

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Thomas Wade Long and Clyde Kiser, individually
and on behalf of TnW and More, LLC

Plaintiffs,

v.

Timothy D. Kettner, Donald Kettner, and TNT and
More, Inc. d/b/a Crab Catchers on the Waterfront,

Defendants.

) IN THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT
) Civil Action No. 2021-CP-26-01512

**ORDER GRANTING PLAINTIFF
THOMAS WADE LONG AND CLYDE
KISER'S MOTION TO AMEND AND
DENYING DEFENDANT TIMOTHY D.
KETTNER'S AND DEFENDANT
DONALD KETTNER'S MOTIONS TO
DISMISS**

RECEIVED

Dec 12 2022

SC Court of Appeals

In this matter, several motions were heard before me at the Horry County Judicial Center in Conway, South Carolina, on December 6, 2021. The motions are the following: Defendant Timothy D. Kettner's two (2) Motions to Dismiss pursuant to Rule 12(b)(6), SCRPC; Defendant Donald Kettner's Motion to Dismiss pursuant to Rule 12(b)(6), SCRPC; Plaintiffs' Motion to Amend the Amended Verified Complaint; and Defendant TNT and More, Inc.'s Motion to Consolidate. Based upon the pleadings, public records, and arguments of counsel, the Court denies Defendants' Motions to Dismiss and grants Plaintiffs' Motion to Amend the Amended Verified Complaint.¹

FACTS

According to the allegations in the Amended Complaint, in 2016, Plaintiff Long and Defendant Timothy Kettner formed TnW and More, LLC ("Plaintiff LLC") to operate a water sports and boat slip and dock rental business. (Am. Verified Compl. ¶¶ 1, 5.) This business is

¹ At the hearing, Defendant TNT and More, Inc.'s Motion to Consolidate was partially granted to the extent that this case and case number 2021-CP-26-04496 are consolidated for discovery.

located adjacent to the Little River restaurant, Crab Catchers, operated by the Defendant Timothy Kettner. (Am. Verified Compl. ¶ 4.) On June 25, 2018, Plaintiff Kiser joined the Plaintiff LLC as a one-third member. (Am. Verified Compl. ¶ 1.) Defendant TNT and More, Inc. (“Defendant Corporation”) operates Crab Catchers. (Am. Verified Compl. ¶ 4.) Defendant Timothy Kettner and his son, Defendant Donald Kettner, are shareholders in the Defendant Corporation. (*Id.*)

When the Plaintiff LLC was formed, a joint venture between the Plaintiff LLC and the Defendant Corporation was also formed. (Am. Verified Compl. ¶ 5.) The Amended Complaint alleges the Plaintiff LLC upgraded and enlarged the Defendant Corporation’s parking lot, purchased land for boat slips, and installed a fuel tank and lines. (Am. Verified Compl. ¶ 7.) To fund the joint venture, the individual Defendants, the Defendant Corporation, the individual Plaintiff Long, and the Plaintiff LLC collectively borrowed \$1,100,000.00 from United Community Bank. (Am. Verified Compl. ¶ 8.) The collateral for this loan is real estate separately owned by the Plaintiff LLC and the Defendant Corporation. (*Id.*) These Defendants each guaranteed this debt. (*Id.*) The business venture operated for several years. (Am. Verified Compl. ¶ 10.) In September 2020, Timothy Kettner was accused of misappropriating funds from the Plaintiff LLC and thereafter moved across the country. (Am. Verified Compl. ¶ 12.) Then, the Defendant Corporation filed an eviction action in Magistrate Court, which was dismissed. (Am. Verified Compl. ¶ 13.) The Plaintiffs filed this action on March 12, 2021.

The March 12, 2021 Complaint alleges four causes of action: (1) promissory estoppel; (2) breach of fiduciary duty; (3) breach of the joint venture agreement; and (4) economic interference. Defendant Timothy Kettner filed his first Motion to Dismiss, and approximately one month later, the Plaintiffs amended their Verified Complaint, to which Defendants Timothy Kettner and Donald Kettner filed separate Motions to Dismiss pursuant to Rule 12(b)(6), SCRCP. On June 30, 2021,

Plaintiffs filed a Motion to Amend to add the Plaintiff LLC as a plaintiff, additional individual defendants, and several additional legal claims.

