not claim the debt nor was it listed on the general ledger. The Bankruptcy Court explained evidence indicated that Tri-Star paid Andrews for the remainder of all his debt at the time of liquidation, which did not include the 1999 Note or any amount from it. (Exhibit 16). Moreover, the Bankruptcy Court held “evidence indicates that Tri-Star, through Broom, liquidated assets, paid debts, and the remainder was distributed to equity holders, with a little left in the bank.” (*Id.*) Accordingly, this further proves the 1999 Note had been canceled.

While Andrews may be disappointed in the outcome of the business venture and the inability to collect on the 1999 Note since 2000, it cannot be a basis for his claims against Broom now. The only evidence demonstrates Andrews not only failed to bring a timely claim for the debt, but that he also received a significant financial benefit for canceling the debt in 2002 and denying

the collectability of the debt in the IGT litigation. Further, Andrews is bound by the Bankruptcy Court's finding that Tri-Star and Broom were meeting creditor obligations as they came due in 2005, all debts had been satisfied at the time of the petition in 2005, and Andrews did not claim the debt—demonstrating the debt was canceled.

B. Deferred Salary

Andrews also asserts Broom improperly compensated himself in the amount of \$920,000 when Tri-Star owed Andrews substantial money for business operations. *See* Counterclaims ¶¶ 31 and 33. This assertion is unfounded. A review of the evidence demonstrates the parties agreed Broom, in his capacity as the sole officer, would oversee and run the business operations of Tri-Star and in return for those services he would be entitled to compensation. (Exhibit 1, at 121 (Andrews admitting he and Broom discussed a \$60,000 salary and that over the course of a five-year period the salary would accrue to \$300,000 in addition to any loan repayments and distributions); *Id.* at 72 (explaining that Broom ran the Dominican operation)) Broom's deferred salary is also supported by Tri-Star's CPA, Timothy Russell, who testified that he believed Broom's salary was reasonable. (Exhibit 18, Russell Depo. at 27 ("Q: Did you think the [salary] number that he decided to take was a fair number? A: Yea. Q: He done the work, right? A: Right")) Moreover, Russell repeatedly reported Broom's salary on Tri-Star's financials, and at no point did Andrews contact him to complain about the unreasonableness of the salary. (*Id.* at 27-28) In stark contrast to this evidence, Andrews has offered no evidence to contradict Broom's entitlement to salary other than a cursory allegation and after-the-fact disappointment. Thus, Broom's deferred salary payments cannot be a basis for Andrews' counterclaims.

C. Liquidation

Andrews also incorrectly contends Broom improperly, “without consent or authority,” liquidated Tri-Star’s assets. Counterclaims ¶ 34. This assertion is baseless and unsupported by any authority. First, there is no requirement that Broom seek consent or authority to sell Tri-Star’s assets, especially in such exigent circumstances. Andrews has produced no evidence to suggest that Broom had any such requirement.

Second, and in direct contradiction to Andrews’ assertion, evidence demonstrates Broom repeatedly contacted Andrews to keep him apprised of developments in the Dominican Republic and the potential requirement of liquidation. Between August 2005 and December 2005, at least seven letters were sent between the parties to discuss Tri-Star’s dire financial and operational situation.⁶ (*See* Exhibit 13, August 10, 2005 Letter (detailing the shift in the political climate in the Dominican Republic, and Broom’s concern that the machines could not be exported because they would “most certainly” be “confiscated and destroyed”); *Id.* (“If the situation does not resolve quickly, it will be necessary to fund Tri-Star to allow the continuation of work to resolve the issue.”); *see also* Exhibit 13, August 17, 2005 Letter))

While initial letters in August 2005 remained hopeful, by September 2005 Broom began attempting to reduce overhead by vacating a warehouse and asking Andrews for monetary assistance in the rent for his other business ventures. (Exhibit 13, September 28, 2005 Letter) Moreover, at this time Broom informed Andrews of Tri-Star’s “need to be funded for protection of its assets in the Dominican Republic . . .” and his belief that Tri-Star was “facing impending financial difficulty.” (*Id.* & Exhibit 13, September 30, 2005 Letter; September 30, 2005 Letter

⁶ Notably, this correspondence was relied on heavily by the Bankruptcy Court. *See* Exhibit 16, Bankruptcy Court Order at 4-7.

(explaining “Tri-Star is in dire need of capital” and requesting each principal contribute \$20,000)).

By the end of September 2005, Broom expressly raised his concerns with Andrews, with his counsel stating:

We could lose all of our assets in the Dominican Republic if immediate action is not taken on these issues. It is therefore imperative that we know Mr. Andrews’ position so the appropriate measures can be taken to protect these jointly owned businesses and so Mr. Broom can make appropriate decisions concerning his future as well.

Id.

In October 2005, it is undisputed that Broom warned of immediate and dire consequences without the assistance of Andrews with Tri-Star. (*See* Exhibit 13, October 10, 2005 (explaining Tri-Star “will simply not be able to survive without an injection of capital”)) at this time, Broom notified Andrews that if he was not willing to contribute the requested funds he would “begin the process of liquidating the assets” to “meet pending financial obligations, including taxes.” (*Id.*) Despite these repeated requests, Andrews did not agree to contribute and instead explained he had “insufficient” information was “not inclined to make any contributions.” (Exhibit 13, October 19, 2005 Letter) As a result, Broom was left no choice and liquidated the machines, which could not be used, and notified Andrews. While Andrews now suggests Broom had no authority, he offers no evidence that he advised Broom on how to address the matter, which is especially concerning given the time-sensitive nature of Broom’s communications and warnings, and the dire circumstances.

Third, Broom’s decision to liquidate as the only means to protect any of Tri-Star’s assets is supported by the change in the Dominican Republic’s climate on video gaming and the change in public policy. (Exhibit 12, News articles) This is further evidenced by Andrews’ stipulation and the Bankruptcy Court’s findings. (*See* Exhibit 16, Bankruptcy Court Order at 3 (“It is stipulated that on June 27, 2005, without notice, the Attorney General of the Dominican Republic

gave a directive that all video poker machine operators had forty-eight hours to remove all machines from the streets in the Dominican Republic and advised Tri-Star that all remaining machines on the street would be confiscated and destroyed.”); *Id.* (“As a result of the actions of the government of the Dominican Republic, Tri-Star, through Broom, undertook to assemble and marshal most of its machines to a warehouse and completed that task by June 30, 2005.”)) Even Andrews acknowledges this drastic change. (Exhibit 1, Andrews Depo. at 70 (agreeing he, Tri-Star, and Broom were at the mercy of the changing government)) The value of the machines had decreased from \$6,900 per machine, when new in 1999 and could be operated in South Carolina, to \$1,000 when sold to Calum for use in the Dominican Republic and then to \$400 per machine in 2005 when they were aged and contraband and being hunted for confiscation and destruction. (Exhibit 4, IGT Trial Transcript at 93, Exhibit 19, October 24, 2005 Jose Perez Letter)

While this last sale came at a significant loss, it is well settled from the news articles, letters from the Attorney General, deposition and IGT testimony, and the 2005 correspondence that Tri-Star could easily have lost all of the machines. In fact, the parties may not have been repaid their \$130,000 loans but for Broom’s reasonable and prudent decision to liquidate. This decision was within Broom’s discretion, was in the best interests of the corporation and shareholders, and more importantly, is uncontradicted by Andrews. Liquidation, under the circumstances in late 2005, cannot support any of Andrews’ counterclaims.

D. Future Revenues

Andrews has further alleged that Broom converted Tri-Star’s assets for his personal use, thereby entitling Andrews to Broom’s future income from other businesses. (Counterclaims ¶ 35) Andrews has submitted no evidence in support of this position nor set forth any legal theory or causation to show how Andrews would be entitled to future revenue from Broom’s businesses in

which Andrews has no ownership interest. His joint venture with Andrews was liquidated and ended in 2005.

Practically, Andrews' contention is inconsistent with his prior actions, like deducting the bad debt and filing an involuntary petition in the Bankruptcy Court. After Tri-Star's liquidation, Andrews cannot claim additional money given his concession there was no money to recover. This allegation also seems to require *res ipsa loquitur*, a doctrine which does not exist in South Carolina. This allegation does not fit any known of asserted legal theory and lacks any evidence to support any of the counterclaims.

E. Loan Repayments to Quentin Broom Sr.

Andrews has also alleged that Broom improperly repaid loans to his father and possibly other family members instead of paying monies owed to him. (Counterclaims ¶ 36) Andrews has offered no evidence on priority to support his position, and the Bankruptcy Court findings directly contradict this allegation. In fact, Mr. Broom Sr. got involved to help keep the business operating and loaned Tri-Star money to support its operations and obligations. (Exhibit 20, Andrews depo. in IGT 1/7/05, at 125; Exhibit 21, TriStar General Ledger Jan. 1, 2004 to Oct. 31, 2004, Acct. No. 20750 ("N/P Mr. Broom" showing all loan payments from Mr. Broom Sr. match loan repayments))

Instead, Andrews has admitted "there's no document" of priority. (Exhibit 20, Andrews Depo. at 46) As discussed above, Andrews has failed to present any evidence of recoverable debt based on the statute of limitations. Andrews also decided to cancel the 1999 Note as bad debt and claim a substantial deduction in 2002. He denied it in the IGT litigation, and the 1999 Note was also written off and removed from Tri-Star's general ledger in 2003.

In sum, Andrews cannot show any evidence to support his counterclaims based on the five factual allegations in the Second Amended Answer and Counterclaims. Summary judgment is

“completely appropriate” when as in this case “when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner.” *David v. McLeod Reg’l Med Ct.* 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006).

III. Collateral Estoppel Bars any Counterclaim Based on Debt that Tri-Star Allegedly owed Andrews

Andrews is also barred from recovering on any counterclaim based on Tri-Star’s notes payable or other debt to him. As previously discussed, Andrews’ counterclaims allege Broom caused Tri-Star to default on loans or promissory notes owed to Andrews. However, when Andrews petitioned the Bankruptcy Court in 2005 he did not claim the debt he is now seeking to recover and on which he is basing all his counterclaims. The Bankruptcy Court found there was no evidence that Tri- Star owed any debt to Andrews other than debt that had already been satisfied. As such, this issue should be precluded from further litigation by Andrews.

South Carolina law recognizes collateral estoppel or issue preclusion as a bar on relitigation of issues previously decided in earlier proceedings. This legal doctrine is based on the “public interest [that] demands an end to the litigation” where a party has once litigated and lost the issue in question. *Beall v. Doe*, 281 S.C. 363, 370, 315 S.E.2d 186, 190 (Ct. App. 1984). A proper application of collateral estoppel supports the “[p]rinciples of finality, certainty, and the proper administration of justice.” *Id.* Collateral estoppel applies only if the particular issue was “(1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment.” *Carolina Renewal, Inc. v. S.C. Dep’t of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009).

Collateral estoppel may be applied by a stranger to the earlier litigation against a person who was a party to the earlier case. *Beall*, 281 S.C. at 370, 315 S.E.2d at 190. This form of collateral estoppel, known as offensive nonmutual collateral estoppel, applies like any other form

of the doctrine unless the estopped party lacked a full and fair opportunity to litigate the issue or was not motivated to defend itself in the earlier litigation. *Wade v. Berkeley County*, 330 S.C. 311, 317, 498 S.E.2d 684, 687 (Ct. App. 1998). Andrews filed the petition and had every incentive to list all then valid and current debt. He did not even mention the 1999 Note or any associated debt. The Bankruptcy Court held a hearing to determine whether the involuntary petition was supported by any evidence that Tri-Star was unable or not paying its debts.

Andrews litigated the issue of the debt Tri-Star owed him as of the 2005 Involuntary Bankruptcy petition. The Bankruptcy Court directly determined that Tri-Star paid all debt owed to Andrews, and these findings were necessary to support the Bankruptcy Court's prior order/judgment that Tri-Star was generally paying its debts as they became due. (*See Bankruptcy Court November 22, 2006 Order*) Thus, offensive non-mutual collateral estoppel bars Andrews' counterclaims against Broom for debts allegedly owed to him by Tri-Star.

IV. Andrews' Common-Law Counterclaims Constitute a Single Cause of Action under Section(s) 33-8-300(e) and 33-8-420(e), both of which are Barred by the Statute of Limitations and the Business Judgment Rule.

Andrews' alleged counterclaims arising from the common law constitute a single cause of action under the applicable statutory provision, which subsumed the common law for the purpose of corporate directors and officers. Under either statutory provision, the derivative claims are barred by the statute of limitations. Additionally, on the merits, these claims are barred by the business judgment rule and standards for conduct by directors and officers.

It is well settled in South Carolina that that common law claims against a director and officer are codified by Code sections 33-8-300 and 33-8-400. *Clearwater Trust v. Bunting*, 367 S.C. 340, 626 S.E.2d 334 (2006). Distinguishable from the common law, the statutory provisions set forth that a claim must be brought "within three years after the cause of action has accrued, or within

two years after the time when the cause of action is discovered, or should reasonably have been discovered, whichever sooner occurs.” *Id.*

Andrews’ counterclaims allege Broom is liable for the \$1.2 million loan that Drew’s made to Tri-Star through the 1999 Note and that was assigned to Andrews in 2002. (*See* Second Counterclaims ¶ 25) Andrews also claims the debt was valued at more than \$3.6 million with possibly penalties and interest that accrued as of October 31, 2005. (*Id.*)

Even if the Court were to accept Andrews’ allegation as true, the first monthly payment would have been due January 1, 2000, and if no payments were ever made after 2000 (as Andrews has and Claudia Humphries consistently maintained in their sworn testimony in the IGT litigation and, in fact, confirmed to the IRS in 2002 canceling as bad debt and deducting from his income taxes this very same receivable) then any claims on that debt must have been brought by January 4, 2002, or two years from the discovery of the default or, alternatively, at least no later than November 11, 2005, which is three years after the Assignment of the Receivable and decision to cancel the debt and deduct it on his personal income taxes as bad business debt. (Exhibit 2, 1999 Note; Exhibit 5, 2002 Assignment)

There is no genuine issue of material fact remaining on any claim for the 1999 Note. It is no longer valid and in any event is barred by the statute of limitation. Because Andrews did not attempt to bring any claim on the Note or debt until May 25, 2006, there is no cause of action against any person or entity for which he could now try to collect. Even if that initial attempt of asserting a counterclaim relates back to the filing of his first pleading, the Answer filed on November 16, 2005, such claim would still be more than three years after the assignment and cancelation and at least five years after default and the last payment made in 2000.

Furthermore, to the extent the Court seeks to address the merits, these claims are barred by the business judgment rule and the legal standards for conduct in the Corporate Code. The business judgment rule has been utilized to protect both officers and directors. Under the rule, a court will not review the business judgment when an officer or director is acting within its authority and acts without corrupt motives and in good faith. *Dockside Ass'n, Inc. v. Detyens*, 291 S.C. 214, 217 352 S.E2d 714, 716 (Ct. App. 1987). In similar fashion to the statute of limitations, South Carolina has codified an analogous rule in section 38-8-300. *See generally Kuznik v. Bees Ferry Assoc.*, 342 S.C. 579, 538 S.E.2d 15 (Ct. App. 2000) (recognizing the codification of the business judgment rule). Pursuant to the statute, a director is protected when he acts in good faith, with the same care as an ordinarily prudent person in similar circumstances in a manner that he reasonably believes to be in the best interests of the corporation. Cf. S.C. Code §§ 33-8-300 & -420.

Here, Andrews has put forth no evidence to suggest the business judgment rule should not apply. As discussed above, Broom has put forth an extensive amount of evidence demonstrating his efforts to keep Tri-Star functioning throughout the policy changes in the Dominican Republic, his attempt to reduce costs, sell the machines to retain some value to Tri-Star's assets, and other actions described herein. For these reasons, summary judgment should be granted on all counterclaims for this independent reason.

V. Andrew Counterclaims for Promissory Estoppel, Fraud, and Negligent Misrepresentation were not pled derivatively, and this Court has previously dismissed all of Andrews' Individual Counterclaims; Additionally, Andrews' Claim for Breach of the Covenant of Good Faith and Fair Dealing Fails as Matter of Law.

As this Court is aware, it previously dismissed with prejudice all direct counterclaims by Andrews individually. (See November 1, 2011 Order & June 2, 2017 Order) In light of Andrews' desire to simply preserve for future argument the already dismissed direct counterclaims brought on behalf of him individually, Broom requests an order entering summary judgment as to all direct

counterclaims: promissory estoppel, fraud, and negligent misrepresentation. In addition, there are no identified false statements or any bases for Andrews to assert these common-law counterclaims against Broom on the facts alleged in the Second Amended Answer and Counterclaims, and no evidence in this case to support those allegations.

In addition, Andrews' separate counterclaim for breach of the covenant of good faith and fair dealing fails as a matter of law. In South Carolina, the covenant of good faith and fair dealing is not an independent cause of action separate from the breach of contract. *See RoTec Servs., Inc. v. Encompass Servs., Inc.*, 359 S.C. 467, 471–73, 597 S.E.2d 881, 883–84 (Ct. App. 2004) (“The implied covenant of good faith and fair dealing is not an independent cause of action separate from the claim for breach of contract.”).

VI. The Law of the Case Doctrine and Res Judicata Bars All Counterclaims

Andrews' counterclaims are barred by the law of the case doctrine and res judicata. As previously discussed in prior filings, because Andrews failed to appeal the dismissal with prejudice derivative claims and did not obtain relief or any ruling on the issues he appealed, the November 1, 2011 order is the final adjudication in this matter.⁷ While the parties have now addressed this issue multiple times with the Court, Broom respectfully submits that summary judgment is appropriate on these bases. In the interest of the Court's time, the argument is truncated.

The law of the case doctrine applies because after the final judgment dismissing the counterclaims and third-party complaint, Andrews failed to obtain a ruling on appeal and did not cure that failure by making any motion to the Supreme Court. Without a reversal or remand from the appeal, this Court's November 1, 2011 order dismissing with prejudice the counterclaims and

⁷ Broom incorporates by reference its Motion to Dismiss the Counterclaims, his Supplemental Motion and Memorandum in Support of the Motion to Dismiss, his Motion to Reconsider the Order Denying the Motion to Dismiss, and all referenced and attached exhibits.

third-party complaint is a final judgment and the law of the case. *Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997); *see also Hudson ex rel. Hudson v. Lancaster Convalescent Ctr.*, 407 S.C. 112, 119–20, 754 S.E.2d 486, 490 (2014). Andrews can offer no evidence to the contrary.

Andrews is barred from reviving his third-party claims because he failed to challenge this Court's dismissal of those claims with prejudice. A review of Andrews' motion to reconsider and his court of appeals' brief illustrates that he only appealed the ruling on the direct claims. The ruling as to the third-party claims is now law of the case with the practical effect of foreclosing the third-party complaint. *Dreher v. S.C. Dep't of Health & Envtl. Control*, 412 S.C. 244, 249–50, 772 S.E.2d 505, 508 (2015) (citing *Judy*, 381 S.C. at 458, 674 S.E.2d at 153 ("Under the law-of-the-case doctrine, a party is precluded from re-litigating . . . , [*inter alia*,] matters that were [] not raised on appeal, but should have been")).

On this Motion for Summary Judgment, Andrews has failed to provide any evidence to dispute Broom's arguments. Andrews cannot raise a genuine issue of material fact on the identical counterclaims that were dismissed with prejudice and from which Andrews did not obtained any relief on appeal or since the dismissal of all counterclaims became a final judgment.

For all of the reasons in the Motion to Reconsider the June 2, 2017, order denying the motion to dismiss all counterclaims and set forth herein, this is one of the rare cases where a verdict in favor of Andrews on his counterclaims against Broom is not reasonably possible under the facts presented. Thus, summary judgment is proper as to Andrews' counterclaims.⁸

⁸ To the extent Andrews would argue he is initiating a new cause of action within his amended complaint, his counterclaims and third-party claims are barred by the doctrine of res judicata. *Catawba Indian Nation v. State*, 407 S.C. 526, 538, 756 S.E.2d 900, 907 (2014) (explaining res judicata may be applied if (1) the identities of the parties are the same as in the prior litigation, (2) the subject matter is the same as in the prior litigation, and (3) there was a final adjudication on

VII. Andrews' Failed to Properly File a Third Party Complaint Pursuant to Rules 7 and 14(a), SCRCP

Last, Andrews' third party complaint cannot be properly before the court because it fails to comply with the requirements of Rule 7 and Rule 14(a), SCRCP. No third-party complaint can be filed against a person who is already a party to the action. *Id.* Because no right exists to implead a party to the action, the third-party complaint and its allegations must be dismissed regardless of the allegations.

CONCLUSION

For all of the above reasons, Plaintiff Quentin S. Broom, Jr. requests summary judgment on all counterclaims.

Summary judgment is proper for six reasons. First, Andrews has failed to provide a mere scintilla of evidence to support his alleged counterclaims. Second, collateral estoppel bars any derivative claim based on Tri-Star's alleged debt owed to Andrews and it's barred by the statute of limitations. Third, the common-law claims are abrogated by the statutory provisions for directors and officers, pursuant to sections 33-8-300(e) and 33-8-420. Additionally, on the merits under either provision, Andrews' claims are barred by the business judgment rule and the legal stand for conduct in the statutes. Fourth, the claims for promissory estoppel, fraud, and negligent misrepresentation were not pled derivatively and are thus barred under this Court's November 1,

the matter). Here, all three elements of res judicata have been met. First, the parties are identical. Second, the subject matter is the same subject matter as in the prior litigation. In both sets of counterclaims, Andrews alleged the following identical claims against Broom: (1) Breach of Fiduciary Duty; (2) Breach of Contract; (3) Breach of Contract Accompanied by a Fraudulent Act; (4) Breach of the Covenant of Good Faith and Fair Dealing; (5) Conversion; (6) Violation of S. C. Code of Laws §33-8-300; (7) Violation of S.C. Code of Laws §33-8-420; (8) Promissory Estoppel; (9) Fraud; and (10) Negligent Misrepresentation. A comparison between the 2006 pleading and the 2016 are identical in causes of actions, allegations, and parties except for a few factual details. See 2016 Second Amended Answer and Counterclaims ¶¶ 22, 31, 32, 34-39, 43, 45-47. Third, there has been final adjudication of the claims, which led to Andrews' appeal. For these reasons, res judicata prohibits these claims.

2011 Order and June 2, 2017 Order. Fifth, all counterclaims are barred by the law of the case doctrine and res judicata. Sixth, Andrews' third-party complaint violates Rule 7 and Rule 14(a), SCRCF, and thus is not properly before the Court.

Accordingly, summary judgment on all counterclaims should be granted.

Respectfully submitted,

s/Matthew T. Richardson

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June 15, 2017
Columbia, SC

Attorneys for Quentin S. Broom, Jr.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
	)	Civil Action No. 2008-CP-42-3397
	)	
H. Hughes Andrews,	)	
	)	
Plaintiff,	)	BROOM'S MOTION TO ESTABLISH
v.	)	FACTS
	)	
Quentin Broom, Jr.,	)	
Defendant.	)	
	)	

Quentin Broom, Jr., by and through undersigned counsel, respectfully submits this Motion to Establish Facts based on Andrews' and his agents' sworn positions and uncontested facts from prior litigation in the U.S. Bankruptcy Court, District of South Carolina, and in the U.S. District Court for the District of South Carolina in which H. Hughes Andrews was a party. As explained herein, the doctrines of judicial and collateral estoppel, as well as the policy of judicial economy, support this Court's adoption of these established facts. Moreover, the adoption of these previously sworn, stipulated, and determined facts significantly narrow the issues to be addressed and litigated in this case through inconsistent positions.

DISCUSSION

Based on evidence previously submitted to the Court and prior sworn testimony and findings of fact in federal cases, involving relevant issues of fact by the same party, acceptance of those facts, and court rulings on the merits of those issues, Broom respectfully requests the Court adopt these Established Facts because:

- (1) Judicial and collateral estoppel: Andrews is barred from asserting inconsistent factual positions on factual issues previously determined in final judgments by federal courts in South Carolina;
- (2) Evidence submitted without objection by Andrews in prior litigation establishes the facts in this case; and

- (3) Andrews is estopped from denying the veracity of his own sworn testimony and exhibits provided in the prior litigation that ended with final orders and judgments, especially when those rulings were never appealed by Andrews.

South Carolina courts apply judicial and collateral estoppel as means of establishing as true certain facts that were previously litigated in earlier proceedings. These legal doctrines are based on a recognized policy that “public interest demands an end to the litigation” where a party has once litigated and lost the issue in question. *Beall v. Doe*, 281 S.C. 363, 370, 315 S.E.2d 186, 190 (Ct. App. 1984). A proper application of estoppel supports the “[p]rinciples of finality, certainty, and the proper administration of justice.” *Id.* Judicial estoppel requires “(1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent.” *Cothran v. Brown*, 357 S.C. 210, 215-16, 592 S.E.2d 629 (2004); *see also Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997). Collateral estoppel applies if the particular issue was “(1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment.” *Carolina Renewal, Inc. v. S.C. Dep’t of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009).

The doctrines will not apply “unless the precluded party was given a full and fair opportunity to litigate the issue in the first action.” *Zurcher v. Bilton*, 379 S.C. 132, 135, 666 S.E.2d 224, 226 (2008). Collateral estoppel applies to findings of fact as well as legal conclusions. *Pye v. Aycock*, 325 S.C. 426, 436, 480 S.E.2d 455, 460 (Ct. App. 1997) (finding doctrine “bars relitigation of the same facts or issues necessarily determined in the former proceeding”); *Shelton v. Oscar Mayer Foods Corp.*, 325 S.C. 248, 251, 481 S.E.2d 706, 707-08 (1997) (noting “administrative agency’s findings of fact may have preclusive effect in a subsequent civil suit”).

Collateral estoppel may be applied by a stranger to the earlier litigation against a person who was a party to the earlier case. *Beall*, 281 S.C. at 370, 315 S.E.2d at 190. This form of collateral estoppel, known as offensive non-mutual collateral estoppel, applies like any other form of the doctrine unless the estopped party lacked a full and fair opportunity to litigate the issue or was not motivated to defend itself in the earlier litigation. *Wade v. Berkeley County*, 330 S.C. 311, 317, 498 S.E.2d 684, 687 (Ct. App. 1998).

Here, Andrews is now asserting factual issues previously determined, including the purported debt that has already been addressed in two federal cases through factual findings, in addition to submitted evidence and testimony. Andrews is barred from doing so based on the factual findings made by the Bankruptcy Court and the District court's reliance on Andrew's and his employee's sworn testimony.

Turning first to the bankruptcy matter, on December 7, 2005, Andrews filed an involuntary petition in the U.S. Bankruptcy Court, District of South Carolina, for relief against Tri-Star Corporation, Inc. under Chapter 11 of the Bankruptcy Code. (**Exhibit 1**, Petition for Involuntary Relief, *In re: Tri-Star Communications, Inc.*, 05-45299-hb (Bankr. D.S.C.)). Andrews, filing as Tri-Star's creditor, was required to list all valid and current debt against Tri-Star. Prior to the hearing, Andrews and Tri-Star stipulated to undisputed facts. (**Exhibit 2**, Joint Stipulation). On November 22, 2006, the Bankruptcy Court made factual findings, relying on the stipulated facts, in support of its ultimate conclusion that Tri-Star was paying its debts as they became due and that no other debts were owed to Andrews by Tri-Star. (**Exhibit 3**, Order Denying Petition for Involuntary Relief, ECF 38, ¶¶ 2-14, and at 12).¹

¹ In fact, the court found the "only potential remaining creditor claim [against Tri-Star on December 7, 2005] was a claim of Best Games, Inc., an entity controlled by Broom" and that "it is not disputed that Andrews received the checks in question and deposited them on March 1, 2006, satisfying his petitioning claim." (*Id.* ¶¶ 6 & 11).

The particular issue of whether Tri-Star owed debts to Andrews as of December, 2006 was litigated and decided in the bankruptcy, and the findings were necessary to support the judgment. *See Carolina Renewal, Inc.* 385 S.C. at 554, 684 S.E.2d at 782. The facts enumerated below were actually litigated in both federal cases. Moreover, the factual findings were based on the parties' statements of undisputed facts and other evidence presented to the Court at the time of its order, and admitted into evidence without objection by Andrews.

The touchstones of an "actually litigated" issue include testimony concerning the issue and references to the issue in the parties' pleadings. *See Carolina Renewal*, 385 S.C. at 557-58, 684 S.E.2d at 783-84. There was extensive deposition testimony in both cases, as set out fully below, regarding issues that are at issue in the present case. Andrews had a full and fair opportunity to litigate the specifics of debt owed to him by Tri-Star.

Turning to the second element, as set out below, the federal court judge's directly determined facts that are at issue in the present case. While South Carolina law does not seem to precisely define what constitutes a "directly determined" issue, this requirement has been satisfied in the past where the adjudicator in the previous litigation "made a specific finding" on the issue. *See Crosby v. Prysmian Comms. Cables & Sys. USA, LLC*, 397 S.C. 101, 110, 723 S.E.2d 813, 817 (Ct. App. 2011). Here, the Bankruptcy Court found Tri-Star was paying its debts that were due, and that no other monies or debts were owed to Andrews. These facts were not merely alluded to or implied but directly determined, as fully explained below.

Finally, the factual findings in the order were necessary to the Bankruptcy Court's final order and judgment. The Bankruptcy Court's finding that, as of November 22, 2006, Tri-Star owed absolutely no monies/debts to Andrews, was necessary for the court's conclusion that Andrews could not force Tri-Star into Chapter 11 Bankruptcy. The factual findings were the basis of the Court's ultimate decision that Tri-Star had paid Andrews all debt owed to him, and that liquidation was done to preserve Tri-Star's assets is evident from the order itself.

Thus, Broom has met all the elements required to apply estoppel to the undisputed facts set out in the Bankruptcy Court's final order. Binding Andrews to the federal court order's findings of fact is fair and just since those findings are taken almost verbatim from the sworn testimony and documents submitted without objection and admitted into evidence in the federal case. Those findings of fact are as follows:

1. "The sole shareholders of Tri-Star are Quentin S. Broom, Jr., and Andrews."² *Id.* ¶ 3.
2. "On December 7, 2005, Andrews filed the involuntary petition. The petitioning claim is one of \$130,000 indisputably owed by Tri-Star to Andrews at some time pre-petition." *Id.* ¶ 5.
3. "This debt also appears on Tri-Star's September 30, 2005 balance sheet." *Id.*
4. "The only potential remaining creditor claim as of the petition date was a claim of Best Games, Inc., an entity controlled by Broom. That alleged claim appears on Tri-Star's balance sheet dated September 30, 2005." *Id.* ¶ 6.
5. "Tri-Star's general ledgers are in evidence to indicate its accounts payable activity including the period of January 1, 2005 through August 31, 2005, along with various balance sheets. The most current balance sheet is dated September 30, 2005, indicating assets of \$694,809.20, liabilities of \$260,801.05 (\$130,000 owed to Andrews and \$130,801.05 owed to Best Games, Broom's company, referenced in (5) and (6) above, respectively), and 'Total Stockholders' Equity' of \$ 434,008.15." *Id.* ¶ 7.
6. "Tri-Star's primary business was the operation of video poker machines in the Dominican Republic. It is stipulated that on June 27, 2005, without notice, the Attorney General of the Dominican Republic gave a directive that all video poker machine operators had forty-eight (48) hours to remove all machines from the streets in the Dominican Republic and advised Tri-Star that all remaining machines on the street would be confiscated and destroyed." *Id.* ¶ 12.
7. "As a result of the actions of the government of the Dominican Republic, Tri-Star, through Broom, undertook to assemble and marshal most of its machines to a warehouse and completed that task by June 30, 2005." *Id.* ¶ 13.
8. "On July 4, 2005, the Attorney General issued another directive to all video poker operators that the machines had to be 'retired' or removed from the country within twenty (20) days." *Id.* ¶ 14.

² This finding is also supported by Andrews' own sworn deposition testimony. (**Exhibit 4**, Andrews Depo. 8/30/07, at 21) (In the video gaming venture, Andrews and Broom were equal shareholders of Tri-Star Communications, Inc., a South Carolina corporation. Andrews and Broom agreed Broom would be the sole officer overseeing and running the business operations).

9. "Tri-Star tried to manage the situation and monitor the political situation in the hope that the political climate might change and it could resume operations. However, Broom eventually liquidated the assets of Tri-Star rather than resume operations." *Id.*
10. "At some point subsequent to December 5, 2005 but prior to March 1, 2006, it is not disputed that Andrews received the checks in question and deposited them on March 1, 2006, satisfying his petitioning claim." *Id.* ¶ 11.

In applying 11 U.S.C. § 303(h)(1), the Bankruptcy Court determined Andrews, as the petitioning creditor, had "the burden of proving that [Tri-Star's] debts were not being paid as they came due and must show more than just a few unpaid debts." *Id.* at 11 (internal case citations omitted). To make this determination that court looked to "a mechanical test including the following factors: the timeliness of payment on past due obligations, the amount of debts long overdue, the length of time during which the debtor has been unable to meet large debts, any reduction in the debtor's assets, and the debtor's deficit financial situation. *Id.* The Court went on to establish additional, pertinent facts in its final order:

11. "[T]here is no indication from the evidence that any debt of Tri-Star had been outstanding for any length of time or that Tri-Star experienced any inability to meet large debt obligations as of December 7, 2005." *Id.* at 12.
12. "Rather, the evidence presented indicates that from a balance sheet perspective Tri-Star was solvent a little more than two months before the petition, even after considering payment of the alleged remaining debt." *Id.*
13. "Further, documentary evidence states that only one month before the petition was filed, Tri-Star was successfully liquidating its assets to pay outstanding obligations." *Id.*
14. "Broom's counsel stated that 'the proceeds, after the payment of remaining expenses owed by Tri-Star will be equally distributed as a final distribution to each principal of Tri-Star. Mr. Broom plans to leave a few thousand dollars in Tri-Star to cover necessary accounting expenses.'" ³ *Id.* (quoting excerpt from letter from Broom's attorney to Stodghill dated November 4, 2005).

³ During the October 6, 2006 bench trial, the Bankruptcy Court admitted into evidence this November 4, 2005 letter, without objection by Andrews. (**Exhibit 5**, BK Court Exhibit Lists, Defendant Tri-Star's Exhibit A) (" . . . We specifically requested that each principal contribute funds immediately in a letter of September 30, 2005. Mr. Broom has stood ready to contribute his half but is unwilling to finance the operations of these two (2) entities without an equal contribution by Mr. Andrews. *** Facing the threat and seizure of the video poker machines by both the

15. "The evidence further indicates that at Broom's direction, Tri-Star did in fact issue a check to Andrews thereafter for payment of the remainder of his debt plus checks intended by Broom as equity distributions [to Andrews] of \$25,000 and \$60,000." *Id.*
16. "The evidence indicates that Tri-Star, through Broom, liquidated assets, paid debts, and the remainder was distributed to equity holders, with a little left in the bank." *Id.*
17. "The primary reason for [Broom's] capital contribution [request] is protection of assets and ongoing operating expenses. There is no mention of any outstanding and unpaid debts and further the focus is on maintaining the value of Tri-Star's assets for the equity holders, not on repaying debt."⁴ *Id.* at 13 (*relying on* excerpt from Broom's attorney to Stodghill dated September 30, 2005).
18. "While Andrews has shown a reduction of assets by Tri-Star and the winding down of that business, he has failed to meet his burden of proving that as of December 7, 2005, Tri-Star was not paying its **debts** as they came due." *Id.* (emphasis in the original).
19. "Rather, the evidence indicates that the assets of the business were liquidated, relevant debts paid and Broom thereafter distributed funds that were sufficient to make a

government and by the owners of the local warehouses, Mr. Broom has had no choice but to liquidate the machines *** Mr. Broom contacted a gaming machine broker in an attempt to determine the value of these machines, if any, in the Dominican. Unfortunately, they are of little value. Nonetheless, Mr. Broom fortunately secured a Dominican who was willing to pay cash for the machines and has sold one thousand one hundred twenty-two (1,122) machines of which nine hundred sixty (960) were operational for a total of Four Hundred Thousand (\$400,000.00) Dollars. This transaction has been consummated in the Dominican, and the proceeds, after the payment of remaining expenses owed by Tri-Star, will be equally distributed as a final distribution to each principal of Tri-Star. Mr. Broom plans to leave a few thousand dollars in Tri-Star to cover necessary accounting expenses"

⁴ At the bench trial, the Bankruptcy Court also admitted into evidence this September 30, 2005 letter, without objection by Andrews. (*Id.*, at Defendant Tri-Star's Exhibit D) ("As I have indicated in earlier correspondence, Tristar and Worldwide are facing impending financial difficulty due to the recent action of the Dominican Republic's Attorney General who has shut down the video poker gaming industry in that country. Our latest information is that the new law which would reopen the video poker gaming industry will take approximately another ninety (90) days to pass and our Dominican partner is requesting \$RD 1,250,000 (approximately \$40,000 U.S. dollars) in contributions to help facilitate the passage of the bill with provisions favorable to our industry. In the meantime, Tristar is in dire need of capital. It is recommended that the principals contribute \$20,000 each immediately in order to maintain the operation of the business and our position in the Dominican Republic for thirty (30) additional days. . . . Worldwide immediately needs \$20,000 for expenses related to the protection of its assets as well as Tri star's, including but not limited to, warehouse rental, security for the equipment, Frank's living expenses, insurance, fuel, legal, accounting, vehicles, and phones, etc In summary, time is of the essence. We could lose all of our assets in the Dominican Republic if immediate action is not taken on these issues. It is therefore imperative that we know Mr. Andrews' position so the appropriate measures can be taken to protect these jointly owned businesses and so Mr. Broom can make appropriate decisions concerning his future as well."

distribution to equity holders with a few thousand dollars remaining in the bank. Liquidation of assets resulting in payment of debt, whether voluntary or economically unavoidable, is not the equivalent of a failure to meet creditor obligations as they come due.” *Id.* at 13-14.

Therefore, Broom respectfully submits that principles of finality, certainty, and the proper administration of justice support the application of judicial and collateral estoppel to each of the nineteen facts set out above.

In addition to the Tri-Star joint venture, Andrews was separately engaged in business through Drew’s Distributing, Inc., which sold video gaming machines to Tri-Star and others. On April 17, 2003, one of Drew’s creditors, International Game Technology (“IGT”), filed a supplemental proceeding against Andrews and Drew’s to enforce a \$1.53 million judgment entered in confirmation of an arbitral award against Drew’s, as well as a judgment for \$107,000 for post arbitration interest and attorney’s fees (both judgments hereinafter collectively referred to as “IGT Judgments”). That litigation involved Andrews’ and Drew’s financial obligations in the purchasing of two hundred poker machines by Drew’s from IGT’s predecessor, Silicon Gaming, Inc.⁵

Tri-Star purchased hundreds of gaming machines from Drew’s. In the *IGT* litigation, Andrews and his employees provided sworn deposition testimony relevant to the present case. Andrews and his witnesses may not contest the veracity of their own sworn testimony in the prior proceeding in which then-U.S. District Judge Henry Floyd relied on in issuing his order. As such, the following sworn facts should be conclusively established, by Order of this Court, to avoid re-litigation and a waste of judicial resources:

1. In connection with this transaction, Broom, Andrews, and Tri-Star executed a Promissory Note and a Purchase Money Security Agreement, dated December 21, 1999 (“Note”) (**Exhibit 6**), and made payable to Drew’s. Tri-Star’s first payment to Drew’s on the Note was due on January 1, 2000.

⁵ Silicon was eventually acquired by IGT, such that it will at all times be referred to as “IGT” in this brief.

2. Tri-Star may have made a few payments to Drew's initially, but by the end of 2000 Tri-Star had ceased making payments to Drew's. (**Exhibit 7**, Transcript of Bench Trial (Vol. 2) at 266, 271 (Testimony of Andrews' bookkeeper, Claudia Humphries) in *IGT v. Hugh Andrews II*, 7:03-1407 (D.S.C. Mar. 29, 2006)).
3. By 2002, Tri-Star had been in default on the 1999 Note payable to Drew's, and Andrews knew it was in default and that he would not be getting repaid. (**Exhibit 8**, Transcript of Bench Trial (Vol. 1) at 106-07, 116-17, 127-28 in *IGT v. Hugh Andrews II*, 7:03-1407 (D.S.C. Mar. 28, 2006)).
4. On November 11, 2002, Drew's assigned its receivables to Andrews, individually. (**Exhibit 9**, Assignment of Drew's Receivables to Andrews on Nov. 11, 2002).
5. At the same time, Andrews "wrote the debt off" because he knew there was no money in Tri-Star to pay the receivable. (**Exhibit 4**, at 116⁶).
6. Andrews received a significant financial benefit for canceling the debt in 2002 and denying the collectability of the debt in the IGT litigation. *See generally*, sec. 1.166-1(c), Income Tax Regs. Andrews repeatedly stated in his deposition that "for tax purposes" he wrote the note off, and by doing so he received "a large income tax refund." (**Exhibit 4**, at 41-42; *Id.* at 116). Moreover, he conceded once the Drew's obligation was assigned to him it was written off. (*Id.* at 44-45).

After Tri-Star's liquidation, Andrews may not assert he is owed additional money from the sale of the machines given his concession that there was no money to recover. Further, Broom's decision to liquidate by selling the machines in the Dominican Republic was the only means to protect any of Tri-Star's assets. The *IGT* litigation produced this relevant trial testimony that should be deemed established in the present case:

7. The value of the machines decreased from \$6,900 per machine, when new in 1999 and could be operated in South Carolina, to \$1,000 when sold to Calum for use in the Dominican Republic and then to \$400 per machine in 2005 when they were aged, contraband, and being hunted for confiscation and destruction. (**Exhibit 8**, IGT Trial Transcript at 93; **Exhibit 10**, October 24, 2005 Jose Perez Letter).

⁶ Q: And you certainly took the refund and deposited it into your personal accounts once it came back, whatever refund you got as a result of that write off?

A: She [Claudia Humphries, my bookkeeper] probably did, yes.

...

Q: So you wrote this debt off when in fact it was collectible, did you not?

A: No, it wasn't. The – ***I wrote the debt off*** to take advantage of a tax situation at a time for tax reasons. I still fully intended to try to collect the debt. There was no – the money – was there two or three million dollars in Tri-Star to go – no sir, there wasn't.

Exhibit 4, at 115-116 (emphasis added).

Further, Andrews is barred from asserting issues concerning Tri-Star's repayment of loans to Quentin Broom, Sr., Broom's father. As set out in Andrews' sworn deposition testimony,

8. Mr. Broom Sr. got involved to help keep the business operating and loaned Tri-Star money to support its operations and obligations. (**Exhibit 11**, Andrews Depo. in IGT 1/7/05, at 125; **Exhibit 12**, TriStar General Ledger Jan. 1, 2004 to Oct. 31, 2004, Acct. No. 20750 ("N/P Mr. Broom" showing all loan payments from Mr. Broom Sr. match loan repayments)).
9. Andrews testified under oath that "there's no document" of priority for the 1999 Note payable by Tri-Star. (**Exhibit 11**, Andrews Depo. at 46).

CONCLUSION

Based on the arguments above, all elements of judicial and collateral estoppel are present and their application is fair and just under these circumstances. Broom respectfully asks the court to find that Andrews is estopped from denying the facts enumerated above and to order that these facts are established for this litigation. Therefore, these facts cannot be re-litigated at the bench trial scheduled to begin on Monday, June 26, 2017.

Respectfully submitted,

s/Matthew T. Richardson

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June 22, 2017
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Attorneys for Quentin S. Broom, Jr.

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Quentin S. Broom, Jr.,

Counterclaims Defendant,

v.

H. Hugh Andrews,

Counter-Claimant.

