

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM SPARTANBURG COUNTY
In the Court of Common Pleas

S.C. SUPREME COURT

Brian M. Gibbons, Circuit Court Judge

Case No. 2017-CP-42-00740

Appellate Case No. 2025-000682

Gibbs International, Inc.,Petitioner,

v.

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

Of whom Sarmad Harake and Eurosa Inc. are the..... Respondents.

RESPONDENTS' RETURN TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

1. Whether the Court of Appeals properly concluded Respondents' fourth counterclaim contained a valid claim for relief.
2. Whether the Court of Appeals properly concluded the Circuit Court could not strike the fourth counterclaim pursuant to Rule 12(f) or Rule 37, SCRCF, given the procedural history of the case and the Circuit Court's failure to address the appropriate factors before determining a sanction.
3. Whether the Court of Appeals properly disregarded Petitioner's arguments as to the prejudice and futility of Respondents' request for an opportunity to amend the fourth counterclaim given that the arguments were neither raised to nor ruled on by the Circuit Court.

INTRODUCTION

While this matter involves complex allegations and both corporate and individual parties, at its core, it is a business dispute arising from an alleged breach of contract related to an alleged investment agreement first discussed in 2015. Petitioner Gibbs International, Inc. ("Petitioner" or "Gibbs") essentially alleges that Respondents Sarmad Harake ("Harake") and Eurosa, Inc. ("Eurosa")(collectively, "Respondents") undertook certain responsibilities relative to multiple investments and were the sole cause of any investment failures, giving rise to an obligation to return all monies paid to Eurosa as well as liability for damages tied to, among other things, the investments made by Gibbs – even including investments made prior to and after Gibbs' business dealings with Respondents. Respondents deny Petitioner's allegations that they were solely responsible for any investment failure and deny they owe Petitioner any damages. Rather, Respondents allege Petitioner did not fulfill its promises, and those failures caused Respondents' damage. But the issue before this Court is even narrower.

As has been Petitioner's modus operandi throughout the appeal, its Petition attempts to distract from the narrow issue on appeal: do the allegations in fourth counterclaim of Respondents' Amended Answer and Counterclaims state a claim for any theory of relief. Rather, Petitioner seeks

to focus on outside allegations, interpretations, or speculation of motive that lack support in the record and are not proper for appellate review. Petitioner's attempt to create a list of what it believes would remain in the underlying litigation should the Court of Appeals' decision stand (such that Respondent's fourth counterclaim is permitted) also has no bearing on the issues before the Court. It is simple; Petitioner decided to file a Third Amended Complaint more than three years after the filing of the initial Complaint, which in turn gave Respondents the ability to modify their Answer and Counterclaims without having to make a motion to do so. Such procedural posture does not change the appellate standard of review, and Petitioner does not and cannot show a conflict between the case law applied by the Court of Appeals and a prior decision of this Court.

Specifically, Petitioner has not cited any South Carolina case, nor does such appear to exist, for the proposition that because a labeled cause of action has not been formally recognized in South Carolina, such cause of action should be automatically dismissed. Moreover, there is no binding case law in this State providing that the label given to a cause of action is the sole factor controlling whether the cause of action should be dismissed as argued by Petitioner. Further, no South Carolina precedent states that you have to use "required words" in order to establish an alleged element. Rather, the case law makes clear a court can, taking all facts in the light most favorable to the pleader, reasonably make inferences from the words used to determine whether any cause of action has been pled for purposes of a motion to dismiss.

It is also axiomatic in South Carolina that an appellate court need not address an appellant's remaining issues if its determination of a prior issue is dispositive of the appeal; therefore, it is not a conflict with case law for the Court of Appeals to have not addressed Petitioner's arguments that the Circuit Court ruled on a motion to amend. As an initial matter, there was no motion to amend, and motions to amend are not immediately appealable. Rather, Respondents' Motion to Alter or

Amend was not a motion made pursuant to Rule 15(a), SCRCP; it contained a request pursuant to Rule 59(e), SCRCP, to proceed under Rule 15(a), SCRCP, within 15 days, and that opportunity was rejected. To the extent Petitioner is arguing that the Court of Appeals should have undergone an analysis pursuant to Rule 15, SCRCP, Petitioner has misapprehended the procedural posture of this case and the scope of appellate review. The Circuit Court did not offer any analysis of the futility or prejudice of an amendment in either the November 18 Order or the November 30 Order addressing Respondents' Motion to Alter or Amend. (Am. R. pp. 035-36, November 18 Order, pp. 12-13; Am. R. p. 053, November 30 Order, p.1). Therefore, such arguments are not preserved for review here.

Finally, there is no precedent in this State standing for the proposition that a pleading should be struck for failing to file a motion for protective order after giving an instruction not to answer. Instead, the remedy as stated in the Rules of Civil Procedure is to reopen the deposition to ask the question for which no motion for protective order was filed. That remedy was neither sought nor denied in this litigation, and as a result, a sanction for the same is improper. Petitioner has failed to show there is any reason pursuant to Rule 242, SCACR, for the Court to grant this Petition. Accordingly, the Petition should be denied.