LEGAL STANDARDS

I. Plaintiffs' Motion to Amend

Rule 15(a) of the South Carolina Rules of Civil Procedure ("SCRCP") states a party has a right to amend his pleading once as a matter of course. Otherwise, a court must permit the amendment, or the adverse party must agree to allow the amendment. "[L]eave shall be freely given when justice so requires and does not prejudice any other party." Rule 15(a), SCRCP. "Rule 15(a) 'strongly favors amendments and the court is encouraged to freely grant leave to amend.'" *Skydive Myrtle Beach, Inc. v. Horry Crty.*, 426 S.C. 175, 180, 826 S.E.2d 585, 587 (2019) (quoting *Patton v. Miller*, 420 S.C. 471, 489-90, 804 S.E.2d 252, 261 (2017)). The party opposing the motion to amend has the burden of establishing prejudice. *Holland ex rel. Knox v. Morbark, Inc.*, 407 S.C. 227, 235, 754 S.E.2d 714, 719 (Ct. App. 2014) (citing *Foggie v. CSX Transp., Inc.*, 313 S.C. 98, 102, 431 S.E.2d 587, 590 (1993)).

II. Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6), SCRCP

When deciding a motion to dismiss for failure to state a claim, "[t]he question is whether, in the light most favorable to the [nonmoving party], and with every doubt resolved in his behalf, the [pleading] states any valid claim for relief." *Plyler v. Burrs*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007) (citing *Toussaint v. HCM*, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987)). Mere doubt that the claimant will prevail in the action is not a sufficient reason to dismiss the claim. *Id.* "If the 'facts alleged and inferences reasonably deducible therefrom would entitle the [litigant] to any relief on any theory of the case,' then dismissal under Rule 12(b)(6) is improper." *Sloan Constr.*

Co., Inc. v. Southco Grassing, Inc., 377 S.C. 108, 113, 659 S.E.2d 158, 161 (2008) (quoting *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 603 (1995)).

CONCLUSIONS OF LAW

I. Plaintiffs' Motion to Amend the Amended Verified Complaint

On June 30, 2021, Plaintiffs filed a Motion to Amend the Amended Verified Complaint, requesting to add TnW and More, LLC as a plaintiff, allege new causes of action including assault, misappropriation and nuisance, and add three additional defendants.² The Defendant Corporation opposes Plaintiffs' Motion to Amend, arguing the amended pleading would prejudice the existing parties and would be futile as to the parties and new allegations therein. Specifically, the Defendant Corporation asserts the proposed amended complaint is confusing and thus prejudicial, and any amendment would be futile.³

Rule 15(a), SCRPC states in part:

² The additional defendants would be Jose Bernardino Morales, Casey Kuznik, and Robert Benoit, who are all shareholders in the Defendant Corporation.

³ The Defendant Corporation also contends Plaintiffs' proposed amendment does not provide whether the individual defendants are being sued personally or as representatives, and therefore, does not provide sufficient notice to the defendants. Not only does the Defendant Corporation lack standing to make this argument on behalf of the already-named individual defendants as well as the proposed individual defendants given that no other party has joined in this objection, but nevertheless, the Court finds this argument unpersuasive. *See Rosario v. Rockefeller*, 410 U.S. 752, 759 n.9 (1973) (holding petitioners could not assert arguments on behalf of a class to which they did not belong); *cf. Seaside Resorts, Inc. v. Club Car, Inc.*, 308 S.C. 47, 57 n.3, 416 S.E.2d 655, 662 n.3 (Ct. App. 1992) (holding an issue unpreserved for appellate review where one party did not join the objection of another at trial). The Defendant Corporation cites to *Gissel v. Hart*, 373 S.C. 281, 644 S.E.2d 772 (Ct. App. 2007), as support that the complaint's caption, allegations, and prayer must specifically allege in which capacity the individuals were sued, but that case was reversed by the Supreme Court of South Carolina two years later when the Court held that the complaints in that case, which alleged the individual defendants were jointly and severally liable or liable in the alternative, were sufficient to name the defendants as individuals. *Gissel v. Hart*, 382 S.C. 235, 243, 676 S.E.2d 320, 234-25 (2009). Here, the Amended Complaint alleges against whom the causes of action pertain, and furthermore, the proposed Amended Complaint specifies the applicability of each cause of action against each defendant in the prayer for relief.