IN THE COURT OF COMMON PLEAS

C.A. No.: 08-CP-42-3397

H. HUGH ANDREWS EXHIBIT LIST

Counter-Claimant, H. Hugh Andrews, by and through his undersigned attorney submits a list of the following exhibits for trial:

1. Quentin Broom Tax Return – 2003
2. Quentin Broom Tax Return – 2004
3. Quentin Broom Tax Return – 2005
4. Quentin Broom Tax Return – 2006
5. Quentin Broom Tax Return – 2007
6. Quentin Broom Tax Return – 2008
7. Quentin Broom Tax Return – 2009
8. Quentin Broom Tax Return – 2010
9. Quentin Broom Tax Return – 2011
10. Quentin Broom Tax Return – 2012
11. Quentin Broom Tax Return – 2013
12. Quentin Broom Tax Return – 2014
- ~~13.~~ 13. Quentin Broom Tax Return – 2015

14. Tri Star Communications General Ledger 2004

15. Tri Star Communications General Ledger 2005

16 STATEMENT OF REVENUES + EXPENSES 9-30-05
Respectfully submitted,

17 LETTER 11-4-05

18 STATEMENT OF REVENUES
AND EXPENSES 9-30-05

Pillsbury Law Firm, LLC

/s/Rodney F. Pillsbury

19 GENERAL LEDGER

20 BANK STATEMENT COPY OF
CL. ARTHUR STATE #4436

Rodney F. Pillsbury (S.C. Bar #013067)

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Phone: (864) 241-9828

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Email: Rodney@PillsburyFirm.law

21 AGREEMENT FOR OED

22 BANK STATEMENT
ARTHUR STATE

ATTORNEY FOR COUNTER-CLAIMANT H.
HUGH ANDREWS.

23 " " "

24 " " "
June 25, 2017

25 " " "

26 " " "

27 " " "

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39 " " "

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

H. Hughes Andrews,

Plaintiff,

v.

Quentin S. Broom, Jr.,

Defendant.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2008-CP-42-3397

**DEFENDANT'S FINAL
EXHIBIT LIST**

Exhibit Number	Exhibit Description	Objection to Exhibit	Agreed
1.	12/21/1999 Promissory Note to Drew's Distributing		
2.	12/21/1999 Purchase Money Security Agreement		
3.	11/11/2002 Assignment of Drew's Receivables to Andrews		
4.	2/2/2001 Calum, LLC Structure Chart		
5.	TriStar Adjusting Journal Entries for Tax Year Ending 2003 and Statement 1 Form 1120S (TriStar Tax Return)		
6.	News Articles from the Dominican Republic (7/1/2005-6/28/2006)		
7.	Letters dated: 8/10/2005 from Knie to Andrews; 8/17/2005 from Knie to Hodge; 8/22/2005 from Knie to Hodge; 8/30/2005 from Knie to Stodghill; 9/28/2005 from Knie to Stodghill; 9/30/2005 from Knie to Stodghill; 10/10/2005 from Knie to Stodghill; 11/4/2005 from Knie to Stodghill; 11/15/2005 from Knie to Stodghill; 11/15/2005 from Knie to Stodghill; 12/5/2005 from Knie letter to Stodghill; and 10/19/2005 from Stodghill to Knie responding to 10/10/05 and 10/14/05 letters.		
8.	9/21/2005 Letter from Knie to Broom forwarding documents from Stodghill		
9.	March 28-29, 2006 Transcript of Bench Trial (Vol. I and II), <i>International Game Technology, Inc. v. Horace Hugh Andrews, II and Drew's Distributing, Inc.</i>		
10.	6/01/2006 Final Order in <i>IGT v. Andrews and Drew's</i>		
11.	12/8/2005 Bankruptcy Petition by Andrews against TriStar, 11/3/2005 Payments, and 11/22/2006 Final Order		
12.	10/19/2005 Fax from Russell to Broom with Spreadsheet of TriStar's Shareholder Notes Payable		

Exhibit Number	Exhibit Description	Objection to Exhibit	Agreed
13.	10/14/2005 Letter from International Gaming Corp. to Broom re: valuing gaming machines		
14.	10/24/2005 Receipt from Jose Perez to Frank Dilleshaw re: sale of machines		
15.	1/7/2005 Deposition of Hugh Andrews in the matter of <i>IGT v. Andrews and Drew's</i>		
~~16.~~	~~1/1/2004 to 10/31/2004 TriStar General Ledger – Broom Sr. Notes Payable [IDENTICAL TO Def. Ex. 18 below]~~		
17.	1/1/2003 to 12/31/2003 TriStar General Ledger – Broom Sr. loans		
18.	1/1/2004 to 12/31/2004 TriStar General Ledger – Broom Sr. loans		
19.	3/6/2001 Fax from Ten State Street to Mike Fletcher re: operation of gaming machines in Dominican Republic		
20.	4/29/2004 Broom Sr. check making loan to TriStar		
21.	Bergmann Roulette machine Manual		
22.	8/31/2016 Letter from Knie to Pillsbury re: release of Broom interests in Dominican off-shore companies to Andrews		
23.	5/10/2001 Fax from Ten State Street to Andrews re: Memo on Outstanding Issues for Dominican companies		
24.	8/7/2001 Letter from Ben Le Clercq (TSS attorney) to Josefina Ricart re: TriStar organizing documents for Dominican companies		
25.	8/23/2001 Letter from Vickie L. Weaver (TSS) to Spencer Hewitt (SC Sec'y of State) re: reference letters for Broom		
26.	8/18/2003 Fax from Ben Le Clercq (TSS) to Andrews forwarding checking account movements and payments (through June 30, 2003) of Dominican companies from Daniel Santos (Director for Dominican companies)		
27.	8/18/2003 Fax from Ben Le Clercq (TSS) to Broom forwarding checking account movements and payments (through June 30, 2003) of Dominican companies from Daniel Santos (Director for Dominican companies)		
28.	2002 Andrews Tax Return (Form 1040) and Statements: Drew's Distributing Passthrough Loss and Schedule E		
29.	2003 TriStar Tax Return (Form 1120S) Statement 1 Other Income, showing Cancellation of Debt		
30.	Civil Docket Sheet for <i>IGT v. Andrews and Drew's</i>		
31.	1997-98 Promissory Notes of TriStar in favor of Broom's companies		
32.	6/9/2005 Letter from Tim Russell to Curt Stodghill re: TriStar's 2004 General Ledgers and January – April of 2005		
33.	TriStar Communications, Inc. – Permanent File Index		
34.	7/31/2001 TriStar Balance Sheet		
35.	8/19/2003 Russell's handwritten notes		
36.	1/1/1998 – 12/31/03 TriStar Accountant Working Papers and Tax Returns		
37.	8/11/2006 Fax from Russell to Knie forwarding TriStar Financial Statements for 8/31/05 – 12/31/05		
38.	2002 TriStar Balance Sheet, Income Statement, and General Ledger		
39.	2001 TriStar Balance Sheet, Income Statement, and General Ledger		

Exhibit Number	Exhibit Description	Objection to Exhibit	Agreed
40.	1999 TriStar Accountant Working Papers, Financial Statements, and Tax Returns		
41.	2000 TriStar Accountant Working Papers, Financial Statements, and Tax Returns		
42.	2002 TriStar Accountant Working Papers, Financial Statements, and Tax Returns		
43.	2003 TriStar Accountant Working Papers, Financial Statements, and Tax Returns		
44.	Drew's Distributing Inc. Corporate Documents – Articles of Incorporation, Stock Certificate, Plan for Issuing Stock, Stockholders' Meeting Minutes, Directors' Meeting Minutes, Bylaws, Demand Letter, Promissory Notes dated 2000 through 2002, and Dividends ledger		
45.	2004 TriStar W-2 Wage and Tax Statements for Broom, Broom Sr., and Robert Dilleshaw		
46.	8/12/2003 Letter from Accountant to Andrews re: Drew's 2002 K-1 for Andrews 2002 Tax Return		
47.	Business Activity for TriStar and Drew's, 1/1/1997 – 10/31/2005		
48.	Copy of Passport of Quentin S. Broom, Jr.		
49.	5/18/2004 TSS and Russell Memo re: TriStar loans, Broom's salary, and real estate		
50.	TSS invoices, signed by H. Hugh Andrews		

51 ANALYSIS

52 MEMORANDUM

53 LETTER + INVOICE

54 DEPOSITION

55 " "

56 Pot-O-Gold
PRICE PER UNIT

57 PAGE OF TIM RUSSELL
DEPOSITION

s/Matthew T. Richardson

Matthew T. Richardson

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RECEIVED FROM LINDA MORRIS,
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6-29-17

Alexander Miller

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

H. Hughes Andrews,

Plaintiff,

vs.

Quentin Broom, Jr.,

Defendant.

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO: 2008-CP-42-3397

**POST-TRIAL MOTION FOR JUDGMENT
NOTWITHSTANDING THE VERDICT
OR, IN THE ALTERNATIVE,
FOR A NEW TRIAL
AND
MOTION TO ALTER OR AMEND
AND FOR RECONSIDERATION**

Defendant Quentin Broom, Jr. respectfully moves pursuant to Rules 50(b), 52(b),¹ 59(a), and 59(e) of the South Carolina Rules of Civil Procedure to alter or amend the findings of facts and conclusions of law in the order dated November 8, 2017 (hereinafter “Final Order”); for reconsideration of the decisions and judgment; and for judgment notwithstanding the verdict or, in the alternative, for a new trial.

Broom has timely filed and served his motion to alter or amend and for reconsideration of the November 8, 2017 order after receipt of written notice of entry of the order on November 17, 2017, and, in the alternative, a motion for new trial. In actions tried without a jury, a party may move the Court to amend its findings or judgment or for a new trial not later than 10 days after receipt of written notice of entry of judgment. Rule 52(a), SCRPC. Broom believes the Court has

¹ “When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the trial court an objection to such findings or has made a motion to amend them or a motion for judgment.” Rule 50(b), SCRPC.

misunderstood, failed to consider, or failed to rule on the issues presented herein. *See Elam v. South Carolina Dep't of Transp.*, 361 S.C. 9, 602 S.E.2d 722 (2004).

This Court erred in effectively denying the motion for a directed verdict and should grant a judgment notwithstanding the verdict based upon the absence of proof that Broom violated the Corporate Code standards of conduct for his salary payments. S.C. Code 33-8-300(a) & (d); 33-8-420(a) & (d). When deciding a motion for directed verdict or JNOV, the court must “view[] the evidence and all reasonable inferences in the light most favorable to the nonmoving party.” *Elam*, 361 S.C. at 9, 602 S.E.2d at 772; *Strange v. South Carolina Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 445 S.E.2d 439 (1994); *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 332, 732 S.E.2d 166, 171 (2012) (citation omitted).

Viewing the evidence in the light most favorable to Andrews, he failed to meet his burden of proof or present any evidence to support any reasonable inference that Broom violated the Corporate Code standards of conduct in paying a reasonable salary for his full-time work for Tri-Star in 2004 and 2005. Andrews presented the testimony of only three witnesses, one of which was offered as an expert witness only on the value of the video gaming machines. The testimony and documentary evidence shows not only that Broom was entitled to salary, but also that the salary amounts were discussed and reported as reasonable and fair by Andrews' attorneys in a May 18, 2004 meeting with both parties and professionals. (Def. Ex. 49 and 57) The Corporate Code standards of conduct specifically protect Broom from liability because he is “entitled to rely on information, opinions, reports, or statements . . . by . . . legal counsel[and] public accountants.” S.C. Code Ann. §§ 33-8-300(b) & -420(b).

It was also undisputed that Andrews' agents also received monthly financial reports with the salary payments and loans for repatriating revenues from the Dominican Republic. Andrews

admitted he relied on his agents to conduct his businesses, including Tri-Star. Further he testified he did not pay much attention to Tri-Star and did not look at financial statements. Andrews cannot rely on his agents, who unquestionably received the Tri-Star financial information along with his attorneys and the Tri-Star CPA, and then try to contradict that evidence by relying only on his own post-litigation protestations by testifying without offering any of his agents as witnesses. Andrews is both charged with knowledge of his agents and the inference that he would have called his agents if their testimony could have helped him. *See, Crystal Ice Co of Columbia v. First Colonial Corp.*, 273 S.C. 306, 309, 257 S.E.2d 496, 497-98 (1979); *Wisconsin Motor Corp. v. Green*, 224 S.C. 460, 79 S.E.2d 718 (1954). Instead, Andrews relied only on his own testimony – which includes his admissions that completely undercut his claims against Broom – and the arguments of his counsel to fill in the gaps of evidence and proof with specific inferences.

The Final Order based its findings that Broom acted fraudulently and in bad faith on the inferences argued by Counsel for Andrews that (1) substantial debt for the machines was still owed at the time salary payments were made, (2) Broom supposedly “secretly” borrowed money to make the salary payments in December 2004, (3) Tri-Star was not profitable in 2004 and 2005, and (4) Broom designed and executed a plan beginning in 2004 to take all the money out of Tri-Star and shut it down. None of these arguments by counsel are supported by the evidence and are not reasonable inferences to make. In fact, the evidence shows each of these inferences is not reasonable and should not be the basis for any findings of fact or conclusions of law. The verdict stands on the supposition of Broom’s grand plan. This premise, and thus the verdict, is undermined by and unreasonable based on the Bankruptcy Order and the undisputed findings that the ban on all gaming in the Dominican Republic was done in late June 2005 without any prior warning or notice. Any alleged scheme depended on that unpredictable and unrelated superseding

cause of the end of Tri-Star's operations. Otherwise, Tri Star would have continued making \$ 180, 000 per month and Broom could have been paid for his work on behalf of Tri Star for 2005, which he wasn't. Tr. at 491 & 501; Def. Ex. 49. Thus, the motions should be granted in favor of Broom on the claim that he violated the Corporate Code standards of conduct in the payment of salary.

The only evidence Andrews submitted to support his claim for improper salary payments was that he does not remember the May 18, 2004 discussion with his own agents: Tri-Star's attorney and the company CPA agreeing that salary payments were owed and the amounts were fair and reasonable. Andrews did not present the testimony of any of his agents on whom he relied to handle his business with Tri-Star. Given the testimony of only two party witnesses, Fletcher and Tri-Star's CPA Tim Russell, the Court should have directed an involuntary nonsuit or directed verdict against Andrews for failing to present any evidence to support his claim for improper salary payments. Now, the Court should grant judgment to Broom notwithstanding the verdict.

Alternatively, Broom hereby moves for a new trial because the amount of the verdict is excessive considering the evidence presented by Andrews at trial. *See, e.g., Vinson v. Hartley*, 324 S.C. 389, 404-05, 477 S.E.2d 715, 723 (Ct. App. 1996); *Allstate Ins. Co. v. Durham*, 314 S.C. 529, 431 S.E.2d 557 (1993).

These post-trial motions are based on the motions, arguments and evidence presented at trial and on the briefs, arguments, and supporting exhibits for the motions for summary judgment, the motion to establish facts, the motion for a directed verdict or involuntary nonsuit during trial, and the following additional grounds:

- I. The Final Order effectively denied Broom's Motion for Summary Judgment after reserving a ruling until the morning of trial.

- II. The Final Order also denied Broom's Motion for Directed Verdict and Involuntary Nonsuit made during the trial at the close of Andrews' evidence and renewed at the close of all the evidence after taking it under advisement to review all the evidence.
- III. The Final Order then rendered a verdict in part for Andrews for one-half of the salary payments and in part for Broom on the sale of the machines in October 2005 and on Broom's future foreign business profits after dissolution of Tri-Star.
- IV. The Final Order also made a partial ruling on the Motion to Establish Facts, accepting the Bankruptcy Court order denying the involuntary petition filed by Andrews against Tri-Star and Broom in 2005, but did not make an explicit ruling on the IGT supplemental proceedings in part because Andrews conceded he had no claims for the debt on the machines or the 1999 promissory note in response to the motion to establish certain facts and in response to the Motion for Summary Judgment before trial. The Motion to Establish Facts should be granted in full now based on Andrews' presentation at trial and arguments by Counsel for inferences contrary to those facts that should be recognized as having already been established against Andrews.
- V. In the Final Order, the Court may have overlooked or should reconsider the following:
 - A. Findings of Fact
 1. Tri-Star's CPA, Tim Russell, testified in the trial through the parties' consent admission of his deposition testimony. Def. Ex. 57; Tr. at 381. His testimony was clear and unrefuted on two key points: the salary payments Broom received were "fair" and he continued to provide to Andrews' agent Claudia Humphries monthly financial statements with all salary payments, including those to Broom.

2. The Final Order makes findings about Broom not providing sufficient evidence of the sale of the machines and the proceeds, evidence that Broom's future businesses in the Dominican Republic did not use Tri-Star's machines, and that Tri-Star and Worldwide were not profitable as Broom testified. This improperly shifts Andrews' burden of proof. The only evidence about the sale of 1,122 machines in the Dominican Republic in October 2005 was consistent with and supported Broom's testimony. *See* Def. Ex. 13 & 14; Tr. at 251. The only evidence about Broom's new business in the Dominican Republic was that it started a year later and with different machines under a different law. The only evidence cited by Andrews were the loans in the United States to repatriate revenues and the wire transfers from Mr. Yunes, part of the connected family that ran Grupo Citrin, Worldwide's partner in the Dominican Republic gaming operations. Broom testified he had to collect Tri-Star's revenues under the consulting contract with Worldwide from Mr. Yunes – and the money was sent to Tri-Star at Broom's direction to benefit Tri-Star. The inference about profitability of Worldwide is irrelevant to Broom's good faith and reasonable efforts on behalf of Tri-Star to collect its revenues and make them available in the U.S. and on the ledger. With twelve years of discovery, Andrews offered only his own testimony, in which he could only speculate differently, and offered no evidence to the contrary.
3. The Final Order stated: "The Court allowed the claims to be stated by Andrews individually for the sole purpose of allowing Andrews to preserve for further review his argument that there is no distinction between direct and derivative

claims when one of a corporation's two owners is suing the other owner." This is an error of law and not the ruling from June 2, 2017 Order denying the Motion to Dismiss the Second Amended Answer and Counterclaims. There is no discussion about preservation of the issue or there being no distinction between direct and derivative claims in the July 6, 2016 Order allowing the Second Amended Answer and Counterclaims.

4. The Final Order on page 3 recites that Andrews asked to amend his counterclaims in response to Broom's Motion to Dismiss in 2011, which was granted on November 11, 2011, but Andrews' Motion to Amend his claims was not filed until November 14, 2011 after the order dismissing with prejudice; and on page 5 the Order correctly notes: "Andrews moved to amend his pleading in response to the order dismissing his counterclaims."
5. Both the verdict in favor of Andrews on the salary payments and the award of punitive damages are based in part on the erroneous finding that the salary payments occurred while significant amounts were owed from Tri-Star to Andrews for the gaming machines. The finding in the Final Order that salary payments were made "at a time when Tri-Star owed Andrews significant sums for the video games" is contrary to all evidence in this case. As presented in the Motions for Summary Judgment and to Establish Facts and supporting exhibits, the admissions of Counsel for Andrews during the oral arguments on the motions before trial, and Andrews' withdrawal of the claim for any debt on the machines, this debt for the gaming machines had been cancelled by

Andrews in 2002. *See* Motions and exhibits; Final Order at 12; Tr. at 12, 19 & 25.

During the arguments on the Motion for Summary Judgment, Andrews conceded his claims for any loan or debt payments, including the 1999 promissory note and debt for the gaming machines he sold to Tri-Star through Drews Distributing in 1997-99. The Motions for Summary Judgment and to Establish Facts and the supporting evidence were not contradicted by any evidence presented by Andrews before or during trial. The supporting evidence for the motions showed the outstanding debt for the machines had been assigned to Andrews personally, who cancelled it in November 2002, meaning it could not still be owed at the time of the alleged violations in his claims. Andrews received personal benefits for cancelling the debt through a tax deduction and also denying the collectability of the same debt in the IGT litigation – thereby avoiding liability in those supplemental proceedings. The Motion to Establish Facts on this point should be granted. Moreover, this critical fact should be accepted with judicial notice of the underlying facts. *See* Rule 201, SCRE.

Without any evidence of this critical underlying fact that there should be no finding that Andrews was owed any debt for the machines or that Broom acted improperly based on Andrews still being owed significant debt for the machines. Without this finding, Andrews has failed to present evidence to support any conclusion of Broom having violated the Corporate Code standard of conduct or that the standard for punitive damages has been met by clear and

convincing evidence. Further, Andrews has failed to meet his burden of proof for an award of attorneys' fees and costs.

6. In addition, the Final Order found that Andrews "consented to a salary for Broom only after Andrews was paid for the video poker machines he sold to Tri-Star [and that] Andrews believed Broom should not have taken a salary because Andrews was never paid for those machines." Final Order at 8. This self-serving testimony is undermined by his own testimony and his agents' admissions in evidence:

- Andrews was not owed any debt for the machines after 2002,
- Broom had full authority to manage Tri-Star,
- Tri-Star was not a sweat equity deal where Broom was expected to contribute his nine years of full-time work for Tri-Star without salary compensation,
- Broom was entitled to a reasonable salary but Andrews thought (mistakenly, because he relied on others to receive and review financial statements of Tri-Star and he didn't review them, and he didn't know until the Bankruptcy Order that all Tri-Star debts were paid and the remaining equity was distributed to shareholders, and that Tri-Star was making \$180,000 per month in late 2004 and the first half of 2005) he should wait until Tri-Star was making money,
- Andrews did not pay much attention to Tri-Star and relied on his agents to protect his interests in it,
- Andrews' agents received monthly financial statements that included payroll payments and wages for officers, but Andrews did not look at financial statements or understand them much,
- Broom should not have been paid less than Frank Dilleshaw,
- Andrews paid Fletcher \$250,000 in 2002 for a company that had gone dark and was winding down,
- Andrews remembered meeting with the attorneys and CPA but just didn't remember when or what was discussed and did not recall the May 18, 2004 memorandum or statements of his attorneys and Tri-Star's accountant in the meeting and on the memorandum while also admitting "that's not to say it didn't happen",
- Andrews had always agreed Broom was entitled to salary and for past years of service,
- The salary amounts were discussed in the May 18, 2004 meeting and his attorneys and the company CPA thought the amounts were reasonable and "fair", and

- The Dominican Republic banking problems made it slow to get money to the Tri-Star in the U.S. and that sometimes Andrews and Broom didn't want to take money out of the Dominican because of the exchange rates and challenges.
7. Further, the Final Order makes an improper inference that Andrews consent on the salary as permitted or required. No evidence was put forth to make this inference.
 8. No loans to Broom's family members were claimed: to be improper, to cause any money to be missing, or that they were hidden from the financial statements provided to Andrews' agents. Andrews offered no evidence that Broom "secretly" borrowed any money, and the inference is not reasonable or supported by any evidence.
 9. Tri-Star involuntarily lost all revenue producing operations at the end of June 2005, when the Dominican Republic's government banned all gaming without warning and without exception. Bankr. Order at 12, 14. Most of the deferred salary payments for previous years were taken months before the gaming ban and when Tri-Star was making \$180,000 per month from the consulting agreement.
 10. There is no evidence of, and no suggestion of one until Andrews' closing arguments by Counsel, "of a meticulously-planned and executed scheme designed to siphon all the value out of Tri-Star while maximizing Broom's take and minimizing the extent to which the company would repay Andrews." Order at 18; *see also* Order at 12 ("a scheme to take all the cash out of Tri-Star, liquidate the company, and cut Andrews out of the business"). Andrews' statements that Broom stole his money and machines is not supported by any

evidence, and he admitted as much. Additionally, the Final Order is inconsistent in its findings on this issue:

- a. “This Court will infer that the immediate motivation in selling the machines was the Attorney General’s action of prohibiting the machines and not the Defendant’s desire to open another gaming operation.” Order at 11.
- b. The only reasonable interpretation, and the Court so finds, is that by the end of 2004, Broom began a scheme by which he would close down Tri-Star and open operations in the Dominican Republic with Tri-Star’s video poker games under an entity deliberately designed to exclude Andrews. Order at 12.

This inconsistency further demonstrates the error in this finding and the lack of evidence.

11. The Miami deed and references by Counsel without any evidentiary support on Florida’s Homestead exemption are not evidence of any plan or scheme. In fact, Broom testified it was put back on the market in August 2005, right after the ban; and ultimately the property was foreclosed on and sold at a loss. This evidence does not support any reasonable inference and is certainly not supportive of clear and convincing evidence of a plan that depended for its success on an unannounced and unknowable ban on all gaming in the entire country of the Dominican Republic for a year. No reasonable inference can be drawn from or supported by the failed purchase of a home in Miami at the wrong time – months before the ban – and causing a loss to Broom. Rather, it undercuts Andrews’ theory along with the superseding cause of the end of operations for Tri-Star as found by the Bankruptcy Court – which was not contradicted by any evidence. This argument too is simply speculation and conjecture of Andrews’ counsel in argument and unsupported by any evidence.

12. The Final Order finds that the amount of money from the sale of machines was deposited in Tri-Star accounts and used to benefit all shareholders, as the Bankruptcy Court also found, but it takes issue with the deposit being the same amount from different sources. This is not legally relevant. *See City of Myrtle Beach v. Tourism Expenditure Review Comte.*, 407 S.C. 298, 308, 755 S.E.2d 425, 430 (2014) (Hearn, J., dissenting) (“Quite simply, a dollar is a dollar; money is fungible. [I]t makes no difference whether a dollar with a particular serial number was expended for one purpose as opposed to another.”). More importantly, it was consistent with Tri-Star’s past practices for repatriating revenues earned from operations in the Dominican Republic and necessary for business purposes in protecting Tri-Star from risks and challenges with the Dominican Republic banking system and currency exchange, as admitted by Andrews. *See, e.g.*, Tr. at 348 (Andrews), 239-40 & 252-53 (Broom).
13. The Final Order mischaracterizes Broom’s admission regarding taxes. Broom admitted that the income not reported was as to World Wide not to Tri-Star.

B. Conclusions of Law

1. Broom did not violate the Corporate Code of Conduct because he did not act fraudulently or with bad faith on the salary payments. S.C. Code Ann. §§ 33-8-420(a) & (d); -300 (a) & (d).
2. As provided by statute for protection of directors and officers of corporations, Broom reasonably relied on the reports by professionals, including attorneys, CPAs and employees. S.C. Code Ann. §§ 33-8-300(b) & 420(b).

3. Andrews failed to present any evidence to meet his burden of proof on the three claims for damages against Broom. Alternatively, Andrews failed to prove by the greater weight of the evidence that he is entitled to any relief against Broom.
4. Andrews brought his claims originally as counterclaims in 2006 and then again in 2016 only in his own name, even though he also alleged he was bringing the claims on behalf of Tri-Star Communications. *See* Amended Answer and Counterclaims and Second Amended Answer and Counterclaims.
5. The following evidentiary objections were sustained by errors of law:
 - i. Statements by Andrews' attorneys in writing in Defendants Exhibits 49 and 50 and at the May 18, 2004 meeting as hearsay when they were admissions of an agent of a party opponent. Rule 801(d)(2)(D), SCRE.
 - ii. To the Broom's Tax Returns 2006-14 being admitted without any foundation or connection to Tri-Star machines. Tr. at 265.
6. Attorneys' Fees. The Final Order cites for the first time the South Carolina Statutory Close Corporation Supplement for general damages and as the basis for awarding attorneys' fees and costs. Andrews had not previously cited to any statutory or contractual basis for an award of attorneys' fees. At the end of Andrews' case in chief, Counsel for Andrews raised a "housekeeping" matter about his claim for attorneys' fees to be awarded, and Counsel for Broom objected because attorneys' fees had not been pled as any part of Andrews' claims. Tr. at 378-79. The Court found it was raised in the pleadings. Tr. at 380. The only mention of attorneys' fees in Andrews' pleading is in the ad damnum clause in part A, which dealt only with Broom's complaint. Broom's

complaint had been dismissed without a motion for attorneys' fees and was not mentioned in any of Andrews' claims against Broom or his prayer for relief on his claims. Thus, Broom believes Andrews did not adequately plead attorneys' fees for his claims against Broom.

The Final Order awarded attorneys' fees on the basis that Tri-Star was a statutory close corporation, S.C. Code Ann. § 33-18-410(b), but there is no allegation or any evidence offered by Andrews that the Code section applies here or that Tri-Star is "a corporation whose articles of incorporation contain a statement that the corporation is a statutory close corporation." S.C. Code Ann. § 33-18-103(a); S.C. Code Ann. § 33-18-102(a) (applicability of Chapter 18, the Statutory Close Corporation Supplement).

In addition, Andrews did not allege any relief or petition the Court for relief under the Statutory Close Corporation Supplement, as required by section 33-18-410(b) for attorneys' fees and costs. *See* S.C. Code Ann. § 33-18-400(a) ("Subject to satisfying the conditions of subsections (c) and (d), a shareholder of a statutory close corporation may petition the circuit court for any of the relief described in Section 33-18-410"). Instead, Andrews brought his claims exclusively under the common law and under the regular Corporate Code, sections 33-8-300 and -420 for director and officer liability.

Andrews' motion to conform the pleadings was withdrawn but would not change that no evidence or claim under the Statutory Close Corporation Supplement was made until after trial. For these reasons, the Motion for JNOV on attorneys' fees should be granted.

7. Andrews' witness Mike Fletcher lacked the experience, training, and education necessary to be qualified as an expert with respect to video gaming machines market in the Dominican Republic in 2005. Andrews offered Fletcher as an expert witness with respect to the reasonable price for Pot-O-Gold machines in 2005. After being qualified subject to voir dire and a motion to exclude being reserved for cross examination, he proceeded to offer opinions characterizing the value of the machines based on a U.S. domestic market survey he testified he conducted sometime around late 2005. Fletcher admitted that he had not been in the Dominican Republic since 2002 and had no experience importing or exporting gaming machines from the Dominican Republic in 2005 or during a government ban that forced country-wide shut-down of the entire industry. Fletcher had not recorded any of the survey data but admitted he had none for the Dominican Republic. Fletcher had no firsthand knowledge of the circumstances in the Dominican Republic, including the ban, the government hunting for machines that were still in the country, legal title issues, import and export duties, sales tax problems, where they were being kept, or shipping issues with getting them to the United States. He could only offer the intrinsic value of a good working machine in the United States but did not know the conditions or whether these machines were all operable. *See generally* Tr. at 54, 61-63, 67-68, 75-77, 80-83, 84-85, and 96-99.

The South Carolina Supreme Court has established the trial court serves as the gatekeeper with respect to expert testimony sought to be admitted under Rule 702, SCRE. *See State v. White*, 382 S.C. 265, 274, 676 S.E.2d 684, 689

(2009); *Payton v. Kears*, 329 S.C. 51, 60-61, 495 S.E.2d 205, 211 (1998) (“The qualification of a witness as an expert and admissibility of his testimony are largely within the discretion of the trial judge; however, the exercise of this discretion will be reserved where an abuse of discretion has occurred.”).

Under Rule 702, SCRE, a witness can be qualified as an expert only if the witness has gained specialized “knowledge, skill, experience, training, or education” in the subject matter in which opinions are to be offered. “Expert testimony receives additional scrutiny to other evidentiary decisions” and a trial court “when executing its gatekeeping duties . . . must . . . find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter.” *Watson v. Ford Co.*, 389 S.C. 434 446-49, 699 S.E.2d 169, 175-76 (2010). Further, pursuant to Rule 705, SCRE, an expert witness relying on facts or data in reaching his or her opinion must be disclosed under cross-examination. Rule 705, SCRE (“The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination”); *State v. Slocumb*, 336 S.C. 619, 628, 521 S.E.2d 507, 512 (Ct. App. 1999) (outlining the process of probing an expert witness on cross-examination with respect “to facts, data, or opinions forming the basis of the experts’ opinion, disclosed on direct examination or during cross-examination, the cross-examiner may explore whether, and if so how, the non-existence of

any fact, data, or opinion or the existence of a contrary version of the fact, data, or opinion supported by the evidence, would affect the expert's opinion.”).

Here, Fletcher only had a general knowledge of the domestic market and lacked any training or prior experience in the international market under the circumstances in this case. Pursuant to *Watson v. Ford Co.*, Fletcher's general experience with domestic pricing and even his informal survey is insufficient. Prior experience with the specific matter at issue is required when that subject matter is unique and specialized. *Watson*, 389 S.C. at 434, 699 S.E.2d at 169. Without any specific knowledge, experience or training about gaming machine sales or pricing under the circumstances in the Dominican Republic in late 2005 and the specific circumstances and challenges of possessing and exporting the machines during the government ban, Fletcher was not qualified to offer opinions about these relevant issues at trial. Under Rule 702 and *Watson*, Fletcher should not have been allowed to offer any opinion about the reasonable price for these machines in the Dominican Republic in late 2005. Further, Fletcher's inability to provide the underlying data demonstrates the lack of credibility and knowledge on this specific issue. *Slocumb*, 336 S.C. at 635, 521 S.E.2d at 516. Thus, Broom's motion to exclude Fletcher's testimony as an expert does not satisfy the standards set forth above.

8. Punitive Damages

The award of punitive damages is unsupported by clear and convincing evidence. Broom is entitled to judgment as a matter of law on Andrews' claim for punitive damages. Andrews' claim for punitive damages fails as a matter

of law because there is no clear and convincing evidence of reckless, willful, or wanton conduct by Broom, and the requisite burden of proof to award punitive damages is not met. *See* S.C. Code Ann. § 15-33-135.

Punitive damages are recoverable only when the defendant's conduct rises to the level of willful, wanton, or malicious conduct. *Clark v. Cantrell*, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000). Such a standard cannot be satisfied by speculative inferences unsupported by evidence.

The following evidence was presented that Broom was entitled to take a salary and that it was. Andrews, and through his agents, was aware of Broom's actions; and other professionals advising Tri-Star approved the salary payments, the amounts, and knew it was being taken:

- Direct testimony from Broom that he received statements and reports from Ten State Street and Scrantom, Andrews' and Tri-Star's attorneys, and Tim Russell, Tri-Star's CPA;
- Andrews' own testimony that Broom was entitled to a reasonable salary;
- Deposition testimony of Russell that Broom was entitled to a salary and the amounts were fair (Def. Ex. 57);
- Memorandum and notes from the May 2004 confirming Andrews had always agreed Broom was entitled to a salary and for past years of service and also detailing the payment plan for Broom's salary—a meeting which Andrews attended. (Def. Ex. 49);
- Attorney bills for hours spent preparing for the May 2004 meeting and the time at the meeting, which was signed off by Andrews or his agent for payment (Def. Ex. 50);
- The listing of all salary payments in the Tri-Star's ledger;
- Copies of financial statements showing all payments and amounts being provided monthly to Andrew's agent Claudia Humphries (Def Ex. 36, 43);
- Andrews' acknowledgment that his agents had full access to the ledger and that relied on them for taking care of his business with Tri-Star
- Andrews acknowledged the challenges with repatriating revenue from the Dominican Republic; and
- Bankruptcy Court's order noting that the government ban was unexpected.

The award of punitive damages violates due process because of vagueness. Imposing punitive damages under the facts of this case renders section 15-33-135 of the South Carolina Code unconstitutionally vague as applied and violates Broom's right to due process under the Fourteenth Amendment of the United States Constitution. As a matter of due process, vagueness may invalidate a quasi-criminal law for either of two independent reasons. "First it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." *City of Chicago v. Morales*, 627 U.S. 41, 56 (1999). If Broom is punished under the factual circumstances of this case—where the evidence does not support Andrews' theory of the case that Broom initiated a scheme in 2004 to shut down the business after months of making \$180,000 per month but then have it banned country-wide for a year by the government there—it is unconstitutional as applied, under both prongs of the vagueness doctrine. It is unconstitutional under the first prong because Broom had no way to predict that his taking a fair salary for years of full time work in the six months before an unexpected government ban would subject him to punishment making it impossible for Broom to conform his conduct to comply with the law and avoid punishment. Additionally, it is unconstitutional under the second prong because it authorizes and encourages arbitrary enforcement.

Further, the punitive damages award violates due process as set forth in *Mitchell v. Fortis Ins. Co.*, 371 S.C. 187, 194, 638 S.E.2d 667, 670 (2006); *see also* S.C. Code Ann. § 15-33-135. As discussed in *Mitchell*, an award is only

found to be reasonable in light of the following factors: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the amount of the punitive damages award; and the difference between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases. *Id.* at 587-88, 686 S.E.2d at 184-86.

In reaching its decision to award punitive damages as to the reprehensibility prong, this Court found that Broom engaged "in a deliberate pre-planned scheme to shut down his business with Andrews by unilaterally" paying himself a salary. This finding is unsupported by the facts of this case.

First, Broom had no role in or advance knowledge of the shutdown of gaming operations in the Dominican Republic. No one associated with Tri-Star knew it in advance. When Broom began taking a salary he would have had no way of knowing the machines and thereby the business would be banned by the government in six or seven months. Revenues to Tri-Star during this period were \$ 180, 000 per month. There simply can be no scheme which depends on such a fundamental future unknown. In direct contradiction to a finding about the scheme, all of the evidence demonstrates that Broom continually attempted to do what he believed was reasonably necessary to expand the business by working full-time until revenues reached \$180,000 per month and even after the ban Broom worked to preserve the company's assets and return all assets or values to Tri-Star in the United States and returned the remaining equity to both shareholders. Broom successfully paid all Tri-Star's debts even with the ban

and all operations ceasing in June 2005. In sum, there is no clear and convincing evidence that there was a scheme to close the business or cut Andrews out.

Second, the Final Order's finding that getting loans to repatriate revenues was deceitful does not provide any evidence that there was an intent to conceal the truth. Both parties testified about the difficulty of repatriating revenues, paying bills in the United States, and the need for short term loans. Third, the entitlement to and amounts of salary was established by a myriad of evidence, as discussed *supra*. The fact that loans were made and repaid periodically was owed was never hidden from Andrews. Andrews' only complaint was that he wanted his loans for machines paid first, but he cancelled that debt in 2002. As recognized by the Bankruptcy Order, all shareholder loans in 2004 and 2005 were being paid and were paid in full. There is no evidence that Andrews was owed any money in 2004 or 2005 that he did not receive, and he received an equity distribution.

When examining the evidence presented through the *Mitchell* factors, the award of punitive damages is an error of law. Turning first to reprehensibility, a court must consider whether (1) the harm caused was physical as opposed to economic; (2) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (3) the target of the conduct had financial vulnerability; (4) the conduct involved repeated actions or was an isolated incident; and (5) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident. *Id.*, 385 S.C. at 587, 686 S.E.2d at 185.

Evidence does not support the finding that Broom's actions were reprehensible. First, Andrews did not incur any physical harm and Broom adamantly contests a finding of economic harm occurred here. The payments made to Broom were for full-time work he performed for Tri-Star for nine years. This cost was well discussed compensation owed to Broom, and was even acknowledged by Andrews. Finding only economic harm "typically weigh[s] against [] reprehensibility." *Hollis v. Stonington Dev., LLC*, 394 S.C. 383, 397, 714 S.E.2d 904, 912 (Ct. App. 2011) (internal quotation omitted); *see also Duncan v. Ford Motor Co.*, 385 S.C. 119, 143, 682 S.E.2d 877, 889 (Ct. App. 2009) (finding the existence of only economic harm weighs in favor of the defendant). Second, Broom's conduct was not an indifference to the health or safety of people.

Third, neither party had financial vulnerability. Both Broom and Andrews had full access to the ledgers, and both were advised by professionals about Broom taking a salary and the amounts. As to the fourth factor, no evidence was presented that there was prior conduct. As to the fifth consideration, there is no evidence that Broom's actions were intentional malice or deceit. In sum, there is not clear and convincing evidence that Broom's actions were reprehensible. Thus, punitive damages are improper.

As to the ratio, the award is excessive given the fact that the salary was owed to Broom. In evaluating this prong, a court is charged with considering the likelihood that the award will deter the defendant from like conduct; whether the award is reasonably related to the harm likely to result from such conduct;

and the defendant's ability to pay." *Mitchell*, 385 S.C. at 588, 686 S.E.2d at 185. It is erroneous to punish an individual for receiving payment for services rendered, which was known and found to be fair by the company's CPA and the attorney, and was sent to Andrews' agents for monthly review.

As to the comparative penalty awards, there is no basis for the Court's finding that its award is comparable. The Final Order does not make any comparison of other awards in similar cases or of civil penalties as required pursuant to *Mitchell*.

For all these reasons, the award of punitive damages is unsupported by the evidence and by the law.

9. ALI Exception. Adoption and application of the ALI exception in this matter is an error of law because it ignores the law of the case doctrine, res judicata, and disregards South Carolina precedent. Further the adoption of the ALI exception undermines South Carolina policy.

The Order's finding that "the Court is required to again encounter the issue of direct claims versus derivative claims" is incorrect and an error of law. First, this Court on three occasions has determined that the claims are derivative. *See* November 11, 2011 Order, July 6, 2016 Order, & June 2, 2017. Specifically, this court held in its 2016 Order, "this Court has already ruled (and adheres to its prior ruling) that all the counterclaims are derivative. Thus, the counterclaims will proceed as derivative only." This sentiment was again echoed by this Court in June 2017 holding, "this Court adheres to this previous ruling that the claims are derivative and not direct." June 2, 2017 Order at 2.

The ruling is correct, and because it was part of the 2011 Order it may not be readdressed based on law of the case and res judicata grounds. *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013); *Catawba Indian Nation v. State*, 407 S.C. 526, 538, 756 S.E.2d 900, 907 (2014).² Further, the Order's suggestion that this matter must be readdressed is inconsistent with its prior ruling that the direct claims were being used for the purpose of "preserving for future argument his position that the claims are direct." June 2, 2017 Order. The purpose of such preservation was challenged by Broom in his motion to reconsider the June 2017 Order as an error of law. This matter should not be revisited now.

As to the merits, the ALI exception is unsupported by South Carolina's case law. The issue before this Court is not a novel one warranting the adoption of a new rule and our appellate courts have continually viewed claims like Andrews' as derivative in nature and chosen not to allow an individual action when the claim is derivative in nature. The Order's bases for adoption is that Andrews has suffered a personal loss, the number of shareholders, and the lack of outside creditors. However, a review of South Carolina case law demonstrates the ALI exception is improper because South Carolina courts

² Additionally, the adoption of the ALI exception based on Andrews' argument that the ALI exception should apply is barred by the law of the case doctrine. When Andrews appealed the 2011 Order he argued that Rule 23 was not applicable to his counterclaims because those claims are direct, as opposed to derivative, and sought the adoption of the ALI exception. Andrews failed to obtain a ruling and this argument is barred because the 2011 order in which this Court rejected the application of an exception is binding, and those claims were dismissed with prejudice. It is an error of law to now revisit this issue.

have continually upheld the corporate form in similar derivative actions. Moreover, the Court's reasoning that the ALI exception has never been rejected is unsupported by our jurisprudence's strict adherence to the general rules. Further, the adoption of the ALI exception is against South Carolina's public policy.³

Characterizing an injury as personal does not make it so in South Carolina. As previously recognized by this Court, each of Andrews's alleged "losses" were first and foremost losses to Tri-Star because it allegedly suffered an alleged dissipation of assets caused by Broom. Andrews's alleged injury flows not from what happened to him individually but from what happened to Tri-Star. Thus, the claims are derivative.

South Carolina adheres to the general rule that individuals may not sue corporate directors or officers for losses suffered by the corporation. *See Brown v. Stewart*, 348 S.C. 33, 51, 557 S.E.2d 676, 686 (Ct. App. 2001). This prohibition on individual suits for damages suffered by the corporation is a central tenet of corporate law. *See Fletcher*, Cyclopedia of Corporate Law § 5912 (stating the general rule and observing that "a diminution in the value of corporate stock resulting from some deprecation or injury to corporate assets is a direct injury only to the corporation; it is merely an indirect or incidental

³ Broom also takes issue with the Court's finding that "the Court has not been presented with and has not been able to discover any sensible argument against Andrews receiving an individual recovery in these circumstances." Order at 15. This issue was addressed through the November 2011 Order, and these issues have not been raised by Andrews since that time.

injury to an individual shareholder,” even if “the act complained of was done with the specific intent of injuring plaintiff as a shareholder”).

