

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
In the Court of Common Pleas
Brian M. Gibbons, Circuit Court Judge

Case No. 2017-CP-42-00740

Appellate Case No. 2020-001642

Gibbs International, Inc., ...Respondent,

v.

Sarmad Harake, Eurosa, Inc., and Katherine Harake, ... Defendants

Of whom Sarmad Harake and Eurosa, Inc. are the Appellants.

PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING *EN BANC*

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DEC 17 2024

SC Court of Appeals

STATEMENT OF POINTS OVERLOOKED OR MISAPPREHENDED

Pursuant to Rules 219(b) and 221(a), SCACR, and for the reasons below, Respondent Gibbs International, Inc. (“Gibbs”) petitions the Court for rehearing and suggests rehearing *en banc* of the November 13, 2024 Panel Opinion No. 2024-UP-385 (the “Panel Opinion”) because:

1. The Panel Opinion conflicts with existing precedent by re-drafting a claim for the Harake Appellants that the Harake Appellants admit has never been recognized in South Carolina.
2. The Panel Opinion also conflicts with, and misapplies, existing precedent by interpreting the claim to be for “intentional interference with contract” when the claim was specifically described as being for “tortious interference with economic interest” and it is undisputed that the claim nowhere asserts the existence of the critical, required element of intentional conduct in thirty-six pages of Appellant’s Answer and Counterclaims.
3. The Panel Opinion overlooked, or perhaps avoided, the amendment issue since the only way to salvage the irretrievably broken claim was by amendment. The Panel Opinion is a de facto amendment that judicially re-writes the claim in a way that plainly runs afoul of, and circumvents, decades of precedent prohibiting amendments that cause undue delay and prejudice which should not be “swept under the rug.”
4. The Panel Opinion also conflicts with existing precedent because a pleading is to be judged “solely” on the allegations on “the face of the complaint” and reasonable inferences must also be based “solely” on those allegations. When “solely” looking at the allegations “on the face” of the pleading, the necessary allegations are indisputably absent and the only way to save the claim is by an improper and unjustified amendment.
5. The Panel Opinion eviscerates distinctly different legal elements and distinctions required to be proven for different claims under decades of existing precedent and inappropriately allows for one alleged economic tort to be re-characterized as another.
6. The Panel Opinion overlooks or misapprehends the argument that the claim is futile, which is a standalone ground for affirming the Circuit Court.
7. The Panel Opinion also misapprehends and overlooks that the dismissal/striking of the claim was independently appropriate due to the violation of a mandatory discovery obligation. Non-compliance with a court order is not the only basis for the entry of sanctions including the striking/dismissal of pleadings. Violation of mandatory discovery obligations provides the necessary basis and prejudice is “presumed,” when mandatory duties are violated.

BACKGROUND

This matter involves claims by Respondent Gibbs International, Inc. (“Gibbs”) of shameful breaches of fiduciary duties and theft of money, among other things, by Sarmad Harake (“Harake”

or “S. Harake”) and his wholly owned company and alter ego, Eurosa, Inc. (“Eurosa”) (collectively, the “Harake Appellants”), among others, resulting in millions of dollars of losses to Gibbs. This lawsuit was filed on March 7, 2017. Gibbs filed a Motion to Amend with its Amendment to the Second Amended Complaint attached to the motion on December 16, 2019 (“Gibbs’ Mot. to Amend Compl.”). This amendment arose out of a document production a few days earlier confirming that Harake had transferred to his wife, K. Harake, money entrusted to him by Gibbs to be used for purposes specified by Gibbs and that she had used the money for inappropriate purposes. The Motion to Amend was set for hearing in January 2020, but then rescheduled at Harake’s request to February 2020. Before the hearing, the parties reached an agreement in February 2020 in which they resolved the Motion to Amend. Gibbs contended the Harake Appellants breached the agreement almost immediately, which resulted in a series of negotiations. The dispute about the motion to amend was finally resolved on June 19, 2020, and the Third Amended Complaint was filed on August 3, 2020.