A party may amend his pleadings once as a matter of course at any time before or within 30 days after a responsive pleading is served.... Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and *leave shall be freely given when justice so requires and does not prejudice any other party.*

(Emphasis added.) “Prejudice occurs when the amendment states a new claim or defense that would require the opposing party to introduce additional or different evidence to prevail in the amended action.” *Holland*, 407 S.C. at 235, 754 S.E.2d at 719 (citing *Ball v. Canadian Am. Express Co., Inc.*, 314 S.C. 272, 275, 442 S.E.2d 620, 622 (Ct. App. 1994)). The prejudice described does not mean “that the non-moving party is forced to defend the merits of a valid claim. Rule 15 prejudice is some result flowing from the amendment that puts the non-moving party at a disadvantage in defending the merits,” which would not have happened if the moving party had timely amended its pleading or originally included as much. *Patton*, 420 S.C. at 491, 804 S.E.2d at 262-63. Moreover, Rule 15 prejudice “envisions [] a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it.” *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 286, 607 S.E.2d 711, 716-17 (Ct. App. 2005) (citing *Tanner v. Florence Cnty. Treasurer*, 336 S.C. 552, 521 S.E.2d 153 (1999)).

To illustrate, in *Holland ex rel. Knox v. Morbark, Inc.*, the Court of Appeals held the circuit court properly ruled an amendment would be prejudicial wherein the motion to amend came on the eve of trial. 407 S.C. 227, 235, 754 S.E.2d 714, 719 (Ct. App. 2014). In that case, the initial complaint was not included in the record on appeal, but the plaintiff amended his complaint once as a matter of course in March 2009. *Id.* at 231 & n.3, 754 S.E.2d at 716 & n.3. At that time, the trial had been set for February 2011. *Id.* at 231, 754 S.E.2d at 717. In July 2010, the Plaintiff filed a motion to amend his amended complaint, to which the adverse party agreed. *Id.* On January 13, 2011, the Plaintiff again filed a motion to amend but did not include a proposed amended

complaint. *Id.* The Court affirmed the circuit court, finding that permitting such an amendment would be prejudicial, particularly because there would be significant cost in reopening discovery on the eve of trial. *Id.* at 234, 236, 754 S.E.2d at 718, 719.

In this case, unlike the defendant in *Holland*, the Defendant Corporation failed to establish that the additional causes of action and defendants would lead to a significant discovery cost.⁴ At the motion hearing, the Court was informed that discovery has been limited, as no depositions have been taken, and this motion to amend has not been made on the eve of trial. Just three months after this lawsuit was started, Plaintiffs filed this Motion to Amend their Amended Verified Complaint. Further, one answer has been filed; Defendant Timothy Kettner has responded only with a Motion to Dismiss pursuant to Rule 12(b)(6), SCRPC in lieu of an answer, and Defendant Donald Kettner has similarly responded only with a Motion to Dismiss pursuant to Rule 12(b)(6), SCRPC. Accordingly, the Defendant Corporation has failed to meet its burden of establishing prejudice, and given the appellate courts' encouragement to freely grant leave to amend, Plaintiffs' Motion to Amend is granted.⁵

⁴ However, "the undertaking of additional discovery does not establish per se prejudice." *Holland*, 407 S.C. at 236, 754 S.E.2d at 719.

⁵ The Defendant Corporation also contends an amended complaint may not assert a new cause of action. The Court finds this notion contrary to existing authority in this State. *See De Loach v. Griggs*, 222 S.C. 326, 330-31, 72 S.E.2d 647, 649 (1952) ("Our decisions are, almost without exception, in accord with the modern theory of code pleading which permits amendments before trial, introducing a new cause of action or substantially changing the cause of action alleged.... 'There is no restriction on the power of the court to allow such amendments, even though their effect be to change entirely the whole cause of action, or the grounds of defense....' [A] litigant may not set up by amendment a wholly different cause of action, -one which does not arise out of or connect itself in a material aspect with the transaction set out in the original complaint, when the cause of action attempted to be set up by the amendment is barred by the statute of limitations.") (citations omitted); *Harris v. Harris*, 279 S.C. 148, 151, 303 S.E.2d 97, 99 (1983) ("Prior to trial, we have authorized a liberal attitude toward amendments in order to 'allow any party to shape his own pleadings to suit himself,' and thus a trial court may 'permit him at any time before trial to amend his pleadings so as to present his own views on the question to be litigated, upon such terms as may be deemed equitable...even though their effect be to change entirely the whole cause of

II. Defendant Timothy Kettner's April 13, 2021 Motion to Dismiss

At the hearing, counsel for Defendant Timothy Kettner conceded his first Motion to Dismiss, filed April 13, 2021, is moot because Plaintiffs subsequently amended their Verified Complaint as a matter of course, and Defendant Timothy Kettner filed a second Motion to Dismiss on April 30, 2021. Therefore, Defendant Timothy Kettner's April 13, 2021 is dismissed as moot.