South Carolina law restricts shareholders from suing corporate directors or officers directly for losses suffered by the corporation. *Babb v. Rothrock*, 303 S.C. 462, 464, 401 S.E.2d 418, 419 (1991). “A corporation is a distinct legal entity.” *Todd v. Zaldo*, 304 S.C. 275, 278 403 S.E.2d 666, 668 (Ct. App. 1991). “[A] cause of action for recovery of an asset of a corporation belongs to the corporation as opposed to the individual shareholders.” *Id.* A plaintiff may not avoid the demand requirement of a derivative suit by merely styling his suit as an individual. *Id.* It is the nature of the wrong alleged which controls whether the suit asserts a derivative or individual claim. *Id.*

A derivative action is brought when a corporation suffered an injury from actionable wrongs committed by its officers and directors. *Ward v. Griffin*, 295 S.C. 219, 221, 367 S.E.2d 703, 704 (Ct. App. 1988). The corporation or its shareholders can bring the cause of action on the corporation’s behalf, so long as they comply with the applicable rules. *Id.* If any relief is granted, it goes to the corporation; shareholders cannot recover the damages in their individual capacities because their loss is the indirect result of the injury to the corporation. *Id.*

Where there are no allegations of a distinct injury to the shareholder, *Ward*, 295 S.C. at 221 367 S.E.2d at 704, or where there is an action for misappropriation of corporate property, *Davis v. Hamm*, 300 S.C. 284, 291, 387 S.E.2d 676, 680 (Ct. App. 1989), the action is derivative. “A shareholder may

maintain an individual action *only if* his loss is separate and distinct from that of the corporation.” *Hite v. Thomas Howard Company of Florence, Inc.*, 305 S.C. 358, 361, 409 S.E.2d 340, 342 (1991) (emphasis added), rev’d on other grounds, *Huntley v. Young*, 319 S.C. 559, 462 S.E.2d 860 (1995).

In *Todd v. Zaldo*, the counterclaim plaintiff “characterized the damages as personal because Georganne Apparel Company, Inc. and MIV Textile Sales, Inc. were small closely held corporations” and, as Mr. Zaldo put it, “[m]y corporation is totally my money” *Todd v. Zaldo*, 304 S.C. at 277, 403 S.E.2d at 668. The *Todd* court stated that the “[m]ere characterization of damages by Zaldo as personal versus corporate does not prove their true nature.” *Id.* The Court of Appeals analyzed the categories of claimed damages and found them to be “clearly corporate in nature.” *Id.* at 278, 403 S.E.2d at 668. This analysis and determination applies equally to the case at hand since Tri-Star’s assets are corporate assets, not personal assets.

The Supreme Court of South Carolina has already applied the pleading and demand requirements of Rule 23 to a non-class case involving a closely held corporation. *See Clearwater Trust v. Bunting*, 367 S.C. 340, 351, 626 S.E.2d 334, 339 (2006) (dismissing unjust enrichment claim brought by shareholder of closely held corporation for failure to comply with the pleading requirements of Rule 23(b)(1), SCRCF). Thereby, demonstrating that the Court is continuing to uphold corporate formalities and procedures, and not relaxing any rule or standard.

The number of shareholders is inapplicable in this Court's analysis. Other jurisdictions apply Rule 23 derivative suit requirements to non-class cases involving corporations with as few as two shareholders.⁴

South Carolina favors priority recovery to creditors for their work on behalf of the corporation, including salary for work performed as opposed to distributions to corporate shareholders. *See, e.g.*, S.C. Code Ann. § 33-6-400(c) (no distribution may be made corporate shareholders if "[t]he corporation would not be able to pay its debts as they become due in the usual course of business" or "the corporation's total assets would be less than the sum of its total liabilities . . ."); *see also Babb v. Rothrock*, 303 S.C. 462, 464-65, 401 S.E.2d 418 (1991) (direct action disallowed in lawsuit involving misappropriation of corporate property; where corporation had disposed of its assets and was bankrupt, assuming the *Thomas v. Dickson* exception to derivative actions was applied, "[t]he claims of corporate creditors may be jeopardized if individual shareholders are permitted to satisfy their personal

⁴ *See, e.g., Ono v. Itoyama*, 884 F. Supp. 892, 895 (D.N.J. 1995), *aff'd sub nom. Keiko Ono v. Itoyama*, 79 F.3d 1138 (3d Cir. 1996); *Executive Leasing Company, Inc. v. Leder*, 191 A.D.2d 199, 200, 594 N.Y.S.2d 217 (1993) ("where there are only two stockholders each with a 50% share, an action cannot be maintained in the name of the corporation by one stockholder against another with an equal interest and degree of control over corporate affairs; the proper remedy is a stockholder's derivative action"); *L.W. Kent and Co., Inc. v. Wolf, et al.*, 143 A.D.2d 813, 533 N.Y.S.2d 119 (1988) (where president and 50% shareholder initiates corporate lawsuit against other 50% shareholder, presumption of president's authority to initiate corporate lawsuit does not apply and appropriate avenue of relief is a derivative action); *Abelow v. Grossman*, 91 A.D.2d 553, 554, 457 N.Y.S.2d 30 (1982) ("action could not be maintained in the name of the corporation, where brought by one stockholder against another with an equal stock interest and degree of control over corporate affairs. The appropriate remedy in such a case is a stockholder's derivative action").

debts by raising a claim which can only be asserted by the corporation. As between creditors and shareholders, the interest of the creditors must prevail”).

The ALI suggested exception challenges the fundamental operation of the corporate form in South Carolina and is contrary to our public policy. There are serious ramifications for allowing such a relaxed standard for pleadings, as suggested by the ALI exception, when bringing derivative actions. Our current rule exists for the purpose of protecting the rights of all entities that place a trust in a business, be it customers, shareholders, creditors, officer, etc.

In *Davis v. Hamm*, the Court of Appeals expressly refused to apply an exception to the general rule concerning when a claim must be brought derivatively. *Davis*, 300 S.C. at 288, 387 S.E.2d at 678. Two years later, the Court of Appeals again had an opportunity to adopt this exception for closely held corporations, and in declining to do so, the court stated as follows:

As an additional theory, Zaldo argues he may recover damages personally because Georganne Apparel Company, Inc. was a close corporation with only three stockholders. He seeks to have Georganne Apparel viewed more as a partnership than a corporation. *See Johnson v. Gilbert, Davis v. Hamm*. This record does not support application of these principles. Mr. Zaldo did business in the corporate form. He testified the business operated as a corporation. He recognized it was owned by the shareholders. This record does not present a factual scenario sufficient to ignore the corporate nature of Georganne Apparel, Inc.

Todd, 304 S.C. at 279, 403 S.E.2d at 668-69 (internal citations omitted).

In the years since the *Davis* and *Todd* cases, our appellate courts have consistently rejected exceptions to the general rule, even when those cases involved closely held corporations. *See Babb*, 303 S.C. at 464, 401 S.E.2d at

419-20; *Brown v. Stewart*, 348 S.C. 33, 51, 557 S.E.2d 676, 685 (Ct. App. 2001). Accordingly, the ALI exception has been rejected in South Carolina.

In any event, this case does not present a factual scenario sufficient to ignore the corporate nature of Tri-Star, Inc.

10. The Law of the Case Doctrine & Res Judicata Prohibit Andrews' Direct and Derivative Claims.

The Final Order erroneously finds the 2011 Order is not a final judgment for the purpose of enforcing the doctrines of law of the case and res judicata. Specifically, the Final Order goes to great lengths to discuss the differences between a final order and final judgment; however, those general principles do not address the specific issue in the present case and are just semantics. The 2011 Order dismissed Andrews' claims individually and on behalf of Tri-Star with prejudice. A dismissal of claims with prejudice "is intended to bar relitigation of the same claim." *Spence v. Spence*, 368 S.C. 106, 128, 628 S.E.2d 869, 881 (2006); *see also Collins v. Sigmon*, 299 S.C. 464, 467, 385 S.E.2d 835, 837 (1989). Thus, dismissal is a final judgment as to those matters. Moreover, the law of the case doctrine and res judicata circumvents any reliance on Rule 54(b), SCRCF. Andrews is bound by his prior arguments and strategic decisions.

As discussed in prior filings, the November 1, 2011 order is the final adjudication of the dismissed claims because Andrews failed to appeal the

dismissal with prejudice of the derivative claims and did not obtain any ruling or relief on the issues he appealed.⁵

The law of the case doctrine applies because after the order dismissing the counterclaims, Andrews failed to obtain a ruling on appeal and did not cure that failure by making any motion to the Supreme Court. Without a reversal or remand from the appeal, this Court's November 1, 2011 order dismissing with prejudice the counterclaims is final and the law of the case. *Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997); *see also Hudson ex rel. Hudson v. Lancaster Convalescent Ctr.*, 407 S.C. 112, 119–20, 754 S.E.2d 486, 490 (2014). Andrews can offer no evidence to the contrary.

Andrews is barred from reviving his derivative claims because he failed to challenge this Court's dismissal of those claims with prejudice. A review of Andrews' motion to reconsider and his court of appeals' brief illustrates that he only appealed the ruling on the direct claims. The ruling as to the derivative claims is now law of the case with the practical effect of foreclosing Andrews' claims. *Dreher v. S.C. Dep't of Health & Envtl. Control*, 412 S.C. 244, 249–50, 772 S.E.2d 505, 508 (2015) (citing *Judy*, 381 S.C. at 458, 674 S.E.2d at 153 (“Under the law-of-the-case doctrine, a party is precluded from re-litigating . . . , [*inter alia*,] matters that were [] not raised on appeal, but should have been . . . ”)). Accordingly, the Court's order awarding actual and punitive damages is invalid and not supported by the law or the facts.

⁵ Broom incorporates by reference its Motion to Dismiss the Counterclaims, his Supplemental Motion and Memorandum in Support of the Motion to Dismiss, his Motion to Reconsider the Order Denying the Motion to Dismiss, and all referenced and attached exhibits.

Conclusion

Based on the trial, motions, evidence, and law, Defendant Broom respectfully requests an order for:

- a. a judgment notwithstanding the verdict in favor of Broom on all Andrews claims or, in the alternative, a new trial;
- b. altering and amending the Final Order consistent with the evidence and law;
- c. reconsidering the Final Order in light of the Transcript and these motions; and
- d. the dismissal of this lawsuit against and other appropriate relief.

Respectfully submitted,

s/Matthew T. Richardson

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Attorneys for Quentin S. Broom, Jr.

November 27, 2017

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	FOR THE SEVENTH JUDICIAL CIRCUIT
	)	
Quentin S. Broom, Jr.,	)	
	)	C.A. No.:08-CP-42-3397
Counterclaim Defendant,	)	
	)	
v.	)	COUNTER-CLAIMANT'S PETITION
	)	FOR ATTORNEYS' FEES AND COSTS
H. Hugh Andrews,	)	AND MEMORANDUM IN SUPPORT
	)	
Counter-Claimant.	)	
	)	

Counter-claimant, H. Hugh Andrews, provides the following memorandum in support of an award of fees and costs pursuant to S.C. Code Ann. § 33-18-410(b) (Supp. 1976) in this matter.

BACKGROUND

This case is 12 years old. It began in September 2005, when Quentin Broom sued Hugh Andrews, a law firm (Ten State Street), and two men who worked at the law firm: Broom v. Ten State Street, L.L.P., et al., C.A. No. 2005-CP-42-2875. Andrews brought counterclaims against Broom in 2006, pleading his counterclaims on his own behalf as well as on behalf of Tri- Star Communications, an entity he and Broom jointly owned. By consent motion and order, that case was removed from the docket pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure, and restored in 2008 under its current case number: Broom v. Ten State Street, L.L.P. et al., C.A. No. 2008-CP-42-3397.

In November of 2011, the Court dismissed the counterclaims directing in the order that the dismissal would be "with prejudice." Andrews appealed that order to the Court of Appeals. In

2015, the Court of Appeals issued an unpublished opinion remanding the case to this Court with specific direction for the Court to rule on Andrews' motion to amend his pleading. Op. No. 2015-UP-030 (S.C. Ct. App. filed Jan. 14, 2015). Later that same year the Supreme Court reversed, holding that the Court of Appeals should not have addressed Andrews' motion to amend-even if only for the purpose of remanding for a ruling-because this Court had not decided the motion. Op. No. 2015-M0-057 (S.C. Sup. Ct. filed Sept. 30, 2015). The case was remanded and a bench trial occurred in June of 2017.

Following a three (3) day trial, the Court entered an order on November 8, 2017 finding in Andrew's favor. The Court also found Broom's conduct was arbitrary, vexatious and not in good faith, thus justifying the award of attorney's fees pursuant to S.C. Code Ann. § 33-18-410(b) (Supp. 1976).

DISCUSSION

A seminal case setting forth the relevant factors in determining the amount of an attorney's fee award is *Baron Data Systems v. Loter*, 297 S.C. 382, 377 S.E.2d 296 (1989). In *Baron Data Systems*, the South Carolina Supreme Court established six (6) separate criteria which the Court is required to review when assessing reasonable attorney's fees. These factors include (1) The nature, extent and difficulty of the legal services rendered; (2) the time and labor necessarily devoted to the case, (3) the professional standing of counsel; (4) the contingency of compensation; (5) the fee customarily charged in the locality for similar legal services; and (6) the beneficial results obtained. Consideration should be given to all six criteria in establishing reasonable attorney's fees and none of the six factors is controlling. *Id.*

Counter-claimant has submitted the affidavits of the attorneys of record representing the Counter-claimant in this matter. [See, Exhibit 1, Affidavit of Rodney F. Pillsbury, and Exhibit 2, Affidavit of Blake A. Hewitt]. When applying the information from these affidavits to the factors an award of \$194,306.53 is proper and just under the circumstances.

(1) The Nature, Extent and Difficulty of the Legal Services Rendered.

As evident from the extensive pre-trial proceedings, motions and discovery, this case was extraordinarily complicated, both factually and legally. The case entailed detailed records of domestic and international companies, thousands of transactions, and a working knowledge of the video gaming industry. Legally, the appeal and remand of this case involved a novel issue for the appellate courts as it pertains to closely-held corporations.

The lawyers on both sides were very well prepared and represented their respective clients with the highest degree of skill and acumen. For Andrews, unraveling the façade of transactions, which on the surface appeared to be in good faith, required diligence in discovery to obtain and assemble the substantive background information as well as mastering a working knowledge of the material to present the same in Court.

(2) Time and Labor Necessarily Devoted to the Case.

The numerous motions and hearings required were very labor intensive. Virtually all pre-trial matters pertained to the discovery and motions between Broom and Andrews. The twelve (12) year period of this case required extensive and exhaustive work. Counsel for Andrews have submitted the affidavits detailing the hours spent on this matter and incorporate that information herein. Counsel for Counter-claimant has attached affidavits of time and

expenses incurred in pursuing this matter.

Plaintiff's counsel (and paralegal staff) collectively expended 831.44 hours.

(3) Professional Standing of Counsel.

Both counsel for Andrews enjoy a high degree of professional standing within the Bar and have been practicing law for many years. Both are "AV" rated with the Martindale-Hubbe, which is its prestigious rating.

(4) The Contingency of Compensation.

Rodney Pillsbury has been working on this matter since 2005. His fee schedule is consistent with the reasonable rate charged by litigation attorneys for civil matters this complex and involved. The original hourly rate in 2005 was \$225.00. Over the years that rate has slowly risen to \$250.00 in 2010 and \$300.00 in 2013. In 2017, the billable rate was increased to \$350.00 per hour.

Andrews hired attorney Blake A. Hewitt and the firm of Bluestein Nichols Thompson & Delagado in 2011 to assist in an appeal to the Court of Appeals at a rate of \$250.00 per hour.

(5) The Fee Customarily Charged in the Locality for Similar Legal Services.

The rates identified above are well within the hourly rates for litigation attorneys of similar skill, experience and expertise. Based upon the inquiries made by Counter-claimant's counsel, the fees customarily charged for appeals ranges from \$200.00 an hour to \$450.00 an hour, depending upon complexity.

When counsel undertook to represent the Plaintiff in 2011, the contractual hourly rate was \$250 per hour. For hourly cases now, Counter-claimant's counsel charges between \$350 and

\$450 per hour (unless the fee has a contingency component of compensation).

(6) The Beneficial Results Obtained.

The results obtained were beneficial, as counsel assisted Andrews in securing a substantial judgment.

CONCLUSION

The affidavits and supporting information substantiate that an award of \$194,306.53 under the circumstances is reasonable and just.

Respectfully submitted,

/s/Rodney F. Pillsbury

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-and-

/s/Blake Hewitt

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blake@bluesteinattorneys.com

Attorney for Counter-claimant Hugh Andrews

December 15, 2017

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

AFFIDAVIT

Blake A. Hewitt states that he is under oath, an adult over the age of eighteen , and the following:

1. I graduated from the University of South Carolina School of Law in May of 2005 and have been licensed to practice law in South Carolina since November of 2005. I am also admitted to practice before the U.S. District Court in South Carolina, the U.S. Court of Appeals for the Fourth Circuit, and the Supreme Court of the United States.
2. I have spoken at numerous continuing legal education seminars for the SC Bar and other organizations on issues pertaining to trial practice, appellate practice, professionalism, and legal writing. I have been a member of the faculty of "Bridge the Gap."
3. I am co-counsel with Rodney Pillsbury for the Counter-Claimant in *Quentin S. Broom, Jr. v. H. Hugh Andrews*, Case No. 2008-CP-42-03397. I was engaged in December of 2011 to help in an appeal to the Court of Appeals.
4. A large part of my current practice is an appellate practice in which I am typically paid an hourly rate. My current hourly rate for cases upon which I work ranges from \$350 to \$450. My hourly rate in this case is lower (\$250) because I was hired in 2011, six years ago. To the best of my knowledge this is a reasonable hourly rate for lawyers with my experience and in my type of practice in South Carolina.

5. I have expended 128.64 hours of time in Mr. Andrew's appeal and matter on remand, or a total of \$32,160.00.
6. To date my firm's costs are \$2,778.15.
7. I verify under oath that these amounts are true and correct.

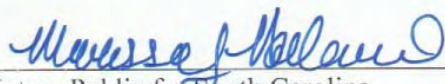
FURTHER AFFIANT SAYETH NOT.


Blake A. Hewitt

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Sworn to and subscribed before me

this 20 day of November, 2017


Notary Public for South Carolina

My commission expires: 1/12/2026

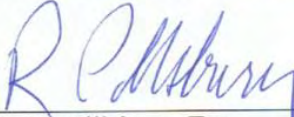
STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	FOR THE SEVENTH JUDICIAL CIRCUIT
	)	
Quentin S. Broom, Jr.,	)	
	)	C.A. No.:08-CP-42-3397
Counterclaim Defendant,	)	
	)	
v.	)	AFFIDAVIT OF RODNEY F. PILLSBURY
	)	
H. Hugh Andrews,	)	
	)	
Counter-Claimant.	)	
	)	

Personally appears before me, **Rodney F. Pillsbury**, the undersigned, who upon being duly sworn, deposes and states as follows:

- 1) I am a citizen and resident of Greenville, South Carolina, over the age of eighteen (18), competent to testify, and the facts set forth herein are those known personally unto me.
- 2) I am the Counsel of Record for the Counter-Claimant in the above-referenced case.
- 3) I graduated from the University of South Carolina School of Law in 1989. I have been a practicing attorney since 1989, licensed by the South Carolina Supreme Court. I have been admitted to practice by the United States District Court for the District of South Carolina (1993); the United States Court of Appeals for the Fourth Circuit (1999) and the United States Court of Appeals for the Federal Circuit (2000).
- 4) My practice is primarily civil litigation. I have tried and/or litigated almost the entire gamut of civil matters, including, medical malpractice, professional negligence, products liability, mass consumer tort, premises liability, shareholder derivative and corporate dissolutions matters, insurance bad faith, securities fraud, RICO and personal injury. I was lead counsel in a consumer class action, In re: Joe Gibson's Auto World, Inc. d/b/a Gibson's Suzuki (D.S.C. Bankr. C.A. No. 08-04215-HB) and In re: Joe Gibson's Automotive, Inc., Inc. d/b/a Gibson's Mitsubishi, (D.S.C. Bankr. C.A. No. 08-04216-HB), which resulted in a \$3.2 million settlement for our 325 clients. I have an AVTM rating with Martindale-Hubbe and I am listed as one of South Carolina Super LawyersTM for civil litigation.
- 5) My current Hourly rate for cases upon which I work ranges from \$300 to \$350 per hours. My hourly rate in this case has ranged from \$225 in 2007 to \$300 beginning in 2013. Beginning in 2017, my billable rate was increased to \$350.00 per hour. To the best of my knowledge this is a reasonable hourly rate for lawyers with my experience and in my type of practice.

- 6) My firm has expended approximately 702.80 hours from 2005 to present on this matter and have a total of approximately \$159,368.38 in fees and expenses to date.

UNDER THE PAINS AND PENALTIES OF PERJURY, THE AFFIANT FURTHER SAITH NOT.



Rodney F. Pillsbury, Esq

SWORN to before me this
15th day of December, 2017



NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 10/18/21

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Mark Hayes, Circuit Court Judge

Case No. 20008-CP-42-3397

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SC Court of Appeals

H. Hughes Andrews.....Respondent,

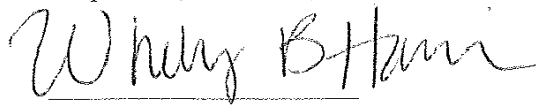
V.

Quentin Broom, Jr.....Appellant,

NOTICE OF APPEAL

Appellant Quentin Broom appeals from a bench trial held before the Honorable Mark Hayes in which the order was entered on November 8, 2017 and the order denying the motion for reconsideration was entered on November 20, 2018.

Respectfully submitted,



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SC Court of Appeals

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ELECTRONICALLY FILED - 2017 Nov 17 10:34 AM - SPARTANBURG - COMMON PLEAS - CASE#2008CP4203397

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

Quentin S. Broom, Jr.,)
Counterclaim Defendant,)
v.)
H. Hughes Andrews,)
Counter-Claimant.)

C.A. No.: 08-CP-42-3397

ORDER AND JUDGMENT

This case comes before the Court following a non-jury trial beginning June 26, 2017 and concluding June 28, 2017. Three witnesses testified. The parties introduced numerous exhibits. Following the conclusion of Andrews' case, Broom made a motion for directed verdict. The Court denied Broom's motion. Following the conclusion of all evidence, Broom renewed his motion for directed verdict. The Court denied Broom's motion and allowed the parties to make closing arguments.

The Court has done its level-best to consider all evidence and arguments. Having considered those materials, having also taken the opportunity to evaluate and weigh the credibility of witnesses, and having heard the arguments of counsel, the Court enters this order and judgment.

Brief Background Summary

This case is nearly 12 years old. It began in September 2005, when Quentin Broom sued Hugh Andrews, a law firm (Ten State Street), and two men who worked at the law firm: Broom v. Ten State Street, L.L.P., et al., C.A. No. 2005-CP-42-2875. Andrews brought counterclaims

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against Broom in 2006, pleading his counterclaims on his own behalf as well as on behalf of Tri-Star Communications, an entity he and Broom jointly owned. By consent motion and order, that case was removed from the docket pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure, and restored in 2008 under its current case number: Broom v. Ten State Street, L.L.P., et al., C.A. No. 2008-CP-42-3397.

There was an interlocutory appeal (more on that later) and parties were dismissed prior to trial. Shortly before trial, Broom also dismissed his claims against Andrews and all other parties.

Because of these intermediate events, the trial only concerned Andrews' claims, which were originally brought as counterclaims. The trial proceeded as though Andrews was the plaintiff and Broom was the defendant. Attorneys Rodney Pillsbury and Blake Hewitt were present for Andrews. Attorneys Matthew Richardson, Patrick Knie, Whitney Harrison, and McKinley Hyman were present for Broom.

The claims were contested, but it was generally established that Broom and Andrews had been co-owners of Tri-Star Communications, a business that ran video poker machines primarily in South Carolina during the 1990s. Following a ban of these machines in South Carolina Broom and Andrews transferred them to the Dominican Republic and began operating them through a separate foreign entity (Worldwide Entertainment or "Worldwide" hereafter). It was generally established the business had 1,122 video poker machines in the Dominican Republic in the year 2005 via Worldwide, which Broom *de facto* controlled. It was generally established that unilaterally Broom orchestrated a sale of these machines in 2005 (over Andrews' objection) and that Tri-Star ceased operating almost immediately thereafter.

Andrews' claims against Broom can be generally characterized as fraud and self-dealing. Andrews alleges Broom paid himself an excessive salary without Andrews' consent.



Andrews also alleges Broom sold the video poker machines below market value; devising and executing a scheme to convert the machines to his own use without regard for Andrews' interests. Broom disputed each of these allegations. These matters were the focus at trial.

Preliminary Issues

Later sections of this order contain a detailed discussion of the evidence and the claims the Court found to be most relevant, but two preliminary matters require attention. Broom argues Andrews' claims are barred by *res judicata* (claim preclusion) and the law of the case doctrine. The Court has carefully considered Broom's arguments and respectfully denies them.

A few sentences about procedure are required to lay out these arguments. Andrews originally pled his counterclaims in 2006. He brought these on his own behalf as well as on behalf of Tri-Star.

Broom filed a motion to dismiss Andrews' counterclaims in September of 2011, seeking dismissal on the basis that all of Andrews' claims were derivative claims, pursuing recovery for harm done to Tri-Star in the first instance, not to Andrews individually. Broom claimed dismissal was warranted because Andrews had not complied with the pleading requirements for derivative lawsuits set out in Rule 23, SCRCP.

Andrews lodged two arguments in response to Broom's motion. First, Andrews asked the Court to relax the rule that derivative claims belong to the corporation and not the shareholder, noting this case involved a corporation with only two shareholders, one of whom was suing the other. Second, Andrews asked to amend his counterclaims.

The Court dismissed the counterclaims in November of 2011, directing in the order that the dismissal would be "with prejudice." Andrews appealed that order to the Court of Appeals.



In 2015, the Court of Appeals issued an unpublished opinion remanding the case to this Court with specific direction for the Court to rule on Andrews' motion to amend his pleading. Op. No. 2015-UP-030 (S.C. Ct. App. filed Jan. 14, 2015). Later that same year the Supreme Court reversed, holding that the Court of Appeals should not have addressed Andrews' motion to amend—even if only for the purpose of remanding for a ruling—because this Court had not decided the motion. Op. No. 2015-MO-057 (S.C. Sup. Ct. filed Sept. 30, 2015).

Andrews began seeking a ruling on his motion to amend after the Supreme Court issued the remittitur. In July of 2016, this Court issued an order allowing Andrews to amend his pleading to state his counterclaims derivatively as well as directly, and to comply with the derivative pleading requirements in Rule 23.

The Court's order recognized and adhered to its ruling that all of Andrews' counterclaims were properly characterized as derivative claims. The Court allowed the claims to be stated by Andrews individually for the sole purpose of allowing Andrews to preserve for further review his argument that there is no distinction between direct and derivative claims when one of a corporation's two owners is suing the other owner.

Broom's "preclusion" arguments relate to this Court's 2011 dismissal of the counterclaims "with prejudice." The argument also involves Andrews' interlocutory appeal and this Court's 2016 order allowing Andrews to re-assert his counterclaims in a way that complies with Rule 23. Broom argues the 2011 dismissal of the counterclaims was a "final order." Broom contends Andrews abandoned his prior appeal of that final order and that the decision to dismiss Andrews' counterclaims is the law of this case. The Court disagrees.

First, the key term is not "final order," but "final judgment." A final judgment terminates the entire case. *Bone v. U.S. Food Serv.*, 404 S.C. 67, 75, 744 S.E.2d 552, 557 (2013) (quoting



Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Env't'l Control, 387 S.C. 265, 267, 692 S.E.2d 894, 895 (2010)). Rule 54(b), SCRCP, allows a court to direct a final judgment on fewer than all claims in a case, but the rule also instructs that unless the Court expressly directs the entry of judgment, any intermediate order is subject to revision, at any time, until a final judgment is issued. A final judgment happens when a case reaches the "end of the road." *Baldwin Const. Co. v. Graham*, 357 S.C. 227, 230, 593 S.E.2d 146, 147 (2004).

This Court's 2011 order was not a final judgment. The order dismissed Andrews' counterclaims, holding they were improperly pled as individual claims when they were in fact derivative claims that did not comply with Rule 23. That order did not direct the entry of any judgment. It was also not the end of the case. The order was not even the end of Andrews' pleading. Broom was still suing Andrews; Andrews' answer remained pending. Andrews moved to amend his pleading in response to the order dismissing his counterclaims. The counterclaims had not reached the end of the road as long as that motion remained pending.

The Court of Appeals recently noted "the ease with which pleadings may now be amended" and held "the fate of [a party's] counterclaims have not been finally determined as long as his motion to amend hangs in the balance." *Tillman v. Tillman*, Op. No. 5493 (S.C. App. filed June 14, 2017) (Shearouse Adv. Sh. No. 23 at 34, 36-37). The Supreme Court recently expressed the same sentiments, explaining amendments are "strongly favor[ed]" and "the court is encouraged to freely grant leave to amend." *Patton v. Miller*, Op. No. 27730 (S.C. Sup. Ct. filed July 26, 2017) (Shearouse Adv. Sh. No. 28 at 87, 99). The decision instructs "If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Id.* at 100 (quoting

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Foman v. Davis, 371 U.S. 178, 182 (1962)). These principles point strongly in favor of allowing Andrews the opportunity to have his claims heard.

There has been no final judgment until *this* Order. There is no mandate or decision from an appellate court establishing *any* law for this case. The Court believes the proper application of the controlling principles counsel strongly in favor of parties' claims being heard on the merits.

A single cause of action: Andrews' amended pleading asserts 10 claims against Broom: breach of fiduciary duty, breach of contract, breach of contract accompanied by a fraudulent act, breach of the covenant of good faith and fair dealing, conversion, violation of the corporate standards for directors, violation of the corporate standards for officers, promissory estoppel, fraud, and negligent misrepresentation. Broom filed a motion to dismiss prior to trial, arguing Andrews' claims constitute a single cause of action for breach of the standards of care for an officer and director.

The Court agrees. Precedent explains the South Carolina Business Corporation Act codifies the common law duties owed by officers and directors to shareholders. *Clearwater Trust v. Bunting*, 367 S.C. 340, 349, 626 S.E.2d 334, 338 (2006). Andrews' pleading, evidence, and arguments consistently indicated his claims are classic claims for corporate self-dealing. Andrews claims Broom paid himself excessive and unauthorized salary without Andrews' consent, sold the video poker machines below market value, converted the machines to his own use, and failed to consider Andrews' interests. These claims constitute a single cause of action for breach of the corporate code.

Partnership Standards Do Not Apply: The parties contested the standard of care Broom owed to Andrews. Broom argued the standard was that of a director. Andrews argued Tri-Star

operated as a partnership notwithstanding the fact that Tri-Star was not a partnership, but was instead a corporation.

The Court is not aware of a vehicle or mechanism allowing the Court to impose partnership duties on the members of this corporation. These parties chose to operate through the corporate form—they did not form and operate a partnership. The applicable standards of care between Broom and Andrews are the standards from the corporate code; specifically, the standards of conduct for officers and directors from Articles 3 and 4 of Title 33, Chapter 8.

Merits: Andrews' claim under the South Carolina Business Corporation Act asserts actual damages for three (3) separate areas: (1) Reimbursement for Broom's unauthorized salary payments to himself; (2) Monies owed from the unauthorized sale of the video poker machines; and (3) Monies due Andrews from Broom's subsequent lucrative income from the Dominican Republic. After considering all the evidence, the Court finds in favor of Andrews as to the first item, but finds for Broom as to the latter two. The Court concludes Broom did not honor the applicable standards of care. Instead, the Court is convinced—and finds as a fact—that Broom acted fraudulently and with bad faith with regard to the monies Broom unilaterally paid to himself in 2004 and 2005.

To be sure, Broom and Andrews tell very different stories. Broom testified that it was a struggle for operations in the Dominican Republic to be profitable. There were problems converting Dominican profits to U.S. dollars and there were problems related to import and export taxes. Broom also testified about legal issues surrounding Worldwide's poker games in the Dominican Republic.

Broom said he worked for years without taking a salary to help the business get on its footing. Broom also said the parties always contemplated his being entitled to a salary, both



prospectively and retroactively. As to the latter point, Andrews testified that he consented to a salary for Broom only after Andrews was paid for the video poker machines he sold to Tri-Star. Andrews believed Broom should not have taken a salary because Andrews was never paid for those machines.

Broom controlled the financial operations of Tri-Star. He admitted that when he began paying himself a salary, he did not consult with Andrews as to the amount (because he believed he was not obligated to); nor did he even notify Andrews he had begun paying himself. Although Tri-Star had been in operation since 1997, Broom did not begin paying himself a salary until December 31, 2004. From the financial records of Tri-Star, Broom paid himself the following amounts on the following dates:

December 31, 2004	\$400,000.00
January 31, 2005	\$130,000.00
February 28, 2005	\$130,000.00
March 31, 2005	\$185,000.00
April 30, 2005	<u>\$ 75,000.00</u>
<u>Total</u>	<u>\$920,000.00</u>

Broom testified he believed these were justified because the company had achieved profitability. However, the evidence directly refutes this assertion. For example, in order to pay himself \$400,000.00 in salary from Tri-Star on December 31, 2004, Broom borrowed \$325,000.00 from relatives and his other company, Best Games. [Pl. Ex. 23] If Tri-Star had been profitable enough to afford a \$400,000.00 salary payment to Broom, it would not have had to borrow 81.25% of that amount to make the payment.

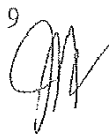
This transaction clearly and convincingly evidences Broom's bad faith and fraudulent intent. There is no legitimate business reason a company would borrow \$325,000.00 from

family members to make a self-dealing \$400,000.00 salary payment to an employee on the last business day of the year.

Other financial transactions demonstrate Broom's bad faith and fraudulent intent. In February 14, 2005, Broom purchased a \$3.5 Million-dollar estate in Miami, Florida. Within the context of the money transfers and payments Broom made to himself beginning on December 31, 2004, the Court is convinced the purchase was made as part of Broom's plan to close down the Dominican operations and re-open them without Andrews. The homestead exemption under Florida law would have made Broom *de facto* judgment-proof from any claims asserted by Andrews.

Additionally, whenever Broom wanted to move money from Worldwide to Tri-Star, he would simply have the funds wire transferred to Tri-Star's account. However, in order to meet Tri-Star's unilateral salary commitment Broom made for himself, it became incumbent for the Dominican Republic's partner in Worldwide (Edmund Elias Yunes) to wire transfer personal funds to Tri-Star. Mr. Yunes transferred \$100,000.00 on April 28, 2005 [Pl. Ex. 28] and \$90,000.00 on June 29, 2005 [Pl. Ex. 29]. Clearly, neither Tri-Star nor Worldwide were independently profitable as Broom testified.

As to the purported sale of the video poker machines themselves, Broom testified that he sold 1,132 video poker machines for the sum of \$400,000.00 in September 2005. The parties stipulated that Andrews did not receive notice of any potential sale until after the sale had already occurred. Andrews vehemently objected to the sale because he believed the machines were worth considerably more. Indeed, Andrews' expert witness, Mr. Mike Fletcher, testified that the CPU boards alone on the machines were worth \$1,122,000.00. Mr. Fletcher opined a value of the machines in September 2005 between \$1,767,150.00 and \$1,512,000.00.

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When testifying about the difficulty of operating the machines in the Dominican Republic to justify his salary, Broom stated that the machines had extensive licensing issues that needed to be overcome to have them domesticated in the Dominican. However, when it came to the sale of the machines, literally Broom only had one (1) piece of paper to document the entire sale of \$1,132 machines: a receipt showing someone paid Broom's employee, Frank Dillashaw, \$400,000.00 cash in US dollars. There are no title transfers; no deposit slips; no other documents of any kind evidencing the sale of 1,132 video poker machines.

Meanwhile, back in South Carolina, Broom never deposited the \$400,000.00 cash in Tri-Star's account. Broom made a \$400,000.00 deposit in Tri-Star's account on November 3, 2005. This was designed to give the appearance of depositing the funds from the alleged sale of the machines, however, the deposit slip reveals the \$400,000.00 came from multiple local accounts (money he allegedly borrowed from family and/or other companies he controlled). [Pl. Ex. 33]

Broom testified that he did not know what happened to the 1,132 poker machines formerly belonging to Tri-Star. He testified that the money he made in the Dominican Republic after closing Tri-Star was a different video game machine. The Court has serious reservations about the credibility of this testimony. Other than one manual, Broom did not provide any documented evidence to support his testimony that the machines were not the video poker machines formerly owned by Tri-Star: not one picture; receipt; title record or any other document which easily would have confirmed Broom's story.

Based upon the totality of the financial records and other evidence, the Court has serious concerns about Broom's purported sale in September 2005.. However, the prior Bankruptcy Court case significantly affects this Court's view of the video poker machines issue: *In re: Tri-Star Communications, Inc.*, C.A. 2005-45299-hb (D.Bnkrtpt.SC). There, the parties stipulated in



the bankruptcy proceeding that the Attorney General of the Dominican Republic did issue a directive against the video poker machines, making them illegal. (Bankruptcy Court Order Paragraphs 12, 13 and 14). With the prior stipulation by both parties, this Court must accept those facts as true. Thus, this Court will infer that the immediate motivation in selling the machines was the Attorney General's action of prohibiting the machines and not the Defendant's desire to open another gaming operation. The record from the bankruptcy proceeding also indicates that the sale/liquidation of the machines was unilateral on the part of the Defendant. Therefore, the manner of sale remains an issue in this case.

Again, the prior bankruptcy proceeding affects this Court's view of the manner of the sale. With the actions of the Attorney General weighing on the liquidation, a reasonable inference is that the sale of the machines would be at a discounted price. At the time of the sale, the machines were illegal in the Dominican Republic and the Attorney General was in the process of hunting for the machines. But for this stipulated factual background, this Court would be in position to more favorably view the sale of machines as theorized by the Plaintiff. The facts as stipulated to the Bankruptcy Court govern this Court's view of those facts. Therefore, this Court cannot award a value for the machines under theories of liability offered by Plaintiff. Additionally, if the machines were sold at a price below the dark market rate as testified by Plaintiff's expert, then both the Plaintiff and Defendant have suffered from a bad business decision forced on them by the machines being declared illegal and subject to government confiscation.

Regarding the monies Broom earned from his operations in the Dominican Republic following the liquidation of Tri-Star Communications, the Court is highly suspicious that the income was not related to the machines formerly owned by Tri-Star. However, the evidence in



the record does not support the conclusion that Plaintiff is entitled to income from Defendant's subsequent business. The financial success of Defendant's subsequent gaming venture standing alone does not meet the standard or burden of proof. While Plaintiff accurately summarizes many aspect of the record before this Court, the Defendant voluntarily dismissed all of its claims against Plaintiff. Therefore the burden of proof rest solely on the Plaintiff. Even though this Court does find the Defendant liable under the theories offered by Plaintiff for the payment of salary, the same theories are not support by the facts presented to reach into the Defendant's subsequent gaming venture.

The Court finds that Broom acted fraudulently and in bad faith. It is clear that Tri-Star did not have the income to support the exorbitant salary Broom unilaterally began paying himself on New Year's Eve 2004. The only reasonable interpretation, and the Court so finds, is that by the end of 2004, Broom began a scheme by which he would close down Tri-Star and open operations in the Dominican Republic with Tri-Star's video poker games under an entity deliberately designed to exclude Andrews. Broom conceived and executed a scheme to take all the cash out of Tri-Star, liquidate the company, and cut Andrews out of the business.

The Court finds these facts by clear and convincing evidence. The timeline and explanation Andrews offered in his closing summation was a compelling explanation of how different events fit together. The records of Tri-Star demonstrate that Broom was able to pull money out of Worldwide any time he wanted. Broom himself testified that he controlled Worldwide. Broom pays himself over \$1,000,000.00 in salary at a time when Tri-Star owed Andrews significant sums for the video games. Broom moved money out of Worldwide at a time when that company owed significant sums for taxes in 2003 and 2004. The court finds it incredulous 1,122 video poker machines would be sold and the sole record is a single piece of



paper stating \$400,000 in US dollars cash was received for 1,122 video poker machines. [Def.Ex. 14] Those funds, if ever received, were never deposited in Tri-Star's account.

When placed within the sequence of financial transactions, Broom's purchase in February 2005 of a \$3.5 Million dollars of a luxurious waterfront estate in Miami, Florida fits neatly into his scheme to cut Andrews out of the Dominican operations. The large monthly salary payments that Broom unilaterally paid himself (\$130,000.00 in January 2005; \$130,000.00 in February 2005 and \$185,000.00 in March 2005) correspond with the timeframe that Broom presumably would be attempting to secure a mortgage and needed to demonstrate a regular income stream.

Given how Broom secretly borrowed money from family and his other companies to give the appearance of legitimate transactions, it is clear that Broom's actions were fraudulent and in bad faith with respect to his obligations to Andrews and to Tri-Star.

Disposition/Recovery

Having concluded Andrews is entitled to a monetary judgment, the Court is required to again encounter the issue of direct claims versus derivative claims.

The monetary judgment represents the amount of harm the Court finds Broom's actions inflicted on Andrews. Broom gained from his conduct; Andrews is the only Tri-Star shareholder who did not gain. The recovery in a derivative claim normally goes to the corporation, but treating this recovery as a "derivative" recovery would require Andrews and Broom to equal shares in the judgment.

The American Law Institute has proposed a principle for handling such circumstances. This principle explains:

In the case of a closely held corporation, the court in its discretion may treat an action raising derivative claims as a direct action, exempt it from



those restrictions and defenses applicable only to derivative actions, and order an individual recovery, if it finds that to do so will not (i) unfairly expose the corporation or the defendants to a multiplicity of actions, (ii) materially prejudice the interests of creditors of the corporation, or (iii) interfere with a fair distribution of the recovery among all interested persons.

Principles of Corporate Governance: Analysis and Recommendations, A.L.I., § 7.01(d), cmt. (e) (1994). The rationale of this exception is that when the purposes of a derivative suit are absent, proceeding derivatively forces litigants to comply with formalities that are cumbersome and futile. *Id.*

South Carolina has examined this exception in four cases: *Davis v. Hamm*, *Todd v. Zaldo*, *Babb v. Rothrock*, and *Brown v. Stewart*. None of these cases apply this exception and none of them reject this exception. This Court notes its decision at the pleading stage declining to apply the exception and requiring Andrews to plead the claims derivatively.

Now that a full record has been developed, the Court is convinced the appropriate recovery in this case is to Andrews, individually. In a two-person corporation, one shareholder's self-dealing necessarily corresponds to the other shareholder's harm. The record proves that principle is true here. All of Broom's gains that were ill-gotten were of necessity taken at Andrews' expense.

There is no risk of a multiplicity of actions. Tri-Star was administratively dissolved in 2009 and it only has two shareholders, one of whom is suing the other.

There are no outside creditors here. Broom asked the Court to take judicial notice of Tri-Star's involuntary bankruptcy and the bankruptcy court determined there were no claims against Tri-Star other than the claims of equity holders (Andrews).



An individual recovery will not interfere with a fair distribution of the recovery among interested persons. Again, the Court's judgment reflects the amount of financial damage done to Andrews. The Court has not been presented with and has not been able to discover any sensible argument against Andrews receiving an individual recovery in these circumstances.

Damages

Under S.C. Code Ann. § 33-18-410(9), when an officer/director has acted fraudulently and in bad faith, as Brooms has done here, the Court may award the aggrieved party damages. The Court finds that Andrews has proven damages casually related to the fraudulent and bad faith actions of Broom. Andrews claims several different items of damage. First, it is undisputed that from December 31, 2004 until September 2005, Broom paid himself \$1,020,000.00 in salary (the bulk of which was done within a 120-day period). The Court will treat these payments as an unauthorized distribution. Therefore, Andrews is entitled to one-half of those payments, or, \$510,000.00. Andrews also argued for prejudgment interest on these distributions. Under South Carolina law, the Court does not find that he is entitled to prejudgment interest.

As discussed previously, the Court denies Andrews' claims for monies related to the sale of the machines and for monies related to Broom's earnings subsequent to the purported sale of the machines in 2005.