On August 24, 2020, the Harake Appellants filed their Answer to the Third Amended Complaint and Amended Counterclaims, along with a Motion to Dismiss the Third Amended Complaint. For the first time, Appellants asserted as their Fourth Counterclaim a counterclaim for “tortious interference with economic interest.” (Am. R. pp. 346–48, ¶¶ 191-204). Gibbs filed a Motion to Dismiss on August 28, 2020. Both sides filed briefs in support of their respective positions.

A hearing was held on September 22, 2020. On September 25, 2020, the Circuit Court entered a Form 4 Order directing the preparation of an order, among other things, dismissing Harake/Eurosa’s Fourth Counterclaim for Relief. The Harake Appellants filed a Motion to Alter or Amend Brief on October 5, 2020 (“Mot. to Alter/Amend”). The Mot. to Alter/Amend sought to amend the Fourth Counterclaim. The Circuit Court entered the formal, 29-page Order on

November 18, 2020 (the “November 18 Order”). The Circuit Court thereafter denied the Mot. to Alter/Amend on November 30, 2020 (the “November 30 Order”) after reviewing the Mot. to Alter/Amend and concluding no additional filings were necessary, and it requested the preparation of a simple Order for the Court’s consideration. (Am. R. p. 53). The Harake Appellants filed a Notice of Appeal on December 17, 2020.

The Harake Appellants’ fourth counterclaim for relief is explicitly for “tortious interference with economic interest.” (Am. R. pp. 346–48, ¶¶ 191-204). This claim was asserted for the first time on August 24, 2020 - 3 years and 5 months after the litigation was filed. The Harake Appellants admitted in their brief to this Court as well as the brief filed with the Circuit Court that this claim has not been recognized in South Carolina. (Am. R. p. 396; Initial Brief of Appellants Sarmad Harake and Eurosa, Inc. (“Harake Def. Br.”), pp. 11, 20). In addition, the claim does not use the words “intentional interference” or “intentional” anywhere in the subject claim, the rest of the 16 and one-half pages of counterclaims, or the entire 36 pages of answer and counterclaims. The factual basis for the claim is entirely new and presents facts not previously addressed in the Harake Appellants’ prior counterclaims. By way of example, the new claim involves a company in the United Kingdom allegedly called Paysend PLC (“Paysend UK”). Paysend UK’s name was not even used a single time in the Harake Appellants’ previously-filed counterclaims or in the rest of its answer.

The Circuit Court dismissed the Harake Appellants’ fourth counterclaim for relief in its November 18 Order. (Am. R. p. 35). The Circuit Court also rejected the verbal request made at the time of the hearing to be allowed to amend and noted that it would also address that motion raised in the subsequent, written Motion to Alter/Amend made by the Harake Appellants. (Am. R. pp. 35–36). The November 18 Order also concluded that Gibbs moved to strike the fourth counterclaim pursuant to Rule 12(f), SCRPC, “and any other applicable Rule and/or common law”

and the basis of that motion was that the Harake Appellants' counsel instructed S. Harake not to answer certain deposition questions about this claim. The Circuit Court also concluded that because the Harake Appellants did not move for a protective order with regard to certain questions that eventually became the fourth counterclaim, the counterclaim should be dismissed or stricken. (Am. R. pp. 36–37). Gibbs did give notice that a protective order was necessary when it filed its motion to dismiss/strike, when it gave notice in open court during the hearing on September 22, and with the submission of the proposed order on this issue on November 2, 2020, and the Circuit Court found that the Harake Appellants did not file a motion for a protective order within five business days of any of those events. (Am. R. pp. 36–37). The Circuit Court then found, in its discretion, that the refusal to allow S. Harake to testify justifies dismissal. (Am. R. pp. 37). The Circuit Court's November 30 Order denied the Harake Appellants' motion to alter and also again denied their motion to amend. (Am. R. p. 53).