III. Defendant Timothy Kettner's April 30, 2021 Motion to Dismiss

a. Rule 23, SCRCP and South Carolina Code § 33-44-1103

Defendant Timothy Kettner contends the Amended Complaint fails to comply with the pleading requirements set forth in Rule 23(b)(1), SCRCP and South Carolina Code Section 33-44-1103. Because the Court has granted Plaintiffs' Motion to Amend, which would add the Plaintiff LLC as a separate plaintiff, the Court need not address whether Plaintiffs properly pled a derivative suit. Nevertheless, as described more fully below, the Court holds Plaintiffs sufficiently pled in accordance with applicable law and the South Carolina Rules of Civil Procedure.

Rule 23(b)(1), SCRCP states in relevant part:

In a derivative action brought by one or more...members to enforce a right of a corporation..., the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a...member at the time of the transaction of which he complains.... The complaint shall also allege with particularity, the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort.

Similarly, South Carolina Code Section 33-44-1103 requires that "[i]n a derivative action for a limited liability company, the complaint must set forth with particularity the effort of the plaintiff

action, or the grounds of defense.") (quoting *Vernon v. Atl. Coast Line R.R. Co.*, 218 S.C. 402, 406, 63 S.E.2d 53, 55 (1951)).

to secure initiation of the action by a member or manager or the reasons for not making the effort.” Here, the pleadings sufficiently comply with Rule 23(b)(1), SCRCP and Section 33-44-1103.

Section 33-44-1101 states, “A member of a limited liability company may maintain an action in the right of the company if...*an effort to cause those members or managers to commence the action is not likely to succeed.*” (Emphasis added). In this case, an effort to cause Member Defendant Timothy Kettner to commence the action was implausible to achieve because he is named as an individual defendant, and he was the President and shareholder in the Plaintiff LLC. In addition, the Defendant Donald Kettner is his son. Plaintiffs provided these specific factual allegations related to demands that gave rise to Plaintiffs’ claims in Paragraph Twelve of the Amended Complaint:

The Defendant Timothy Kettner managed and controlled [TnW and More, LLC] until September 2020 when it was discovered that he was converting LLC funds and its assets without the individual Plaintiffs’ knowledge or consent. When the Plaintiffs first discovered the self-serving activities of the Defendant Timothy Kettner, *they requested complete documentation from said Defendant but said Defendant refused to provide needed LLC business information and now moved across the country.* In addition, Defendant Timothy Kettner was *requested by the Plaintiff to return the misappropriated funds to the LLC, but he refused.* *Since the Defendant Timothy Kettner controlled the LLC, the demands by the Plaintiffs were refused by the LLC not undertaking any action against the Defendant Timothy Kettner.*

(Emphasis added). As evidenced by that paragraph, Plaintiffs allege not one but two separate instances where Defendant Timothy Kettner refused to communicate with Plaintiffs. Given that Defendant Timothy Kettner controlled the Plaintiff LLC, any demands by Plaintiffs would have been and were refused. Therefore, in order to do justice to the parties, this Court construes the derivative action as sufficiently pled. *See* Rule 8(f), SCRCP (“All pleadings shall be so construed as to do substantial justice to all parties.”).

b. Separate and Distinct Damages Sufficient to Plead Individual Claims

Defendant Timothy Kettner next argues the individual Plaintiffs have not pled separate and distinct damages apart from the Plaintiff LLC to provide them standing. The Court disagrees.

“If misconduct by the management of a corporation has caused a particular loss to an individual stockholder, the liability for the mismanagement is an asset of the individual stockholder. Of course, a suit based on the misconduct can be brought by the individual stockholders.” *Brown v. Stewart*, 348 S.C. 33, 49, 557 S.E.2d 676, 684-85 (Ct. App. 2001) (quoting *Ward v. Griffin*, 295 S.C. 219, 221, 367 S.E.2d 703, 703-04 (Ct. App. 1988)) (internal quotations omitted). “An individual action is also allowed if the alleged wrongdoers owe a fiduciary relationship to the stockholder and full relief to the stockholder cannot be had through a recovery by the corporation.” *Brown*, 348 S.C. at 50, 557 S.E.2d at 685 (citing 19 Am. Jur. 2d *Corporations* § 2268, at 167 (1986)).