Andrews also request punitive damages. A detailed explanation of the purpose and legal requirements for awarding punitive damages can be found in *Mellon v. Lane*, 377 S.C. 261, 659 S.E.2d 236 (Ct. App. 2008):

Punitive damages, alternatively known as exemplary damages, are imposed as punishment. *Clark v. Cantrell*, 339 S.C. 369, 378-379, 529 S.E.2d 528, 533 (2000). Punitive damages are allowed in the interest of

society in the nature of punishment and as a warning and example to deter the wrongdoer and others from committing like offenses in the future. *Id.* Moreover, they serve to vindicate a private right by requiring the wrongdoer to pay money to the injured party. *Id.*

At least three important purposes are served by a punitive damages award: (1) punishment of the defendant's reckless, willful, wanton, or malicious conduct; (2) deterrence of similar future conduct by the defendant or others; and (3) compensation for the reckless or willful invasion of the plaintiff's private rights. *Id.* The paramount purpose for awarding punitive damages is not to compensate the plaintiff but to punish and set an example for others.

On the issue of punitive damages, the highest burden of proof known to the civil law is applicable. Section 15-33-135 of the South Carolina Code provides: "In any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence." S.C. Code Ann. § 15-33-135 (Supp. 2003). Punitive damages can only be awarded where the plaintiff proves by clear and convincing evidence the defendant's misconduct was willful, wanton, or in reckless disregard of the plaintiff's rights. *Taylor v. Medenica*, 324 S.C. 200, 220, 479 S.E.2d 35, 46 (1996); *Lister v. NationsBank of Delaware*, 329 S.C. 133, 149, 494 S.E.2d 449, 458 (Ct.App.1997).

There is no formula or standard to be used as a measure for assessing punitive damages. However, factors relevant to consideration of punitive damages are: (1) the character of the defendant's acts; (2) the nature and extent of the harm to plaintiff which defendant caused or intended to cause; (3) defendant's degree of culpability; (4) the punishment that should be imposed; (5) duration of the conduct; (6) defendant's awareness or concealment; (7) the existence of similar past conduct; (8) likelihood the award will deter the defendant or others from like conduct; (9) whether the award is reasonably related to the harm likely to result from such conduct; and (10) defendant's wealth or ability to pay. See *Gamble v. Stevenson*, 305 S.C. 104, 111-112, 406 S.E.2d 350, 354 (1991); see also *Welch v. Epstein*, 342 S.C. 279, 306, 536 S.E.2d 408, 422 (Ct.App.2000) ("Under *Gamble*, the trial court is not required to make findings of fact for each factor to uphold a punitive damage award.").

Id. at 289-291, 659 S.E.2d at 251-252.

The Court finds by clear and convincing evidence that Andrews is entitled to punitive damages. When all evidence is placed in context and within its timeframe, it is clear to this

Court that Broom engaged in a deliberate pre-planned scheme to shut down his business with Andrews by unilaterally paying himself an authorized salary of over one million dollars during the last months Tri-Star was in operation. The plan was meticulously conceived. For example, there is no legitimate business reason to borrow \$325,000.00 for the sole purpose of paying Broom \$400,000.00 in payroll two (2) weeks later. In order to make a payroll payment to himself of \$400,000.00 on December 31, 2004, Broom had to coordinate with family members in advance to obtain substantial monies loaned to him to help him effectuate this purpose. Similarly, when concealing the \$400,000 for alleged proceeds for the sale of the machines, Broom once again had to coordinate with family members to make this deposit on November 3, 2005. These actions evidence a clear intent to conceal the truth from Andrews.

The Court agrees with Andrews' argument that this scheme was pre-conceived well in advance and executed with surgical precision to cut Andrews out of the business operations in the Dominican Republic. The Court is equally concerned that Broom may likely have violated relevant tax laws with the manner by which he attempted to document the sale of the poker machines, given the fact that \$400,000.00 in cash was allegedly received in the Dominican Republic but this income was by Broom's admission not reported.

The Court also finds that awarding punitive damages in this case would deter others who may who may seek to engage in similar misconduct in the future.

The actual damages for Andrews totals \$510,000.00. Under South Carolina law, to pass constitutional scrutiny, a punitive award can be no more than ten (10) times actual damages. The Court finds that Broom's fraudulent and bad faith conduct warrants an award equal to Plaintiff's actual damages. An award of \$510,000.00 fairly and accurately reflects the scope of Broom's



misconduct, is reasonably related to the harm suffered by Andrews, and satisfies all other factors outlined in *Gamble* and *Mellon*.

The Court has considered the reprehensibility of Broom's conduct and finds it was the result of an intentional design to deceive Andrews for Broom's financial benefit. See *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 587, 686 S.E.2d 176, 185 (2009) (requiring a court to consider the degree of reprehensibility when reviewing punitive damages). The Court has already considered the ratio and finds a 1 to 1 ratio of actual and punitive damages is reasonable and proportional to the harm inflicted on Andrews.

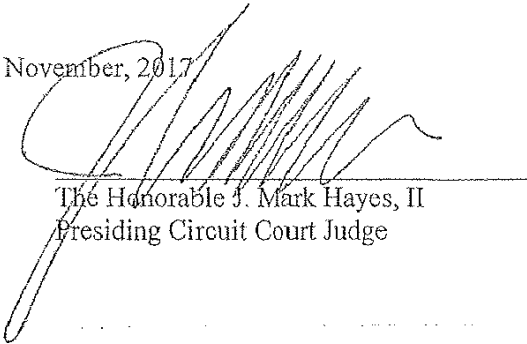
The Court has also considered comparative penalty awards. The harm to Andrews was purely economic, but it was the result of a meticulously-planned and executed scheme designed to siphon all the value out of Tri-Star while maximizing Broom's take and minimizing the extent to which the company would repay Andrews. South Carolina courts have long upheld punitive awards for cases involving fraudulent conduct. See, e.g., *Jordan v. Holt*, 362 S.C. 201, 608 S.E.2d 129 (S.C., 2005) (punitive award for self-dealing upheld). The Court believes a 1 to 1 ratio between actual damages and punitive damages is justified considering this history and was unable to locate any case suggesting the punitive award in this case was out-of-step with comparable awards.

Finally, Andrews has requested payment of attorney's fees and costs as permitted by SC Code 33-18-410(b): "If the court finds that a party to the proceeding acted arbitrarily, vexatiously, or otherwise not in good faith, it may award other parties their reasonable expenses, including counsel fees and the expenses of appraisers or other experts, incurred in the proceeding." Broom certainly has acted "arbitrarily, vexatiously, or otherwise not in good faith." As such, the Court finds that Andrews is entitled to attorney's fees and costs.



As noted above, this case has had a lengthy litigation history. As such, the Court will give Andrew's fifteen (15) days from the date of entry of this order to submit a petition for attorney's fees and costs. Broom will have fifteen (15) days from Andrew's petition to file any response or reply. Thereafter, the Court will rule on the attorney's fee and cost amount to be added to the awards set forth herein.

It is so ordered, this 2nd day of November, 2017


The Honorable J. Mark Hayes, II
Presiding Circuit Court Judge

11 | 2, 2017

CLERK OF COURT
SPARTANBURG COUNTY
2017 NOV -6 AM 12
M. HOPE SLACKLEY

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)
H. Hughes Andrews,)
Plaintiff,)
v.)
Quentin S. Broom, Jr.,)
Defendant.)

IN THE COURT OF COMMON PLEAS
Civil Action No. 2008-CP-42-03397

**FINAL ORDER
and JUDGMENT**

RECEIVED
DEC 18 2018
SC Court of Appeals

This case came before the Court on a motion filed by the Defendant and a motion filed by the Plaintiff. The Defendant's motion is for JNOV, or, in the alternative, for a new trial, to alter or amend, and for reconsideration. The Plaintiff's motion is for attorney's fees and costs.

The Court conducted a hearing on the motions August 23, 2018.

On September 26, 2018, the Court entered a Form 4 denying the Defendant's motion and granting the Plaintiff's motion. The Form 4 explained this final, formal order would follow.

This has been a difficult case. Yet, after considering all of the parties' filings and arguments, as well as the evidence, the Court remains convinced its prior Order and Judgment is correct.

The judgment entered after the bench trial in this case was based principally on the Court's examination of the circumstances surrounding the Defendant's withdrawal of \$1,020,000 from the parties' business in 2004 and 2005. Business records show the Defendant paid himself \$400,000 on December 31, 2004 and that he made other large payments to himself over the following months.

The evidence also showed, however, that \$325,000 of the first salary payment was borrowed from the Defendant's relatives and from one of the Defendant's other companies. The

1 

evidence further showed that a partner in the Dominican Republic *personally* transferred \$190,000 into the business during this time. The business also owed significant sums for 2003 and 2004 taxes.

In the Court's view, the foregoing evidence proved Tri-Star Communications plainly did not have sufficient income to support the salary Defendant began paying himself on New Year's Eve in 2004.

The outcome of this case turned on a credibility determination, which was a factual dispute. The Plaintiff claimed he did not consent to the Defendant's salary and that circumstances of the loans and salary payments constituted strong evidence of a scheme to cut him out of the business. The Defendant claimed the parties agreed he was entitled to a salary, that he had the authority to set his salary, and that business had been doing well enough to support the salary. As described above, the Court believes the evidence directly refutes the Defendant's argument that the business had sufficient income to support the salary payments he was taking. The Plaintiff presented compelling evidence that the Defendant used his management of Tri-Star for his own benefit in 2004 and 2005 rather than for the benefit of Tri-Star and its other shareholder. The Defendant's explanation was not credible.

I.

The Defendant's motion challenges the admission of various items of evidence during trial. This was a bench trial and the Court elected to admit all evidence before evaluating it in a non-jury setting and giving weight to the evidence as it deemed appropriate. As described above, the outcome of this case ultimately turned on the factual finding that the Plaintiff's evidence was compelling and that the Defendant's explanation for the events was not believable and belied by the company having to borrow much of the money he elected to pay himself.

The Defendant's motion also challenges the award of punitive damages. The Order and Judgment included an amount of punitive damages that was equal to the \$510,000 compensatory award. As stated there, the Court believes the Plaintiff made a compelling case for an award of punitive damages and that a 1 to 1 ratio between compensatory and punitive damages is evidence that the award is within constitutional boundaries and is not excessive.

The Court has considered the criminal penalties for similar misconduct as outlined in the Plaintiff's return to the Defendant's motion. Comparison to civil and criminal penalties can provide evidence that a punitive award is excessive. See *BMW v. Gore*, 517 U.S. 559, 583 (1996). That comparison does not suggest a punitive award of roughly \$500,000 is excessive.

All other arguments on the motion for a JNOV, for a new trial, and for reconsideration not directly mentioned have been considered and are denied. This pertains to all arguments that have been previously raised and decided in prior orders as well as any arguments properly made in the post-trial motion for the first time.

II.

Regarding the Plaintiff's motion for attorney's fees and costs, the first thing the Court must consider is whether the motion is untimely. The Defendant says it is not timely because the petition was due December 2, 2017 and the Plaintiff did not request an extension of that deadline until two days later.

The Defendant says original deadline for the petition to be filed was fifteen days from November 17, 2017, which would be December 2. The Court takes judicial notice that December 2, 2017 was a Saturday. On Monday, December 4, the Plaintiff requested an extension of the deadline. The petition was filed two weeks later, on December 15, 2017. The Court declines to find the petition untimely.

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The Plaintiff seeks an award of \$194,306.53 in attorney's fees and costs.¹ The Defendant opposes this motion and says the request for attorney's fees was not adequately pled, not adequately proven, and that the Plaintiff only prevailed in part and should not be granted fees and costs for his "unsuccessful" prior appeal.

First, the Court finds the request for attorney's fees was properly raised. As described in the Form 4, this litigation has been exceptionally lengthy. Litigation began in 2005 when the party who is now the Defendant brought several claims against the party who is now the Plaintiff. The Defendant abandoned those claims shortly before trial. The Court entered an order re-aligning the parties the day after the trial concluded.

The Plaintiff first requested attorney's fees in his amended pleading filed in 2006. This request was repeated in his second amended pleading filed in 2016. In both instances, the request was stated in regards to defending against the Defendant's claims, however, as noted above, from the time this litigation commenced until shortly before trial, the Plaintiff was defending those claims and campaigning determinedly to keep his own claims in court. The Court finds the specific request for attorney's fees provided straightforward notice the Plaintiff was seeking fees and costs.

Second, the Court finds the request for fees was adequately proven. The Defendant argues the Plaintiff did not present evidence that the parties' business—Tri-Star Communications—was a statutory close corporation and that the Plaintiff is therefore not entitled to fees and costs under § 33-18-410(b) (part of the Statutory Close Corporation Supplement). At the hearing, however, the Plaintiff produced a Tri-Star share certificate with the language required by § 33-18-109(a), indicating the company was in fact a statutory close corporation. This had been attached to a previous summary judgment filing filed by the Defendant.

¹ The Form 4 accidentally listed this amount as \$194,406.53.

Third and finally, the Court finds the Plaintiff prevailed to a significant extent and that it is appropriate to award the full amount of requested fees and costs. Section 33-18-410(b) allows a successful party to recover "reasonable expenses, including counsel fees." It may be true that the Plaintiff only prevailed in part, and that the prior appeal was "unsuccessful," but those things are true only when speaking in the most formal and technical sense. The Plaintiff proved a scheme to shut him out of \$510,000 in proceeds from the parties' business. The Plaintiff proved the Defendant's conduct was deliberate and reprehensible, justifying an additional award of \$510,000 for a total award of \$1,020,000. The prior appeal was part of the Plaintiff's sustained effort to keep his claims in court; claims the Plaintiff eventually pursued to a successful outcome. The fact that the Plaintiff was not awarded relief for the sale of the video poker machines or additional damages due to the Defendant's income from a subsequent gambling operation in the Dominican Republic does not afford any basis for reducing the fees and costs awarded.

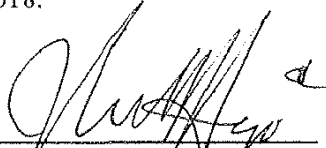
This Court has considered the nature, extent, and difficulty of the services rendered, the time and labor devoted to the case, the professional standing of counsel, the contingency of compensation, customary fees for similar services, and beneficial results obtained. This was an extremely difficult case. It required a great deal of effort to get it to trial and to try it. The hourly rates are reasonable, and the Plaintiff achieved a beneficial result.

All other arguments opposing the Plaintiff's petition for attorney's fees and costs not directly mentioned have been considered and are denied.

Judgment shall be entered in favor of the plaintiff Hugh Andrews against the Defendant Quentin Broom, Jr. in the amount One Million Two Hundred Fourteen Thousand Four Hundred Six and 53/100ths Dollars (\$1,214,406.53).

5 

It is so ordered, this 20 day of November, 2018.


The Honorable J. Mark Hayes, II
Presiding Circuit Court Judge

ELECTRONICALLY FILED - 2018 Nov 20 2:54 PM - SPARTANBURG - COMMON PLEAS - CASE#2008CP4203397

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG
IN THE COURT OF COMMON PLEASJUDGMENT IN A CIVIL CASE
CASE NUMBER 2008CP4203397

Quentin S Broom Jr Tri Star Communications Inc	H Hughes Andrews	Quentin S Broom Jr	
PLAINTIFF(S)		DEFENDANT(S)	
Submitted by:		Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant	

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit);
☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ STAYED DUE TO BANKRUPTCY
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk: SEE ATTACHED ORDER

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
HUGHANDREWS	QUENTIN BROOM, JR	1,214,406.53
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge

Judge Code

Date

2132

11/20/18

RECEIVED

DEC 18 2018

SC Court of Appeals

Court Reporter:

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 2/17)

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.



Spartanburg County Seventh Judicial Circuit Public Index



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[South Carolina Judicial Department Home Page](#)
[SC.GOV Home Page](#)

Switch View

Quentin S Broom Jr , plaintiff, et al VS Ten State Street L L P , defendant, et al

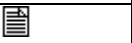
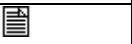
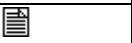
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Status:	Appeal	Assigned Judge:	Hayes, J. Mark II		
Disposition:	Judgment	Disposition Date:	11/20/2018	Disposition Judge:	Hayes, J. Mark II
Original Source Doc:		Original Case #:			
Judgment Number:	2008CP4203397	Court Roster:			

[Case Parties](#)
[Judgments](#)
[Tax Map Information](#)
[Associated Cases](#)
[Actions](#)
[Financials](#)

Name	Description	Type	Motion Roster	Begin Date	Completion Date	Documents
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Andrews, H Hughes	Order/Stay of Execution of Judgment	Order		08/21/2019-10:43		
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Hewitt, Blake A.	6-26-17MJURYTRIAL/Notice of Case Roster Publication Sen	Action		05/31/2017-13:15	11/20/2018-13:15	
Richardson, Matthew Terry	6-26-17MJURYTRIAL/Notice of Case Roster Publication Sen	Action		05/31/2017-13:15	11/20/2018-13:15	
Nichols, John S.	6-26-17MJURYTRIAL/Notice of Case Roster Publication Sen	Action		05/31/2017-13:15	11/20/2018-13:15	
Pillsbury, Rodney F.	6-26-17MJURYTRIAL/Notice of Case Roster Publication Sen	Action		05/31/2017-13:15	11/20/2018-13:15	
Howser, R. Davis	6-26-17MJURYTRIAL/Notice of Case Roster Publication Sen	Action		05/31/2017-13:15	11/20/2018-13:15	
Knie, Patrick E.	6-26-17MJURYTRIAL/Notice of Case Roster Publication Sen	Action		05/31/2017-13:15	11/20/2018-13:15	
Broom, Quentin S Jr	Memo/Memo in Support	Filing		05/16/2017-18:02	11/20/2018-18:02	
Broom, Quentin S Jr	Notice/Notice of Appearance	Filing		05/12/2017-12:35	11/20/2018-12:35	
Knie, Patrick E.	5/17/2017_MOTION_Roster/Notice of Motions Roster Publication	Action		04/27/2017-14:40	11/20/2018-14:40	
Knie, Patrick E.	5/17/2017_MOTION_Roster/Notice of Motions Roster Publication	Action		04/27/2017-14:40	11/20/2018-14:40	
Howser, R. Davis	5/17/2017_MOTION_Roster/Notice of Motions Roster Publication	Action		04/27/2017-14:40	11/20/2018-14:40	
Howser, R. Davis	5/17/2017_MOTION_Roster/Notice of Motions Roster Publication	Action		04/27/2017-14:40	11/20/2018-14:40	
Nichols, John S.	5/17/2017_MOTION_Roster/Notice of Motions Roster Publication	Action		04/27/2017-14:40	11/20/2018-14:40	
Nichols, John S.	5/17/2017_MOTION_Roster/Notice of Motions Roster Publication	Action		04/27/2017-14:40	11/20/2018-14:40	
Pillsbury, Rodney F.	5/17/2017_MOTION_Roster/Notice of Motions Roster Publication	Action		04/27/2017-14:40	11/20/2018-14:40	
Pillsbury, Rodney F.	5/17/2017_MOTION_Roster/Notice of Motions Roster Publication	Action		04/27/2017-14:40	11/20/2018-14:40	
Hewitt, Blake A.	5/17/2017_MOTION_Roster/Notice of Motions Roster Publication	Action		04/27/2017-14:40	11/20/2018-14:40	
Hewitt, Blake A.	5/17/2017_MOTION_Roster/Notice of Motions Roster Publication	Action		04/27/2017-14:40	11/20/2018-14:40	
Knie, Patrick E.	1/18/2017_MOTION_Roster/Notice of Motions Roster Publication	Action		11/29/2016-16:21	11/20/2018-16:21	
Nichols, John S.	1/18/2017_MOTION_Roster/Notice of Motions Roster Publication	Action		11/29/2016-16:21	11/20/2018-16:21	
Pillsbury, Rodney F.	1/18/2017_MOTION_Roster/Notice of Motions Roster Publication	Action		11/29/2016-16:21	11/20/2018-16:21	
Howser, R. Davis	1/18/2017_MOTION_Roster/Notice of Motions Roster Publication	Action		11/29/2016-16:21	11/20/2018-16:21	
Broom, Quentin S Jr	Motion/2nd Amended Motion to Dismiss	Motion		10/31/2016-12:50	05/17/2017-12:50	
Broom, Quentin S Jr	Motion/Amended Motion to Dismiss w/Signature	Motion		10/28/2016-16:59	04/27/2017-16:59	
Broom, Quentin S Jr	Motion/Dismiss	Motion		10/28/2016-16:20	04/27/2017-16:20	
Broom, Quentin S Jr	Order/Denying Motion to Reconsider	Order		10/14/2016-14:33	11/20/2018-14:33	
Knie, Patrick E.	11/1/2016_JURYDCM/Notice of	Action		10/14/2016-	11/20/2018-	

	Case Roster Publication Sent			12:14	12:14	
Howser, R. Davis	11/1/2016_JURYDCM/Notice of Case Roster Publication Sent	Action		10/14/2016-12:14	11/20/2018-12:14	
Pillsbury, Rodney F.	11/1/2016_JURYDCM/Notice of Case Roster Publication Sent	Action		10/14/2016-12:14	11/20/2018-12:14	
Nichols, John S.	11/1/2016_JURYDCM/Notice of Case Roster Publication Sent	Action		10/14/2016-12:14	11/20/2018-12:14	
Broom, Quentin S Jr	ADR/Mediation Results Report	Action		09/29/2016-14:04	11/20/2018-14:04	
Pillsbury, Rodney F.	9/9/2016_MOTION_Roster/Notice of Motions Roster Publication	Action		08/30/2016-09:52	11/20/2018-09:52	
Howser, R. Davis	9/9/2016_MOTION_Roster/Notice of Motions Roster Publication	Action		08/30/2016-09:52	11/20/2018-09:52	
Nichols, John S.	9/9/2016_MOTION_Roster/Notice of Motions Roster Publication	Action		08/30/2016-09:52	11/20/2018-09:52	
Knie, Patrick E.	9/9/2016_MOTION_Roster/Notice of Motions Roster Publication	Action		08/30/2016-09:52	11/20/2018-09:52	
Knie, Patrick E.	9/9/2016_MOTION_Roster/Notice of Motions Roster Publication	Action		08/05/2016-11:13	11/20/2018-11:13	
Howser, R. Davis	9/9/2016_MOTION_Roster/Notice of Motions Roster Publication	Action		08/05/2016-11:13	11/20/2018-11:13	
Pillsbury, Rodney F.	9/9/2016_MOTION_Roster/Notice of Motions Roster Publication	Action		08/05/2016-11:13	11/20/2018-11:13	
Nichols, John S.	9/9/2016_MOTION_Roster/Notice of Motions Roster Publication	Action		08/05/2016-11:13	11/20/2018-11:13	
Broom, Quentin S Jr	Motion/Reconsider, Alter or Amend Judgment	Motion		07/19/2016-08:43	10/14/2016-08:43	
Broom, Quentin S Jr	Certificate Of Service by Mail	Filing		07/18/2016-14:10	11/20/2018-14:10	
Andrews, H Hugh	Service/Certificate Of Service	Filing		07/08/2016-09:46	11/20/2018-09:46	
Andrews, H Hugh	Verification	Filing		07/08/2016-09:45	11/20/2018-09:45	
Andrews, H Hugh	Secord Amended Answer Counterclaims & Third-Party Complaint	Filing		07/08/2016-09:38	11/20/2018-09:38	
Broom, Quentin S Jr	Order	Order		07/06/2016-09:59	11/20/2018-09:59	
Broom, Quentin S Jr	Order/Form 4	Order		06/23/2016-16:53	11/20/2018-16:53	
Broom, Quentin S Jr	Letter/Letter	Filing		06/16/2016-09:52	11/20/2018-09:52	
Nichols, John S.	6/23/2016_MOTION_Roster/Notice of Motions Roster Publication	Action		06/14/2016-16:36	11/20/2018-16:36	
Pillsbury, Rodney F.	6/23/2016_MOTION_Roster/Notice of Motions Roster Publication	Action		06/14/2016-16:36	11/20/2018-16:36	
Howser, R. Davis	6/23/2016_MOTION_Roster/Notice of Motions Roster Publication	Action		06/14/2016-16:36	11/20/2018-16:36	
Knie, Patrick E.	6/23/2016_MOTION_Roster/Notice of Motions Roster Publication	Action		06/14/2016-16:36	11/20/2018-16:36	
Knie, Patrick E.	6/23/2016_MOTION_Roster/Notice of Motions Roster Publication	Action		05/25/2016-14:08	11/20/2018-14:08	
Howser, R. Davis	6/23/2016_MOTION_Roster/Notice of Motions Roster Publication	Action		05/25/2016-14:08	11/20/2018-14:08	
Pillsbury, Rodney F.	6/23/2016_MOTION_Roster/Notice of Motions Roster Publication	Action		05/25/2016-14:08	11/20/2018-14:08	
Nichols, John S.	6/23/2016_MOTION_Roster/Notice of Motions Roster Publication	Action		05/25/2016-14:08	11/20/2018-14:08	
Broom, Quentin S Jr	Reply	Filing		01/27/2016-12:21	11/20/2018-12:21	
Broom, Quentin S Jr	Letter from Blake Hewitt to Judge Hayes	Filing		01/12/2016-10:49	11/20/2018-10:49	
Broom, Quentin S Jr	Letter/Letter	Filing		12/15/2015-10:29	11/20/2018-10:29	
Broom, Quentin S Jr	Remittitur From Supreme Court	Filing		12/08/2015-10:58	11/20/2018-10:58	
Broom, Quentin	Supreme Court Order - Reversing	Filing		10/05/2015-	11/20/2018-	

S Jr	Appeals Court			13:55	13:55	
Nichols, John S.	Roster/Notice of Case Roster Publication Sent	Action		10/20/2014-11:50	11/20/2018-11:50	
Pillsbury, Rodney F.	Roster/Notice of Case Roster Publication Sent	Action		10/20/2014-11:50	11/20/2018-11:50	
Howser, R. Davis	Roster/Notice of Case Roster Publication Sent	Action		10/20/2014-11:50	11/20/2018-11:50	
Knie, Patrick E.	Roster/Notice of Case Roster Publication Sent	Action		10/20/2014-11:50	11/20/2018-11:50	
Howser, R. Davis	Roster/Notice of Case Roster Publication Sent	Action		10/20/2014-11:36	11/20/2018-11:36	
Nichols, John S.	Roster/Notice of Case Roster Publication Sent	Action		10/20/2014-11:36	11/20/2018-11:36	
Pillsbury, Rodney F.	Roster/Notice of Case Roster Publication Sent	Action		10/20/2014-11:36	11/20/2018-11:36	
Knie, Patrick E.	Roster/Notice of Case Roster Publication Sent	Action		10/20/2014-11:36	11/20/2018-11:36	
Knie, Patrick E.	Roster/Notice of Case Roster Publication Sent	Action		04/11/2013-11:03	11/20/2018-11:03	
Pillsbury, Rodney F.	Roster/Notice of Case Roster Publication Sent	Action		04/11/2013-11:03	11/20/2018-11:03	
Nichols, John S.	Roster/Notice of Case Roster Publication Sent	Action		04/11/2013-11:03	11/20/2018-11:03	
Howser, R. Davis	Roster/Notice of Case Roster Publication Sent	Action		04/11/2013-11:03	11/20/2018-11:03	
Broom, Quentin S Jr	Service/Proof Of Service	Filing		03/12/2013-10:10	11/20/2018-10:10	
Broom, Quentin S Jr	Service/Certificate Of Service as to Davis Howser	Filing		03/12/2013-10:08	11/20/2018-10:08	
Andrews, H Hugh	Service/Certificate Of Service	Filing		03/12/2013-10:07	11/20/2018-10:07	
Broom, Quentin S Jr	Notice/Notice of Appeal	Filing		03/12/2013-10:05	11/20/2018-10:05	
Ten State Street L L P	Service/Certificate Of Service	Filing		03/12/2013-00:00	11/20/2018-00:00	
Broom, Quentin S Jr	Motion/Motion Filing Fee	Filing		02/04/2013-10:41	11/20/2018-10:41	
Broom, Quentin S Jr	Order Denying Motions to Reconsider	Order		02/01/2013-10:43	11/20/2018-10:43	
Ten State Street L L P	F4/Court declines to alter/amend prior Ord.Formal Ord. follo	Order		01/14/2013-09:14	11/20/2018-09:14	
Knie, Patrick E.	Roster/Notice of Motions Roster Publication Sent	Action		11/28/2012-12:03	11/20/2018-12:03	
Nichols, John S.	Roster/Notice of Motions Roster Publication Sent	Action		11/28/2012-12:03	11/20/2018-12:03	
Pillsbury, Rodney F.	Roster/Notice of Motions Roster Publication Sent	Action		11/28/2012-12:03	11/20/2018-12:03	
Howser, R. Davis	Roster/Notice of Motions Roster Publication Sent	Action		11/28/2012-12:03	11/20/2018-12:03	
Knie, Patrick E.	Roster/Notice of Case Roster Publication Sent	Action		10/23/2012-13:33	11/20/2018-13:33	
Howser, R. Davis	Roster/Notice of Case Roster Publication Sent	Action		10/23/2012-13:33	11/20/2018-13:33	
Nichols, John S.	Roster/Notice of Case Roster Publication Sent	Action		10/23/2012-13:33	11/20/2018-13:33	
Pillsbury, Rodney F.	Roster/Notice of Case Roster Publication Sent	Action		10/23/2012-13:33	11/20/2018-13:33	
Nichols, John S.	Roster/Notice of Case Roster Publication Sent	Action		10/23/2012-11:32	11/20/2018-11:32	
Pillsbury, Rodney F.	Roster/Notice of Case Roster Publication Sent	Action		10/23/2012-11:32	11/20/2018-11:32	
Howser, R. Davis	Roster/Notice of Case Roster Publication Sent	Action		10/23/2012-11:32	11/20/2018-11:32	
Knie, Patrick E.	Roster/Notice of Case Roster Publication Sent	Action		10/23/2012-11:32	11/20/2018-11:32	
Broom, Quentin S Jr	CP Motion Hearing/ Alter or Amend Order/ 1 hr.	Event		04/17/2012-10:45	04/04/2012-17:00	

Knie, Patrick E.	Notice of Case Roster Publication Sent	Action		04/02/2012-16:04	11/20/2018-16:04	
Howser, R. Davis	Notice of Case Roster Publication Sent	Action		04/02/2012-16:04	11/20/2018-16:04	
Pillsbury, Rodney F.	Notice of Case Roster Publication Sent	Action		04/02/2012-16:04	11/20/2018-16:04	
Nichols, John S.	Notice of Case Roster Publication Sent	Action		04/02/2012-16:04	11/20/2018-16:04	
Nichols, John S.	Notice of Case Roster Publication Sent	Action		04/02/2012-14:59	11/20/2018-14:59	
Pillsbury, Rodney F.	Notice of Case Roster Publication Sent	Action		04/02/2012-14:59	11/20/2018-14:59	
Howser, R. Davis	Notice of Case Roster Publication Sent	Action		04/02/2012-14:59	11/20/2018-14:59	
Knie, Patrick E.	Notice of Case Roster Publication Sent	Action		04/02/2012-14:59	11/20/2018-14:59	
Andrews, H Hugh	Notice/Notice Of Apperance	Filing		12/16/2011-00:00	11/20/2018-00:00	
Andrews, H Hugh	Service/Certificate Of Service	Filing		12/16/2011-00:00	11/20/2018-00:00	
Broom, Quentin S Jr	Service/Certificate Of Service	Filing		12/16/2011-00:00	11/20/2018-00:00	
Broom, Quentin S Jr	Certificate Of Service For Party Rep By Rodney Pillsbury	Filing		12/16/2011-00:00	11/20/2018-00:00	
Broom, Quentin S Jr	Certificate Of Service For Party Rep By James Gilreath	Filing		12/16/2011-00:00	11/20/2018-00:00	
Andrews, H Hugh	Motion/Motion/Order Filing Fee	Filing		11/14/2011-11:23	04/17/2012-11:23	
Andrews, H Hugh	Motion/Motion/Order Filing Fee	Filing		11/14/2011-16:48	11/14/2011-16:48	
Broom, Quentin S Jr	Filing/Filing Of Exhibits 1&2	Filing		11/14/2011-00:00	11/20/2018-00:00	
Andrews, H Hugh	Filing/Filing Of Image Of Motion & Exhibits 1-2	Filing		11/14/2011-00:00	11/20/2018-00:00	
Andrews, H Hugh	Filing/Image of Motion	Filing		11/14/2011-00:00	11/20/2018-00:00	
Andrews, H Hugh	Memo/Memo in Support	Filing		11/14/2011-00:00	11/20/2018-00:00	
Broom, Quentin S Jr	Certificate Of Service For Parties Rep byPatrick Knie	Filing		11/14/2011-00:00	11/20/2018-00:00	
Broom, Quentin S Jr	Service/Certificate Of Service	Filing		11/14/2011-00:00	11/20/2018-00:00	
Broom, Quentin S Jr	Certificate Of Service For Party Rep By R. Davis Howser	Filing		11/14/2011-00:00	11/20/2018-00:00	
Andrews, H Hugh	Motion/Alter and/or Amend	Motion		11/14/2011-00:00	01/14/2013-00:00	
Tri-Star Communications, 3Rd Party Plaintiff	Motion/Alter and/or Amend	Motion		11/14/2011-00:00	06/23/2016-00:00	
Andrews, H Hugh	Motion/Reconsider	Motion		11/14/2011-00:00	02/01/2013-00:00	
Broom, Quentin S Jr	Motion/Motion/Order Filing Fee	Filing		11/02/2011-10:49	04/17/2012-10:49	
Broom, Quentin S Jr	Order grt. Queintin S. Broom Jr's Motion to Dismiss	Order		11/01/2011-00:00	11/20/2018-00:00	
Andrews, H Hugh	Motion/Motion/Order Filing Fee	Filing		10/24/2011-16:24	10/24/2011-16:24	
Andrews, H Hugh	Filing/Image of Motion	Filing		10/24/2011-00:00	10/24/2011-00:00	
Andrews, H Hugh	Motion/Reconsider/ 30 min	Motion		10/24/2011-00:00	10/24/2011-00:00	
Andrews, H Hugh	Memo/Memo in Support	Filing		10/24/2011-00:00	11/20/2018-00:00	
Pillsbury, Rodney F.	Notice of Case Roster Publication Sent	Action		10/17/2011-14:58	11/20/2018-14:58	
Howser, R. Davis	Notice of Case Roster Publication Sent	Action		10/17/2011-14:58	11/20/2018-14:58	

Knie, Patrick E.	Notice of Case Roster Publication Sent	Action		10/17/2011-14:58	11/20/2018-14:58	
Broom, Quentin S Jr	Order/Form 4/pL.attys.are to prepare formal order on motion	Order		10/07/2011-00:00	11/20/2018-00:00	
Broom, Quentin S Jr	CP Motion Hearing/ All pending motions	Event		10/05/2011-09:30	10/05/2011-17:00	
Broom, Quentin S Jr	Affidavit/Affidavit of	Filing		10/05/2011-00:00	11/20/2018-00:00	
Broom, Quentin S Jr	SUPPLEMENTAL ANSWER	Filing		10/05/2011-00:00	11/20/2018-00:00	
Broom, Quentin S Jr	Memo/Memo in Support	Filing		10/05/2011-00:00	11/20/2018-00:00	
Broom, Quentin S Jr	Memo/Memo in Support	Filing		10/05/2011-00:00	11/20/2018-00:00	
Andrews, H Hugh	Memo/Memo in Opposition	Filing		10/05/2011-00:00	11/20/2018-00:00	
Broom, Quentin S Jr	Service/Certificate Of Service	Filing		10/05/2011-00:00	11/20/2018-00:00	
Howser, R. Davis	Service/Certificate Of Service	Filing		10/05/2011-00:00	11/20/2018-00:00	
Andrews, H Hugh	Motion/Motion/Order Filing Fee	Filing		09/16/2011-15:38	10/05/2011-15:38	
Andrews, H Hugh	Motion/Compel/ 15 min	Motion		09/16/2011-00:00	10/05/2011-00:00	
Broom, Quentin S Jr	Service/Certificate Of Service	Filing		09/16/2011-00:00	11/20/2018-00:00	
Broom, Quentin S Jr	Motion/Motion/Order Filing Fee	Filing		09/14/2011-16:26	10/05/2011-16:26	
Broom, Quentin S Jr	Motion/Dismiss	Motion		09/14/2011-00:00	10/05/2011-00:00	
Ten State Street L L P	Service/Certificate Of Service	Filing		09/14/2011-00:00	11/20/2018-00:00	
Broom, Quentin S Jr	Service/Certificate Of Service	Filing		09/14/2011-00:00	11/20/2018-00:00	
Knie, Patrick E.	Notice of Case Roster Publication Sent	Action		09/01/2011-16:06	09/01/2011-16:06	
Howser, R. Davis	Notice of Case Roster Publication Sent	Action		09/01/2011-16:06	09/01/2011-16:06	
Pillsbury, Rodney F.	Notice of Case Roster Publication Sent	Action		09/01/2011-16:06	09/01/2011-16:06	
Broom, Quentin S Jr	Order/F4--Mediation shall be held in this case on 9/6/11	Order		08/11/2011-00:00	11/20/2018-00:00	
Broom, Quentin S Jr	Form 4	Filing		08/10/2011-00:00	11/20/2018-00:00	
Broom, Quentin S Jr	CP Motion Hearing/ Alter or Amend/ 30 min	Event		05/25/2011-16:30	05/25/2011-17:00	
Pillsbury, Rodney F.	Notice of Case Roster Publication Sent	Action		05/13/2011-10:15	11/20/2018-10:15	
Howser, R. Davis	Notice of Case Roster Publication Sent	Action		05/13/2011-10:15	11/20/2018-10:15	
Knie, Patrick E.	Notice of Case Roster Publication Sent	Action		05/13/2011-10:15	11/20/2018-10:15	
Broom, Quentin S Jr	CP Motion Hearing/ Alter or Amend/ 30 min	Event		05/12/2011-16:30	04/27/2011-17:00	
Knie, Patrick E.	Form 4	Filing		05/12/2011-00:00	11/20/2018-00:00	
Knie, Patrick E.	Notice of Case Roster Publication Sent	Action		11/10/2010-08:39	11/20/2018-08:39	
Howser, R. Davis	Notice of Case Roster Publication Sent	Action		11/10/2010-08:39	11/20/2018-08:39	
Pillsbury, Rodney F.	Notice of Case Roster Publication Sent	Action		11/10/2010-08:39	11/20/2018-08:39	
Pillsbury, Rodney F.	Notice of Case Roster Publication Sent	Action		11/09/2010-16:45	11/20/2018-16:45	
Howser, R. Davis	Notice of Case Roster Publication Sent	Action		11/09/2010-16:45	11/20/2018-16:45	
Knie, Patrick E.	Notice of Case Roster Publication	Action		11/09/2010-	11/20/2018-	

	Sent			16:45	16:45	
Broom, Quentin S Jr	Order	Order		10/11/2010-09:30	11/20/2018-09:30	
Broom, Quentin S Jr	Motion/Alter and/or Amend/30 min	Motion		10/04/2010-09:24	05/15/2011-09:24	
Andrews, H Hugh	Motion/Motion/Order Filing Fee	Filing		10/01/2010-15:42	05/12/2011-15:42	
Broom, Quentin S Jr	Service/Certificate Of Service	Filing		10/01/2010-15:57	11/20/2018-15:57	
Broom, Quentin S Jr	Motion/Motion/Order Filing Fee	Filing		09/27/2010-09:17	05/12/2011-09:17	
Broom, Quentin S Jr	Order/Continuance	Order		09/24/2010-09:39	11/20/2018-09:39	
Broom, Quentin S Jr	Order/Form 4	Order		09/17/2010-13:38	11/20/2018-13:38	
Broom, Quentin S Jr	Motion/Partial Summary Judgment/ 30 min	Motion		09/15/2010-09:20	05/12/2011-09:20	
Broom, Quentin S Jr	Motion/Motion/Order Filing Fee	Filing		09/15/2010-09:22	09/15/2010-09:22	
Pillsbury, Rodney F.	Service/Certificate Of Service by Mail	Filing		09/15/2010-09:22	11/20/2018-09:22	
Howser, R. Davis	Service/Certificate Of Service by Mail	Filing		09/15/2010-09:22	11/20/2018-09:22	
Broom, Quentin S Jr	Notice/Notice of Motion	Filing		09/15/2010-09:20	11/20/2018-09:20	
Broom, Quentin S Jr	Order/Dismissal as to Def Mark Broadwater, ONLY!	Order		09/07/2010-08:52	11/20/2018-08:52	
Ten State Street L L P	Motion/Motion/Order Filing Fee	Filing		09/03/2010-14:28	09/03/2010-14:28	
Knie, Patrick E.	Notice of Case Roster Publication Sent	Action		09/02/2010-16:29	11/20/2018-16:29	
Howser, R. Davis	Notice of Case Roster Publication Sent	Action		09/02/2010-16:29	11/20/2018-16:29	
Pillsbury, Rodney F.	Notice of Case Roster Publication Sent	Action		09/02/2010-16:29	11/20/2018-16:29	
Broom, Quentin S Jr	CP Motion Hearing/ Pending Motions / 1/2 day	Event		08/30/2010-14:30	08/30/2010-17:00	
Broom, Quentin S Jr	Form 4	Filing		08/26/2010-00:00	11/20/2018-00:00	
Broom, Quentin S Jr	Form 4	Filing		08/13/2010-00:00	11/20/2018-00:00	
Broom, Quentin S Jr	CP Motion Hearing/ Bench Trial/ 1/2 day	Event		08/02/2010-14:30	07/12/2010-17:00	
Knie, Patrick E.	Notice of Case Roster Publication Sent	Action		06/25/2010-14:09	11/20/2018-14:09	
Howser, R. Davis	Notice of Case Roster Publication Sent	Action		06/25/2010-14:09	11/20/2018-14:09	
Pillsbury, Rodney F.	Notice of Case Roster Publication Sent	Action		06/25/2010-14:09	11/20/2018-14:09	
Pillsbury, Rodney F.	Notice of Case Roster Publication Sent	Action		06/09/2010-15:31	11/20/2018-15:31	
Howser, R. Davis	Notice of Case Roster Publication Sent	Action		06/09/2010-15:31	11/20/2018-15:31	
Knie, Patrick E.	Notice of Case Roster Publication Sent	Action		06/09/2010-15:31	11/20/2018-15:31	
Broom, Quentin S Jr	Order/Order Motion to Compel of the Plt is Granted.	Order		04/27/2010-14:33	11/20/2018-14:33	
Broom, Quentin S Jr	Order/Order Filing Fee	Filing		04/22/2010-15:03	11/20/2018-15:03	
Broom, Quentin S Jr	CP Motion Hearing/ Compel/Quash/ 1 hour	Event		04/21/2010-14:30	04/21/2010-17:00	
Broom, Quentin S Jr	Order/Form 4/ Compel granted	Order		04/21/2010-09:12	11/20/2018-09:12	
Broom, Quentin S Jr	Form 4	Filing		04/14/2010-00:00	11/20/2018-00:00	
Broom, Quentin S Jr	Motion/Motion/Order Filing Fee	Filing		03/23/2010-14:47	04/21/2010-14:47	