THE PANEL'S OPINION AND SUMMARY OF ARGUMENT

The Panel Opinion judicially re-drafts the alleged claim for “tortious interference with economic interest” that the Harake Appellants admit has never been recognized in South Carolina. The new, re-drafted claim by the Panel Opinion changes the claim to one for “intentional interference with contract” by literally re-writing it, even though the Harake Appellants never used the words “intentional interference” or even “intentional” a single time in 16 pages of counterclaims or 36 pages of answer and counterclaims. The Harake Appellants also admitted to the Court that intentional conduct is a required element of the newly manufactured claim. Moreover, the labeling of the original claim was by no means an unintentional mistake. Instead, it was a deliberate choice by the Harake Appellants to assert a claim for “tortious interference with economic interest” so an argument could be made that no intentional conduct need be shown. The Circuit Court correctly recognized this and dismissed the claim.

The alleged torts at issue are independent claims with different characteristics and elements of proof. The Panel Opinion eviscerates those distinctions and allows for one alleged tort to be treated the same as another. Here, for example, it allows “tortious interference with economic interest” to be treated the same as “intentional interference with contract.” Decades of precedent say that business torts like this are independent torts that cannot be treated the same.

Even the Panel Opinion’s paraphrasing of the allegations in the complaint to try to justify the de facto amendment nowhere references the existence of intentional conduct. That is for the good reason that those words are not present and have never been alleged. The only potential bridge is by way of amendment which cannot be built here because the case was at the very end of the governing scheduling order and the amendment indisputably interjects an entirely new claim adding \$22 million in purported damages for a situation never previously raised in the case. PaySend UK was never even mentioned in any prior answer or counterclaim. The de facto amendment runs directly afoul of existing precedent of this Court and the Supreme Court. As a result, the Panel Opinion tried to avoid the amendment issue by re-writing the claim itself since no amendment could reasonably be allowed. The Harake Appellants should not be allowed to circumvent decades of precedent about when amendments should be disallowed due to undue delay and prejudice. It is completely unfair to Gibbs to have an unrelated claim adding \$22 million in alleged damage thrown in at the very end of the scheduling order. Re-drafting and de facto amending the complaint is in direct subversion of the time-honored amendment standard and, again, is plainly unfair.

Equally important, there is an independent, stand-alone ground on which the Circuit Court’s decision should have been affirmed. Any amendment here, for the reasons set forth below, is futile. The response by the Harake Appellants was non-existent as to these points other than to

refer the Court to its overall brief. By way of limited example, the Harake Appellants offered no meaningful response to the following arguments:

- There was no contractual or other legal duty for Gibbs to agree to be bought out or to roll over its interest—so, as a matter of law, no duty existed for Gibbs to agree to the buyout/roll over.
- Gibbs acted within its rights in deciding not to be bought out or to roll over.
- There are no allegations of fraud, misappropriation, intimidation, molestation, or that the defendant acted maliciously.
- This type of claim cannot be based on an allegation that pending litigation caused a third-party decision not to do business with the other party. As a result, any amendment should be denied based on futility independent of even the undeniable delay and prejudice that exists.

Additionally, dismissal/striking of the fourth counterclaim was also justified, among other reasons, due to violation of a mandatory discovery obligation. Violation of a court order is not required, and prejudice is presumed when mandatory obligations are violated.

ARGUMENT

I. THE PANEL OPINION RISKS CONFUSION AND ENCOURAGES GAMESMANSHIP AND INARTFUL PLEADINGS IN FUTURE CASES.

A. The Harake Appellants asserted a claim that they admitted has not been recognized under South Carolina law.

While the admission was conveniently buried in a footnote, the Harake Appellants did flatly admit that the fourth counterclaim at issue in this appeal they referred to as “tortious interference with economic interest” has not been recognized in South Carolina. (Harake Def. Br. at 20 n.4). As a result, the Circuit Court correctly found, among other things, that “the fourth counterclaim for relief is dismissed because the claim that Counterclaim Plaintiff chose to assert is not recognized in South Carolina.” (Am. R. p. 35). That dismissal was exactly the right treatment of the claim. The Circuit Court also correctly noted that the claim does not even allege “intentional

interference,” whether in the claim itself or elsewhere in the counterclaims. *Id.*¹ At a minimum, the Panel Opinion should have affirmed the Circuit Court on that point and then moved to the amendment issue.