Defendant Timothy Kettner’s emphasis on fragments of the Amended Complaint is misplaced and misleading; although Defendant Timothy Kettner’s acts injured the Plaintiff LLC, his acts also brought about injury to the individual Plaintiffs as a result. *See Patterson v. Witter*, 425 S.C. 213, 232, 821 S.E.2d 677, 687 (2018) (“Direct and derivative claims may be brought simultaneously.... ‘When determining whether a claim is derivative or direct, some injuries affect both the corporation and the stockholders; if this dual aspect is present, a plaintiff can choose to sue individually.’”) (citations omitted). In this case, Plaintiffs pled that they suffered individual damages:

Paragraph 7: “In reliance upon the representations of the Defendants, *the Plaintiffs and the LLC* undertook and completed [numerous purchases and construction projects]”;

Paragraph 8: “In order to accomplish the above activities and in additional reliance on the representations of the Defendants, *Plaintiff Long and the LLC* agreed to

become borrowers with the Defendants for the purpose of borrowing from United Community Bank the sum of \$1,100,000.00.”;

Paragraph 15: “The actions of the Defendants have significantly harmed *the LLC and the Plaintiffs....*”;

Paragraph 16: “The Defendants have breached their duties to the Plaintiffs by refusing to participate in the joint venture even though over \$1,000,000.00 has been expended *as well as many hours of equity sweat by the individual Plaintiffs.*”;

Paragraph 18: “The misrepresentations of the Defendants were *individually relied upon by the Plaintiffs....*”;

Paragraph 20: “[T]he Plaintiffs are entitled to an award of actual and punitive damages....”;

Paragraph 25: “As a result of the breach of fiduciary duties by the Defendant Timothy Kettner, the Plaintiffs, *individually and on behalf of the LLC*, are entitled to an award of actual damages, punitive damages, and attorney’s fees and costs.”;

Paragraph 31: “As a result, *the Plaintiffs* have been harmed and therefore *the Plaintiffs* are entitled to actual and punitive damages from the Defendants.”

(Emphases added.) Defendant Timothy Kettner essentially asks this Court to raise the standard of surviving a motion to dismiss for failure to state a claim by contending the Plaintiffs should have alleged what evidence the Plaintiffs would present at trial for individual damages—which is not in accord with South Carolina law. *See Clark v. Clark*, 293 S.C. 415, 416, 361 S.E.2d 328, 328 (1987) (citation omitted) (“[Stating a cause of action] requires a litigant to plead the ultimate facts which will be proved at trial, not the evidence which will be used to prove those facts.”).⁶

c. South Carolina Code § 33-6-220(b)

Defendant Timothy Kettner’s next argues Section 33-6-220(b) prohibits Plaintiffs from naming him as a defendant in this action because Plaintiffs alleged he had filed an eviction proceeding on behalf of the Defendant Corporation. However, Defendant Timothy Kettner’s

⁶ Defendant Timothy Kettner also suggests a verified complaint cannot be amended, but he has cited to no authority—and the Court is not aware of any law—supporting that position.

argument contains a misstatement of Plaintiffs' pleading. Paragraph Thirteen of the Amended Complaint states: "Shortly after the discovery of the misfeasance of the Defendant Timothy Kettner, *the Defendant Donald Kettner, on behalf of Inc*, commenced a legal action in Magistrate Court...." Am. Verified Compl. ¶ 13 (emphasis added). Thus, Defendant Timothy Kettner has either attempted to make an argument on behalf of Defendant Donald Kettner or has misread the Amended Complaint. Regardless, even assuming the Amended Complaint acknowledges that Defendant Timothy Kettner was a shareholder in TNT and More, Inc., several of the allegations against Defendant Timothy Kettner as an individual relate to actions he committed, unrelated to the Defendant Corporation. *See, e.g.*, Am. Verified Compl. ¶ 12 ("[Defendant Timothy Kettner] was converting LLC funds and its assets without the individual Plaintiffs' knowledge or consent."). Therefore, much of Defendant Timothy Kettner's emphasis on piercing TNT and More, Inc.'s corporate veil is misplaced.