Broom, Quentin S Jr	Order/Continuance	Order	03/23/2010-14:47	11/20/2018-14:47
Broom, Quentin S Jr	Form 4	Filing	03/23/2010-00:00	11/20/2018-00:00
Broom, Quentin S Jr	Form 4	Filing	03/23/2010-00:00	11/20/2018-00:00
Knie, Patrick E.	Motion/Continuance/ 15 min	Motion	03/05/2010-13:47	03/23/2010-13:47
Broom, Quentin S Jr	Motion/Motion/Order Filing Fee	Filing	03/05/2010-16:48	04/21/2010-16:48
Ten State Street L L P	Service/Certificate Of Service	Filing	03/05/2010-16:51	11/20/2018-16:51
Knie, Patrick E.	Notice of Case Roster Publication Sent	Action	03/04/2010-09:13	11/20/2018-09:13
Howser, R. Davis	Notice of Case Roster Publication Sent	Action	03/04/2010-09:13	11/20/2018-09:13
Pillsbury, Rodney F.	Notice of Case Roster Publication Sent	Action	03/04/2010-09:13	11/20/2018-09:13
Broom, Quentin S Jr	Motion/Compel/ 15 min	Motion	02/26/2010-09:57	04/21/2010-09:57
Broom, Quentin S Jr	Motion/Motion/Order Filing Fee	Filing	02/24/2010-16:17	04/21/2010-16:17
Broom, Quentin S Jr	Motion/Motion/Order Filing Fee	Filing	02/24/2010-13:31	04/21/2010-13:31
Ten State Street L L P	Service/Certificate Of Service	Filing	02/24/2010-16:27	11/20/2018-16:27
Broom, Quentin S Jr	Notice of motion/motion compel prod. pursuant rule 45(2)(B	Filing	02/24/2010-13:37	11/20/2018-13:37
Knie, Patrick E.	Motion/Alter and/or Amend Complaint/ 30 min	Motion	02/24/2010-09:59	05/17/2017-09:59
	Deposition Of Horace H. Andrews II	Filing	01/22/2010-16:48	11/20/2018-16:48
Broom, Quentin S Jr	Deposition Of Timothy L. Russell	Filing	01/22/2010-16:48	11/20/2018-16:48
Broom, Quentin S Jr	Deposition Of Timothy L. Russell - Exhibits	Filing	01/22/2010-16:47	11/20/2018-16:47
Broom, Quentin S Jr	Deposition Of Timothy D. Scramtom	Filing	01/22/2010-16:46	11/20/2018-16:46
Broom, Quentin S Jr	Deposition Of Timothy D. Scramtom	Filing	01/22/2010-16:46	11/20/2018-16:46
Broom, Quentin S Jr	Service/Certificate Of Service	Filing	12/29/2009-10:23	11/20/2018-10:23
Broom, Quentin S Jr	Pl.s supplemental requests for prod. of documents to def.s	Filing	12/29/2009-10:22	11/20/2018-10:22
Broom, Quentin S Jr	Motion/Quash/ 30 min	Motion	12/22/2009-16:00	04/21/2010-16:00
Broom, Quentin S Jr	Motion/Motion/Order Filing Fee	Filing	12/22/2009-15:59	04/21/2010-15:59
Broom, Quentin S Jr	F-4, Reset for next tern, about 1/2 or day	Order	12/18/2009-10:15	11/20/2018-10:15
Broom, Quentin S Jr	CP Motion Hearing/ SJ/ 30 min	Event	12/15/2009-11:00	12/15/2009-17:00
Howser, R. Davis	Motion/Protective Order/ 30 min	Motion	12/07/2009-15:44	12/07/2009-15:44
Ten State Street L L P	Motion/Motion/Order Filing Fee	Filing	12/07/2009-14:16	12/07/2009-14:16
Broom, Quentin S Jr	Service/Certificate Of Service	Filing	12/07/2009-14:25	11/20/2018-14:25
Broom, Quentin S Jr	Form 4	Filing	12/07/2009-00:00	11/20/2018-00:00
Pillsbury, Rodney F.	Motion/Summary Judgment/ 15 min	Motion	12/04/2009-15:46	12/04/2009-15:46
Pillsbury, Rodney F.	Motion/Protective Order/ 15 min	Motion	12/04/2009-15:45	12/04/2009-15:45
Andrews, H Hugh	Motion/Summary Judgment	Motion	12/04/2009-13:21	12/04/2009-13:21
Andrews, H	Motion/Motion/Order Filing Fee	Filing	12/04/2009-	12/04/2009-

Hugh				13:20	13:20	
Andrews, H Hugh	Motion/Protective Order	Motion		12/04/2009-13:20	12/04/2009-13:20	
Andrews, H Hugh	Motion/Motion/Order Filing Fee	Filing		12/04/2009-13:17	12/04/2009-13:17	
Broom, Quentin S Jr	Service/Certificate Of Service	Filing		12/04/2009-13:22	11/20/2018-13:22	
Broom, Quentin S Jr	Order/Order Filing Fee	Filing		11/20/2009-16:40	11/20/2018-16:40	
Broom, Quentin S Jr	Order/Order	Order		11/20/2009-11:43	11/20/2018-11:43	
Broom, Quentin S Jr	Order/Form 4/Ord.for prod.of accounting records to follow	Order		11/20/2009-10:43	11/20/2018-10:43	
Broom, Quentin S Jr	CP Motion Hearing/ motion to quash/ 30 min	Event		11/19/2009-16:15	11/19/2009-17:00	
Ten State Street L L P	Form 4	Filing		11/19/2009-00:00	11/20/2018-00:00	
Pillsbury, Rodney F.	Notice of Case Roster Publication Sent	Action		11/16/2009-14:26	11/20/2018-14:26	
Howser, R. Davis	Notice of Case Roster Publication Sent	Action		11/16/2009-14:26	11/20/2018-14:26	
Knie, Patrick E.	Notice of Case Roster Publication Sent	Action		11/16/2009-14:26	11/20/2018-14:26	
Broom, Quentin S Jr	Order/Order Filing Fee	Filing		10/28/2009-15:08	11/20/2018-15:08	
Broom, Quentin S Jr	Amended Scheduling Order	Filing		10/28/2009-09:54	11/20/2018-09:54	
Knie, Patrick E.	Notice of Case Roster Publication Sent	Action		10/23/2009-15:44	11/20/2018-15:44	
Howser, R. Davis	Notice of Case Roster Publication Sent	Action		10/23/2009-15:44	11/20/2018-15:44	
Pillsbury, Rodney F.	Notice of Case Roster Publication Sent	Action		10/23/2009-15:44	11/20/2018-15:44	
Broom, Quentin S Jr	CP Motion Hearing/ SJ/ 30 min	Event		09/10/2009-10:00	08/17/2009-17:00	
Broom, Quentin S Jr	Motion/Quash/ 30 min	Motion		09/01/2009-10:36	11/19/2009-10:36	
Broom, Quentin S Jr	Service/Certificate Of Service	Filing		08/13/2009-09:17	11/20/2018-09:17	
Broom, Quentin S Jr	NOTICE OF DEPOSITIONS	Filing		08/13/2009-09:16	11/20/2018-09:16	
Knie, Patrick E.	Scheduling Order	Order		07/06/2009-13:52	11/20/2018-13:52	
Broom, Quentin S Jr	Scheduling Order	Order		07/06/2009-09:46	11/20/2018-09:46	
Pillsbury, Rodney F.	Notice of Roster Publication Sent	Action		06/19/2009-09:18	11/20/2018-09:18	
Howser, R. Davis	Notice of Roster Publication Sent	Action		06/19/2009-09:18	11/20/2018-09:18	
Knie, Patrick E.	Notice of Roster Publication Sent	Action		06/19/2009-09:18	11/20/2018-09:18	
Broom, Quentin S Jr	CP Motion Hearing/ Reconsider/ 30 min	Event		11/18/2008-11:15	11/18/2008-17:00	
Broom, Quentin S Jr	Form 4	Filing		11/10/2008-00:00	11/20/2018-00:00	
Broom, Quentin S Jr	CP Motion Hearing/ Reconsider/ 30 min	Event		10/30/2008-15:30	10/30/2008-17:00	
Broom, Quentin S Jr	Form 4	Filing		10/21/2008-00:00	11/20/2018-00:00	
Howser, R. Davis	Motion/Motion/Order Filing Fee	Filing		08/05/2008-15:39	08/05/2008-15:39	
Scrantom, Timothy D	Motion/Summary Judgment/ 30 min	Motion		08/05/2008-16:01	10/03/2008-16:01	
Knie, Patrick E.	Service/Certificate Of Service	Filing		08/05/2008-16:10	11/20/2018-16:10	
Knie, Patrick E.	Service/Certificate Of Service	Filing		07/28/2008-11:24	11/20/2018-11:24	

Ten State Street L L P	Answer/Answer	Filing		07/28/2008- 11:23	11/20/2018- 11:23	
Scrantom, Timothy D	Answer/Answer	Filing		07/28/2008- 11:23	11/20/2018- 11:23	
Broadwater, Mark	Answer/Answer	Filing		07/28/2008- 11:23	11/20/2018- 11:23	
Broom, Quentin S Jr	CERTIFICATE OF SERVICE BY MAIL	Filing		06/30/2008- 15:01	11/20/2018- 15:01	
	Verification/Verified	Filing		06/30/2008- 12:17	11/20/2018- 12:17	
Broom, Quentin S Jr	Summons & Complaint	Filing		06/30/2008- 12:11	11/20/2018- 12:11	

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Switch View

Quentin S, Jr Broom VS Llp Ten State Street , defendant, et al

Case Number:	2005CP4202875	Court Agency:	Common Pleas	Filed Date:	09/16/2005
Case Type:	Common Pleas	Case Sub Type:	Special-Comp/Oth 699	File Type:	Jury
Status:	Dismissed	Assigned Judge:	Clerk Of Court C P, G S, And Family Court		
Disposition:	Dismissed per Rule 40J	Disposition Date:	06/10/2008	Disposition Judge:	Cole, J. Derham
Original Source Doc:		Original Case #:			
Judgment Number:	2005CP4202875	Court Roster:			

Case Parties **Judgments** **Tax Map Information** **Associated Cases** **Actions** **Financials**

Name	Description	Type	Motion Roster	Begin Date	Completion Date	Documents
Broom, Quentin S, Jr	Letter/Letter	Filing		03/28/2012-00:00		
Broom, Quentin S, Jr	Filing/Filing Of Sealed Depositions and Exhibits	Filing		09/29/2011-16:24		
Ten State Street, Llp	Notice of Deposition	Filing		12/29/2009-10:26		
Andrews, H Hugh	Service/Certificate Of Service	Filing		09/10/2009-09:07		
Broom, Quentin S, Jr	Notice/Notice of depositions	Filing		09/10/2009-09:00		
Broom, Quentin S Jr	Motion/Quash or in the Alternative Mot for Protective Order	Motion		09/01/2009-12:00	09/01/2009-12:00	
Broom, Quentin S Jr	Motion/Motion/Order Filing Fee	Filing		09/01/2009-11:57	09/01/2009-11:57	
Andrews, H Hugh	Service/Certificate Of Service	Filing		09/01/2009-12:04		
Tri Star Communications Inc	Service/Certificate Of Service	Filing		09/01/2009-12:04		
Broom, Quentin S, Jr	Order/ Supplemental Consent Order	Order		08/17/2009-15:27		
Broom, Quentin S, Jr	Order/Order Filing Fee	Filing		08/17/2009-14:47		
Broom, Quentin S, Jr	Order/Consent Order	Order		06/17/2008-11:43	06/10/2008-11:43	
Broom, Quentin S, Jr	Motion/Motion/Order Filing Fee	Filing		06/11/2008-10:26	06/10/2008-10:26	
Ten State Street, Llp	Service/Certificate Of Service Certified Mail	Filing		06/05/2008-14:25	06/10/2008-14:25	
Scrantom, Timothy D	Service/Certificate Of Service Certified Mail	Filing		06/05/2008-14:25	06/10/2008-14:25	
Broadwater, Mark	Service/Certificate Of Service Certified Mail	Filing		06/05/2008-14:25	06/10/2008-14:25	
Broom, Quentin S, Jr	Response/Second Set of Request for	Filing		06/05/2008-12:52	06/10/2008-12:52	

	Production of Defendant					
Pillsbury, Rodney F	Motion/Reconsider/ 30 MIN	Motion		04/09/2008-16:24	06/10/2008-16:24	
Pillsbury, Rodney F	Motion/Motion/Order Filing Fee	Filing		04/09/2008-10:54	06/10/2008-10:54	
Andrews, H Hugh	Service/Certificate Of Service	Filing		04/09/2008-09:37	06/10/2008-09:37	
Broom, Quentin S, Jr	Order/Protective Order	Order		04/08/2008-09:38	06/10/2008-09:38	
Knie, Patrick E	Motion/Motion/Order Filing Fee	Filing		03/21/2008-16:05	06/10/2008-16:05	
Pillsbury, Rodney F	Certificate/Certificate Service	Filing		03/21/2008-11:51	06/10/2008-11:51	
Pillsbury, Rodney F	Motion/Compel Disc by 3rd party def/ 15 min	Motion		03/21/2008-11:48	06/10/2008-11:48	
Ten State Street, Llp	CP Motion Hearing	Event		02/07/2008-00:00	02/07/2008-00:00	
Ten State Street, Llp	CP Motion Hearing	Event		11/15/2007-00:00	11/15/2007-00:00	
Ten State Street, Llp	MOTION PROTECTIVE ORDER	Motion		09/21/2007-00:00	02/07/2008-00:00	
Ten State Street, Llp	MOTIONS (2)SJ/PROT ORD/RESET ATT IN FED	Motion		07/16/2007-00:00	11/15/2007-00:00	
Ten State Street, Llp	CP Motion Hearing	Event		04/30/2007-00:00	04/30/2007-00:00	
Ten State Street, Llp	MOTION TO COMPEL/RESOLVED	Motion		01/22/2007-00:00	04/30/2007-00:00	
Broom, Quentin S, Jr	CP Motion Hearing	Event		11/20/2006-00:00	11/20/2006-00:00	
Broom, Quentin S, Jr	CP Motion Hearing	Event		09/27/2006-00:00	09/27/2006-00:00	
Ten State Street, Llp	CP Motion Hearing	Event		07/20/2006-00:00	07/20/2006-00:00	
Ten State Street, Llp	MOTION TO AMEND ANSWER	Motion		05/30/2006-00:00	07/20/2006-00:00	
Andrews, H Hugh	Answer/Answer	Filing		11/16/2005-00:00		
Broom, Quentin S, Jr	STATUS CONFERENCE	Motion		09/16/2005-00:00	09/27/2006-00:00	
Broom, Quentin S, Jr	STATUS CONFERENCE	Motion		09/16/2005-00:00	11/20/2006-00:00	
Broom, Quentin S, Jr	Summons & Complaint	Filing		09/16/2005-00:00	09/16/2005-00:00	

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Hon. J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2018-002223

RECEIVED
Jul 31 2020
SC Court of Appeals

H. Hugh Andrews Respondent,

v.

Quentin S. Broom, Jr., ...Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Corrected Record on Appeal contains all
material proposed to be included by any of the parties and not any other material.

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July 31, 2020
Greenville, SC

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2018-002223

RECEIVED

Jul 31 2020

SC Court of Appeals

H. Hugh Andrews Respondent,

v.

Quentin S. Broom, Jr., ...Appellant.

APPELLANT'S FINAL OPENING BRIEF

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STATEMENT OF ISSUES ON APPEAL

- I. Whether Andrews' claims are precluded by the law of the case doctrine because he failed to obtain a ruling from his prior appeal of a 2011 order dismissing his claims with prejudice?**
- II. Whether Andrews' claims are barred by the statute of limitations because his 2016 complaint does not relate back to the prior pleading that was dismissed with prejudice?**
- III. Whether the trial court erred in finding Andrews had met his burden of proof that Broom violated fiduciary duties as an officer and director of Tri-Star?**
- IV. Whether the trial court erred in adopting and applying an exception for pleading shareholder derivative claims as individual claims involving a statutory close corporation when South Carolina has explicitly rejected the exception and Andrews submitted no supporting evidence?**
- V. Whether the trial court erred in awarding punitive damages?**
- VI. Whether the trial court erred in awarding attorneys' fees?**

STATEMENT OF THE CASE

This dispute between two video gaming business partners has a protracted and cumbersome history spanning more than fourteen years and two previous appellate decisions. Appellant Quentin Broom initially filed a lawsuit in 2005 alleging a variety of claims against Respondent Hugh Andrews in connection with being equal shareholders in Tri-Star Communications, Inc. (“Tri-Star”). In 2006 Andrews alleged direct and derivative counterclaims on behalf of Tri-Star. Broom moved to dismiss the counterclaims primarily because Andrews failed to comply with Rule 23, SCRCP, requirements for a derivative suit. Following a hearing, the Honorable J. Mark Hayes dismissed with prejudice Andrews’ counterclaims for failing to comply with Rule 23(b)(1) for derivative actions by shareholders. (R. pp. 1-9) Andrews then moved for reconsideration and moved to amend the counterclaims. The trial court denied the motion for reconsideration, but did not rule on the motion for leave to amend. (R. pp. 10-11)

Andrews appealed the dismissal of his counterclaims, arguing for the creation of a new rule for an exception to the derivative suit filing requirements when a corporation only has two shareholders and that he should have been given an opportunity to amend the pleadings before their dismissal. (R. pp. 2542-2551) Broom responded, arguing that the claims were derivative not direct, and clear precedent required the special pleading rule for derivative claims. (R. pp. 2571-2582) Broom also pointed out Andrews’ last argument about an amendment was not preserved for review. (R. pp. 2583-84) Following oral argument, the Court of Appeals entered an unpublished opinion that “did not address these issues and, instead remanded the case to the [trial] court so the trial judge could rule on [Andrews’] Rule 15, SCRCP, motion to amend the pleadings.” *Broom v. Ten State St., LLP*, No. 2015-000583, 2015 WL 5728106, at *1 (Sept. 30, 2015). (R. pp. 12-14)

Broom appealed the remand to the Supreme Court, which issued an unpublished opinion reversing the Court of Appeals because the issue raising the amendment to Andrews' pleading was unpreserved for appellate review. *Id.* (R. pp. 15-17) The matter was then remitted, instead of being returned to the Court of Appeals to address Andrews' remaining issue on appeal. (R. pp. 2604) No motion to cure the direct remittitur to the trial court was made.

Upon return of the matter to trial court¹ in December 2015, Andrews again moved to amend his dismissed pleading. The trial court granted the motion, and Andrews then filed a second amended answer, asserting the same direct and derivative counterclaims as in his previous pleading. Broom moved to dismiss the counterclaims under the law of the case doctrine based on the trial court's prior judgment and Andrews' failure to obtain a reversal on appeal. The trial court denied the motion to dismiss, and the matter was scheduled for a bench trial. (R. pp. 38-40) In addition, Broom filed a motion for summary judgment and a motion to establish facts, both of which were never ruled upon. (R. pp. 154, 171-72, 2623-2657) Shortly before trial, Broom dismissed all his claims as plaintiff; thus, leaving only Andrews' counterclaims from the second amended answer.² (R. pp. 41-43) The parties were realigned, and the matter was recaptioned with Andrews as the plaintiff for trial. (R. pp. 44-45)

In June 2017, a three-day bench trial was held with just three fact witnesses and one expert witness. The trial court issued an order in November 2018 finding in favor of Andrews on only one of his ten causes of action. Specifically, the trial court awarded \$1,020,000 for willful breach

¹ This matter was returned to the Honorable J. Mark Hayes, II.

² These claims included (1) Breach of Fiduciary Duty; (2) Breach of Contract; (3) Breach of Contract Accompanied by a Fraudulent Act; (4) Breach of the Covenant of Good Faith and Fair Dealing; (5) Conversion; (6) Violation of S. C. Code of Laws §33-8-300; (7) Violation of S.C. Code of Laws §33-8-420; (8) Promissory Estoppel; (9) Fraud; and (10) Negligent Misrepresentation.

of fiduciary duty by Broom paying deferred salary payments to himself in late 2004 and the first part of 2005. (R. pp. 49-67) The damages represented one-half of the \$1,020,000 total salary that Broom received from Tri-Star for 7 years of work, and another \$510,000 in punitive damages. Broom moved for reconsideration, and Andrews petitioned for attorneys' fees. A year later, the trial court denied Broom's motion for reconsideration and granted Andrews' motion for attorneys' fees. (R. pp. 68-75) This appeal followed.³

FACTS

In the 1990s, Broom and Andrews began several business ventures, including Tri-Star Communications, Inc. ("Tri-Star"), a South Carolina Corporation, to own and operate video gaming machines. Andrews and Broom were the only two shareholders with each owning fifty percent of the shares. (R. p. 316, line 5-p. 321, line 12) Broom served as Tri-Star's sole director and sole officer overseeing and running Tri-Star's business operations. (R. pp. 316-321, 455-57) Andrews did not pay much attention to Tri-Star's operations but contributed video gaming machines on credit with a promissory note from Tri-Star to one of his gaming machine companies, Drew's Distributing. (R. pp. 453, 456, 950-955) Both shareholders also advanced a series of loans to Tri-Star each totaling over \$1 million through other promissory notes. (R. pp. 333-35, 456, 1438-39) As more capital was needed over time, Andrews provided additional loans, and Broom continued to provide all the sweat equity. (R. pp. 456-57, 1438-39)

³ Following the denial of Broom's motion to reconsider, Broom filed a motion to stay the execution with the trial court. Before the trial court ruled, Broom filed the notice of appeal and a petition for supersedeas to stay the execution of judgment. This Court held this appeal in abeyance until the trial court ruled on the motion to stay. Eight months later, in August 2019, the trial court denied the motion to stay.

Tri-Star operated a variety of video gaming machines, which Tri-Star would supply to various locations like restaurants and gas stations. Tri-Star enjoyed financial success until the state-wide ban of video gaming in 2000. (R. pp. 482-483) Following the South Carolina ban, Andrews and Broom explored moving operations to other states and abroad. (R. pp. 322-25, 1466-67) In 2004, Tri-Star ultimately decided to begin operating in the Dominican Republic. (R. pp. 322-325, 482-83) One critical condition of establishing operations in the Dominican Republic, which differed greatly from operating in the United States, was that the Dominican government mandated legal title of all machines be held by the government. (R. pp. 490, 1499-1503)

Through this restructuring process, Tri-Star's business operation began providing consulting services because it could not own and operate the machines directly. (R. pp. 328-29, 712-19) Andrews already had legal counsel for some of his other businesses and arranged for that same counsel, Ten State Street, LLP and attorney Timothy D. Scrantom (collectively "Ten State Street"), to also assist with the transition of Tri-Star operations to the Dominican Republic and Tri-Star's general business needs. (R. p. 325, lines 13-18; p. 457, lines 15-24) These efforts included representing Tri-Star in structuring and entering into an operating agreement with World Wide, a Dominican company which could provide the local support needed to operate video gaming there. (R. p. 325, lines 6-18; p. 326, line 19-p. 328, line 14) Pursuant to the agreement, World Wide would operate the machines in the Dominican Republic while Tri-Star would provide the services of Broom, in his capacity as Tri-Star's officer, and other employees as consultants. (*Id.*) These consulting services included marketing, set up and lay out, and general direction and instruction on the gaming operations. (*Id.*) In connection with these changes, Tri-Star sold its remaining inventory of gaming machines to a Dominican gaming entity. (*Id.*)

Not surprisingly, following the South Carolina ban in 2000 and during the restructuring and relocation to the Dominican Republic during 2001-03, Tri-Star experienced significant revenue reductions. Both Broom, as an officer and shareholder, and Andrews, as a shareholder and one of Tri-Star's largest creditors, were aware of Tri-Star's financial circumstances.⁴ This included both Andrews and Broom being aware that neither Broom's salary nor the shareholders' promissory notes could be paid during this transition time. The largest Tri-Star promissory note was owed to one of Andrews' other business ventures—Drews Distributing—for the initial inventory of gaming machines. (R. pp. 950-51, 1114-15, 1124-25, 1135-36) Andrews faced a lawsuit for personal liability related to another gaming business and wanted to take advantage of Tri-Star's inability to pay the note during this time. In 2002, Andrews assigned the Drews Distributing note to himself personally and cancelled this indebtedness of Tri-Star.⁵ (R. pp. 956-971, 1476-77) In similar fashion, Broom continued to defer all his salary payments until Tri-Star was cash flow positive. (R. pp. p. 276, line 25-p. 278, line 5) Both shareholders agreed that, based on the revenues and their desire to satisfy outstanding debt and grow the company, Broom's work efforts would be compensated with a reasonable salary for each year of work, once Tri-Star was financially stable. (R. p. 281, lines 17-22; p. 336, line 11-p. 337, line 11; p. 462, line 5-p. 463, line

⁴ Access to Tri-Star's revenues, during this time, encountered varying degrees of difficulty because of Dominican Republic banking crises and other currency transfer regulations. As a result, personal loans to Tri-Star were used on several occasions to transfer funds in U.S. dollars to Tri-Star in the United States, while equivalent amounts were repaid in full from Dominican operations to keep Tri-Star functioning. (R. p. 385, line 5-p. 386, line 19; p. 398, line 2-p. 399, line 13; p. 494, lines 15-23) No money from these transfers or additional transactions were unaccounted for or ever missing from Tri-Star's ledger.

⁵ This, in turn, allowed Andrews to recognize the loss and deduct it from his income that year. (R. p. 454, line 23-p. 456, line 3; pp. 1373-75, 1506-08) The assignment of debt also permitted Andrews to reduce the assets of Drews shortly before Drews was subjected to a \$1.5 million adverse judgment in an arbitration with a competitor. (R. p. 1403)

12) As a result, from inception in 1997 to the positive cash flow from operations in the Dominican Republic in late 2004 Broom did not receive any salary. (R. p. 276, line 25-p. 278, line 5)

In 2004 and early 2005, Tri-Star's finances not only stabilized but became very profitable with Tri-Star receiving \$180,000 per month from Worldwide. (R. p. 345, lines 1-13; p. 480, line 19-p. 482, line 3; pp. 1606-1622) In May 2004, Broom, Andrews, and Tri-Star's attorneys and its CPA, Tim Russell, met to discuss Tri-Star's finances, which included Broom's deferred salary payments. (R. p. 337, line 9-p. 344, line 24; p. 454, lines 9-22; pp. 2462-63) Broom and Andrews, with the CPA's guidance, determined Broom was entitled to a fair and reasonable deferred salary of \$100,000 per year for his work from 1997-2000, \$110,000 per year from 2001-2004, and \$20,000 per month going forward in 2005. (*Id.*) At trial, Tri-Star's CPA, Russell, testified by deposition that the salary amounts were reasonable. (R. p. 2471)

Pursuant to this agreement, Broom received deferred salary payments of \$400,000 in December 2004 for the first 4 years of 1997-2000; and further payments of \$130,000 in January 2005, \$130,000 in February 2005, \$185,000 in March 2005, and \$75,000 in April 2005. (R. pp. 1541, 1555) These payments were placed in Tri-Star's ledger, and copies of financial statements showing all payments and amounts were provided monthly to Andrews' agents, including his bookkeeper Claudia Humphries and attorney Curt Stodghill. (R. p. 516, line 18-p. 522, line 21; pp. 1541, 1555, 1558, 1606-1622) Andrews' and Tri-Star's attorneys, Ten State Street, issued statements and reports confirming their receipt of these material payments. (R. p. 2462) Andrews admitted that he didn't review or understand the financial records and counted on his agents in that regard. (R. p. 503, lines 5-18)

Tri-Star's operations in Dominican Republic remained intact until June 2005 when without notice, the Attorney General of the Dominican Republic directed all gaming machines had to be

removed from use by consumers. (R. p. 345, line 17-p. 347, line 17; pp. 972-985) Failure to remove the machines would result in confiscation and destruction. (*Id.*) In response, Broom on behalf of Tri-Star, along with the assistance of Tri-Star's Dominican business joint venture World Wide, removed the machines to a warehouse to comply with the mandate. (R. p. 346, lines 12-23, pp. 986-87)

Less than a week later, the Attorney General issued a second directive that all machines had to be "retired" or removed from the Dominican Republic within twenty days. (R. p. 342, line 23-p. 346, line 5; pp. 988-989) Being initially hopeful that operations would resume based on a change in the local law, Broom thought operations would resume and made efforts to manage the uncertain and changing circumstances and improve the political situation through lobbying efforts. (R. p. 346, line 12-p. 348, line 20) Revenues had ceased, but expenses were continuing. (R. p. 347, line 25-p. 349, line 24) World Wide still owed Tri-Star for operations before the ban, and Broom secured payments to Tri-Star from World Wide's Dominican owner. (R. p. 390, line 6-p. 392, line 6)

Andrews kept abreast of developments through his agents and Tri-Star's legal counsel. During this time, Broom made requests for capital contributions to keep the business efforts funded while Tri-Star's revenue stream was stopped. (R. pp. 993-997) Despite these documented requests, Andrews refused to provide capital contributions for Tri-Star. (R. p. 509, line 6-p. 510, line 24) Instead, he traveled to the Dominican Republic and confirmed the uncertain political and financial circumstances. (R. p. 501, lines 5-17) As in the past when money needed to be transferred between Tri-Star and World Wide, money was moved between the companies and across borders through a series of transfers. (R. p. 385, line 5-p. 386, line 19; p. 398, line 2-p. 399, line 13; R. p. 494, lines 15-23)

In the absence of financial resources and dwindling time to remove the machines from the country to avoid confiscation, Broom, on behalf of Tri-Star, undertook efforts to have the machines sold and money returned to Tri-Star to avoid a total loss. He received two bids and selected the only viable one. (R. p. 1440) Broom's counsel kept Andrews updated throughout this process. (R. p. 501, lines 1-22; p. 509, line 6-p. 510, line 6; pp. 986-1008) At the end of 2005 during the wind down, an equity distribution was issued to both Broom and Andrews after all outstanding debt was satisfied and before Broom received all his deferred salary payments.⁶ (R. p. 1435-36)

PROCEDURAL HISTORY

During this period of uncertainty after operations had been stopped in late June 2005, Broom filed the underlying lawsuit because Andrews refused to help manage the uncertain future of the company in the Dominican Republic. Andrews answered the lawsuit but refused to seek a solution to the situation in the Dominican Republic. Then in 2006 after Broom paid all the company's known debts and distributed the remaining money as equity, Andrews amended his answer to allege ten causes of action against Broom. (R. pp. 95-108) All of Andrews' claims were based on various allegations of mismanagement on the part of Broom as an officer and director that allegedly resulted in losses to Tri-Star, as a corporate entity, and to Andrews, as a shareholder and creditor of Tri-Star.

In September 2011, Broom moved to dismiss the Andrews' claims because Andrews had not complied with the pleading and demand requirements of Rule 23(b)(1) prior to filing shareholder derivative claims on behalf of Tri-Star. After a hearing, the trial court dismissed with

⁶ Tri-Star ceased operations and wound down in December 2005. It was administratively dissolved on August 13, 2009.

prejudice “all claims of Tri-Star and all claims brought by Andrews individually that overlap with any alleged injuries suffered by Tri-Star.” (R. pp. 1-9)

The trial court provided a claim-by-claim analysis explaining that Andrews failed to allege facts sufficient to show he had standing because all recoveries were to be paid to Tri-Star. (R. p. 4) Notably, the trial court held “this record does not present a factual scenario sufficient to ignore the corporate nature of [Tri-Star].” (R. p. 8) The trial court specifically rejected Andrews’ argument that an exception to the rule for derivative claims should be applied, noting that “our appellate courts have consistently rejected exceptions to the general rule, even when those cases involved closely held corporations.” (*Id.*)

Andrews subsequently filed a motion to amend the counterclaims “based upon information learned and/or events that have transpired since the filing of his Amended Answer and Counterclaims is May 2006” as well as a motion to reconsider the order granting Broom’s motion to dismiss. (R. pp. 2483-2513) Following a hearing, the motion to reconsider was denied, and no ruling was made on the motion to amend. (R. pp. 10-11) An appeal followed.

In the prior appeal, Andrews argued he should be allowed to bring direct claims instead of being encumbered by derivative suit requirements when a corporation only has two shareholders and that he also should have been provided the opportunity to amend the pleadings. (R. pp. 2542-2551) Broom argued the latter was not preserved for review because the trial court did not rule on Andrews’ motion to amend and a ruling had not been sought in a motion to reconsider. (R. pp. 2583-84) Following oral argument, the Court of Appeals entered an unpublished opinion that “did not address these issues and, instead remanded the case to the [trial] court so the trial judge could rule on [Andrews’] Rule 15, SCRCp, motion to amend the pleadings.” *Broom v. Ten State St., LLP*, 2015 WL 164429, at *1. (R. pp. 12-14)

Broom petitioned the Supreme Court arguing the decision to remand was an error of law because Andrews failed to obtain a ruling on the motion to amend, and it would be improper to provide Andrews a second opportunity to receive a ruling. (R. pp. 2587-2596) In his return, Andrews acknowledged the Court of Appeals' decision was incorrect but urged the Supreme Court to end the appeal and allow him to amend his pleadings. (R. pp. 2600-02) Relying solely on the petition and return, the Supreme Court reversed the Court of Appeals. *Broom v. Ten State St., LLP*, 2015 WL 164429, at *1. (R. pp. 15-17)

The only remaining issue on appeal which had not been addressed by either appellate court, was whether the trial court erred in holding that the ALI exception to the requirement of asserting derivative claims did not apply. (R. pp. 2542-2551) Following the Supreme Court's reversal of the Court of Appeals decision, the matter was remitted, instead of being returned to the Court of Appeals to address Andrews' remaining issue on appeal. (R. pp. 2604) Andrews' counsel wrote a letter to the Supreme Court to note the discrepancy, to which the Supreme Court responded by notifying counsel that the sole basis to maintain appellate jurisdiction was through a motion to reinstate a remittitur that was sent down by mistake, error or inadvertence, citing *Wise v. S.C. Dep't of Corr.*, 372 S.C. 173, 174, 642 S.E.2d 551, 551 (2007). (R. pp. 2611-12) No motion to cure the mistake was made, and the matter was sent back to the trial court.⁷

At a hearing in June 2016, Andrews moved to amend the pleadings to allege derivative claims that complied with the requirements of Rule 23. (R. pp. 18-36) Although the trial court

⁷ At that time Broom's complaint was still pending, and the Honorable J. Mark Hayes, II again presided.

reaffirmed its prior decision that direct recovery was not permitted,⁸ it granted the motion permitting Andrews to cure the Rule 23 deficiencies for asserting derivative claims. (*Id.*)

After the amended pleading was filed, Broom moved to dismiss the amended pleading pursuant to the law of the case doctrine based on the trial court's prior ruling and Andrews' failure to obtain a ruling from his appeal of that order. (R. pp. 2613-2622) The trial court ruled that the prior appellate proceedings did not establish any law of the case that would prevent Andrews from reasserting his derivative claims. (R. pp. 38-40)

Shortly before trial, Broom dismissed all his affirmative claims against Andrews, leaving only Andrews' derivative claims. The matter was then recaptioned and tried with Andrews as the plaintiff. (R. pp. 44-46)

In late June 2017, a three-day bench trial was held.⁹ Both Andrews and Broom testified, along with a former employee for Drews Distributing as an expert witness on the value of the gaming machines sold in the Dominican Republic in 2005. Additionally, one page of Tri-Star's CPA Tim Russell's deposition testimony was submitted by the consent of both parties. (R. p. 2471) There was lengthy questioning about Broom's deferred salary payments and the May 2004 meeting among Tri-Star's attorneys, CPA, Broom, and Andrews. Significantly, Andrews and Broom each testified that Broom was entitled to a salary for the entirety of his employment, which was further supported by the admission of the meeting's agenda and notes, in which the proposed salaries were listed. (R. p. 2462-63) Russell confirmed the amounts of Broom's deferred salary payments were reasonable. (R. p. 2471) Andrews acknowledged that his agents had full access

⁸ No appeal of the trial court's reaffirmed ruling dismissing Andrews' direct claims has been made.

⁹ Because Andrews succeeded on only one of his ten causes of action (statutory breach of fiduciary duty for the payment of deferred salary) and no cross appeal was filed, Broom has truncated the factual discussion of trial testimony to reflect only relevant testimony for that issue.

to the ledger showing all transactions and that he relied on them for taking care of his business with Tri-Star. (R. p. 466, line 11-p. 467, line 1) Moreover, Andrews confirmed Broom’s testimony that no transactions or other information was kept from Andrews and that Andrews generally ignored the financial information he received. (R. p. 466, lines 11-20, p. 502, line 18-p. 503, line 18)

In November 2017, the Court entered an Order and Judgment (the “Final Order”). The trial court rejected Broom’s contention that the law of the case doctrine barred Andrews’ claims. The court held that the law of the case doctrine did not apply because the 2011 dismissal with prejudice was merely an interlocutory order, and “there [wa]s no mandate or decision from an appellate court establishing any law for this case.” (R. p. 54)

Turning to the claims themselves, the court agreed with Broom that Andrews’ ten causes of action constituted a single cause of action for breach of the standard of care for an officer and director. (R. p. 54)¹⁰ The court described Andrews’ claim breach of fiduciary duty as alleging three breaches: (1) unauthorized payments by Broom to himself; (2) unauthorized sale of video gaming machines; and (3) income Broom made in the Dominican Republic from activities after Tri-Star stopped operating. As to the second and third allegations, the court determined Andrews had failed to meet his burden.

As to the allegation about unauthorized deferred salary payments, the court held Andrews had shown by clear and convincing evidence that Broom’s payments of deferred salary to himself from Tri-Star’s account beginning December 31, 2004 was done in bad faith and with fraudulent

¹⁰ The court further concluded that the applicable standard of care was the standards of conduct for officers and directors in the South Carolina Business Corporation Act, not the standard for a partnership, as Andrews had urged. (R. p. 55)

intent. Finding Broom breached his duty, the court then turned to the derivative nature of the claims and adopted the ALI exception for statutory close corporation, which would allow Andrews to collect damages directly, despite it being a derivative suit. In so doing, the court determined Andrews was entitled to damages in an amount of \$510,000—half of Broom’s Tri-Star salary. In addition, the court awarded punitive damages in the amount of \$510, 000, finding there was clear and convincing evidence that Broom acted fraudulently and in bad faith. Specifically, the court held Broom paid himself exorbitant amounts of deferred salary as part of a plan or scheme to shut down and cut Andrews out of the business operations in the Dominican Republic and concealed his actions from Andrews. Additionally, the court awarded attorney’s fees pursuant to section 33-18-410(b) of the South Carolina Code.

Broom subsequently filed a motion pursuant to Rules 50(b), 52(b), 59(a), and 59(e) of the South Carolina Rules of Civil Procedure to alter or amend the findings of facts and conclusions of law in the Final Order; for reconsideration of the decisions and judgment; and for judgment notwithstanding the verdict or, in the alternative, for a new trial. (R. pp. 2663-2694) Andrews filed a petition for attorney’s fees in the amount of \$194,306.53. (R. p. 2695-2699) The trial court denied Broom’s motion and granted Andrews’ motion for attorney’s fees in full. (R. pp. 68-75) In total, the Court ordered a judgment to be entered in the amount of \$1,214,406.53. This appeal followed.¹¹

¹¹ This Court stayed the appeal while Broom’s motion for stay of execution of judgment pending appeal was pending before the trial court. This Court then lifted the stay following the trial court’s denial of the motion to stay execution of the judgment pending appeal.

STANDARD OF REVIEW

In an appeal based on an error of law, the Court reviews *de novo*, owing no deference to the lower court's decision. *Carolina First Bank v. BADD, LLC*, 414 S.C. 289, 292, 78 S.E.2d 106, 108 (2015). Statutory interpretation is a question of law subject to *de novo* review. *Hueble v. S.C. Dept. of Natural Resources*, 416 S.C. 220, 228, 785 S.E.2d 461, 465 (2016). Moreover, "because of changes in federal case law, the South Carolina Supreme Court has recently adopted a *de novo* standard for the review of trial court determinations of the constitutionality of punitive damages awards." *Hale v. Finn*, 388 S.C. 79, 92, 694 S.E.2d 51, 58 (Ct. App. 2010).

"In an action at law, on appeal of a case tried without a jury, the Court views the trial court's findings of fact as equivalent to a jury's findings in a law action, and will not disturb the findings unless the Court views the trial court's findings to be without reasonable evidentiary support." *Abbeville Cty. Sch. Dist. v. State*, 410 S.C. 619, 629, 767 S.E.2d 157, 162 (2014), *amended*, 414 S.C. 166, 777 S.E.2d 547 (2015). However, "[w]here mixed questions of fact and law are presented, the legal conclusions to be drawn are not entitled to the same deference." *Chambers v. Pingree*, 351 S.C. 442, 449, 570 S.E.2d 528, 532 (Ct. App. 2002).

ARGUMENT

This appeal has a long procedural history that should not have been allowed. Finite procedural rules and precedent exist to ensure consistency and finality. Yet when rules and precedent are ignored, errors can grow like weeds, eventually choking justice and taking over if left unchecked—like in this case. This Court is now being asked to cut through an unwieldy and nuanced factual and procedural history to remedy the error. However, the error itself is quite simple: Andrews should have been barred from amending his pleadings in 2016 to add derivative claims that were eventually tried for two independent reasons: (1) his derivative claims had

previously been dismissed with prejudice in 2011, and that ruling was unsuccessfully appealed and became the law of the case; and (2) the time had expired to assert claims based on allegations that were then ten years old. Each of these reasons separately warrant reversal.

If this Court finds it necessary to inquire further, then the trial court's award to Andrews that Broom's deferred salary payments violated his duty owed to Tri-Star is unsupported by any evidence in the record. In the absence of evidence of a violation, the award of damages, including also awards of punitive damages and attorneys' fees should be reversed. Additionally, the trial court should not have adopted the use of an ALI exception, which is inapplicable and unsupported by law, to overcome the same deficiencies in Andrews pleading derivative claims the second time. Even revisiting the ALI exception's applicability in this case, which had been rejected and appealed by Andrews in his earlier appeal, further demonstrates the error arising from Andrews' failure to obtain a ruling in that appeal. The trial court's inconsistent rulings after the prior appeal cause the fundamental error raised by this appeal—that is, the dismissal with prejudice of Andrews' derivative claims became the law of the case and thus barred their re-litigation. For these reasons, Broom requests this Court reverse the trial court by recognizing the finality of this matter before the trial even occurred or at least that Andrews failed to prove any violation under the circumstances at the time the deferred salary payments were made.

I. Andrews' Claims are Barred by the Law of the Case Doctrine.

The trial court erroneously allowed Andrews to amend his pleading following a mistaken remittitur in the first appeal. By failing to have his first appeal reinstated to obtain an appellate ruling, the 2011 order dismissing Andrews' claims with prejudice became law of the case. Accordingly, Andrews was barred from pursuing any derivative claims, and thus the trial was allowed only in error.

As this Court is aware, the doctrine of the law of the case prohibits issues that have been decided in a prior appeal from being re-litigated. *Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997); *see also Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 573, 776 S.E.2d 397, 404 (Ct. App. 2015). It also forbids a party from “re-litigating issues decided in a lower court, when the party voluntarily abandons its appeal of that order.” *Hudson ex rel. Hudson v. Lancaster Convalescent Ctr.*, 407 S.C. 112, 119–20, 754 S.E.2d 486, 490 (2014); *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009). The law of the case doctrine equally applies to a remittitur. *Shirley’s Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) (“The doctrine of the law of the case applies to an order or ruling which finally determines a substantial right.”). Additionally, if a remittitur is issued by mistake or error, a party is required to file a motion for reinstatement, which is the procedural mechanism for a court to recall the remittitur. *Wise*, 372 S.C. at 174, 642 S.E.2d at 551 (citing *State v. Keels*, 39 S.C. 553, 17 S.E. 802 (1893)); *see also* Rule 221, SCACR.

Andrews’ failure to obtain relief on appeal from the 2011 order dismissing his claims with prejudice is the law of the case. In the prior appeal, Andrews argued his claims should not be dismissed because the ALI exception should apply to save his claims and, alternatively, that he was entitled to amend his pleadings. In reversing this Court’s ruling that the issue be remanded for the trial court to rule on motion to amend, the Supreme Court expressly found Andrews’ issue of amending his pleading was unpreserved for appellate review. (R. pp. 15-17) Thus, the issue to be addressed in the prior appeal was whether the dismissal with prejudice of Andrews’ claims should be reversed and in particular whether the ALI exception should have been applied. (R. pp. 2542-2551) When the matter was remitted, instead of being remanded to the Court of Appeals,

Andrews received no ruling on that issue. Thus, the 2011 order dismissing his derivative claims was effectively affirmed.