In light of the Harake Appellants’ flat admission that the claim they pled was not a legally recognized claim, the only way to try to salvage the claim was to re-draft the complaint into something else that it plainly was not. Courts should not re-draft complaints in any situation, much less in a situation like this in which a party deliberately chose to assert the claim it did to try to lower the standard for recovery and sidestep having to prove intentional conduct.

B. The Panel Opinion re-drafts the claim and calls it intentional interference with contract but that also completely misses the mark.

The Harake Appellants took the position on appeal that “one possible claim” that its allegations have alleged is for intentional interference with contract. (Harake Def. Br. at 20). The claim was dismissed, and the Harake Appellants have admitted that the claim they pled is not recognized. Yet, even as of the filing of their brief with the Court of Appeals, they would not definitively say what the claim is that they are trying to assert. They just want to say this is “one possible claim” it could be. *Id.*

Even in *pro se* cases, courts have ruled that a court “may not rewrite a complaint to include claims that were never presented, construct the plaintiff’s legal arguments for him, or conjure up questions never squarely presented to the court.” *Martin v. Duffy*, No. CV 4:18-317-DCN-TER, 2018 WL 11462188, at *1 (D.S.C. Feb. 14, 2018) (emphasis added), *report and recommendation adopted*, No. 4:18-CV-0317 DCN, 2018 WL 11462186 (D.S.C. Mar. 12, 2018), *aff’d*, 732 F. App’x 197 (4th Cir. 2018). The Harake Appellants concede that the required elements of the claim they want the fourth counterclaim to now become are: (1) the existence of a contract; (2) knowledge of

¹Gibbs also vigorously contests the other elements of this claim.

the contract; (3) *intentional* procurement of its breach; (4) the absence of justification; and (5) damages. *Gecy v. S.C. Bank & Tr.*, 422 S.C. 509, 520, 812 S.E. 2d 750, 756 (Ct. App. 2018), *reh'g denied* (Apr. 26, 2018) (emphasis added). (Harake Def. Br. at 20).

In *Carolina Park Associates, LLC v. Marino*, the court explained “[a] ruling dismissing a complaint for failure to state facts sufficient to constitute a cause of action must be based **solely on allegations set forth in the complaint**. ‘If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory,’ dismissal is improper.” 400 S.C. 1, 6, 732 S.E.2d 876, 878 (2012) (emphasis added) (citation omitted). The bedrock foundation to test claim viability is “solely” based on “allegations” on the “face of the complaint.” In addition, the fact that the claim is to be judged “solely” on the allegations on the face of the complaint means that “inferences reasonably deducible therefrom” must also be judged “solely” on those allegations.

In the case at hand, when “solely” looking at the complaint allegations, they nowhere—not once—use the word “intentional,” much less the words “intentional interference” in the 36-page pleading. The case law does not allow for re-writing the complaint as, again, the test is “solely” from the “allegations” on the “face of the complaint.” Plain and simple, the required words absolutely are not present. The only way to try to put them there is to add them by amendment. The Circuit Court “got it right.” The label of the claim is not to be discarded as the Harake Appellants contend but instead is to be considered along with the allegations. Moreover, the allegations are equally as flawed as the label. *United Educational Distributors, LLC v. Educational Testing Service*, 350 S.C. 7, 10 n.1, 564 S.E.2d 324, 326 n.1 (Ct. App. 2002); *Crandall Corp. v. Navistar International Transportation Corp.*, 302 S.C. 265, 395 S.E.2d 179 (1990).

C. The cases cited by the Harake Appellants from other states do not support the conclusion that economic relations torts or their titles are interchangeable.