Furthermore, Defendant Timothy Kettner devotes much of his argument to the notion that a trial must be bifurcated. However, despite his best efforts to manipulate font so as to change the meaning of a case, he cannot morph the court of appeals' recitation of facts into a holding of the case. At issue in *Hunting v. Elders* was whether the trial court erred in piercing the corporate veil of the defendant corporation, thereby holding the defendant shareholder personally liable for a judgment against the corporation. 359 S.C. 217, 223, 597 S.E.2d 803, 806 (Ct. App. 2004). In that case, one of the individual defendants became intoxicated at a bar where he was overserved, and later that day, he collided with a victim who became brain-dead as a result of the drunk-driving incident. *Id.* at 220-21, 597 S.E.2d at 805. The guardian ad litem for the victim brought a suit against the drunk driver, the company that was the owner and operator of the bar, and the individual shareholder as the alter ego of the bar. *Id.* The case was bifurcated to first determine the liability

of the drunk driver and corporation. *Id.* at 221, 597 S.E.2d at 805. The second phase of the trial determined whether the individual shareholder was the alter ego of the company, justifying the piercing of the corporate veil. *Id.*

After the trial court found the individual shareholder liable, the shareholder appealed, and the court of appeals reviewed whether piercing the corporate veil was error. *Id.* In affirming the trial court, the court of appeals recognized that several factors in the first prong of the corporate-veil-piercing test were irrelevant in the context of statutory close corporations. *Id.* at 225-26, 597 S.E.2d at 807. However, the court of appeals ultimately held piercing the corporate veil was appropriate in that case. *Id.* at 228-29, 597 S.E.2d at 809. The court did not hold that trials for piercing the corporate veil must be bifurcated, as Defendant Timothy Kettner suggests. Nevertheless, even if such a trial should be bifurcated, Defendant Timothy Kettner fails to explain how that would warrant dismissal of the Amended Complaint pursuant to Rule 12(b)(6), SCRPC at this stage of litigation.

Ultimately, the South Carolina General Assembly did intend to protect shareholders of a corporation from personal liability, but that protection is not unlimited: “Unless otherwise provided in the articles of incorporation, a shareholder of a corporation is not personally liable for the acts or debts of the corporation *except that he may become personally liable by reason of his own acts or conduct.*” S.C. Code Ann. § 33-6-220(b) (emphasis added). Here, Plaintiffs alleged that Defendant Timothy Kettner and Defendant Donald Kettner have become personally liable by reason of their own acts and conduct, and therefore, in a light most favorable to the Plaintiffs and assuming all facts to be true, neither Section 33-6-220(b) nor *Hunting v. Elders* warrants dismissal of Plaintiffs’ causes of action.

IV. Defendant Donald Kettner’s Motion to Dismiss
a. Fair Notice of Claims

Without citing to any supporting law, Defendant Donald Kettner first alleges he has no notice of the causes of action against him. Specifically, Defendant Donald Kettner states, “Plaintiffs’ Amended Complaint fails to plead the presence of a promise unambiguous in its terms because it fails to make clear who’s [sic] representation was relied upon, the Inc.’s or Donald’s.” Def.’s Mot. to Dismiss, pg. 5.⁷ However, Paragraph Six of the Amended Complaint alleges who made promises to the Plaintiffs: “In the creation of the joint venture, the Kettner Defendants, *individually and on behalf of [TNT and More, Inc.]*, promised that the business activities of the LLC were entitled [to certain uses].” (Emphasis added.) The next paragraph explains, “In reliance upon the representations of the Defendants, the Plaintiffs and the LLC undertook and completed [numerous purchases and improvements].” Am. Compl. ¶ 7.

Further, other specific allegations against Defendant Donald Kettner are recited below:

Paragraph 14: “Defendant Donald Kettner interfered with the business activities of the LLC by blocking access to the parking lot, blocking access to the buildings constructed by the LLC denying ingress and egress to the floating docks and the boat docks used for charter boats even though the docks are located on the real property owned by the LLC, all the time while continuing to use portions of the LLC’s property.”

Paragraph 27: “The Defendants breached the aforesaid Joint Venture Agreement by refusing to permit the Plaintiffs to continue the operations of the LLC and renege on their promises.”

Paragraph 30: “The Defendants Donald Kettner and Inc have interfered in the economic relations of the Plaintiffs by blocking access to the parking lot and the buildings constructed by the Plaintiffs and by blocking water sports business activities. In addition, the said Defendants, with the consent of the Defendant Timothy Kettner, has prevented charter fishing customers[’] access to the boats...”