Andrews could have received a ruling on that issue by requesting the Supreme Court to reinstate the appeal. *See Wise*, 372 S.C. at 174, 642 S.E.2d at 551. By failing to assert a motion for reinstatement the final decision on Andrews' derivative claims, pursuant to the law of the case, can be only one: they were dismissed with prejudice. Practically, one cannot amend claims that have been dismissed with prejudice.¹²

Furthermore, the trial court's explanation for not applying the law of the case doctrine is unavailing. The trial court held that Andrews' claims are not precluded because the earlier order granting Broom's motion to dismiss was merely an order and not a final judgment. (R. pp. 52-53) This is a distinction without a difference because the law of the case doctrine can apply to interlocutory orders, not merely to final judgments. *See Cooper Tire & Rubber Co. v. Perry*, 261 S.C. 538, 539, 201 S.E.2d 245, 246 (1973) (holding that "where ruling on demurrer to complaint was not appealed from, it became the law of the case" on a subsequent demurrer to an amended complaint in the same action).

For these reasons alone, this Court should reverse.

II. Andrews' Claims Are Also Barred by the Statute of Limitations.

Andrews' claims were also barred by the state of limitations. Andrews did not file his second amended counterclaims until 2016, which is long past the two-year statute of limitations for the actions that occurred in 2004-2005. S.C. Code Ann. §§ 33-8-300(e); 33-8-420(e).

¹² This outcome is consistent with the concerns raised by Broom to the Supreme Court in his petition for certiorari in the prior appeal. (R. pp. 2592-95) Broom argued that Andrews should not be allowed to amend his pleading after the final and appealed ruling that Andrews' claims were dismissed with prejudice. (*Id.*) To allow the amendment ignored preservation rules and the finality of appealed judgments that are not properly exhausted.

Moreover, the second amended complaint does not relate back to the earlier complaint since the earlier complaint was dismissed with prejudice. *See Grover v. Eli Lilly & Co.*, 896 F. Supp. 725, 728 (N.D. Ohio 1995) (“Because the dismissal of *Grover I* with prejudice wiped the slate clean of remaining claims, plaintiffs’ current claims cannot relate back to the filing of plaintiffs’ second amended complaint.”); *see also Harmon v. Patrolman’s Benev. Ass’n of City of New York (PBA)*, 199 F. App’x 46, 48 (2d Cir. 2006) (“The dismissal with prejudice of a lawsuit does not toll the statute of limitations.”); *cf. Braudie v. Richland Cty.*, 217 S.C. 57, 61, 59 S.E.2d 548, 550 (1950) (“It clearly appears that the statute of limitations had not run so as to bar the plaintiff’s cause of action at the time the amendment was allowed.”).¹³

For these reasons, Andrews was barred from asserting these claims in 2016, and this Court should reverse.

III. The Trial Court’s Material Findings of Fact and Application of Facts to the Law are Unsupported by the Evidence.

The trial court’s ruling that Broom breached his fiduciary duty is riddled with factual error and unsupported by evidence in the record, which in turn amounts to legal error. In making the overall determination on breach, the trial court made four unsupported factual findings: (1) substantial debt for the machines was still owed at the time deferred salary payments were made, (2) Broom “secretly” borrowed money to make the salary payments in December 2004, (3) Tri-Star was not profitable in 2004 and 2005, and (4) Broom designed and executed a plan beginning

¹³ Furthermore, the statute of limitations is not tolled based on Andrews having moved for leave to amend prior to the 2011 appeal. First, Andrews’ claims had already been dismissed with prejudice before that motion for leave to amend was filed in November 2011. Second, the 2011 motion for leave to amend was not the motion that the trial court ultimately granted in 2016. Andrews moved for leave to amend in 2011 simply to add some supplemental facts to his pleading. (R. pp. 2514-2531) It was not until 2016 that Andrews moved for leave to amend to cure the Rule 23 pleading deficiencies that had caused the trial court to dismiss his claims in 2011. (R. pp. 18-21, pp. 130-145)

in 2004 to take all the money out of Tri-Star and shut it down. These factual assertions and findings of bad faith are not true and unsupported by the evidence in the record, which includes the Bankruptcy Order and undisputed findings concerning the Dominican Republic's unexpected complete ban on all video gaming at the end of June 2005.

The South Carolina Corporate Code requires a corporate officer or director to discharge his duties “(1) in good faith; (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner he reasonably believes to be in the best interests of the corporation and its shareholders.” S.C. Code Ann § 33-8-420. Andrews offered only his own and Broom's testimony as fact witnesses and failed to present any evidence to support any reasonable inference that Broom violated the Corporate Code standards of conduct in making payments in late 2004 and early 2005 for a reasonable deferred salary for his full-time work for Tri-Star from 1997-2005.

All evidence in the record demonstrates that Broom was entitled to a salary. Both Andrews and Tri-Star's CPA Russell testified that Broom was entitled to a reasonable salary for his efforts. (R. p. 462, line 5-p. 463, line 12; R. p. 2471) Moreover, evidence demonstrates that the salary amounts were discussed and reported as reasonable and fair by Tri-Star's CPA and attorneys in the May 18, 2004 meeting with both parties and the professionals. (R. p. 337, line 12-p. 343, line 24; R. pp. 2462-2471) While Andrews stated he did not remember the May 18, 2004 meeting—the only alleged evidence of an improper salary submitted by Andrews—he did not deny the documented meeting and also admitted he relied on his agents to conduct all of his businesses, including Tri-Star. (R. p. 479, lines 8-18; p. 503, lines 5-18; p. 506, line 12-p. 507, line 21) Significantly, the record reflects that deferred salary payments were discussed in advance; made after Tri-Star was making \$180,000 per month; disclosed to and known by Andrews, at least

through his agents; and were properly recorded in ledgers and other financial documents—all of which was available to Andrews and his agents. (R. p. 516, line 18-p. 522, line 21; pp. 1541, 1555, 1558, 1606-1622)

Significantly, Andrews acknowledged he usually ignored the financial information and relied on his agents and the Tri-Star CPA, who unquestionably received the Tri-Star financial information and created the ledgers that were admitted by both sides without dispute. (R. p. 517, line 18-p. 518, line 18) Yet at trial, Andrews did not present the testimony of any of his agents on whom he relied to handle his business with Tri-Star. Andrews cannot try to contradict the documentary evidence of disclosure of the salary with self-serving testimony without offering any of his agents as witnesses. Andrews is charged with both knowledge of his agents and the inference that he would have called his agents if their testimony could have helped him. *See Crystal Ice Co of Columbia v. First Colonial Corp.*, 273 S.C. 306, 309, 257 S.E.2d 496, 497-98 (1979); *Wisconsin Motor Corp. v. Green*, 224 S.C. 460, 79 S.E.2d 718 (1954). In the absence of this evidence, Andrews failed to meet his burden. Moreover, the Corporate Code specifically shields Broom from liability when he relied on Tri-Star’s attorneys and CPA, including Russell’s trial testimony through deposition that the deferred salary payment amounts were reasonable. *See* S.C. Code Ann. §§ 33-8-300(b) & -420(b) (stating officers are “entitled to rely on information, opinions, reports, or statements . . . by . . . legal counsel [and] public accountants.”) (R. p. 337, line 12-p. 344, line 24; pp. 2462-63, 2471) This alone warrants reversal.

Because the trial court’s ruling ignored the statutory shield for reliance on the company’s professionals and in turn made unsupported evidentiary findings on bad faith and fraudulent intent, a limited discussion of each is required. In so doing, Broom recognizes he is asking this Court to broadly revisit underlying themes of Andrews’ arguments at trial that are not on direct appeal nor

raised in a cross-appeal. However, the trial court improperly latched on to those unsupported themes—like the suggestion that Broom effectively controlling the ban in the Dominican Republic—that effectively shaped the trial court’s review of the evidence. As discussed herein, each of the four findings are unsupported by any evidence and demonstrate the error of the trial court’s evaluation of the evidence and the overall ruling in this matter.

First, the trial court’s finding that salary payments were made “at a time when Tri-Star owed Andrews significant sums for the video games” is contrary to all evidence in this case. In November 2002, Andrews cancelled the significant promissory note from his company Drews Distributing’s initial contribution of gaming machines to Tri-Star and after he had assigned that note to himself. (R. pp. 956-59) With the cancellation of Tri-Star’s debt to Andrews then, it could not be owed in 2004 and 2005 when the alleged violations occurred. Andrews acknowledged this by not including the debt in his involuntary bankruptcy petition he filed against Tri-Star in 2005. (R. pp. 1418-1437)¹⁴ Moreover, at the start of trial Andrews withdrew any claim against Broom for any loan or debt payments. (R. p. 160, lines 16-25) Without any evidence of this critical underlying fact, there should be no finding that Andrews was owed any debt for the machines or that Broom acted improperly based on Andrews still being owed significant debt for the machines.

¹⁴ On December 7, 2005, Andrews filed an involuntary petition in the U.S. Bankruptcy Court for relief against Tri-Star under Chapter 11 of the Bankruptcy Code. (R. pp. 1418-19) In his bankruptcy filings, Andrews made only one claim for a \$130,000 business loan he made to Tri-Star. (R. p. 1424) Broom had checks issued to Andrews before the bankruptcy petition was filed, which were refused, and then again post-petition to satisfy his petition debt claim along with two checks in the amounts of \$25,000 and \$60,000, “representing Andrews’ equity in Tri-Star after liquidation of assets.” (R. pp. 1424-25) The Bankruptcy Court found no evidence that Tri-Star owed any debt to Andrews, other than the amounts that had already been paid before wind down. (R. pp. 1435-36)

Without this erroneous finding, Andrews failed to present evidence to support any conclusion of Broom having violated the Corporate Code standard of conduct.

Second, there is no evidence that Broom kept any loans or other transactions secret, nor did the loans themselves suggest financial distress. As recognized by the Bankruptcy Order, all shareholder loans in 2004 and 2005 were being paid and were paid in full. (R. pp. 1435-36) There is no evidence that Andrews was owed any money in 2004 or 2005 that he did not receive, *and he received an equity distribution.* (*Id.*) Moreover, the trial court's finding that getting loans to repatriate revenues was deceitful is not supported by any evidence that there was an intent to conceal the truth. Both parties testified about the difficulty of repatriating Tri-Star revenues from the Dominican Republic to pay bills in the United States and the need for short term loans to do so under the circumstances at the time in the Dominican Republic. (R. p. 385, line 5-p. 386, line 19; p. 398, line 2-p. 399, line 13; p. 494, lines 15-23)

The trial court acknowledged that the full value of the machine sale was deposited in Tri-Star accounts and used to benefit all shareholders, as previously determined in the final, unappealed order from the Bankruptcy Court. However, the trial court took issue with the deposit being the same amount from different sources. This is not legally relevant. *See City of Myrtle Beach v. Tourism Expenditure Review Comte.*, 407 S.C. 298, 308, 755 S.E.2d 425, 430 (2014) (Hearn, J., dissenting) ("Quite simply, a dollar is a dollar; money is fungible. [I]t makes no difference whether a dollar with a particular serial number was expended for one purpose as opposed to another."). More importantly, it was consistent with Tri-Star's past practices for repatriating revenues earned from operations in the Dominican Republic and necessary for business purposes in protecting Tri-Star from risks and challenges with the Dominican Republic banking system and currency exchange, as admitted by Andrews. (R. p. 385, line 5-p. 386, line

19; p. 398, line 2-p. 399, line 13; p. 494, lines 15-23) In sum, the trial court failed to appreciate the parties' accepted course of business caused by the banking crises in the Dominican Republic and the many complexities of cross-border financial transactions – cash flow, fax, and currency exchange issues – and instead erroneously seemed to infer fraud at every turn. Such an inference would be inappropriate in any event without evidentiary support but is particularly inappropriate here given the evidence that demonstrates the legitimacy and full disclosure of the transactions.

Third, Broom did not have plans in 2004 to wind down or cut Andrews out of the business they had pursued for more than seven years at that point. Most importantly, there is no evidence Broom knew or could have known in advance of the Dominican Republic's complete ban of video gaming in late June 2005. Inexplicably, the trial court concluded that Broom engaged "in a deliberate pre-planned scheme to shut down his business with Andrews by unilaterally" paying himself a salary beginning in 2004. (R. p. 65) All testimony and evidence demonstrates that Tri-Star was profitable through the first half of 2005 until the unexpected ban. Neither Broom nor anyone else associated with Tri-Star knew of the ban in advance, as demonstrated by the Bankruptcy Court's order noting that the government ban was unexpected. (R. p. 1425) Even the trial court acknowledged that the bankruptcy court proceedings required the Court to "infer that the immediate motivation in selling the machines was the Attorney General's action of prohibiting the machines ***and not the Defendant's desire to open another gaming operation.***" (R. p. 59) The sale of the machines came in October 2005, months after the ban and efforts to salvage the business. (R. pp. 1440-41)

Thus when Andrews and Broom and Tri-Star's attorney and CPA met in May 2004 to discuss Broom's deferred salary payments and then Broom began taking deferred salary payments in late 2004, he had no way of knowing the machines would be banned more than six months later.

Revenues to Tri-Star during this period were \$180,000 per month. (R. p. 345, lines 1-22; p. 480, line 4-p. 482, line 3; pp. 1606-1622) In direct contradiction to the trial court conclusion about a scheme, the undisputed evidence demonstrates that Broom worked without pay until revenues reached \$180,000 per month in late 2004 and the first half of 2005. The ban caused all Tri-Star's operations and revenues to stop, and there was no future opportunity there or with the machines stuck in the Dominican Republic under the ban and subsequent confiscation order. (R. p. 345, line 17-p. 349, line 24) Even after the ban, Broom continued to work to preserve the Tri-Star's assets in the Dominican Republic, return the value of those machines to Tri-Star in the United States, pay off all remaining debts, and distribute the remaining equity to both shareholders. (R. p. 345, line 17-p. 349, line 24; p. 396, line 22-p. 397, line 8; pp. 1435-36, 1440) In sum, there is no evidence that there was a scheme to close the business or to cut Andrews out of the business.

Any alleged scheme depended on that unpredictable and unrelated superseding cause of the end of Tri-Star's operations. Otherwise, Tri Star would have continued making \$180,000 per month. Then, Broom could have been paid for his work on behalf of Tri Star for late 2005, which he has never received. (R. p. 348, lines 15-20; R. p. 2462-63)

Finally, the trial court's reliance on Broom's February 2005 purchase of a home in Miami as part of a scheme to shut down Tri-Star was convoluted and mystifying. At one point the trial court concluded the deferred salary payments were needed to fund the home purchase but at another point that the purchase was designed to shield the payments from recovery under the Florida homestead exemption from judgments. (R. p. 57, 61) Neither of these inferences have any support in the record. In fact, the uncontroverted evidence from Broom's testimony was that he had to put that home back on the market in August 2005, right after the ban, and that ultimately the property was foreclosed on and sold at a loss. (R. p. 353, line 23-p. 354, line 9) This evidence

does not support any inference of a plan that depended for its success on an unannounced and unknowable ban on all gaming in the entire country of the Dominican Republic for a year. No reasonable inference can be drawn from or supported by the failed purchase of a home in Miami at the wrong time – months before the ban – and which caused a loss to Broom. Rather, it undercuts Andrews’ theory along with the superseding cause of the end of operations for Tri-Star as found by the Bankruptcy Court – which was not contradicted by any evidence in this case.

For these reasons, the trial court’s findings of violation of the Corporate Code in bad faith are completely unsupported by the evidence presented at trial, and the trial court’s order should be reversed for this reason alone.

IV. The Trial Court Erred in Applying an ALI Exception to Established Precedent.

Despite correctly finding that Andrews’ claims were derivative, the trial court incorrectly permitted Andrews to obtain an individual recovery for the derivative claims. The ALI exception ignores precedent and is contrary to this State’s public policy. Moreover, the necessity to have this question addressed in this appeal further highlights that Andrews previously appealed it but failed to obtain a ruling on this issue.

“It is firmly established by [the South Carolina Supreme Court] that individual shareholders may not sue corporate directors or officers directly for losses suffered by the corporation.” *Babb v. Rothrock*, 303 S.C. 462, 464, 401 S.E.2d 418, 419 (1991); *Todd v. Zaldo*, 304 S.C. 275, 278, 403 S.E.2d 666, 668 (Ct. App. 1991) (“[A] cause of action for recovery of an asset of a corporation belongs to the corporation as opposed to the individual shareholders.”).

In rejecting this unambiguous precedent, the trial court relied on an ALI exception, which provides courts with the discretion to treat an action raising derivative claims as a direct action in

certain circumstances involving closely held corporations.¹⁵ The trial court’s adoption of a new rule ignored well settled law and policy of this State. South Carolina courts have explicitly rejected creating special exceptions and continued to uphold the requirements of corporate form. In *Todd v. Zaldo*, the plaintiff argued that he could raise derivative claims as direct claims against a director because the company “was a close corporation with only three stockholders.” *Todd*, 304 S.C. at 279, 403 S.E.2d at 668. In declining to do so, this Court stated:

[Plaintiff] seeks to have Georganne Apparel viewed more as a partnership than a corporation. [] This record does not support application of these principles. Mr. Zaldo did business in the corporate form. He testified the business operated as a corporation. He recognized it was owned by the shareholders. This record does not present a factual scenario sufficient to ignore the corporate nature of Georganne Apparel, Inc.

Id. (internal citations omitted); *see also Brown v. Stewart*, 348 S.C. 33, 557 S.E.2d 676 (Ct. App. 2001).

In *Babb v. Rothrock*, the plaintiff “contend[ed] that an exception to the general rule should be recognized . . . where the underlying reasons for requiring a derivative action were absent.” *Babb*, 303 S.C. at 464, 401 S.E.2d at 419. In rejecting this argument, the Supreme Court noted that “[t]he claims of corporate creditors may be jeopardized if individual shareholders are permitted to satisfy their personal debts by raising a claim which can only be asserted by the

¹⁵ The exception provides:

“In the case of a closely held corporation [], the court in its discretion may treat an action raising derivative claims as a direct action, exempt it from those restrictions and defenses applicable only to derivative actions, and order an individual recovery, if it finds that to do so will not (i) unfairly expose the corporation or the defendants to a multiplicity of actions, (ii) materially prejudice the interests of creditors of the corporation, or (iii) interfere with a fair distribution of the recovery among all interested persons.

Principles of Corp. Governance § 7.01 (1994).

corporation.” *Id.* “As between the creditors and shareholders, the interest of the creditors must prevail.” *Id.*

Allowing an exception to the derivative claim requirements would challenge the fundamental operation of the corporate form in South Carolina. While the exception is based on legitimate policy concerns, there are serious consequences for allowing such a relaxed standard for pleadings, as suggested by the ALI exception, when bringing derivative actions. The current rule exists for the purpose of protecting the rights of all entities that place a trust in a business, including customers, shareholders, creditors, et cetera. While the exception purports to apply only if the interests of those other entities does not exist, it can be difficult in practice to know when such a situation exists, and errors can occur. For example, it is not easily apparent whether a corporation has creditors whose rights require protection. For these reasons, a number of other states have also rejected the exception. *See* Allan B. Cooper, *et al.*, *Too Close for Comfort: Application of Shareholder’s Derivative Actions to Disputes Involving Closely Held Corporations*, 9 U.C. Davis Bus. L.J. 171, 182 (2009) (“Of the thirty-seven states that have considered the issue, sixteen have adopted the ALI approach by permitting direct suits. Twenty states have held that the traditional shareholder’s derivative requirement applies. In one jurisdiction the decisions appear inconsistent.”). Here, the record does not clearly establish that no other interests would be affected at the time of filing, when pleading requirements are tested.

Moreover, the exception should also not be adopted because South Carolina law has sufficient safeguards to remedy many of the most important policy considerations that gave rise to the ALI exception. The exception is based in part on the view that the typical requirement in a derivative claim of a pre-suit demand on a corporation will create needless delay for little result in the case of a close corporation. But South Carolina law, like many states, permits a plaintiff

bringing a derivative claim to alternatively plead facts that show why a pre-suit demand was not made. Rule 23, SCRCP. Similarly, South Carolina has created an individual cause of action for a shareholder in a statutory close corporation to individually petition a court for damages or other forms of relief. S.C. Code Ann. § 33-18-400, *et seq.*

Finally, Andrews failed to meet his burden to show that the ALI exception should be applied in this case, regardless of whether it could ever be applied in South Carolina in theory. Specifically, Andrews failed to present any evidence that applying the exception would not prejudice corporate creditors of Tri-Star. The trial court ironically attempted to address this issue by pointing to evidence that Broom introduced at trial – Tri-Star’s involuntary bankruptcy in 2006 in which “the bankruptcy court determined there were no claims against Tri-Star other than the claims of equity holders (Andrews).” (R. p. 62)

The problem with this analysis is that the data point that the trial court relied on to establish that there were no creditors was over a decade old at the time of trial. Tri-Star could have incurred other debts after the bankruptcy court’s determination. Andrews could have shown that no other creditors existed by showing that the claim resolution procedures of S.C. Code Ann. §§ 33-14-106; -107 were followed after Tri-Star’s administrative dissolution in 2009. Yet, Andrews did not do so. Thus, Andrews, having the burden of proof, should not be given the benefit of a presumption that would result in such a serious step as an exception to the rules of derivative claims.

V. The Trial Court Erred in Awarding Punitive Damages to Andrews.

The trial court’s conclusion that Andrews had met the high burden necessary for the imposition of punitive damages was also in error. “In any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence.” S.C. Code Ann. § 15–33–135. This is “the highest burden of proof known to the civil law.” *Austin v. Specialty Transp. Servs., Inc.*, 358 S.C. 298, 313, 594 S.E.2d 867, 875 (Ct. App. 2004). Thus,

“[p]unitive damages can only be awarded where the plaintiff proves by clear and convincing evidence the defendant’s misconduct was willful, wanton, or in reckless disregard of the plaintiff’s rights.” *Keane v. Lowcountry Pediatrics, P.A.*, 372 S.C. 136, 148, 641 S.E.2d 53, 60 (Ct. App. 2007) (internal quotations omitted). Andrews failed to meet his burden of proof in this case, and the trial court’s decision to award \$510,000 in punitive damages was in error.

The South Carolina Supreme Court has identified three factors that should be considered in conducting a post-judgment review of punitive damages awards: (1) the degree of reprehensibility of the defendant’s misconduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the amount of the punitive damages award; and (3) the difference between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases. *Mitchell, Jr. v. Fortis Ins. Co.*, 385 S.C. 570, 587-88, 686 S.E.2d 176, 185 (2009).

Regarding the first factor, reprehensibility – the Supreme Court has explained that

[r]eprehensibility is “perhaps the most important indicium of the reasonableness of a punitive damages award.” *Gore*, 517 U.S. at 565, 116 S.Ct. 1589. “This principle reflects the view that some wrongs are more blameworthy than others.” *Id.* In considering reprehensibility, a court should consider whether: (i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident.

Id. Application of these five considerations demonstrates that Broom’s action at issue in this case – taking deferred salary payments from Tri-Star after the May 2004 meeting and only after Tri-Star was making \$180,000 per month – does not reflect conduct that could be considered reprehensible.

First, it is undisputed that the harm caused was economic, not physical. Finding only economic harm “typically weigh[s] against [] reprehensibility.” *Hollis v. Stonington Dev., LLC*,

394 S.C. 383, 397, 714 S.E.2d 904, 912 (Ct. App. 2011) (internal quotation omitted); *see also* *Duncan v. Ford Motor Co.*, 385 S.C. 119, 143, 682 S.E.2d 877, 889 (Ct. App. 2009) (finding the existence of only economic harm weighs in favor of the defendant).

Second, it is similarly undisputed that the conduct did not evince an indifference for the health or safety or others. Third, it is also undisputed that neither party had financial vulnerability. Both Broom and Andrews had full access to the ledgers, and both were advised by professionals about Broom taking deferred salary and the amounts. As to the fourth factor, no evidence was presented that there was prior conduct, nor could the action recur since Tri-Star no longer exists.

As to the fifth consideration, there is no evidence that Broom's actions were based on intentional malice or deceit. In reaching its decision to award punitive damages as to the reprehensibility prong, the trial court found that Broom engaged "in a deliberate pre-planned scheme to shut down his business with Andrews by unilaterally" paying himself a salary. This finding is unsupported by the facts of this case for the reasons stated in part III, *supra*. Furthermore, the finding is even further off the mark in the context of punitive damages, given the requirement of clear and convincing evidence. In sum, there is not clear and convincing evidence that Broom's actions were reprehensible. Thus, punitive damages are improper.

As to the ratio, the award is excessive given the fact that Broom reasonably believed he was entitled to the salary. In evaluating this prong, a court is charged with considering the likelihood that the award will deter Broom from like conduct; whether the award is reasonably related to the harm likely to result from such conduct; and the defendant's ability to pay. *Mitchell*, 385 S.C. at 588, 686 S.E.2d at 185. It is erroneous to punish an individual for receiving payment for services rendered, which was known and found to be fair by the company's CPA and the attorney, and was sent to Andrews' agents for monthly review.

Finally, as to the comparative penalty awards, there is no basis for the trial court's finding that its award is comparable. For all these reasons, the award of punitive damages is unsupported by the evidence and by the law.

VI. The Trial Court erred in Awarding Attorneys' Fees to Andrews.

The trial court erred in awarding \$194,306.53 in attorneys' fees pursuant to section 33-18-410(b) of the South Carolina Code for three reasons. First, Andrews waived his right to request fees by failing to plead or request fees until the end of trial. Second, Andrews failed to meet his burden to show that Tri-Star was a statutory close corporation subject to section 33-18-410(b). Third, Andrews did not meet his burden to provide facts and evidence to support the award that was issued.

Andrews waived any award of attorneys' fees because he did not plead them. The only mention of attorneys' fees in Andrews' pleading is in the ad damnum clause in part A, which only answered Broom's complaint, which was dismissed prior to trial. (R. p. 144) Andrews did not mention attorneys' fees in any of his claims against Broom nor in his prayer for relief regarding those claims.

The first mention of fees was by Andrews' counsel at the close of his case in chief as a "housekeeping" matter, to which Broom's counsel objected. (R. p. 524, line 9-p. 525, line 24) Even then, Andrews provided no statutory or contractual basis for an award. Significantly, Andrews did not cite the Statutory Close Corporation Supplement,¹⁶ or any other statute, as the basis for requesting an award of attorney's fees and costs until the filing of his proposed order on

¹⁶ Andrews did not allege any relief or petition the Court for relief under the Statutory Close Corporation Supplement, as required by section 33-18-410(b) for attorneys' fees and costs. *See* S.C. Code Ann. § 33-18-400(a) ("Subject to satisfying the conditions of subsections (c) and (d), a shareholder of a statutory close corporation may petition the circuit court for any of the relief described in Section 33-18-410 . . .").

findings of fact and conclusions of law – more than twelve years into this litigation and 170 days after the trial was completed.

Andrews waived any claim for fees. *See generally Westbrook v. Hutchison*, 195 S.C. 101, 10 S.E.2d 145, 150 (1940) (holding that specific relief and damages are required to be pleaded so that a party may have notice of such requested relief and defend accordingly).¹⁷ This Court should reverse because the award ignores pleading requirements, including that parties seeking special damages should plead specific as compared to general damages and that it effectively usurps the notice requirements.

Andrews also failed to offer any evidence that Tri-Star was a statutory close corporation, i.e., “a corporation whose articles of incorporation contain a statement that the corporation is a statutory close corporation.” S.C. Code Ann. § 33-18-103(a). At the attorneys’ fee hearing, the trial court Andrews’ counsel “produced a Tri-Star share certificate with the language required by 33-18-109(a), indicating the company was in fact a statutory close corporation.” (R. p. 71) The document was not authenticated and, in any event, does not state whether Tri-Star was a statutory close corporation. Andrews had 12 years of litigation and a full trial to provide admissible testimony on this issue or to provide an authenticated copy of the articles of incorporation to meet his burden to show that Tri-Star was a statutory close corporation. Without such evidence, the

¹⁷ *See also Parrish v. Allison*, 376 S.C. 308, 327, 656 S.E.2d 382, 392 (Ct. App. 2007); *Gaskins v. State Farm Bureau Cas. Ins. Co.*, 343 S.C. 666, 671, 541 S.E.2d 269, 271 (Ct. App. 2000), *aff’d as modified on other grounds*, 354 S.C. 416, 581 S.E.2d 169 (2003); *see also* Rule 8(f), SCRCF (providing that all pleadings must be construed to do substantial justice to all parties); Rule 12(b), SCRCF (“Every defense, in law or fact, to a cause of action in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto . . .”).

attorneys' fees remedy of S.C. Code § 33-18-410(b) does not apply. S.C. Code Ann. § 33-18-102(a).¹⁸

Finally, the award of fees was unsupported by evidence. The party seeking the fee award has the burden of coming forward with sufficient evidence to support the request. *Gainey v. Gainey*, 279 S.C. 68, 301 S.E.2d 763 (1983). Andrews failed to meet his burden. Andrews did not submit a copy of his fee agreement and did not provide any detailed billing statements of his counsel. This deficiency alone warranted a denial of the request for the award of attorney's fees and costs. See *4 Amigos, LLC v. Carolina Bueno, LLC*, 2011 WL 1979720 * 5 (D.S.C. May 20, 2011); *Laser Supply & Servs v. Orchard Park Assocs.*, 382 S.C. 326, 341-42, 676 S.E.2d 139, 148 (Ct. App. 2009) (reversing award of attorney's fees as unsupported by the evidence where the affidavit submitted by counsel failed to properly address the work done on a particular claim in the case).

Andrews' attorneys' fees petition also failed to provide information that would allow the trial court to evaluate the fees requested or to award fees for the limited success. Andrews pursued a total of ten causes of action and five factual claims for damages, only one of which was he ultimately successful. Specifically, there is no detailed accounting of any of the time nor does the petition distinguish between Andrews' partial success of Andrews on one of ten causes of action that until the morning of trial made five damages claims, only one of which (the deferred salary payments) was successful at trial, and his lack of success on the other claims. It also fails to

¹⁸ Moreover, the attorney fee petition cannot serve as a petition under S.C. Code Ann. § 33-18-400(a) because Tri-Star was dissolved long before the attorneys' fee petition was filed. See *Davis v. Hamm*, 300 S.C. 284, 291, 387 S.E.2d 676, 680 (Ct. App. 1989) (noting that application of the statutory close corporation act "is futile since [plaintiff] was not a stockholder when he instituted this action").

distinguish or detail the time spent on the defense of claims asserted against him that were dismissed prior to trial.

Notably, the Petition even requests an award for his unsuccessful appeal, and those amounts should clearly be denied. The South Carolina Supreme Court has recognized that a party seeking a fee award may only recover on fees on claims in which the party is successful. *See, e.g., Haley Nursery Co, Inc. v. Forrest*, 298 S.C. 520, 381 S.E.2d 906 (1989); *Laser Supply & Services*, 382 S.C. at 341-42, 676 S.E.2d at 148. It is well established under South Carolina law that a fee award cannot include fees relating only to claims which the requesting party did not prevail. *See, e.g., Rice v. Multimedia Inc.*, 318 S.C. 95, 100, 456 S.E.2d 381, 384 (1995) (affirming the reduction of a fee request by half where plaintiff prevailed on only four of the seven claims); *Spriggs Group P.C. v. Slivka*, 402 S.C. 42, 55, 738 S.E.2d 495, 503 (Ct. App. 2013) (“The trial court surely did not award fees for the two causes of action it dismissed.”). For these reasons, the award of fees should be reversed.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the trial court.

Respectfully submitted,

July 31, 2020
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2018-002223

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Jul 31 2020

SC Court of Appeals

H. Hughes Andrews..... Respondent,

v.

Quentin Broom, Jr.....Appellant,

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b),
SCACR.

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Aug 03 2020

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY

The Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2018-002223

H. Hugh Andrews,

Respondent,

v.

Quentin S. Broom, Jr.

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. WERE RESPONDENT'S CLAIMS ARE PRECLUDED BASED UPON THE 2011 APPEAL?
- II. WERE RESPONDENT'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS?
- III. WAS THERE SUFFICIENT EVIDENCE BEFORE THE TRIAL COURT TO SUPPORT ITS DETERMINATION THAT APPELLANT HAD BREACHED HIS FIDUCIARY DUTY TO RESPONDENT AS AN OFFICER AND DIRECTOR OF THEIR CLOSELY-HELD CORPORATION?
- IV. DID THE TRIAL COURT CORRECTLY HELD RESPONDENT LIABLE UNDER THE UNIQUE FACTS AND CIRCUMSTANCES OF THIS CASE?
- V. WAS THE TRIAL COURT'S AWARD OF PUNITIVE DAMAGES SUPPORTED BY THE LAW AND EVIDENCE?
- VI. WAS THE TRIAL COURT'S AWARD OF ATTORNEY'S FEES SUPPORTED BY THE LAW AND EVIDENCE?

STATEMENT OF THE CASE

On September 16, 2005, Appellant filed his original complaint alleging legal malpractice against the lawyers and law firm which organized and administrated off-shore entities for the benefit of Appellant and Respondent. [R pp. 76-94] Appellant also alleged claims against Respondent for fraud, constructive fraud, negligent misrepresentation and civil conspiracy. [*Id.*] Respondent filed his answer on November 16, 2005.

On May 30, 2006, Respondent filed an Amended Answer and Counterclaims. Respondent asserted claims against Appellant for himself individually and on behalf of their closely-held corporation, Tri-Star Communications, Inc. On behalf of himself, Respondent alleged claims against Appellant for promissory estoppel, fraud, negligent representation. [R pp. 95-108] On behalf of Tri-Star, Respondent alleged claims against

Appellant for breach of fiduciary duty, breach of contract, breach of contract accompanied by a fraudulent act, breach of covenant of good faith and fair dealing, conversion, and violation of S.C. Code of Laws §33-8-300. [*Id.*] Collectively, Respondent alleged ten (10) counterclaims: four (4) individually, and six (6) on behalf of Tri-Star. [*Id.*]

On September 25, 2006, Appellant filed his reply. [R. pp.109-129] In his reply, Appellant alleged the same defense *verbatim* as to each counterclaim asserted by Respondent:

[Respondent's] Counterclaim does not set forth sufficient facts or the requisite legal elements for the claims sought therein and [Respondent] fails to adequately state a claim upon which relief may be given against the [Appellant].

Id. at p. 111 ¶20, p. 113 ¶38, p. 115 ¶55, p. 117 ¶72, p. 119 ¶89, p. 120 ¶ 107, p. 122 ¶125, pp. 123-124 ¶144, p. 125 ¶ 166, and p. 127 ¶186.

The defenses were identically worded, regardless of whether the counterclaim was individually asserted by Respondent, or one brought on behalf of Tri-Star. None referenced Rule 23 SCRCivP. [*Id.*] The parties agreed to dismiss the case from the trial docket on June 11, 2008, pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure. The case was reinstated by agreement on June 30, 2008 and issued its new case number of 08-CP-42-3397. [R pp. 2745-2746]

On September 15, 2010, Broom filed a motion for partial summary judgment, and did not raise any Rule 23 issue. [R pp. 2477-2479]

The first time Appellant raised any issue that Respondent failed to comply with the shareholder derivative notice requirements under Rule 23 SCRCivP. was not until five (5) years after his original reply, immediately before the case was scheduled to go to trial. [R

pp. 2480–2482] Tri-Star had ceased to do business in 2006 and had been administratively dissolved by the South Carolina Secretary of State in 2009. [R. p.28, p. 62]

On November 1, 2011, the Court granted Appellant’s motion to dismiss based upon non-compliance with the class action rule, Rule 23. [R pp. 1 - 9] Respondent filed a motion to alter or amend, a motion to reconsider and motion to amend his pleadings. [R, pp. 2483-2513] On February 1, 2013, the trial court entered an order denying Appellant’s motion to alter or amend and motion to reconsider; however, the court did not rule upon Appellant’s motion to amend. [R pp. 10 - 11] Respondent appealed the trial court’s orders of November 1, 2011 and February 1, 2013. [R pp. 1576-1603]

In 2015, the Court of Appeals issued an unpublished opinion remanding the case back to the trial court with specific directions to rule on Respondent’s motion to amend his pleading. Op. No. 2015-UP-030 (S.C. Ct. App. filed Jan. 14, 2015) [R pp. 12 – 14]. Later that same year the Supreme Court reversed, holding that the Court of Appeals should not have addressed Respondent’s motion to amend — even if only for the purpose of remanding for a ruling —because the trial court had not decided the motion. Op. No. 2015-MO-057 (S.C. Sup. Ct. filed Sept. 30, 2015) [R pp. 15 - 17].

The case was remitted back to the trial court on December 15, 2015. Respondent began seeking a ruling on his motion to amend after the Supreme Court issued the remittitur. In July 6, 2016, the trial Court issued an order allowing Respondent to amend his pleading to state his counterclaims derivatively as well as directly, and to comply with the derivative pleading requirements in Rule 23. [R pp. 18 - 36] Respondent filed his Second Amended Answer and Counterclaims on July 8, 2016. [R pp. 109 - 124]

Immediately before the scheduled trial date of June 26, 2017, Appellant dismissed his legal malpractice claims against Ten State Street and dismissed his claims against Respondent. [R pp. 41 - 42] The only remaining issues to be tried were Respondent's claims against Appellant, which were tried non-jury before the Honorable Mark Hayes, II the week of June 26, 2017.

After a three (3) day trial, on November 8, 2017, the Court entered a judgment in favor of Respondent for \$550,000.00 actual damages, \$550,000.00 punitive damages and granted Respondent's request for attorney's fees. [R pp. 49 - 67] Respondent filed his motion for attorney's fees on December 15, 2017. [R pp. 2695-2703]

The court granted Respondent's motion and entered a Form 4 order on September 26, 2018 [R pp. 47-48] The court entered a Final Order and Judgment on November 20, 2018, wherein the Court denied all post-trial motions filed by Appellant and entered a judgment in favor of the Respondent against the Appellant in the amount of \$1,214,406.53. [R pp. 68 - 76]

Appellant filed his notice of appeal on December 18, 2018. [R. p. 2706]

RELEVANT FACTS

In the 1980s and 1990s, Respondent Andrews owned numerous video poker machines. [R. p. 267 l.22 – p.271 l.24] Respondent's business model was that he would go into business with various individuals where provided the video poker machines, and his partner handled the day-to-day operations, as a "sweat equity" partner. [R. pp. 520-521] Under this arrangement, the partners would share profits 50-50; and the sweat equity partner never was paid a salary. [*Id.*]

When Respondent Andrews began working with Broom via Tri-Star, the compensation was similar. [*Id.*] The corporate and personal tax returns reflect that Appellate and Respondent were the only owners of Tri-Star and each reported owning a 50 percent interest in the business. [R. pp. 277, ll 13-15; p. 520, l. 16 – p. 521, l.13; ; R pp. 456-476, 539-544] When the business operated in South Carolina, Broom never received a salary, and, in fact, never requested one. [R. pp. 277, ll 13-15; and R. p. 418, ll. 6-19] All payments were equal distributions as shareholder/owners. [*Id.*]

As the trial court found, Tri-Star operated video poker machines primarily in South Carolina during the 1990s. [R. p.50] Following a ban of these machines in South Carolina, Appellant and Respondent transferred them to the Dominican Republic and began operating them through a separate foreign entity (Worldwide Entertainment or “Worldwide” hereafter). [*Id.*] Worldwide began with a capital contribution of \$600,000.00, whereby Respondent and Appellant each caused to be invested \$300,000.00. [R, p. 423, ll. 5-11; p. 327, ll. 7-9; p. 273, ll. 20-23] It was generally established the business had 1,122 video poker machines in the Dominican Republic in the year 2005 via Worldwide, which Broom *de facto* controlled. [R. p. 56]

The core of the dispute arose in 2005 when Worldwide needed \$600,000 of additional capital. Respondent had the funds; Appellant did not. [R pp. 273-274; p. 424, ll. 3-22] Respondent made the entire \$600,000 contribution; however, the parties did not agree how the additional capital contribution should be treated. [*Id.*] Because Respondent now had invested \$900,000.00 to Appellant’s \$300,000.00, he wanted their memberships to reflect this 75/25 ratio. Appellant disagreed; he wanted Respondent’s \$600,000.00

contribution to be treated as a loan, and the parties maintain their equal ownership. [*Id.* and R p. 327, ll. 7-18]

Appellant later discovered paperwork prepared by the law firm reflecting a reduction in his membership interest to 25%. [R pp. 80-81] Thereafter, Appellant set into motion a plan to liquidate Tri-Star of its assets, so he could cut Respondent out of doing business in the Dominican Republic. [pp. 55-58]

Appellate began by unilaterally paying himself a salary (retroactive to the formation of their business in 1997). [R p. 56; p. 850; p. 277, l.6 – p.278, l.14] Importantly, Broom controlled the checkbook for Tri-Star. [R p. 56, p. 275, ll. 6-18] He admitted that when he began paying himself a salary, he did not consult with Andrews as to the amount (because he believed he was not obligated to); nor did he even notify Andrews he had begun paying himself. [R pp. 283, ll. 1-25] Although Tri-Star had been in operation since 1997, Broom did not begin paying himself a salary until December 31, 2004. [R. p. 56; p. 280, l. 20 – p. 281, l. 17] From the financial records of Tri-Star, Broom paid himself the following amounts on the following dates:

December 31, 2004	\$400,000.00
January 31, 2005	\$130,000.00
February 28, 2005	\$130,000.00
March 31, 2005	\$185,000.00
April 30, 2005	<u>\$ 75,000.00</u>
<u>Total</u>	<u>\$920,000.00</u>

[R. p. 56; p. 836 and p. 850]

Respondent testified he believed these were justified because the company had achieved profitability. [R. p. 345, ll. 1-16] However, the evidence directly refuted this

assertion. For example, in order to pay himself \$400,000.00 in salary from Tri-Star on December 31, 2004, Broom borrowed \$325,000.00 from relatives and his other company, Best Games. [R. p. 56 and pp. 385, ll. 1-8, p. 386, ll. 23-25, p. 890 and 892] In other words, in order to pay himself \$400,000.00 payment from Tri-Star in December 2004, Broom had to borrow 81.25% of that amount to make the payment. [*Id.*]

In February 14, 2005, Broom purchased a \$3.5 Million-dollar estate in Miami, Florida. [R. p. 57, pp. 873-888] Within the context of the money transfers and payments Broom made to himself beginning on December 31, 2004, as the trial court found the purchase was made as part of Appellant's plan to close down the Dominican operations and re-open them without Respondent Andrews. [R. p. 57] The homestead exemption under Florida law would have made Broom de facto judgment-proof from any claims asserted by Andrews.

Additionally, whenever Broom wanted to move money from Worldwide to Tri-Star, he would simply have the funds wire transferred to Tri-Star's account. [R p. 383, l. 11 – p. 385, l. 4] However, in order to meet Tri-Star's unilateral salary commitment Broom made for himself, it became incumbent for the Dominican Republic's partner in Worldwide (Edmund Elias Yunes) to wire transfer personal funds to Tri-Star. [R p. 390, l 24 – p. 391, l. 5; p. 911] Mr. Yunes transferred \$100,000.00 on April 28, 2005 [R p. 911] and \$90,000.00 on June 29, 2005 [R p. 921]. Clearly, neither Tri-Star nor Worldwide were independently profitable as Appellant Broom contended.

In September 2005, Appellant Broom unilaterally sold all of the video poker machines (1,132) for \$400,000.00. [R. p. 1441] The parties stipulated that Respondent did not receive notice of any potential sale until after the sale had already occurred. [R. p.