The Harake Appellants represent that “[o]ther states have recognized [tortious interference with contractual relations] under multiple names” (Harake Def. Br. at 19), and then cite cases from other jurisdictions. However, none of the cases cited by the Harake Appellants support the conclusion that economic relations torts are interchangeable or that other jurisdictions have adopted multiple names for the same tort within their jurisdiction. In fact, several cases explicitly find the opposite. *See, e.g., Ixchel Pharma, LLC v. Biogen, Inc.*, 470 P.3d 571, 575–76 (2020); *Gieseke ex rel. Diversified Water Diversion, Inc. v. IDCA, Inc.*, 844 N.W.2d 210, 218 (Minn. 2014); *Dunlap v. Cottman Transmission Systems, LLC*, 754 S.E.2d 313, 318 (Va. 2014). More specifically, not a single case cited expressly identified a claim for “tortious interference with economic interest” that the court redrafted and renamed as a claim for “intentional interference with contract,” which is what the Harake Appellants have asked this Court to do.

II. THE CIRCUIT COURT’S DENIAL OF THE HARAKE APPELLANTS’ MOTION TO AMEND WAS ALSO A PROPER RULING WITHIN ITS DISCRETION.

A. Overview Concerning Rule 15(a) Motions to Amend.

As noted above, “[u]ndue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.,” all justify denying a Rule 15 motion to amend pleadings. *Patton v. Miller*, 420 S.C. 471, 490, 804 S.E.2d 252, 262 (2017) (emphases added) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)). 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 ex rel. Knox v. Morbark, Inc.*, 407 S.C. 227, 235, 754 S.E.2d 714, 719 (Ct. App. 2014).

Skydive Myrtle Beach v. Horry County, 426 S.C. 175, 182, 826 S.E.2d 585, 589 (2019), is entirely different. First, it just holds that it is error to grant a Motion to Dismiss “without considering [a] request to amend the complaint.” Here, the Motion to Amend was considered twice—first at the September 22 hearing and second in the written Motion to Amend contained in the Rule 59 motion filed on October 5. Gibbs’ counsel even asked if Appellants were going to submit additional argument and they said no unless the Court asked for it. (Am. R. p. 22). The Circuit Court entered its Form 4 Order on September 25, 2020, its first formal order on November 18, and the final order on November 30. Appellants had more than adequate opportunity to try to amend and submit any additional filings they chose before the final order of dismissal and failed to do so. *Skydive* simply holds that a party’s request for amendment needs to be considered. *Skydive* does not mean every party is automatically entitled to amend if their complaint is dismissed. The liberal Rule 12(b)(6) standard and *Skydive* in no way override the *Holland* rule, which requires denial of amendments causing undue delay/prejudice.

B. The Harake Appellants should not be allowed to amend because of undue delay and prejudice.

The prejudice in the case at bar to Gibbs unquestionably falls within the above definition of prejudice for the following reasons:

Gibbs will have to depose Harake about this claim. That examination will likely identify other lay witnesses who have to be deposed, but Gibbs needs to be allowed to first depose Harake. That examination will also identify records that need to be produced and third-party subpoenas that need to be issued. The new claim would require additional discovery because it involves issues never previously raised in this case. These issues just scratch the surface based only on two pages out of sixteen total pages of counterclaims asserted by Harake. These issues were not addressed in Harake’s original counterclaims.

The Panel Opinion's creation of an intentional interference with contract claim is a brand new claim never previously asserted. This will require the gathering and analysis of new facts. It is very important to note that this is a brand new claim that is factually independent of Harake's other claims and raises the damages being sought in Harake's counterclaim from \$5 million to \$27 million. By Harake's own testimony, he knew about this claim and was only waiting to file because he was allegedly working on the damages issues. He simply testified that he had not "finished calculating" the alleged damage (Am. R. pp. 446–48, 478–79). That was no barrier to him proceeding with the claim, as claims are routinely filed before damages are finalized.