⁷ At the hearing, the Defendant Corporation took the position that Defendant Donald Kettner was acting within the scope of his authority.

Defendant Donald Kettner may disagree with the allegations contained in the Amended Complaint, but the Court finds he has notice of the allegations against him.⁸

b. Conflict of Interest

Next, Defendant Donald Kettner appears to assert an argument on behalf of Defendant Timothy Kettner in that the Plaintiffs' suit against a third member of the Plaintiff LLC creates a conflict of interest. Yet again, Defendant Donald Kettner has cited no law to support the proposition that any alleged conflict of interest would warrant dismissal pursuant to Rule 12(b)(6), SCRPC. Indeed, the purpose of Rule 23, SCRPC and statutes such as Section 33-44-1103 and other similar veil-piercing doctrines is to provide the entity and members thereof protection from injustice. *See Mid-S. Mgmt. Co. v. Sherwood Dev. Corp.*, 374 S.C. 588, 599, 649 S.E.2d 135, 141 (Ct. App. 2007) ("The main purpose of piercing the corporate veil is to prevent the likelihood of injustice or unfairness if the limited liability enjoyed by the corporate entity is sustained.") (citing *Sturkie v. Sifly*, 280 S.C. 453, 458-59, 313 S.E.2d 316, 318 (Ct. App. 1984)). Believing Defendant Timothy Kettner breached fiduciary duties by misappropriating the Plaintiff LLC's funds, Plaintiffs are protecting the Plaintiff LLC by initiating this suit against Defendant Timothy Kettner.

c. Naming Individual Defendants

Lastly, similar to Defendant Timothy Kettner, Defendant Donald Kettner contends Plaintiffs failed to comply with South Carolina Code Section 33-6-220(b) in that the individual

⁸ Similar to Defendant Timothy Kettner, Defendant Donald Kettner contends Plaintiffs Long and Kiser cannot maintain a derivative action on behalf of the Plaintiff LLC because they have not complied with Rule 23(b), SCRPC or South Carolina Code Section 33-44-1103. Because this argument is identical to that of Defendant Timothy Kettner's in his Motion to Dismiss pursuant to Rule 12(b)(6), SCRPC, the Court restates its holding that because the Plaintiffs' Motion to Amend is granted, the issue of pleading a derivative action is moot, but regardless, the Court finds Plaintiffs have sufficiently complied with the requirements of Rule 23(b), SCRPC and Section 33-44-1103.

Defendants are protected by such and no veil-piercing doctrine has been pled. Defendant Donald Kettner asks this Court to require Plaintiffs to plead above and beyond what is required by the South Carolina Rules of Civil Procedure. *See Clark*, 293 S.C. at 416, 361 S.E.2d at 328 (citation omitted) (“[Stating a cause of action] requires a litigant to plead the ultimate facts which will be proved at trial, *not the evidence which will be used to prove those facts.*”) (emphasis added). Here, Plaintiffs sufficiently pled instances wherein Defendant Donald Kettner individually and on behalf of the Defendant Corporation violated the law. *See, e.g., Am. Verified Compl.* ¶ 6: “In creating the joint venture, the Kettner Defendants, *individually and on behalf of Inc.*, promised [use of property].” Plaintiffs are not required to set forth all evidence to prove their claims at the very beginning of litigation. For these reasons and those noted in Defendant Timothy Kettner’s similar argument above, the Court holds Plaintiffs have sufficiently alleged causes of action against Defendant Donald Kettner individually.

Based on the foregoing, it is ORDERED, that Plaintiffs’ Motion to Amend the Amended Verified Complaint is granted, Defendants’ Motions to Dismiss Pursuant to Rule 12(b)(6), SCRCF are denied, and Defendant TNT and More, Inc.’s Motion to Consolidate is partially granted to the extent Case Number 2021-CP-26-04496 is consolidated with this civil action for the purpose of discovery.

IT IS SO ORDERED.

_____, 2022

Honorable, Benjamin H. Culbertson
Presiding Judge of the 15th Judicial Circuit



Horry Common Pleas

Case Caption: Thomas Wade Long , plaintiff, et al VS Timothy D Kettner , defendant,
et al

Case Number: 2021CP2601512

Type: Order/Amend

Presiding Circuit Court Judge

s/Benjamin H. Culbertson, Judge Code 2148