364, ll. 13-25] Respondent Andrews vehemently objected to the sale because he believed the machines were worth considerably more. [R p. 998] Respondent's expert witness, Mr. Mike Fletcher, testified that the CPU boards alone on the machines were worth \$1,122,000.00. [R p. 206, ll. 10-21] Mr. Fletcher opined a value of the machines in September 2005 between \$1,767,150.00 and \$1,512,000.00. [R p. 202, ll. 7-22]

The sale of the machines themselves was highly suspect. When Appellant Broom testified about the great difficulty of operating the machines in the Dominican Republic to justify his salary, he stated that the machines had extensive licensing issues that needed to be overcome to have them domesticated in the Dominican Republic. [R pp. 359, l. 1 – p. 360, l. 8] However, when it came to the sale of the machines, literally Broom only had one (1) piece of paper to document the entire sale of \$1,122 machines: a receipt showing someone paid Broom's employee, Frank Dillashaw, \$400,000.00 cash in US dollars. [R. p. 1441] There were no title transfers; no bank deposit slips for the sale; no other documents of any kind evidencing the sale of 1,122 video poker machines. [R. p. 397, ll. 9-22; p. 1441]

Following the supposed sale, Appellant Broom never deposited the \$400,000.00 cash in Tri-Star's account. [R. p. 398, l. 2 – p. 401, l. 2] Broom made a \$400,000.00 deposit in Tri-Star's account on November 3, 2005. [*Id.* and R pp. 936 and 937] This was designed to give the appearance of depositing the funds from the alleged sale of the machines, however, the deposit slip reveals the \$400,000.00 came from multiple local accounts (money he allegedly borrowed from family and/or other companies he controlled). [R pp. 936 and 937]

By the December 2005, Tri-Star had no assets, after Appellate Broom had paid himself \$1,020,000.00 in salary from December 31, 2004 through September 30, 2005. [R pp. 859] Following 2005, Appellate Broom's income taxes reflect that he made several million dollars from gaming operations in the Dominican Republic. [R p. 405, l. 16 - 410, l. 11; p. 750, p. 768, p. 772, p. 776, p. 779, p. 782, p. 788, p. 792, p. 797, p. 802, and p. 949]

STANDARD OF REVIEW

The parties tried the case non-jury by consent. In an action at law, on appeal of a case tried without a jury, the Court views the trial court's findings of fact as equivalent to a jury's findings in a law action, and will not disturb the findings unless the Court views the trial court's findings to be without reasonable evidentiary support. Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (S.C., 1976). Thus, the appellate court's review generally extends merely to corrections of errors of law. Abbeville County Sch. Dist. v. State, 767 S.E.2d 157, 410 S.C. 619 (S.C. 2014), *citing*, Moseley v. All Things Possible, Inc., 395 S.C. 492, 495, 719 S.E.2d 656, 658 (2011).

Legal Arguments

I. RESPONDENT'S CLAIMS WERE NOT PRECLUDED BY THE 2011 APPEAL.

Broom argues, in essence, that Andrews should not have been permitted to do exactly what the South Carolina Supreme Court instructed by way of its remittitur – obtain a ruling on his motion to amend his pleadings (filed on November 14, 2011). Appellate

repeatedly incorrectly labels the Court’s 2011 dismissal of Andrews’ counterclaims a “final judgment.” This is a misstatement of the law.

“Final judgment” is a term of art with a definite meaning. A final judgment terminates the entire case: it “disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined.” *Bone v. U.S. Food Serv.*, 404 S.C. 67, 75, 744 S.E.2d 552, 557 (2013) (quoting *Charlotte–Mecklenburg Hosp. Auth. v. S.C. Dep’t of Health & Env’tl Control*, 387 S.C. 265, 267, 692 S.E.2d 894, 895 (2010)). This is not a new definition. Other frequently cited cases include *Good v. Hartford*, decided in 1942, see 201 S.C. 32, 21 S.E.2d 209, and *Adickes v. Allison & Bratton*, 21 S.C. 245 (1884). A final judgment happens when a case reaches the “end of the road.” *Baldwin Const. Co. v. Graham*, 357 S.C. 227, 230, 593 S.E.2d 146, 147 (2004). This case has never reached the end of the road.

The trial court’s November 1, 2011 order dismissed Andrews’ counterclaims, holding they were improperly pled as individual claims when they were in fact derivative. Importantly, that order was not the end of the case. It was not even the end of Andrews’ pleading, which remained pending, until the case was remanded back to the trial court in 2015. At the time of the order dismissing the counterclaims, Andrews had a pending motion to amend his pleading to add additional facts supporting those counterclaims. In the prior appeal, Appellate insisted that the motion to amend had not been ruled on by the circuit court; necessarily acknowledging the story of Andrews’ counterclaims would go on.

The South Carolina Court of Appeals recently articulated the same analysis. *See, Tillman v. Tillman*, 801 S.E.2d 757, 420 S.C. 246 (S.C. App. 2017) In *Tillman*, the court explained “the fate of [a party’s] counterclaims has not been finally determined as long as his motion to amend hangs in the balance,” and it also noted “the ease with which pleadings may now be amended.” *Id.* at p. 759.

There are factual differences between the present case and *Tillman* to be sure. The counterclaims in *Tillman* were not dismissed with prejudice, but that distinction makes no difference. At the time of the original appeal, Andrews had a pending motion to amend his pleading. At no time did Broom identify any authority that would prohibit Andrews from bringing properly pled derivative counterclaims after his individual counterclaims were dismissed with prejudice. These counterclaims would obviously relate back to the filing of the original lawsuit under Rule 15(c), SCRPC.

Appellant’s arguments, both here and on “law of the case,” are an intellectually dishonest shell game. Until the Court entered its final order and judgment on November 20, 2018 following the three (3) day trial and determination of all post-trial motions, there was no final judgment entered in the case.

The law of the case applies to subsequent proceedings in the same litigation following an appellate decision. Lifschultz Fast Freight, Inc. v. Haynsworth, Marion, McKay & Guerard, 334 S.C. 244, 245, 513 S.E.2d 96, 96-97 (1999). This part of the doctrine is obviously satisfied: the proceedings following the Supreme Court’s remittitur (ruling on motion to amend; trial; and ruling on all post-trial motions) were in the same litigation following an appeal.

The law of the case “prohibits issues which have been *decided* in a prior appeal from being relitigated in the trial court in the same case.” Ross v. Med. Univ. of S.C., 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997) (emphasis added). Nothing was decided in the prior appeal. The Court of Appeals tried to remand the case for a ruling on the motion to amend, specifically instructing the circuit court that amendments should be freely granted. The Supreme Court reversed the Court of Appeals for addressing a motion that had not been ruled on.¹ The Supreme Court remitted the case back to the trial court, a remittitur which Broom inferentially concedes was by mistake.

Broom makes then argues that Andrews’ failure to ask the Supreme Court to recall the mistakenly issued remittitur counts as abandonment of the appeal, citing no authority that is remotely similar. Moreover, Broom has failed to articulate—and cannot articulate—how he was prejudiced by allowing Andrews to amend his pleading to state counterclaims for corporate self-dealing when Andrews has consistently asserted those counterclaims since 2006. If Broom *had* articulated such an argument (and he has not), and if an appellate court *had* bought that argument (they have not), Broom’s law of the case argument would have sticking power. But the appellate decisions readily disclose neither court decided anything of the sort.

If the trial court viewed its November 1, 2011 order as a final judgment on the merits following remittitur from the Supreme Court, the trial court could have denied Andrews’ motion to amend the pleadings and granted Broom’s motion for summary

¹ It should be noted that on appeal to the Supreme Court, Broom adamantly maintained in that appeal that Andrews’ motion to amend had not been decided by the trial court. Andrews’ petition for rehearing asked the Supreme Court to consider the case’s age and, in the interest of economy, rule that Andrews’ amendments should be allowed before remanding. The Supreme Court simply remanded.

judgment on that basis. However, the trial court recognized that Andrews should be allowed to amend his pleadings, and then permitted the case to go to trial on the merits.

Rather than help the case towards a final judgment, Broom chose on remand to be obstructionist: first, contending the Court could not hold a hearing on the motion to amend, then forcing two additional hearings on the topic, and ultimately filing no fewer than four motions re-litigating the point. This “law of the case” argument is a sham. The circumstances are difficult only because Broom seems happy to take different and inconsistent positions depending on the forum, telling the Court of Appeals and Supreme Court the motion to amend is pending but, after the case was remanded because of the pending motion to amend, arguing that the motion to amend is “dead.”

The trial court correctly saw through Broom’s contradictory positions. By granting Andrew’s motion to amend in June 2016, clearly the trial court recognized that its November 1, 2011 order was not a full and final adjudication on the merits. Adhering to the liberal principle of allowing motions to amend, and following the Supreme Court’s directive remanding the case, the trial court properly permitted Andrews to amend his pleadings, thereby allowing Andrews to proceed to trial on its merits.

II. RESPONDENT’S CLAIMS ARE NOT BARRED BY THE STATUTE OF LIMITATIONS, BECAUSE THEY RELATE BACK TO THE ORIGINAL FILING OF THE CASE.

Derivative of Appellant’s previous argument, Broom argues that the 2016 claims are barred by the statute of limitations – as if the second amended answer and counterclaims filed in 2017 were being alleged against Broom *de novo* on a new filing. As stated above, because the first appeal never addressed the merits, the November 1, 2011 order was not a

final ruling on the merits. Permitting Andrews to amend his pleadings related back to the original allegations set forth Andrew's Amended Answer and Counterclaims, filed in May 2006. Indeed, the 2017 Second Amended Answer and Counterclaims allege substantially the same misconduct by Broom, with different statutory claims.

Upon remand from the South Carolina Supreme Court, the fact that the case maintained its original 2008-CP-42-3397 further supports that the second amended complaint related back to the original filings of this case against the same parties, and was not a new or separate pleading on a new action. Under Rule 15(c) of the South Carolina Rules of Civil Procedure, the claims relate back to the original filing and the timeliness is proper.

III. THE TRIAL COURT PROPERLY DETERMINED THAT APPELLANT BREACHED HIS FIDUCIARY DUTY TO RESPONDENT AS AN OFFICER AND DIRECTOR OF THEIR CLOSELY-HELD CORPORATION.

Broom argues that the trial court's findings of fact and application of those facts to the law are unsupported by the evidence. This argument underscores why the trial court's finding of facts is given such great deference on appeal. The trial court acknowledged that the parties presented vastly diverse accounts about Broom's unilateral liquidation of Tri-Star and his unilateral payment of over a million dollars in salary to himself during the process. [R. p. 55]

In his brief, Broom proffers the evidence at trial in the light most favorable to Broom. Broom testified that it was a struggle for operations in the Dominican Republic to be profitable. [R p. 327, l. 21 – p. 333, l. 9; p. 359, l. 1 – p. 361, l. 10] There were problems converting Dominican profits to U.S. dollars and there were problems related to import and

export taxes. [*Id.*] Broom also testified about legal issues Worldwide's poker games ran into in the Dominican Republic. [*Id.*]

Broom said he worked for years without taking a salary to help the business get on its footing. [R p. 336, ll. 13-25] Broom also said the parties always contemplated his being entitled to a salary, both prospectively and retroactively. [*Id.*] As to the latter point, Andrews testified that he consented to a salary for Broom only after Andrews was paid for the video poker machines he sold to Tri-Star. [R p. 462] Because Andrews was never paid for those games, Broom should not have taken a salary.

Broom controlled the financial operations of Tri-Star. [R p. 56, p. 275, ll. 6-18] He admitted that when he began paying himself a salary, he did not consult with Andrews as to the amount (because he believed he was not obligated to) [R pp. 281, l. 23 – p. 283, l. 7]; nor did he even notify Andrews he had begun paying himself. [*Id.*] Although Tri-Star had been in operation since 1997, Broom did not begin paying himself a salary until December 31, 2004. [*Id.*] From December 31, 2004 until December 31, 2005, Broom paid himself a total of \$1,020,000.00. [R p. 56; p. 836 and p. 850]

Broom testified he believed these were justified because the company had achieved profitability. However, the evidence directly refuted this assertion. For example, in order to pay himself \$400,000.00 in salary from Tri-Star on December 31, 2004, Broom borrowed \$325,000.00 from relatives and his other company, Best Games. [R. p. 56 and pp. 385, ll. 1-8, p. 386, ll. 23-25, p. 890 and 892] In other words, in order to pay himself \$400,000.00 payment from Tri-Star in December 2004, Broom had to borrow 81.25% of that amount to make the payment. [*Id.*]

This transaction by itself clearly and convincingly evidences Broom's bad faith and fraudulent intent. There is no legitimate business reason a company would borrow \$325,000.00 from family members to make a self-dealing \$400,000.00 salary payment to an employee on the last business day of the year.

Other financial transactions demonstrated Broom's bad faith and fraudulent intent. In February 14, 2005, Broom purchased a \$3.5 Million-dollar estate in Miami, Florida. [R. p. 57, pp. 873-888] Within the context of the money transfers and payments Broom made to himself beginning on December 31, 2004, the purchase was made as part of Broom's plan to close down the Dominican operations and re-open them without Andrews. The homestead exemption under Florida law would have made Broom *de facto* judgment-proof from any claims asserted by Andrews.

Additionally, whenever Broom wanted to move money from Worldwide to Tri-Star, he would simply have the funds wire transferred to Tri-Star's account. [R p. 383, l. 11 – p. 385, l. 4] However, in order to meet Tri-Star's unilateral salary commitment Broom made for himself, it became incumbent for the Dominican Republic's partner in Worldwide (Edmund Elias Yunes) to wire transfer personal funds to Tri-Star. [R p. 390, l. 24 – p. 391, l. 5; p. 911] Mr. Yunes transferred \$100,000.00 on April 28, 2005 [R p. 911] and \$90,000.00 on June 29, 2005 [R p. 921]. Clearly, neither Tri-Star nor Worldwide were independently profitable as Broom testified.

Finally, there is the purported sale of the video poker machines themselves. Broom testified that he sold 1,122 video poker machines for the sum of \$400,000.00, in September 2005. [R. p. 1441] The parties stipulated that Andrews did not receive notice of any potential sale until after the sale had already occurred. [R. p. 436, l. 25 – p. 437, l. 2, p.

439, ll. 2-8] Andrews vehemently objected to the sale, because he believed the machines were worth considerably more. [R. p. 439, ll. 2-13] Mr. Mike Fletcher, testified that the CPU boards alone on the machines were worth \$1,122,000.00. [R p. 206, ll. 10-21] Mr. Fletcher opined a value of the machines in September 2005 between \$1,767,150.00 and \$1,512,000.00.² [R p. 202, ll. 7-22]

When testifying about the difficulty of operating the machines in the Dominican Republic to justify his salary, Broom stated that the machines had extensive licensing issues that needed to be overcome to have them domesticated in the Dominican Republic. [R pp. 359, l. 1 – p. 360, l. 8] However, when it came to the sale of the machines, literally Broom only had one (1) single slip of paper to document the entire sale of \$1,122 machines: a receipt showing someone paid Broom's employee, Frank Dillashaw, \$400,000.00 cash in US dollars. [R. p. 1441, p. 397, ll. 9-22] Although Broom testified the \$400,000.00 was paid in cash to Dillashaw in the Dominican Republic, there were no title transfers; no bank deposit slips of the money received; no other documents of any kind evidencing the sale of 1,112 video poker machines. [*Id.*]

Meanwhile, back in South Carolina, Broom never deposited the \$400,000.00 from the alleged sale in Tri-Star's account. In his unilateral decision to liquidate Tri-Star, Broom made a \$400,000.00 deposit in Tri-Star's account on November 3, 2005. [R. p. 398, l. 2 – p. 401, l. 2] This was designed to give the appearance of depositing the funds from the alleged sale of the machines. However, the deposit slip reveals the \$400,000.00 came from

² Broom argues at length that the involuntary bankruptcy action foreclosed all claims Andrews had related to the sale of the video poker games themselves. The trial court largely agreed. [R. pp. 58-59] However, the trial court found that the bankruptcy action did not address Broom's unilateral salary payments to himself, and based Andrews recovery as to that item alone. [R. pp. 59-60]

multiple local accounts (money he allegedly borrowed from family and/or other companies he controlled). [R pp. 936 and 937]

The Court had good reason to question if a sale ever, in fact, did take place. Broom testified that he invested \$150,000.00 (from his net share of the sale proceeds) in a business with Frank Dillashaw – specifically in a venture that did not involve Respondent’s video poker games. [R. p. 295, l.4 - p. 306, l.15] From that supposed \$150,000.00 investment in late 2005, Broom’s tax records reflect that he made a phenomenal return on his investment: over \$3,588.101 over eight and a half (8½) years. [R p. 405, l. 16 - 410, l. 11; p. 750, p. 768, p. 772, p. 776, p. 779, p. 782, p. 788, p. 792, p. 797, p. 802, and p. 949]

Broom testified that he did not know what happened to the 1,122 poker machines formerly belonging to Tri-Star. [R. p. 355, ll.2-24] He testified that the money he made in the Dominican Republic after closing Tri-Star was a different video game machine. [R. pp. 356-357] The Court properly found this testimony lacked any credibility. Other than one manual, Broom did not provide any documented evidence to support his testimony that the machines from which he made millions were not the video poker machines formerly owned by Tri-Star: not one picture; receipt; title record or any other document which easily would have confirmed Broom’s story.

Based upon the totality of the financial records and other evidence, the Court’s finding that Broom’s purported sale in September 2005 of the Tri-Star assets was a sham is supported by the evidence. The money Broom made for years following 2005 from the video poker operations in the Dominican Republic is entirely consistent with the income stream the machines from Tri-Star would have generated. In particular, the Court did not

find Broom's unsubstantiated contention that a simple \$150,000 investment generated \$224,000 in income³ for only six (6) months of operations to be credible in the least.

The records of Tri-Star demonstrate that Broom was able to pull money out of Worldwide any time he wanted. Broom himself testified that he controlled Worldwide. Broom paid himself over \$1,000,000.00 in salary at a time when Tri-Star owed Andrews significant sums for the video games.

Broom also moved significant money out of Worldwide at a time when that company owed significant sums for taxes in 2003 and 2004. [R pp. 291-292] The court justifiably found it to be incredulous to sell 1,132 video poker machines would be sold and the sole record is a single piece of paper stating \$400,000 in US dollars cash was received for 1,122 video poker machines. [R p. 1098] Those funds, if ever received, were never deposited in Tri-Star's account.

When placed within the sequence of financial transactions, Broom's purchase in February 2005 of a \$3.5 Million dollars of a luxurious waterfront estate in Miami, Florida fits neatly into his scheme to cut Andrews out of the Dominican operations. The large monthly salary payments that Broom unilaterally paid himself (\$130,000.00 in January 2005; \$130,000.00 in February 2005 and \$185,000.00 in March 2005) correspond with the timeframe that Broom presumably would be attempting to secure a mortgage and needed to demonstrate a regular income stream.

³Broom testified that video poker did not become legalized in the Dominican Republic until June or July 2006. The \$224,000 identified in his 2006 tax return represents his *share* of the income over a six (6) month period. Thus, the business in the Dominican Republic was making money at a rate of almost one million dollars (\$1,000,000.00) per year.

Accordingly, the Court's finding that Broom acted fraudulently and in bad faith is clearly supported by the evidence. Tri-Star did not have the income to support the exorbitant salary Broom unilaterally began paying himself on New Year's Eve 2004. The only reasonable interpretation is that by the end of 2004, Broom began a scheme by which he would close Tri-Star and open operations in the Dominican Republic with Tri-Star's video poker games under a new entity deliberately designed to exclude Andrews. Broom conceived and executed a scheme to take all the cash out of the company Tri-Star, liquidate the company, keep the machines for himself, and cut Andrews out of the business.

IV. THE TRIAL COURT CORRECTLY FOUND RESPONDENT LIABLE UNDER THE UNIQUE FACTS AND CIRCUMSTANCES OF THIS CASE.

A. The Rationale Behind the Closely-Held Closed Corporation for Direct Actions by Shareholders.

Because the overarching policy goals of derivative actions and Rule 23 are inapplicable in most disputes arising in closely held corporations, certain well-recognized exceptions to this general rule have evolved. One of those exceptions (not applicable here) occurs when a stockholder suffers an injury as a result of a special relationship between the wrongdoer and the shareholder or an injury which is separate and distinct than that of the corporation. See Lesesne v. Lesesne, 307 S.C. 67, 68-69, 413 S.E.2d 847, 848, (S.C. App. 1991); see also Hite v. Thomas & Howard Company of Florence, Inc., 305 S.C. 358, 361-62, 409 S.E.2d 340, 342 (1991). The other exception arises when circumstances **require** a complainant to proceed in a direct action because **“full relief to the stockholder cannot be had through a recovery by the corporation.”** Brown v. Stewart, 348 S.C. 33,

557 S.E.2d 676 (Ct. App. 2001), citing 19 Am.Jur.2d Corporations § 2268, at 167 (1986) (emphasis added).

The American Law Institute⁴ (“ALI”) adopted the latter exception and since applied by several courts in numerous jurisdictions. Section 7.01(d) states:

In the case of a closely held corporation, the court in its discretion may treat an action raising derivative claims as a direct action, exempt it from those restrictions and defenses applicable only to derivative actions, and order an individual recovery, if it finds that to do so will not (i) unfairly expose the corporation or the defendants to a multiplicity of actions, (ii) materially prejudice the interests of creditors of the corporation, or (iii) interfere with a fair distribution of the recovery among all interested persons.

American Law Institute, Principles of Corporate Governance: Analysis and Recommendations § 7.01(d) at 17 (2008).

Importantly, at least two (2) South Carolina courts have acknowledged this exception, but have been unable to apply due to the facts of those particular cases. See

⁴ As the purveyor of the various Restatements and Principles of the Law, South Carolina courts have relied on the principles and rationales espoused by American Law Institute publications on numerous occasions and on a litany of topics. See e.g., Branham v. Ford Motor Co., 390 S.C. 203, 701 S.E.2d 5 (2010) (adopting the risk-utility test for products liability cases as published by the American Law Institute in the Restatement (Third) of Torts: Products Liability (1998) and emphasizing the Legislature’s reliance on the ALI for guidance in this area of the law); Beall v. Doe, 281 S.C. 363, 315 S.E.2d 186 (Ct. App. 1984) (adopting the rule formulated by the American Law Institute in its Restatement (Second) of Judgments § 29 (1982) for determining whether a party is precluded from relitigating an issue with a nonparty as the more flexible and modern view); McDaniel v. McDaniel, 243 S.C. 286, 292, 133 S.E.2d 809, 813 (1963) (holding that the appropriate rule for determining standing in a death case is “succinctly and aptly stated in American Law Institute’s Restatement, Conflict of Laws ...”); and Wiggins v. Moskins Credit Clothing Store, 137 F. Supp. 764, 766 (D.S.C. 1956) (citing the “prestige of the American Law Institute” as one of the reasons for adopting its new position on the recovery of damages for emotional distress resulting from abusive language).

Babb v. Rothrock, 303 S.C. 462, 464-65, 401 S.E.2d 418, 419-20 (1991); see also Brown v. Stewart, 348 S.C. at 33, 557 S.E.2d at 685. The focus of our courts' discussions has been on the exception articulated in Thomas v. Dickson, 301 S.E.2d 49 (1983), wherein a stockholder is permitted to file an individual action for losses suffered by the corporation if the underlying reasons for requiring a derivative action are absent. Id. at 774.

Thomas v. Trio Sales, Inc., a Georgia corporation owned by three equal shareholders, one of which was Dickson, the plaintiff. Id. at 50-51. Each shareholder served as an officer and agreed to receive a monthly salary of \$1,000 and to distribute profits equally as bonuses. Id. Dickson eventually died and his shares passed to his wife through his estate. Id. At the time of his death no bonuses had been distributed. Subsequently, the two other defendant shareholders began paying bonuses to themselves but did not convey any part of the distribution of profits to the estate. Id. Dickson's wife, individually and on behalf of his estate, filed an action against the corporation and the two shareholders for misappropriation and conversion of corporate assets. Id. The defendant shareholders sought a dismissal on the grounds that Dickson's action had to be brought derivatively and not directly. The trial court denied the motion and the two remaining shareholders appealed.

In its opinion, the Georgia Supreme Court set forth the reasons that shareholders must generally file derivative actions for losses suffered by the corporation:

The reasons underlying the general rule are that (1) it prevents a multiplicity of lawsuits by shareholders; (2) it protects corporate creditors by putting the proceeds of the recovery back in the corporations; (3) it protects the interests of all shareholders by increasing the value of their shares, instead of allowing a recovery by one shareholder to prejudice the rights of others not

a party to the suit; and (4) it adequately compensates the injured shareholder by increasing the value of his shares.

Id. at 51. After analyzing each of these reasons and whether or not they applied to Dickson's case, the court held that because Dickson was the sole injured shareholder and because the reasons underlying the general rule calling for corporate recovery did not exist, Dickson was properly allowed to bring a direct action. Id.

Our Court in Babb declined to adopt the Thomas exception based strictly upon the particular facts of that case. There, the Court determined that the claims of corporate creditors would be jeopardized, and thus the parties could not maintain the action directly because at least one of the reasons for the general rule was prevalent. Babb, 303 S.C. at 464-65, 401 S.E.2d at 419-20.

The Thomas exception was again discussed in Brown v. Stewart, and though our court of appeals declined to apply it under the facts of the case, the exception received favorable treatment:

Brown may not rely on the Thomas exception. As a result of the damage to the corporation, Brown suffered a reduction in the value of his stock. The damage to Brown as a stockholder, however, was shared by all of the stockholders including Silvers and Altier, who were dismissed from this action. Permitting Brown to maintain his action as an individual action would not protect the interests of all stockholders because the diminution in the value of the stock was suffered by all of the stockholders. Thus, the reasons for requiring a derivative action described in Thomas were not absent. **Pursuant to Babb, where the reasons are not absent, we must rely on the general rule that individuals may not sue corporate directors or officers for losses suffered by the corporation.**

Brown v. Stewart, at 775. Again, the Court found that one of the underlying reasons for requiring a derivative action was present, i.e., the protection of all injured shareholders. The language in the opinion, however, clearly suggests that under the proper factual

scenario the Court would be inclined to apply the exception. The case at bar is easily distinguishable from both Babb and Brown and would thus fall within the framework of the Thomas exception.

In addition to Thomas, other courts have weighed-in in support the ALI/Thomas rationale and are similar to the case at bar. The case of Durham v. Durham, 871 A.2d 41 (N.H. 2005), is particularly persuasive as the New Hampshire Supreme Court was presented with facts nearly identical to the case at bar and chose to adopt the ALI's position for closely-held corporations. In Durham, the plaintiff shareholder brought a direct action against the other three shareholders of a closely held corporation for, *inter alia*, breach of fiduciary duty and unlawful distributions. The trial court determined that the plaintiff's claims should have been brought derivatively and dismissed them for failure to state a claim. On appeal, the plaintiff argued "that practical and policy reasons justify allowing a direct, as opposed to derivative, action against the defendants because the plaintiff is the sole aggrieved shareholder and is suing all the remaining shareholders." Id. at 44.

Setting forth its rationale, the New Hampshire Supreme Court explained:

The corporation here is typical of other close corporations in that the shareholders are few in number, know each other, and actively serve in the management of the business as officers or directors. Because the corporation's shares are not publicly traded, the plaintiff as a minority shareholder does not have the opportunity to extricate himself from the corporation by selling his shares on the open market. In addition, construing all reasonable inferences drawn from the well-pleaded facts below in the plaintiff's favor, we conclude for purposes of this analysis that the corporation's board of directors is not disinterested. In these circumstances, the formalities of the derivative proceeding may be impractical and unnecessary because the corporation does not have a disinterested board of directors and a multiplicity of suits is unlikely.

Id. at 45. Citing Thomas and relying on the ALI rationale the Court concluded:

We are persuaded that the derivative/direct distinction makes little sense when the only interested parties are two individuals or sets of shareholders, one who is in control and the other who is not. In this context, the debate over derivative status can become purely technical. In cases such as this one, where the principles underlying the derivative proceeding are not served, the trial court should have the discretion to allow the plaintiff to pursue a direct claim against the corporate officers. Courts that continue to require a derivative proceeding in this context generally do so to promote consistency and predictability in corporate law. While we agree that consistency in the law is important, we also recognize that the derivative proceeding involves burdensome, and often futile, procedural requirements when a minority shareholder seeks to redress wrongful behavior by the majority shareholders. Furthermore, any recovery from a derivative proceeding goes to the corporation and thus would be under the control of the alleged wrongdoers.

Id. at 46. (internal citations and quotations omitted).

Similarly, in W & W Equipment Co. v. Mink, 568 N.E.2d 564 (Ind. Ct. App. 1991), a shareholder in a closely held corporation brought a direct suit alleging a breach of fiduciary against the directors for wrongful termination, misrepresentation and extortion. Id. at 573. The court rejected the defendant's claim that the plaintiff's suit had to be brought derivatively, concluding that "the reasons for requiring a derivative action are not present in this case." Id. at 571. The Court emphasized that there were only two shareholders, that the plaintiff was the sole injured shareholder, and there was "thus no potential for multiplicity of shareholder suits" Id. Further, "there [was] no evidence of any creditor in need of protection," nor was there "prejudice to other shareholders not a party to the suit since [the plaintiff was] the only injured shareholder" Id. Moreover, the plaintiff "would not be adequately compensated by a corporate recovery because [the corporation was] a close corporation with no ready market for the sale of [the plaintiff's] shares." Id.

Finally, in Richards v. Bryan, 879 P.2d 638, 641 (Kan. Ct. App. 1994), a minority shareholder in a close corporation brought a direct suit against the majority shareholders alleging that the defendants had effectively frozen out the plaintiff, denied the plaintiff a reasonable return on investment, and fraudulently induced the plaintiff to enter a formation agreement. Id. The Court permitted the plaintiff to bring a direct suit for the derivative claims explaining that the suit “will not expose [the corporation] to a multiplicity of actions or interfere with a fair distribution of recovery because the [plaintiff is] the only minority shareholder in the corporation.” Id. at 648. Furthermore, the Court said, “there is no indication that resolution of [plaintiff’s] claims will prejudice any creditors’ interests.” Id.

B. The ALI/Thomas Rationale is Applicable to the Case at Bar.

The basis for allowing a shareholder to maintain an action directly against the fraudulent acts of an officer or director exists in the very limited circumstances when, as in the case at bar, four (4) criteria are present:

- (1) The action does not create the possibility of multiple lawsuits by other shareholders;
- (2) The action does not impair creditors of the corporation, because the proceeds of the recovery go directly to one shareholder, as opposed to the corporation;
- (3) The action does not adversely impact other shareholders, by allowing recovery by one shareholder which might prejudice the rights of other shareholders not a party to the suit; and
- (4) The action adequately compensates the injured shareholder by increasing the value of his shares.

In this case at bar, Andrews unique circumstances meets all four (4) requirements, as in Thomas and the ALI.

First, there is no risk of multiple lawsuits by other shareholders, because Andrews and Broom are the only two (2) shareholders.

Second, there were no other creditors of Tri-Star because corporation had been dissolved since 2009.

Third, the action did not impair other shareholders because Andrews and Broom were the only two (2) shareholders.

Finally, and perhaps most importantly to the facts of this case, allowing a direct action against the fraudulent officer/director was the only means by which Andrews *could* be made whole.

In this case, Andrews could not be adequately compensated by an increase in the value of his shares for three reasons. Presumably doing such would confer a benefit to Broom, the sole wrongdoer, in the form of an increase in the value of his shares as well.⁵ Additionally, an increase in the value of shares is of little or no benefit to Andrews as there is no open market for shares of a closely held corporation. Finally, Appellate Broom had

⁵ Cf. Lesesne, 307 S.C. at 67, 413 S.E.2d at 848:

It is a well-settled equitable rule that anyone acting in a fiduciary relationship shall not be permitted to make use of that relationship to benefit his own personal interests. It is a doctrine repeatedly announced by the courts of this nation that courts of equity will scrutinize with the most zealous vigilance transactions between parties occupying confidential relations toward each other and particularly any transaction between the parties by which the dominant party secures any profit or advantage at the expense of the person under his influence.

unilaterally shut the corporation down. Although it was viable at the time Andrews filed his original claims, Broom allowed the corporation to be administratively dissolved. Thus, at the time of trial, the corporation technically could not recover the losses due to Broom's unilateral actions by his dissolving of the same. It would be the highest form of inequity to prevent Andrews from recovering for the wrongful acts of his partner Broom by rewarding Broom for closing the corporate door from which Andrews' recovery could be obtained.

Alternatively, as alleged in the pleadings, Broom was the primary operator, bookkeeper decision maker and Chief Executive Officer for Tri-Star and had control of Tri-Star's business relationships. (Amended Answer and Counterclaims, ¶¶ 15, 24 and 28). As such, Andrew is akin to a minority shareholder. As explained in Durham, a derivative proceeding under these circumstances would involve "burdensome, and often futile, procedural requirements" and "any recovery from a derivative proceeding ... would be under the control of the alleged wrongdoers." 871 A.2d at 46. Based on Broom's misconduct as the controlling shareholder, Andrews certainly could not expect recovery by and through the corporation and thus his only remedy was and is through direct action.

For these reasons, the trial court ordered Broom to return one-half of the salary he unilaterally paid himself - when Tri-Star was otherwise insolvent - directly to the **only** other person harmed by his actions: Respondent Andrews. Because of the very unique facts of this case, allowing Andrews to recover directly from the corporate wrongdoer was the only realistic means the affected shareholder could be made whole. For these reasons, the trial court's finding of liability was both supported by the law and the evidence in this case and should be affirmed.

V. THE TRIAL COURT’S AWARD OF PUNITIVE DAMAGES WAS SUPPORTED BY THE LAW AND EVIDENCE.

As set forth in detail in Argument III, *supra*, the trial court’s finding that Broom engaged in a deliberate pre-planned scheme to shut down Tri-Star. [R. pp. 56-61, 63-66] A detailed explanation of the purpose and legal requirements for awarding punitive damages can be found in Mellon v. Lane, 377 S.C. 261, 659 S.E.2d 236 (Ct. App. 2008):

Punitive damages, alternatively known as exemplary damages, are imposed as punishment. Clark v. Cantrell, 339 S.C. 369, 378-379, 529 S.E.2d 528, 533 (2000). Punitive damages are allowed in the interest of society in the nature of punishment and as a warning and example to deter the wrongdoer and others from committing like offenses in the future. *Id.* Moreover, they serve to vindicate a private right by requiring the wrongdoer to pay money to the injured party. *Id.*

At least three important purposes are served by a punitive damages award: (1) punishment of the defendant's reckless, willful, wanton, or malicious conduct; (2) deterrence of similar future conduct by the defendant or others; and (3) compensation for the reckless or willful invasion of the plaintiff's private rights. *Id.* The paramount purpose for awarding punitive damages is not to compensate the plaintiff but to punish and set an example for others.

On the issue of punitive damages, the highest burden of proof known to the civil law is applicable. Section 15-33-135 of the South Carolina Code provides: “In any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence.” S.C. Code Ann. § 15-33-135 (Supp. 2003). Punitive damages can only be awarded where the plaintiff proves by clear and convincing evidence the defendant's misconduct was willful, wanton, or in reckless disregard of the plaintiff's rights. Taylor v. Medenica, 324 S.C. 200, 220, 479 S.E.2d 35, 46 (1996); Lister v. NationsBank of Delaware, 329 S.C. 133, 149, 494 S.E.2d 449, 458 (Ct.App.1997).

There is no formula or standard to be used as a measure for assessing punitive damages. However, factors relevant to consideration of punitive damages are: (1) the character of the defendant's acts; (2) the nature and extent of the harm to plaintiff which defendant caused

or intended to cause; (3) defendant's degree of culpability; (4) the punishment that should be imposed; (5) duration of the conduct; (6) defendant's awareness or concealment; (7) the existence of similar past conduct; (8) likelihood the award will deter the defendant or others from like conduct; (9) whether the award is reasonably related to the harm likely to result from such conduct; and (10) defendant's wealth or ability to pay. *See Gamble v. Stevenson*, 305 S.C. 104, 111-112, 406 S.E.2d 350, 354 (1991); see also *Welch v. Epstein*, 342 S.C. 279, 306, 536 S.E.2d 408, 422 (Ct.App.2000) (“Under *Gamble*, the trial court is not required to make findings of fact for each factor to uphold a punitive damage award.”).

Id. at 289-291, 659 S.E.2d at 251-252.

Broom’s willful and fraudulent scheme is evident even if Respondent’s version of events is to be believed. According to Broom, the parties agreed in **May 2004** during a meeting where his CPA attended that Broom was entitled to receive a salary (including payments retroactive for his involvement with Tri-Star since 1997). [Brief of Appellant, p.24] Further, according to Broom, revenues at that time were \$180,000 per month. [*Id.*]

If this was all true, when Broom paid himself \$400,000 in salary on December 31, 2004, he would not have had to borrow \$325,000 of that from his other businesses and from family members in order to fund his salary payment. [R. p. 56 and pp. 385, ll. 1-8, p. 386, ll. 23-25, p. 890 and 892] Furthermore, in April 2005 and in June 2005, Broom’s Dominican Republic business partner (Edmund Yunes) had to wire money from his personal account to Tri-Star in order for Broom to make his salary payment. [R p. 390, l 24 – p. 391, l. 5; p. 911; and p. 911 and p. 921, respectively] Again, these transactions took place before any ban by the Dominican Republic government. If Tri-Star was truly making the money Broom claimed it was earning, the personal transfers from his Dominican partner would not have been necessary.

Finally, the sale of the machines themselves further evident Broom's insidious intent. Other than one loan receipt [R p. 1441], Broom produce no other evidence documenting the actual sale of the machines. The alleged \$400,000 proceeds from the sale were never deposited in Tri-Star's account. However, the deposit slip for the \$400,000.00 reveals that money came from multiple local accounts (money Broom borrowed from family and/or other companies he controlled). [R. p. 398, l. 2 – p. 401, l. 2; p. 936 and p. 937]

When applying the facts of the case to South Carolina case law, the trial court found Broom's scheme was pre-conceived well in advance (because it required his borrowing \$325,000 from family members and his other companies in order to execute the first phase of paying himself \$400,000.00 on December 31, 2004. All were designed to cut Andrews out of the Dominican operations, which he executed all the way down to faking the deposit of the \$400,000.00 of sale proceeds in Tri-Star's account.

The trial court found that awarding punitive damages would deter others who may seek to engage in similar misconduct. [R. p. 65] Even though South Carolina permits a punitive award to be ten (10) times the actual damages, the trial court determined that a punitive award equal to Respondent's actual damages (i.e., \$510,000.00) fairly and adequately reflects the scope of Broom's misconduct, is reasonably related to the harm suffered by Respondent Andrews, and satisfied all other factors outlined in Gamble and Mellon. The Court considered the ratio and finds a 1 to 1 ratio of actual and punitive damages to be reasonable and proportional to the harm inflicted on Respondent Andrews.

The trial court has also considered the reprehensibility of Broom's conduct and found it was the result of an intentional design to deceive and defraud Respondent Andrews

for Broom's financial benefit. *See, Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 587, 686 S.E.2d 176, 185 (2009) (requiring a court to consider the degree of reprehensibility when reviewing punitive damages).

When evaluating comparative penalty awards, the Court recognized that the harm to Andrews was purely economic. But, importantly, the trial court found that harm to be the result of a meticulously-planned and executed scheme designed to siphon all the value out of Tri-Star while maximizing Broom's take and minimizing the extent to which the company would repay Andrews. South Carolina courts have long upheld punitive awards for cases involving fraudulent conduct. *See, e.g., Jordan v. Holt*, 362 S.C. 201, 608 S.E.2d 129 (S.C., 2005) (punitive award for self-dealing upheld).

Accordingly, the award of punitive damages by the trial court is both supported by the clear and convincing evidence of Broom's misconduct and self-dealing and by the applicable law of South Carolina.

VI. THE TRIAL COURT'S AWARD OF ATTORNEY'S FEES IS SUPPORTED BY THE LAW AND EVIDENCE.

Relying upon S.C. Code of Laws §33-18-410(b), the trial court found that because Broom acted "arbitrarily, vexatiously, or otherwise not in good faith," Andrews was entitled to an award of reasonable expenses, including attorney's fees and the expenses of experts fees, incurred in the proceeding. [R. pp. 68-73] In seeking to overturn the trial court's award of attorney's fees to the Respondent, Appellant proffers three (3) arguments: (1) attorney's fees was not plead; (2) Respondent failed to show that Tri-Star was a statutory closed corporation; and (3) Respondent failed to meet his burden to support the

award. The trial court properly rejected each of these arguments when Broom asserted them post-trial.

A. Plaintiff Adequately Pled Attorney's Fees

When Appellant commenced the litigation 2005, the Appellant brought several claims against the Respondent. The Appellant abandoned those claims shortly before trial. The Court entered an order re-aligning the parties the day after the trial concluded. [R. p.44]

The Respondent first requested attorney's fees in his amended pleading filed in 2006. [R. pp. 95-108] This request was repeated in his second amended pleading filed in 2016. [R. pp. 109-124] In both instances, the request was stated in regards to defending against the Appellant's claims. However, from the time this litigation commenced until shortly before trial, the Respondent was defending those claims and campaigning determinedly to keep his own claims in court. The Court properly found the specific request for attorney's fees provided straightforward notice the Respondent was seeking fees and costs.⁶ *C.f., S.C. Elec. & Gas Co. v. Hartough*, 375 S.C. 541, 654 S.E.2d 87 (Ct. App. 2007) (pleadings requesting attorney's fees is sufficient)

B. There is no Dispute that Tri-Star was Statutory Closed Corporation.

Evidencing the extent Appellant will go to avoid responsibility, Appellant argues there was no proof that Tri-Star was a statutory close corporation. It was not disputed that Appellant and Respondent were the sole shareholders of Tri-Star. [R. pp. 708-711] Also,

⁶ Appellant can hardly claim prejudice from any alleged lack of notice, because during the twelve (12) years of hotly contested litigation leading up to the ultimate trial in June 2017, Appellant never once asked Respondent in discovery to explain or itemize the damages he sought under his counterclaims. [Plaintiff Broom's Interrogatories to Andrews].

during cross-examination of the Respondent, Broom's own counsel got Respondent to admit that Appellant was the sole officer of Tri-Star [R. p.303]

Furthermore, at a hearing on Broom's motion for partial summary judgment in 2011, Broom submitted the articles of incorporation for Tri-Star in support of his motion. [R. pp. 708-711] On the forth page of Plaintiff's own exhibit, the record clearly establishes Tri-Star was a statutory closed corporation. [*Id.* at 711] At the hearing on Respondent's post-trial motions, the trial court took judicial notice of the documents previously submitted by Appellant in prior matters on this case. [R. pp. 1755]

C. The Award of Attorney's Fees is Supported by the Record.

The trial court reviewed the fee affidavits of counsel and the six (6) factors set forth in Baron Data Systems v. Loter, 297 S.C. 382, 377 S.E.2d 296 (1989) to approve Plaintiff's fee request. Importantly, since 2008, Judge Mark Hayes has been the designated presiding judge for this case. He was the judge who presided over the numerous hearings, conference calls, and, ultimately, the trial itself. Respectfully, the trial court knew better than anyone how much work the case required. The trial court knew first-hand that Respondent's successful pursuit of this matter extensive pre-trial proceedings, motions and discovery, and was extraordinarily complicated, both factually and legally. The case entailed detailed records of domestic and international companies, thousands of transactions, and a working knowledge of the video gaming industry. Legally, the appeal and remand of this case involved a novel issue for the appellate courts as it pertains to closely-held corporations.

A cursory review of the public record filings reflects the extensive and intensive effort this case has required. [R. pp. 1755-1766] Since Broom initiated the litigation in 2005, over thirty-three (33) motions have been filed resulting in twenty-four (24) orders.

Although Broom attempts to minimize Andrew's success at trial (characterizing the judgment a result of one cause of action when originally ten (10) were plead, the same work was entailed to produce that verdict – the same evidence supported all claims. Additionally, Appellant argues that Respondent did not prevail in his 2013 appeal. However, the appeal achieved exactly the result sought by Respondent – namely, remanding the case back for a trial on the merits.

Furthermore, it cannot be underscored enough to be mindful that, after twelve (12) years of litigation and numerous pre-trial motions and orders – that Broom voluntarily dismissed all claims against all parties literally on the eve of trial.

Given the trial court's twelve (12) year history with this case, Judge Hayes knew intimately the work involved. The trial court's finding of attorney's fees is supported both by the independent record and Judge Hayes' personal experience with this matter. Accordingly, the award for attorney's fees and costs should be upheld.