Upon deposing the above-referenced witnesses, Gibbs will need to evaluate and determine if additional expert witnesses are needed. That will necessitate a re-opening of expert identification for this new claim only. The original expert deadlines passed in January and February of 2020. The equivalent of eighty-five banker's boxes of documents were produced by Gibbs alone. (Am. R. p. 504). Depositions of all experts and numerous others were taken. The case has been pending since March 7, 2017. Harake did not pursue the amendment until its filing on August 24, 2020, over 3 years and 5 months after the original filing. It is completely unfair, and highly prejudicial to Gibbs, for Gibbs to have to defend a \$22 million claim thrown in after three and one-half years of litigation, most of the depositions are taken, and the expert deadline passed long ago.

It is also nonsensical for the Harake Appellants to argue that there is not any prejudice to Gibbs for its motion to amend in light of Gibbs' "recent" amendment. (Am. R. p. 458). Gibbs' motion to amend was filed in December 2019, just days after a document production confirmed that its money had been used inappropriately. Harake did not need more documents from Gibbs to assert his new claim as Harake flatly admitted in July 2019 he was just waiting to conclude "calculating" his damages. (Am. R. pp. 447, 479). In stark contrast, Gibbs needed the bank records

from Harake which he had hidden through the discovery objection process and later through objections while simultaneously threatening Gibbs with a frivolous proceeding claim if it pursued the claims. (Am. R. pp. 171, 175–76, 211, 215, 275, 279). The Harake Appellants were the architect of their now late-stage amendment, and should not be rewarded for Harake’s calculated, dilatory tactics with an unrelated claim being shoehorned in at this point. The Harake Appellants were completely aware of this counterclaim for at least over thirteen months before bringing the claim against Gibbs. They never filed a motion to amend their pleadings on their own initiative and clearly should have done so if they were going to pursue the claim. Claims are routinely asserted before damages are finalized so this was no excuse at all. Any amendment should be denied.

C. The forecasted amendment is futile.

The proposed amendment is futile.² First, the Harake Appellants concede in the words of their own counterclaims that they would not have been damaged if Gibbs had agreed to allow the other investors to buy Gibbs out of Paysend Processing or if Gibbs had agreed to roll Paysend Processing into Paysend UK. (Am. R. pp. 347–48). This claim is irretrievably broken because Gibbs had no legal duty to agree to allow the other investor to buy Gibbs out or to agree for the shares to be rolled from Paysend Processing into Paysend UK. The “existence and scope of the duty are questions of law for the Court to determine.” *Miller v. Camden*, 317 S.C. 28, 31, 451 S.E.2d 401, 403 (Ct. App. 1999).

Second, in *Gecy*, 422 S.C. 509, 812 S.E.2d 750, a case relied on by the Harake Appellants, the court affirmed dismissal of a claim for intentional interference with contract because the

²In accordance with Rule 208(b)(2) and 220(c), SCACR, Gibbs respectfully requests the Court affirm the Circuit Court’s order based on the additional alternate sustaining grounds referred to in the above section. *See I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419-20, 526 S.E.2d 716, 723 (2000).

defendant acted within its rights so there was no legal basis to show an intentional procurement of a breach of contract without justification. *See, Webb v. Elrod*, 308 S.C. 445, 448, 418 S.E.2d 559, 561 (1992). Assertion of, and pursuit of, legal rights do not act as a basis for a claim of intentional interference. Gibbs acted within its rights in declining to agree to be bought out or to roll over its stock into Paysend UK.

Third, in *United Educational Distributors, LLC v. Educational Testing Service*, 350 S.C. 7, 564 S.E.2d 324, 326 (Ct. App. 2002) the court explained: “Generally, there can be no finding of intentional interference with prospective contractual relations if there is no evidence to suggest any purpose or motive by the defendant other than the proper pursuit of its own contractual rights with a third party.” Gibbs was entitled to pursue, or not to pursue, a relationship with Paysend UK.