COUNTER-STATEMENT OF THE CASE

Petitioner initially brought this business dispute on March 7, 2017, but it was amended twice within the first few months, with the Second Amended Complaint filed on June 9, 2017. An entry of default was entered against, among other parties, Harake, Eurosa, and their co-defendant Katherine Harake on July 17, 2017; however, Harake, Eurosa, and Katherine Harake timely answered the Second Amended Complaint on August 17, 2017, and the entry of default was set aside by Order of the Circuit Court on December 21, 2017. The Second Amended Complaint, which spanned some thirty pages, alleged causes of action for: (1) breach of a contract between Harake and Eurosa on one

hand and Gibbs on the other; (2) breach of the implied covenant of good faith and fair dealing; (3) breach of fiduciary duties; (4) an accounting; (5) invasion of privacy; (6) a derivative action against IOtive and its Board Members and Shai Hemli; (7) an action for *quantum meruit* against Katherine Harake; (8) conversion; and (9) unfair and deceptive trade practices. (Am. R. pp. 086-114, 2d Am. Complaint, ¶¶ 11-110). When Respondents timely answered the Second Amended Complaint, they also alleged counterclaims for breach of contract, negligent misrepresentation, and unjust enrichment. (Am. R. pp. 134-143, Answer and Counterclaims, ¶¶ 124-176). Katherine Harake was voluntarily dismissed from this litigation on June 1, 2018.¹ Collectively since January 2018, the parties produced tens of thousands of pages of documents and took more than 10 depositions.

Gibbs filed its Third Amended Complaint on August 3, 2020, but did not renew the derivative cause of action in its previous Complaints or the breach of fiduciary duty cause of action as to certain prior defendants, leaving only Harake, Eurosa, and Katherine Harake as defendants in this litigation. (Am. R. p. 285, 3d Am. Complaint, p.1). The Third Amended Complaint contains causes of action for: (1) breach of contract and declaratory judgment, (2) breach of the implied covenant of good faith and fair dealing, (3) breach of fiduciary duty, (4) accounting, (5) invasion of privacy/wrongful intrusion, (6) conversion, (7) unfair and deceptive trade practices, (8) fraud, (9) civil conspiracy, (10) unjust enrichment/quasi contract/implied contract/quantum meruit, and (11) piercing the corporate veil. (Am. R. pp. 286-312, 3d Am. Complaint, ¶¶ 6-119). On August 24, 2020, Respondents filed a partial motion to dismiss the Third Amended Complaint as well as their Answer to Plaintiff's Third Amended Complaint and Amended Counterclaims ("Answer and Amended Counterclaims"). In their Answer and Amended Counterclaims, Respondents asserted four counterclaims, including

¹ Katherine Harake was brought back into this litigation as part of Gibbs' Third Amended Complaint in 2020 pursuant to different claims than were originally brought against her; although some of those claims were dismissed, she has not been a party to this appeal.

(1) breach of contract, (2) negligent misrepresentation, (3) unjust enrichment, and (4) tortious interference with economic interest (the “fourth counterclaim”). (Am. R. pp. 333-348, Answer and Amended Counterclaims, ¶¶ 124-206).

At issue in this Petition are the allegations related to the fourth counterclaim and testimony related to those allegations taken prior to the amendment. Respondents alleged more than thirty (30) paragraphs of background information in addition to claim-specific allegations supporting the four counterclaims they pled. (Am. R. pp. 334-342, Answer and Amended Counterclaims, ¶¶ 128-160).² Specifically, Respondents alleged that around June 1, 2015, Respondents, through Eurosa, began doing business with Gibbs after a handshake with Gibbs’ President and CEO, Jimmy I. Gibbs, and as part of this agreement, they agreed to create a limited liability company, Gibbs Investment Holdings (“GIH”), as a vehicle to work together on certain investment projects and under certain revenue sharing terms. (Am. R. p. 334, Answer and Amended Counterclaims, ¶¶ 128-131). However, an operating agreement for GIH was never executed by Gibbs. (Am. R. p. 335, Answer and Amended Counterclaims, ¶ 134).

As of June 2016, the parties further agreed that Harake would receive a monthly draw of approximately Thirty-Three Thousand and No/100 Dollars (\$33,000) from GIH, which would count as part of Gibbs’ investment in GIH. (Am. R. pp. 334-335, Answer and Amended Counterclaims, ¶ 133). As of August 5, 2016, Harake, on behalf of Eurosa, and Jimmy I. Gibbs,