CONCLUSION

After twelve (12) years of litigation, Respondent Andrews finally had his day in court. The facts and evidence overwhelmingly support the trial court's verdict for actual and punitive damages, as well as its post-trial award of attorney's fees and costs. For these reasons, the trial court's order and judgment should be affirmed.

Respectfully Submitted,

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July 31, 2020

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2018-002223

RECEIVED

Jul 31 2020

SC Court of Appeals

H. Hugh Andrews Respondent,

v.

Quentin S. Broom, Jr. Appellant.

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INTRODUCTION

This case needs finality. The question for this appeal is what should be the finality for Appellant Quentin S. Broom, Jr. (“Broom”) and Respondent H. Hugh Andrews (“Andrews”). Their gaming business, Tri-Star Communications, Inc. (“Tri-Star”), was shut down in 2005 when the Dominican Republic unexpectedly banned all gaming in the country. Andrews’ brief mentions this Dominican action only once in passing, but it was the death blow to Tri-Star that caused the loss of all assets and eliminated the significant monthly revenues.

While Andrews was incapacitated during this time, Broom operated the business and made all the efforts to collect what was owed to Tri-Star and capture some value for the gaming machines that could no longer be used in any way in the Dominican Republic. (R. p. 321, lines 7-12; p. 348, line 15-p. 349, line 2) As the trial court recognized, the U.S. Bankruptcy Court found in 2006 that Broom paid all debts of the company, wound up the business, and distributed the proceeds to the two Tri-Star shareholders equally. (R. pp. 58-59, 435-36)

This case should never have gone to trial. Broom voluntarily dismissed his claims that had been filed in 2006. The trial court had dismissed with prejudice all Andrews’ counterclaims in 2011 long before trial, and Andrews unsuccessfully appealed that decision without any relief. The trial court erred in trying Andrews’ same claims that were dismissed with prejudice because of the law of the case. Even so, the trial court’s findings on Broom’s salary payments were also unsupported by the weight of the evidence. Thus, the result of the trial was a travesty of justice and should be reversed based on the clear errors of law in permitting Andrews’ claims to go to trial and the findings from the evidence at trial.

ARGUMENT

I. The Trial Court's 2011 Order Dismissing with Prejudice all of Andrews' Counterclaims is the Law of the Case.

A. The law of the case doctrine applies to interlocutory orders from which an unsuccessful appeal is taken.

Andrews' attempts to circumvent the law of the case doctrine must fail. While Andrews directs this Court to focus on the interlocutory nature of the 2011 order, such effort is merely a game of semantics. The law of the case applies to interlocutory orders from which an appeal is able to be taken or is unsuccessfully taken, including the 2011 order. *See Cooper Tire & Rubber Co. v. Perry*, 261 S.C. 538, 542, 201 S.E.2d 245, 247 (1973) (holding that an unappealed order sustaining demurrers to counterclaims was the law of the case on a subsequent demurrer to "amended" counterclaims that were substantively the same as the earlier counterclaims).

In the 2011 dismissal order, the trial court held that Andrews' claims were derivative and that he could not obtain an individual recovery based on the "ALI exception" to the rule of derivative recovery. (R. p. 8, "[T]his case does not support the application of the exception for closely held corporations.") The trial court dismissed all of the claims *with prejudice*. *See RIM Assocs. v. Blackwell*, 359 S.C. 170, 182, 597 S.E.2d 152, 159 (Ct. App. 2004) ("A case that is dismissed 'with prejudice' indicates an adjudication on the merits and, pursuant to res judicata, prohibits subsequent litigation to the same extent as if the action had been tried to a final adjudication." (internal quotations omitted)).

Andrews appealed that order for the purpose of challenging that decision but failed to obtain a ruling reversing the decision on the appeal. Thus, the 2011 dismissal order became the law of the case, and the trial court then lacked authority after that appeal to inexplicably reverse his earlier decision and decide that Andrews was permitted to obtain an individual recovery on his derivative claims.

B. The law of the case doctrine applies here because Andrews failed to obtain a ruling in his appeal of the trial court's decision.

Andrews also mischaracterizes the result of his appeal of the trial court's 2011 dismissal order. He erroneously claims the Supreme Court remanded the case to permit Andrews to "obtain a ruling on [Andrews'] motion to amend his pleadings." (Resp. Brief at 9, 14, 35) In fact, the Supreme Court specifically held that the "Court of Appeals erred in remanding the case for a ruling on [Andrews'] Rule 15, SCRCp, motion because the issue on appeal – whether the trial judge erred in dismissing [Andrews'] counterclaims without allowing [Andrews] to amend his pleadings – was not preserved for review." (R. p. 17) Thus, following remittitur to the trial court, Andrews obtained no relief from the dismissal with prejudice, not even a remand to consider leave to amend.

While Andrews suggests a remittitur is analogous to a remand, such a position confuses the Court's administrative tools and the procedural posture of this case. A remand directs a lower court to take further actions, whereas a remittitur ends the jurisdiction of an appellate court signaling the appellate matter is finished.

Following review, the Supreme Court reversed the Court of Appeals' decision on preservation, finding that the issues previously raised by Andrews in the first appeal were ripe for review. Instead of sending the case back to the Court of Appeals, the case was erroneously remitted. In so doing, the appellate courts did not give Andrews any relief on his original issues on appeal. There is no question Andrews was aware of the Supreme Court's mistake and was given guidance to file a motion to address any problem. (R. p. 2611 (explaining "I believe normal procedure would be to remand to the Court of Appeals"); R. p. 2612)

In sum, Andrews failed to avail himself of the procedural mechanism to obtain a ruling. Likely strategically, Andrews chose not to pursue the appeal further with the error and instead attempted to get a second chance from the trial court to amend his complaint. By choosing to

accept the remittitur without any relief, the trial court’s 2011 dismissal order became the law of the case.

C. The trial court’s post-remittitur decision to grant Andrews leave to amend is irrelevant to the law of the case inquiry.

Andrews attempts to shield himself from the law of the case by relying on a subsequent ruling by the trial court to amend. (Resp. Brief at 10-11) That cannot prevail. Once an issue is bound by the law of case, the issue is finally decided for the parties in the litigation. *See Hudson ex rel. Hudson v. Lancaster Convalescent Ctr.*, 407 S.C. 112, 119, 754 S.E.2d 486, 490 (2014) (“Under the law of the case doctrine, a party is precluded from re-litigating issues decided in a lower court order, when the party voluntarily abandons its appeal of that order.”). The doctrine preserves finality and avoids the inconsistent rulings and multiple appeals of the same issue—the very harms implicated by the trial and this appeal.

II. Andrews’ Second Amended Counterclaims Could Not Relate Back to His Earlier Pleadings.

Andrews argues that his claims filed in 2016 were not barred by the statute of limitations because they related back to his earlier pleadings under Rule 15(c), SCRPC. (Resp. Brief at 13-14) That cannot be. The Supreme Court’s issuance of the remittitur made final the trial court’s 2011 dismissal with prejudice of Andrews’ claims. Practically, Andrews had no affirmative pleading in 2016—the claims filing upon which Andrews now relies. In the absence of a lawsuit, all claims made in 2016 are barred by the statute of limitations.

Andrews misses the point when he argues that his Second Amended Answer and Counterclaims “allege substantially the same misconduct by Broom” as his earlier pleading. The identical nature of the claims is the problem. The claims are the same claims that were dismissed with prejudice by the trial court and which Andrews appealed without success. That ended

Andrews' case against Broom, and thus there was nothing to which the Second Amended Counterclaims could relate back.

III. The Trial Court Improperly Awarded Andrews a Direct Recovery for Admittedly Derivative Claims.

Andrews' claim for direct recovery relies solely on the law of foreign jurisdictions and contradicts well-settled law and policy of this State. (Resp. Brief at 21-26) Additionally, an exception is unwarranted when the General Assembly expressed its intent to guard individuals by statutory protections. Even if the trial court had the authority to adopt and impose an exception to South Carolina law on derivative claims, such an exception would be improper in this matter.

At the outset, South Carolina has determined that individual shareholders may not sue corporate directors directly for corporate losses. *Babb v. Rothrock*, 303 S.C. 462, 464, 401 S.E.2d 418, 419 (1991) (holding “that it is firmly established by our decisions that individual shareholders may not sue corporate directors or officers directly for losses suffered by the corporation” and recognizing that the “ALI” or “*Thomas*” exception was merely an alternative holding for its ruling: “Assuming we should adopt the *Thomas* exception, these defendants would not be entitled to its benefit.”). While Andrews suggests that the ALI provision is allowed and necessary, such exception is unwarranted because of South Carolina’s statutory scheme. Specifically, shareholders of qualified small corporations have the option of forming under the Statutory Close Corporation Supplement in order to obtain additional shareholder rights. S.C. Code Ann. §§ 33-18-400, 410; *see also Mason v. Mason*, 412 S.C. 28, 55, 770 S.E.2d 405, 419 (Ct. App. 2015) (“An individual shareholder may bring a direct suit against the corporation only when his or her ‘loss [is] personal and not a loss of the corporation.’ However, [u]nder [sections 33–18–400 to –430 of the South Carolina Code (2006)], in closely held corporations, a minority stockholder can maintain an action

for managerial misconduct and other forms of oppression by majority stockholders.” (internal quotations and citations omitted)).¹

If this Court were inclined to agree with the ALI adoption, despite statutory and policy reasons,² the record does not support an exception in this case. Andrews failed to demonstrate (1) that Tri-Star had no corporate creditors at the time it was administratively dissolved, (2) that “the corporation technically could not recover the losses due to Broom’s unilateral actions by his dissolving of the same,” or (3) that Andrews “could not expect recovery by and through the corporation and thus his only remedy was and is through direct action.” (Resp. Brief at 26-28.) In fact, his legal assertions are not supported. *See, e.g.*, S.C. Code Ann. §§ 33-14-105(4); 33-14-210 (noting that “[a] corporation dissolved administratively continues its corporate existence” and may carry on any business necessary to wind up and liquidate its business and affairs, including “distributing its remaining property among its shareholders according to their interests”).

In sum, Andrews failed to meet his burden for the standard for application of the “ALI” exception to the derivative claim requirements. For all of these reasons, this Court should reverse.

¹ Indeed, *only after trial* Andrews claimed that even he had such rights because Tri-Star was a statutory close corporation, yet he chose not to plead for relief under the Statutory Close Corporation Supplement or offer evidence at trial to obtain such relief. *See infra*, part VI.

² Carving out exceptions to well-established rules carry significant and obvious disadvantages, particularly in the field of corporate law. As one court noted in rejecting the “ALI” exception:

Corporations are *not* partnerships. Whether to incorporate entails a choice of many formalities. Commercial rules should be predictable; this objective is best served by treating corporations as what they are, allowing the investors and other participants to vary the rules by contract if they think deviations are warranted. So it is understandable that not all states have joined the parade.

Bagdon v. Bridgestone/Firestone, Inc., 916 F.2d 379, 384 (7th Cir. 1990) (emphasis in original) (applying Delaware law).

IV. Andrews' Arguments in Support of Liability Are Based on Speculation and Are Contradicted by the Undisputed Evidence.

The trial court erred in finding that Broom breached his duties to Tri-Star by taking a reasonable salary payment when Tri-Star became profitable. The trial court based its decision on speculation and unreasonable inferences. Andrews defends the judgment with the same speculative arguments and highlights the absence of evidence by ignoring the most importance circumstances that arose unexpectedly and doomed the business. Significantly, Andrews does not dispute the fact that Broom fully disclosed to Andrews all the salary payments he received. Evidence in the record demonstrates that Andrews was fully informed of the decision and all transactions related to the payments, along with evidence that Andrews expressly ignored information he received regarding Tri-Star's financial transactions and condition. (R. p. 516, line 18-p. 522, line 21; pp. 1541, 1555, 1558, 1606-1622)

While Andrews' main allegation was that Tri-Star was not financially sound to support salary payments, he failed to offer any expert witness to review the company's books and opine on that issue. Expert testimony was warranted because such any opinion about Tri-Star's financial health that was contrary to the company's CPA's undisputed testimony requires knowledge of a company's line of business, transactions, and overall financial situation. *See* Rule 701, SCRE ("If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which . . . do not require special knowledge, skill, experience or training.") This is particularly so for an atypical company such as Tri-Star that was operating a volatile gaming business in a third-world county and that was required to repatriate revenues through receiving and making payments from and to related companies and associated individuals using loans and other financial transactions.

While Andrews directs this Court to rely on the existence of loans as evidence, the mere existence of such debt is insufficient. Simply put, a loan does not determine health of a company. Companies use loans and lines of credit in standard business operations and to manage cash flow. Debt is simply a tool that all companies manage and use to manage capital flows, and debt in the right circumstances (interest rate, loan terms) can be advantageous. If Andrews believed this position to be true, it required more than mere speculation to advance this argument.

Most importantly, the one expert who did testify at trial, Tri-Star's CPA Tim Russell, testified that the salary payments Broom received were reasonable. (R. p. 2471) There was substantial and un rebutted evidence at trial about Tri-Star's need to manage cash flow issues through loans, particularly to repatriate revenues due to the regulatory and currency exchange issues arising from operating in a foreign country. (R. p. 385, line 5-p. 386, line 19; p. 398, line 2-p. 399, line 13; p. 494, lines 15-23) Finally, it could not have been a surprise that Tri-Star was receiving loans from persons and entities related to Broom. Tri-Star received and distributed payments frequently throughout its corporate life from persons and entities related to both Andrews and Broom. (R. pp. 333-35, 456, 1438-39)

In sum, no evidence supports the trial court's inference that the existence of loans from persons and entities related to Broom demonstrated that the salary payments Broom received constituted a breach of Broom's fiduciary duties.

Andrews' remaining arguments in support of the trial court's judgment are even more speculative. For example, Andrews asks the court to infer that Broom behaved improperly based on Broom's purchase of a home in Florida in 2015. (Resp. Brief at 16, 19) However, Andrews presents no factual support or explanation that would support such an inference. Andrews' argument that the home purchase was the motive for Broom's decision to take a salary is rank

speculation and, more importantly, irrelevant. Even if Broom did use his salary payments to pay a mortgage, that has nothing to do with whether it was a breach of his fiduciary duties to take a salary.

Andrews' arguments based on Broom's sale of the gaming machines suffers from the same infirmities. As Andrews concedes in a footnote, "the trial court largely agreed" with Broom "that the involuntary bankruptcy action foreclosed all claims Andrews had related to the sale of the video poker games." (Resp. Brief at 17 n.2) For this reason, it is not clear why Andrews argues that Broom's sale of the gaming machines is a basis on which to affirm the trial court's judgment. (Resp. Brief at 16-18) In fact, it is not because the trial court "based Andrews['] recovery as to [the salary payments] alone." (Resp. Brief at 17 n.2.) This is also true with respect to Andrews' arguments about the income Broom received in his ventures after Tri-Star. (Resp. Brief at 18; R. p. 60, "Even though this Court does find the Defendant liable under the theories offered by Plaintiff for the payment of salary, the same theories are not support[ed] by the facts presented to reach into the Defendant's subsequent gaming venture.")

Andrews' efforts to defend the trial court's judgment based on arguments that the trial court rejected shows the absence of evidence to support the judgment regarding Broom's salary payments. All Andrews offered to support his argument was the existence of loans that fail to support any reasonable inference about the financial health of Tri-Star. Andrews also failed to offer any expert evidence to support this issue, and the judgment should be reversed.

V. The Trial Court Erred in Awarding Punitive Damages.

Andrews recycles all the arguments he made in support of the trial court's liability findings as a basis for also upholding the trial court's decision to award punitive damages. Andrews' arguments fail for the reasons noted above. *Supra* part IV. Nonetheless, Andrews' inability to provide any additional basis for the punitive damages award also demonstrates that he did not meet

his burden to “prove[] by clear and convincing evidence the defendant’s misconduct was willful, wanton, or in reckless disregard of the plaintiff’s rights.” *Keane v. Lowcountry Pediatrics, P.A.*, 372 S.C. 136, 148, 641 S.E.2d 53, 60 (Ct. App. 2007) (internal quotations omitted).

Furthermore, both Andrews’ and the trial court’s confused theories of alleged wrongdoing show that an award of punitive damages was not appropriate. The trial court found that the money loaned to Tri-Star as part of its repatriation of revenues from the Dominican Republic while Broom was receiving a salary “evidence a clear intent to conceal the truth from Andrews.” (R. p. 65) As noted previously, the loans do not show that the salary Broom received was illegitimate or unwarranted. Even if the loans did show the salary payments were improper, though, they would not support a finding of *concealment* of the salary payments. To the contrary, the record at trial was clear that Broom forwarded all financial information about his salary to Andrews and his agents and (2) that Andrews was completely uninterested in reviewing that information. (R. p. 370, line 18-p. 376, line 21; R. pp. 1198, 1212, 1215, 1263-1279, 1550-51) Thus, the finding of concealment of the salary is not supported.

VI. The Trial Court Erred in Awarding Attorneys’ Fees.

The trial court’s award of attorneys’ fees was erroneous for three reasons. First, the award of fees was based on a cause of action – S.C. Code Ann § 33-18-410 – that Andrews did not plead and was not tried. (R. p. 154, line 5-p. 172, line 7) It is undisputed that Andrews did not bring a cause of action against Broom under the South Carolina Statutory Close Corporation Supplement, S.C. Code Ann. §§ 33-18-101, *et seq.*, which was the sole legal basis for the trial court’s award of fees. Andrews is not entitled to obtain fees based on a legal claim he never brought.

Andrews suggests that his boilerplate claim for “costs and attorney’s fees” in his answer to Broom’s causes of action against him was sufficient to put Broom on notice that he was seeking attorneys’ fees for his counterclaims. That is not so, and it was not Broom’s obligation to find out

on what legal basis Andrews was seeking fees through discovery, as Andrews argues in a footnote. (Resp. Brief at 33 n. 6) But, that issue is also irrelevant because Andrews never sought or obtained relief under the only statutory basis on which attorneys' fees were awarded.

Andrews' failure to plead for relief under the South Carolina Statutory Close Corporation Supplement is sufficient to reverse the award of attorneys' fees on that sole basis. However, the award should also be reversed because Andrews failed to offer any evidence at trial – or even with his petition for fees – that Tri-Star was organized under the Statutory Close Corporation Supplement. It was only at the hearing on the fee petition, long after the trial record was closed, that Andrews' counsel belatedly offered to the trial court a Tri-Star stock certificate that contains the statutory language in S.C. Code Ann. § 33-18-109 that suggests that Tri-Star was a close corporation at the time the certificate was issued. This was just too little, too late. Andrews could have easily filed Tri-Star's articles of incorporation prior to his attorney fee petition or sought to elicit testimony at trial as to whether Tri-Star was a statutory close corporation, yet he chose not to do so. Thus, he failed his burden of proof at trial that S.C. Code Ann § 33-18-410 was a valid basis for an award of attorney's fees in this case.

Finally, Andrews' efforts to defend the substance of his plainly deficient attorney fee petition also fail. Andrews makes much of the fact that the case had been pending for many years and that the trial court judge knew the case well, but he has not and cannot defend his failure to provide adequate support for the amount requested in the petition. (Resp. Brief at 34-35) Andrews did not provide billing records with detailed time entries in support of the petition. Rather, he only submitted affidavits of about one page in length from his attorneys attesting to the total time they spent and that the time was reasonable. (R. pp. 2700-03) Other factors necessary for any award

of attorney's fees against an opposing party were not supported by any evidence. Thus, the attorney fee award must also be reversed and remanded based on this failure of proof.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the trial court.

July 31, 2020
Columbia, SC

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2018-002223

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Jul 31 2020

SC Court of Appeals

H. Hughes Andrews..... Respondent,

v.

Quentin Broom, Jr.....Appellant,

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

Respectfully submitted,

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

H. Hughes Andrews, Respondent,

v.

Quentin S. Broom, Jr., Appellant.

Appellate Case No. 2018-002223

Appeal From Spartanburg County
J. Mark Hayes, II, Circuit Court Judge

Unpublished Opinion No. 2022-UP-022
Heard October 12, 2021 – Filed January 12, 2022
Withdrawn, Substituted, and Refiled February 9, 2022

REVERSED

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Whitney Boykin Harrison, of McGowan Hood & Felder,
LLC, both of Columbia; and James Edward Cox, Jr., of
Wyche, PA, of Greenville, for Appellant.

Rodney F. Pillsbury, of Pillsbury Law Firm, LLC, of
Greenville, for Respondent.

PER CURIAM: In this action over the collapse of a video poker business in the Dominican Republic, Quentin Broom appeals a circuit court decision finding him

liable for breaching corporate standards and awarding more than a million dollars to Hugh Andrews. Broom argues that (1) Andrews's claims were barred by the law of the case; (2) the statute of limitations had run on Andrews's claims; (3) portions of the circuit court's findings were unsupported by the evidence; (4) the circuit court erred in finding for Andrews under a previously unadopted exception to corporate law; (5) the punitive damages award against him was unreasonable; and (6) Andrews was not entitled to attorney's fees. We reverse.

Several years ago, Andrews and Broom decided to join forces using a corporation known as Tri-Star for the purposes of operating a video poker business. The business did well until South Carolina criminalized video poker in 2000.¹ The two men then moved the business to the Dominican Republic. Because Tri-Star was an American company, the operations in the Dominican had to be run through a company called Worldwide.² Both men contributed \$300,000 to the company; Andrews kicked in another \$600,000 as a loan.

In the summer of 2005, Broom said, "[w]ithout any notice[,] the attorney general issued a directive that there couldn't be any machines operating on the street outside of a casino environment or a licensed casino."

The business soon collapsed, though not before the beginning of the current litigation. On September 2005, in a complaint filed in Spartanburg County, Broom brought claims against a law firm, a lawyer in the firm, and Andrews. The claims against Andrews were for common law fraud, constructive fraud, negligent misrepresentation, and civil conspiracy.

Andrews filed counterclaims against Broom, including breach of fiduciary duty; breach of contract; breach of contract accompanied by a fraudulent act; breach of the covenant of good faith and fair dealing; conversion; violations of two statutory provisions of South Carolina law; promissory estoppel; fraud; and negligent misrepresentation.

On November 1, 2011, the circuit court dismissed Andrews's counterclaims. The court found that Andrews should have brought his claims as a derivative action

¹ See S.C. Code Ann. § 12-21-2710 (2014).

² We have attempted to simplify as much as possible the convoluted nature of the business entities that Broom and Andrews used to set up and run the venture in the Dominican Republic.

under Rule 23(b)(1), SCRCP. The order also took care to spell out the reasons for dismissing each claim. The dismissal was "with prejudice."

Ten days later, Andrews filed a motion to reconsider. He also filed a motion to amend his pleading along with a proposed Second Amended Answer, Counterclaims and Third Party Complaint "based upon information learned and/or events that have transpired since the filing of his Amended Answer and Counterclaims in May 2006." He did not, at that time, propose to add any claims under Rule 23. The circuit court denied Andrews's motion to reconsider, but did not specifically rule on the motion to amend.

On appeal, this court remanded so that the circuit court could "consider whether justice requires [allowing Andrews's requested] amendment and whether Broom will be prejudiced by the amendment." *Broom v. Ten State Street, LLP*, Op. No. 2015-UP-030 (S.C. Ct. App. filed Jan 14, 2015). Our supreme court reversed this, holding that "the issue on appeal—whether the [circuit court] erred in dismissing [Andrews]'s counterclaims without allowing [Andrews] to amend his pleadings—was not preserved for review." *Broom v. Ten State Street, LLP*, Op. No. 2015-MO-057 (S.C. Sup. Ct. filed Sept. 30, 2015).

In a petition for rehearing, Andrews argued that the court's ruling could run counter to its precedent of *Spence v. Spence*.³ The supreme court denied the petition for rehearing and remitted the case, sending it back to the circuit court.

After the remittitur was sent, Andrews filed another motion to amend with the circuit court. In that motion, Andrews mentioned Rule 23 "[i]n the event any claims are 'derivative.'" Broom argued that there was no authority for the circuit court to continue proceedings in a case that the circuit court had dismissed with prejudice. The circuit court nonetheless granted Andrews's motion to amend the pleadings.

Broom dropped his claims against Andrews in June 2017. Around the same time, Broom settled his claims against the other parties. The court held a three-day trial on Andrews's claims. The circuit court found for Andrews on a claim of "breach of the corporate code." The court ordered that Broom pay Andrews \$510,000, then doubled the award with punitive damages. The court also awarded attorney's fees.

The circuit court denied Broom's motion to reconsider. This appeal followed.

³ 368 S.C. 106, 628 S.E.2d 869 (2006).

1. We agree with Broom that the circuit court erred in allowing the case to go forward a second time by allowing Andrews a chance to amend his complaint despite the dismissal with prejudice. See *RIM Assocs. v. Blackwell*, 359 S.C. 170, 182, 597 S.E.2d 152, 159 (Ct. App. 2004) ("A case that is dismissed 'with prejudice' indicates *an adjudication on the merits* and, pursuant to res judicata, prohibits subsequent litigation to the same extent *as if the action has been tried to a final adjudication.*" (emphases added) (quoting *Nelson v. QHG of S.C., Inc.*, 354 S.C. 290, 311, 580 S.E.2d 171, 182 (Ct. App. 2003), *rev'd in part on other grounds*, 362 S.C. 421, 608 S.E.2d 855 (2005)), *cert. granted* Aug. 25, 2005; *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) ("Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court."); *Mason v. Mason*, 412 S.C. 28, 48, 770 S.E.2d 405, 415 (Ct. App. 2015) ("[A]n unappealed ruling, right or wrong, is the law of the case." (quoting *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012))); *Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997) ("The law of the case applies both to those issues explicitly decided and to those issues which were necessarily decided in the former case."); *Hudson ex rel. Hudson v. Lancaster Convalescent Ctr.*, 407 S.C. 112, 119, 754 S.E.2d 486, 490 (2014) ("Under the law of the case doctrine, a party is precluded from re-litigating issues decided in a lower court order, when the party voluntarily abandons its appeal of that order."); *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("The doctrine of the law of the case applies to an order or ruling which finally determines a substantial right. . . . Ordinarily[,] an interlocutory order which merely decides some point or matter essential to the progress of the cause, collateral to the issues in the case, is not binding as the law of the case, and may be reconsidered and corrected by the court before entering a final order on the merits." (quoting *Weil v. Weil*, 299 S.C. 84, 89, 382 S.E.2d 471, 473 (Ct. App. 1989)); *Wachovia Bank, Nat'l Ass'n v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014) ("Appellate courts may decide questions of law with no particular deference to the circuit court's findings.").

Andrews received a final adjudication from the circuit court when the case was dismissed with prejudice. He appealed that final adjudication. However, the ground on which this court remanded was later found by our supreme court to have not been preserved for review. Therefore, "whether the [circuit court] erred in dismissing [Andrews]'s counterclaims without allowing [Andrews] to amend his pleadings" was not appealed because it could not be. *Broom v. Ten State Street, LLP*, Op. No. 2015-MO-057 (S.C. Sup. Ct. filed Sept. 30, 2015).

Because of his own failure to preserve the issue through a Rule 59(e) motion, Andrews was not able to raise that ground on appeal. *See Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review."); *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) ("[O]ur rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.").

Furthermore, as a practical matter, the circuit court's decision was in conflict with the manner in which our supreme court disposed of the matter in the prior appeal. This court had already remanded the case so that the circuit court could consider the motion to amend; that decision was reversed by the supreme court. Had the supreme court intended for the circuit court to rule on the motion to amend, we believe it would not have reversed this court, or that it would have gone to greater lengths to spell out that it was not closing off that procedural avenue.⁴

Additionally, the circuit court erred in finding that its initial ruling was interlocutory. The court had already determined whether Andrews had a right to bring his action in its motion to dismiss. While Broom's underlying claims were still live at that point, that does not provide life to Andrews's counterclaims; a final adjudication on those claims was made with the dismissal with prejudice.

Our law clearly holds that if a different circuit court judge than the one who dismissed the case were to have heard the motion to amend, the second judge would have been unable to grant it. *See Shirley's Iron Works, Inc.*, 403 S.C. at 573, 743

⁴ Even if we were to assume that *Skydive Myrtle Beach, Inc. v. Horry Cnty.*, 426 S.C. 175, 826 S.E.2d 585 (2019), issued after the circuit court's final ruling in the current matter, suggests that our supreme court might now reach a different conclusion in the prior appeal—and we do not make that assumption—the law of the case doctrine nonetheless applies. The law of the case doctrine contemplates that a court might reach a different result in a different case. *See Mason*, 412 S.C. at 48, 770 S.E.2d at 415 ("[A]n unappealed ruling, *right or wrong*, is the law of the case." (emphasis added) (quoting *Atl. Coast Builders & Contractors, LLC*, 398 S.C. at 329, 730 S.E.2d at 285)).

S.E.2d at 785 ("This State has a long-standing rule that one judge of the same court cannot overrule another."). The outcome of a case should not depend on a party's fortune in having the same circuit court judge hear the matter twice.

The circuit court ruled that the case was dismissed with prejudice a decade ago, then rejected a motion to reconsider more than a year later; this ruling was never altered on appeal. If the circuit court's initial ruling, and the subsequent ruling by our supreme court, are to have any meaning, then Andrews should not have been allowed to pursue his claim further.⁵

2. Likewise, we agree that allowing Andrews to move forward with his counter-claims was erroneous because doing so would violate the statute of limitations. *See* Rule 15(c), SCRPC ("Whenever the claim or defense asserted in the amended

⁵ We acknowledge that the law of the case doctrine is discretionary. *See State v. Hewins*, 409 S.C. 93, 113 n.5, 760 S.E.2d 814, 824 n.5 (2014) (referring to the law-of-the-case doctrine as a "discretionary appellate doctrine with no preclusive effect on successive trial proceedings"); *S. Ry. Co. v. Clift*, 260 U.S. 316, 319 (1922) ("The prior ruling may have been followed as the law of the case, but there is a difference between such adherence and res [j]udicata. One directs discretion: the other supersedes it and compels judgment. In other words, in one it is a question of power, in the other of submission."); *Slowinski v. Valley Nat'l Bank*, 624 A.2d 85, 89 (N.J. App. Div. 1993) ("Law of the case' . . . operates as a discretionary rule of practice and not one of law."); 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 4478 (2d ed. 2002) ("So long as the same case remains alive, there is power to alter or revoke earlier rulings."); 5 C.J.S. *Appeal and Error* § 1008 (2019 & 2021 update) ("The doctrine is discretionary rather than mandatory. Nonetheless, it should be disregarded *only upon a showing of good cause* for failure timely to request reconsideration of the original appellate decision, and *only as a matter of grace rather than right*." (emphases added) (footnotes omitted)). We find no good cause here, nor reason for grace. Andrews did not take the procedural steps necessary to preserve his grounds for appeal.

We also question Broom's seeming attempt to elevate remittitur to the status of a ruling, as when his brief states: "The law of the case doctrine equally applies to a remittitur." But we need not reach that issue in this appeal. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating that the "appellate court need not address remaining issues when disposition of prior issue is dispositive" (citing *Whiteside v. Cherokee Cnty. Sch. Dist. No. One*, 311 S.C. 335, 428 S.E.2d 886 (1993))).

pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading."); *Spence v. Spence*, 368 S.C. 106, 130, 628 S.E.2d 869, 881 (2006) ("When a plaintiff is not given the opportunity to file and serve an amended complaint, but is left with no choice but to appeal after dismissal of her case with prejudice, an appellate court which affirms the dismissal may modify the lower court's order to find the dismissal is without prejudice. When the statute of limitations has expired, the appellate court may in its discretion impose a reasonable period of time in which to amend the complaint."); *Wachovia Bank, Nat. Ass'n v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014) ("Appellate courts may decide questions of law with no particular deference to the circuit court's findings.").

Here, no appellate court modified the order to dismiss the case with prejudice. Therefore, Andrews's counterclaims remained dismissed, and could not be used for the purposes of the relate-back doctrine.

3. Because Andrews should not have prevailed on the case below, we reverse the award of punitive damages. *See Gamble v. Stevenson*, 305 S.C. 104, 111, 406 S.E.2d 350, 354 (1991) ("[P]unitive damages may be awarded only upon a finding of actual damages.").

4. We also find that the circuit court erred in awarding attorney's fees to Andrews. Because this action was properly dismissed, attorney's fees should not have been granted.

5. As to the other grounds raised in the appeal, we find it unnecessary to address them. *See Futch*, 335 S.C. at 613, 518 S.E.2d at 598 (stating that the "appellate court need not address remaining issues when disposition of prior issue is dispositive" (citing *Whiteside*, 311 S.C. 335, 428 S.E.2d 886 (1993))).

REVERSED.

THOMAS and GEATHERS, JJ., and HUFF, A.J., concur.

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Jan 27 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY

The Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2018-002223

H. Hugh Andrews,

Respondent,

v.

Quentin S. Broom, Jr.

Appellant.

RESPONDENT'S PETITION FOR REHEARING

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January 27, 2022

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As authorized by the South Carolina Appellate Court Rule 221(a), the Respondent moves for Reconsideration of the court's Opinion No. 2022-UP-022, filed January 12, 2022. The Petitioner respectfully submits that while the Court of Appeals incorrectly applied the relevant law to the facts and circumstances of this case.¹ In the Opinion under review, the Court reversed the Trial Court's decision on four (4) principal grounds:

1. Respondent's claims were barred by the law of the case;
2. Respondent's claims were barred by the statute of limitations;
3. Punitive damages should not have been awarded; and
4. Attorney's fees should not have been awarded.

Items two (2) through four (4) above stem are the resulting derivative application of its finding on the first issue to the remaining issues on appeal.

1. Because no appellate court has previously ruled on the substantive issue of the dismissal of Respondent's Counterclaims, the trial court was completely within its discretion to reverse its prior ruling and let the case proceed on its merits.

Petitioner and Respondent were former 50-50 business partners, operating through a closely-held corporation of the Petitioner's, Tri-Star Communication. After six (6) years of litigation, on the eve of its scheduled trial, the trial court ruled that Respondent's

¹ In its opinion, the Court of Appeals made a factual finding, "By early 2005, Tri-Star was earning \$180,000 per month." Andrews v. Broom, Unpublished Opinion No. 2022-UP-022, at p. 2. Incredibly, this statement was **never** a finding by the trial court and was, in fact, a hotly contested issue at trial. For example, the vast majority of funds the Petitioner used to clandestinely pay himself \$920,000 he borrowed funds from personal sources and immediately repaid after showing the salary on the books of Tri-Star. The Court of Appeals cannot make its own findings of fact. In an action at law, on appeal of a case tried without a jury, the Court views the trial court's findings of fact as equivalent to a jury's findings in a law action, and will not disturb the findings unless the Court views the trial court's findings to be without reasonable evidentiary support. Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976).

counterclaims were barred because the Respondent did not comply with Rule 23(b)(1), a procedural rule on its face applicable to class actions and shareholder derivative suits. This ruling contradicted the established law set forth in the American Law Institute, Principles of Corporate Governance: Analysis and Recommendations § 7.01(d) at 17 (2008):

In the case of a closely held corporation, the court in its discretion may treat an action raising derivative claims as a direct action, exempt it from those restrictions and defenses applicable only to derivative actions, and order an individual recovery, if it finds that to do so will not (i) unfairly expose the corporation or the defendants to a multiplicity of actions, (ii) materially prejudice the interests of creditors of the corporation, or (iii) interfere with a fair distribution of the recovery among all interested persons.

Id.

Two (2) South Carolina courts have acknowledged this exception but could apply it due to the facts of those particular cases. See Babb v. Rothrock, 303 S.C. 462, 464-65, 401 S.E.2d 418, 419-20 (1991); see also Brown v. Stewart, 348 S.C. 33, 557 S.E.2d 676, 685 (Ct. App. 2001).

Following its ruling, Respondent appealed to the Court of Appeals. The overwhelming focus on Respondent's 2011 appeal was to address this issue. Because when the parties are *de facto* partners and the only two (2) shareholders of a closely-held corporation, the pleading pre-requisites and requirements for derivative shareholder actions for large corporations make absolutely no sense. The Petitioner did not raise this issue any time prior during six (6) years of litigation, and only after he had dissolved the corporation, thereby making complying with the rule (even if applicable) an impossibility. The application of such a Rule 23(b)(1) to this case made zero practical sense. The counterclaims are not part of any class action. Also, when Respondent and Petitioner are

the only shareholders, there is no logical reason to require the Respondent, the victim of a scheme by his partner to steal all of the company's assets, to specify efforts to get the board of directors (which there were none in this case) to act on Petitioner's theft of all of the corporate assets.

On appeal in 2015, there were essentially two (2) issues: (1) the dismissal of claims (i.e., should Rule 23(b)(1) apply to disputes between 50/50 owners of a closely-held corporation); and (2) amending the complaint.² The Court of Appeals addressed the latter of these two and remanded the case back to the trial court with a directive to rule on the amended complaint. Broom v. Ten State Street, Op. No. 2015-UP-030 (S.C. Ct. App. filed Jan. 14, 2015)]. On appeal to the Supreme Court, the Supreme Court addressed the amendment issue by reversing the Court of Appeals on its order to remand. Broom v. Ten State Street, Op. No. 2015-MO-057 (S.C. Sup. Ct. filed Sept. 30, 2015). Importantly, the Supreme Court never addressed the dismissal issue. *Id.*

Respectfully, the Court of Appeals misinterpreted the impact of the ruling from the Supreme Court's decision in 2015 by conflating the separate issues before the Court. In its opinion, the Court summarized the Supreme Court's decision as follows:

² The reason why Respondent wanted to amend the complaint to begin with was to update the pleadings to reflect the facts that had been learned from six (6) years of discovery. The original counterclaims were filed in 2005. Respondent learned a great deal about Petitioner's theft of the corporate assets. If the appellate court was to decide a matter based upon the pleadings, Respondent believed the Court would benefit from knowing what had been learned over the prior six (6) years.

Our supreme court reversed this, holding that "the issue on appeal—whether the [circuit court] erred in dismissing [Andrews]'s counterclaims without allowing [Andrews] to amend his pleadings—was not preserved for review." *Broom v. Ten State Street, LLP*, Op. No. 2015-MO-057 (S.C. Sup. Ct. filed Sept. 30, 2015).

Andrews v. Broom, Slip. Opin. No. 2022-UP-022 (filed, January 12, 2022)

Importantly, deciding whether the counterclaims were properly dismissed is, and has always been, a separate and independent issue – one which neither appellate court addressed. Because neither appellate court addressed the dismissal issue, the order dismissing Respondent’s counterclaims does not qualify as “the law of the case” under South Carolina law. *Cf. Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) ("Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, **but expressly rejected by the appellate court.**") (emphasis added). Indeed, every case relied upon by the Court of Appeals in its opinion can be distinguished on this basis.³

The law of the case “prohibits issues which have been *decided* in a prior appeal from being relitigated in the trial court in the same case.” *Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997) (emphasis added). Nothing was decided in the prior appeal. The Court of Appeals tried to remand the case for a ruling on the motion to amend,

³ For example, *RIM Assocs. v. Blackwell*, 359 S.C. 170, 597 S.E.2d 152 (Ct. App. 2004) is inapplicable to this issue because there has never been a final ruling on merits of the Rule 23 issue. *Mason v. Mason*, 412 S.C. 23, 770 S.E.2d 405 (Ct. App. 2015) is inapplicable because Respondent raised the issue in question on appeal, but no appellate court has addressed it. *Hudson ex rel. Hudson v. Lancaster Convalescent Ctr.*, 407 S.C. 112, 754 S.E.2d 486 (2014) is inapplicable because Respondent never abandoned this issue on appeal.

specifically instructing the circuit court that amendments should be freely granted. The Supreme Court reversed the Court of Appeals for addressing a motion that had not been ruled on. The Supreme Court remitted the case back to the trial court.

The law of the case applies to subsequent proceedings in the same litigation following an appellate decision. Lifschultz Fast Freight, Inc. v. Haynsworth, Marion, McKay & Guerard, 334 S.C. 244, 245, 513 S.E.2d 96, 96-97 (1999). This part of the doctrine is obviously satisfied: the proceedings following the Supreme Court's remittitur (ruling on motion to amend; trial; and ruling on all post-trial motions) were in the same litigation following an appeal.

Here, because there was a pending motion to amend, and neither appellate decision addressed the applicability of Rule 23 to closely-held corporations issues (directly or indirectly), the trial court was free to take up the pending motion to amend. *See, Tillman v. Tillman*, 801 S.E.2d 757, 420 S.C. 246 (S.C. App. 2017) In *Tillman*, the court explained "the fate of [a party's] counterclaims has not been finally determined as long as his motion to amend hangs in the balance," and it also noted, "the ease with which pleadings may now be amended." *Id.* at p. 759.

2. The remaining three (3) holdings of the Court's opinion should be reversed on similar grounds.

The remainder of the Court's opinion finds that Respondent's claims were barred by the statute of limitations; that punitive damages should not have been awarded; and that attorney's fees should not have been awarded – all of these were premised upon the erroneous conclusion that the merits of Respondent's appeal of his counterclaims had been addressed or adjudicate during the prior appeal. Because there was never a ruling on the

merits of Respondent's appeal about the applicability of Rule 23, these claims were neither final nor fully adjudicated. As such, they were not barred by the statute of limitations, and the Court's award of punitive damages and attorney's fees was proper.

CONCLUSION

To this day, no appellate court has addressed the merits of Petitioner's appeal about the applicability of a pleading requirement in Rule 23 to closely-held corporations. Because there was no ruling on the merits, the trial court's 2011 order was neither final nor *res judicata* to the proceedings which took place when the case was remitted back to the trial court. Respectfully, the Court of Appeals erred in holding otherwise.

Respectfully submitted,

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/s/Rodney F. Pillsbury

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January 27, 2022

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
Jan 27 2022
SC Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
The Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2018-002223

H. Hugh Andrews, Respondent,

v.

Quentin S. Broom, Jr., Appellant.

PROOF OF SERVICE

I certify that I have served Respondent's Petition for Rehearing by electronic mail, on
January 27, 2022 addressed as shown below:

James E. Cox, Jr., Esq.: jcox@wyche.com

Whitney B. Harrison, Esq.: wharrison@mcgowanhood.com

Matthew Terry Richardson, Esq.: mrichardson@wyche.com

Respectfully submitted,

Pillsbury Law Firm, LLC

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January 27, 2022



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RECEIVED

Jan 27 2022

SC Court of Appeals

January 27, 2022

Via US Mail

The Honorable Jenny Abbott Kitchings
Clerk for The SC Court of Appeals
P O Box 11629
Columbia, SC 29211

Re: H. Hugh Andrews v. Quentin S. Broom, Jr.
Appellate Case No.: 2018-002223

Dear Ms. Kitchings:

I am enclosing our firm check for the filing fee in the amount of \$50.00 for Respondent's Petition for Rehearing that was filed today by email.

By copy of this letter to other counsel, I am notifying them of the same.

Please accept my best regards.

Very truly yours,

Pillsbury Law Firm, LLC

A handwritten signature in black ink, appearing to read 'R. Pillsbury', written in a cursive style.

Rodney F. Pillsbury

RFP/tpd

cc: Whitney Boykin Harrison, Esq.
Matthew Terry Richardson, Esq.
James Edward Cox, Jr., Esq.

The South Carolina Court of Appeals

H. Hughes Andrews, Respondent,

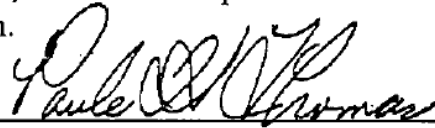
v.

Quentin S. Broom, Jr., Appellant.

Appellate Case No. 2018-002223

ORDER

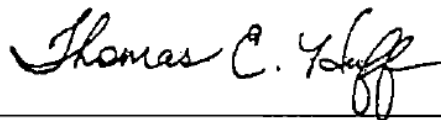
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied. However, the attached opinion is substituted for the previous opinion, which is withdrawn.



J.



J.



A.J.

Columbia, South Carolina

cc:

Whitney Boykin Harrison, Esquire
Matthew Terry Richardson, Esquire
Rodney F. Pillsbury, Esquire

FILED
Feb 09 2022

James Edward Cox, Jr., Esquire
The Honorable J. Mark Hayes, II