Last, Harake testified an individual named Abdul “forced” him out of Paysend UK because of this litigation between Gibbs and Harake. (Am. R. pp. 446-48, 476, ln. 6-25). Harake testified that he was forced out because Abdul indicated that Abdul would be raising money and “the first question they ask you is “Do you have any ongoing cases?” (Am. R. pp. 446-48, 477 ln. 12-16). Harake also testified Abdul said: “we don’t want you involved because you have a case ongoing.” (Am. R. p. 476, ln. 22-25). Again, the amendment is futile and should be disallowed.

III. VIOLATION OF THE DISCOVERY RULES WARRANTED DISMISSAL/ STRIKING OF THE FOURTH COUNTERCLAIM.

Dismissal/striking of the fourth counterclaim was appropriate due to violation of a mandatory discovery obligation. The Harake Appellants were required under SCRCP 30(j)(9) to file a motion for a protective order. Violation of a court order is not required. *Richardson on Behalf of 15th Circuit Drug Enft Unit v. Twenty-One Thousand & no/100 Dollars (\$21,000.00) U.S. Currency & Various Jewelry*, 430 S.C. 594, 599, 846 S.E.2d 14, 16 (Ct. App. 2020); *Downey v. Dixon*, 294 S.C. 42, 44, 362 S.E.2d 317, 318, n.1 (Ct. App. 1987). Prejudice is presumed where

mandatory duties are violated. *Id.* The refusal of the witness to answer coupled with Harake Appellants' failure to comply with mandatory obligations over three months all justify the dismissal/striking of the claim under Rules 12(b)(6), 12(f), and/or 37.

CONCLUSION

As part of its twenty-nine page Order, the Circuit Court dismissed the Harake Appellants' counterclaim for "tortious interference with economic interest." The Harake Appellants admitted to the Circuit Court that this claim has not been recognized in South Carolina. In addition, as the Circuit Court found, the Harake Appellants did not even use the words "intentional" or "intentional interference" anywhere in its thirty-six pages of Answer and Counterclaims. The admission that the asserted claim was unrecognized, coupled with the complete absence of an allegation of intentional conduct, made dismissal the exact right thing to do. Last-minute efforts to judicially redraft the last-minute claim should have been rejected in the Panel Opinion. The claim was properly dismissed and amendment was properly denied.

It is critical to remember that this was no 12(b)(6) dismissal of a claim asserted at the outset of litigation but instead was a claim asserted three and a half years in, with the governing scheduling order providing the case was to be ready for trial as of January 4, 2021 and that date was not changed by subsequent order. The governing discovery deadline was December 7, 2020. The expert deadlines were January 20, 2020 for Gibbs and February 20, 2020 for the Harake Appellants. All of this coupled with the following easily constitutes undue delay and causes extraordinary prejudice:

- \$22 million in new damages;
- Starting written discovery about the new claim after this appeal including, but not limited to, the service of international subpoenas;
- New experts will need to be located and identified after the Harake Appellants and lay witnesses are deposed on this issue;

- Motions to compel will unquestionably be required based on prior experience in this case;
- The de facto amendment in the Panel Opinion and the proposed amendment at this stage, plainly violate *Holland* and are extraordinarily unfair to Gibbs;
- The parties were in the final turn but are now back in the starting gate.

For the foregoing reasons, Gibbs respectfully requests that the Court rehear the matter by panel or *en banc* and affirm the Circuit Court's rulings.

Respectfully submitted this the 17th day of December, 2024.

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PROOF OF SERVICE

The undersigned hereby certifies that on December 17, 2024, he has caused to be served
Respondent's Petition for Rehearing and Suggestion for Rehearing *En Banc* upon all parties
of record via e-mail. A copy of the email serving all parties of record is attached hereto.

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Date: Tuesday, December 17, 2024 12:52:05 PM
Attachments: Respondent Gibbs International's Petition for Rehearing & Suggestion for Rehearing En Banc.pdf

Good afternoon,

Hope you all are well. Please find attached for service Respondent's Petition for Rehearing and Suggestion for Rehearing *En Banc* in the above-referenced matter. Best holiday wishes to you and your families.

Thank you.