² Additionally, each of the counterclaims included an incorporation paragraph, restating Respondents’ previous allegations. (Am. R. pp. 342-346, Answer and Amended Counterclaims, ¶¶ 161, 168, 182, and 191). The remaining paragraphs make up each of the four counterclaims, specifically (1) breach of contract (Am. R. pp. 342-343, Answer and Amended Counterclaims, ¶¶ 161-167), (2) negligent misrepresentation (Am. R. pp. 343-345, Answer and Amended Counterclaims, ¶¶ 168-181), (3) unjust enrichment (Am. R. pp. 345-346, Answer and Amended Counterclaims, ¶¶ 182-190), and (4) tortious interference with economic interest (Am. R. pp. 346-348, Answer and Amended Counterclaims, ¶¶ 191-204).

on behalf of Gibbs, signed a Memorandum of Agreement (“MOA”) providing their agreement would be reevaluated on or before February 5, 2017. (Am. R. p. 339, Answer and Amended Counterclaims, ¶ 143). The MOA provided that GIH would be owned in equal shares by the two sides, would not own any assets, would be managed by Harake, and would consist of unanimously chosen investment projects. (Am. R. p. 339, Answer and Amended Counterclaims, ¶ 144). The MOA also provided that project and investment ownership would be divided equally and that Gibbs would provide Three Million Two Hundred Thousand And No/100 Dollars (\$3,200,000.00) in “cash to fully fund agreed investment projects.” (Am. R. p. 339, Answer and Amended Counterclaims, ¶¶ 145-146).

Additionally, in July 2016, Gibbs agreed to certain obligations related to Paysend Processing, Inc. (“Paysend Processing”), which included providing \$1 million in investment money as long as it received money back during the second capital raise. (Am. R. p. 340, Answer and Amended Counterclaims, ¶ 149). Pursuant to an agreement between Eurosa, Gibbs, and a third party, Eurosa owned a 13% interest in Paysend Processing based on a valuation of \$27 million. (Am. R. p. 340, Answer and Amended Counterclaims, ¶ 150). As of September 2016, Jimmy I. Gibbs on behalf of Gibbs insisted that the \$33,000 draw promised to Harake from GIH should instead be drawn from Paysend Processing; however, Gibbs refused to make any investment over \$250,000 and refused to be bought out by the other investor. (Am. R. pp. 340-341, Answer and Amended Counterclaims, ¶¶ 151-152, 155).

At the time, Harake had acquired a company in the United Kingdom which changed its name to Paysend PLC (“Paysend UK”), and Gibbs refused to allow the investment in Paysend Processing to be transferred to Paysend UK. (Am. R. pp. 340-341, 347, Answer and Amended Counterclaims, ¶¶ 153, 155, 197-198). Gibbs knew Harake had acquired 100% ownership interest

of Paysend UK and that Paysend UK was going to continue to raise capital. (Am. R. p. 347, Answer and Amended Counterclaims, ¶¶ 195-196). Yet, Gibbs unjustifiably refused to be bought out or to roll Paysend Processing into Paysend UK. (Am. R. p. 348, Answer and Amended Counterclaims, ¶ 202). As a result of Gibbs' unjustified refusal: (1) Respondents were forced to purchase the other investor's shares in Paysend Processing; (2) Respondents were forced to pay for expenses incurred by that investor; and (3) Harake was first diluted and then forced to sell his shares in Paysend UK, causing him damages related thereto. (Am. R. pp. 341-342, Answer and Amended Counterclaims, ¶¶ 155-160).

The deposition of Harake at issue took place on July 25, 2019, over a year prior to the filing of the Third Amended Complaint by Gibbs which added more causes of action against Harake and to which Respondents added a fourth counterclaim to their Answer. (Am. R. p. 462, Harake Depo. Tr., Vol. 2, p. 1). Harake was permitted to testify as to Paysend Processing and Paysend UK, including that Harake received a \$1.5 million loan from a fund in Switzerland to use as capital to create Paysend UK, that as of July 2019 Paysend UK was worth around \$173 million, that Jimmy I. Gibbs refused to be a part of Paysend UK and refused to be bought out of Paysend Processing, and that Harake was forced to divest from Paysend UK. (Am. R. p. 473, line 9- p.478, line 17, Harake Depo. Tr., Vol. 2, pp. 286:9-291:17). That testimony is consistent with the allegations pled in Respondents' fourth counterclaim. However, when Harake began to testify about work product-protected information regarding the "next phase" and "damage" caused to him – and Gibbs' counsel asked questions about that, Harake was instructed by his counsel not to answer as further testimony would have revealed attorney-client and work product protected information. (Am. R. p. 478, line 17-p. 480, line 23, Harake Depo. Tr., Vol. 2, pp. 291:18-293:23).

Following the multiple depositions that were taken during the same week as Harake's

reopened deposition, counsel agreed off the record that should a motion for protective order need to be filed related to the instructions not to answer or refusal to answer given in either of the depositions of Jimmy I. Gibbs or Harake, opposing counsel was to let the counsel who gave the instruction know. (Am. R. p. 398, Memo. in Opp. to Gibbs' Motion, p. 9). At no time was such a request made to Respondents' counsel. (Am. R. p. 398, Memo. in Opp. to Gibbs' Motion, p. 9).

Following Respondents' Answer and Amended Counterclaims, Gibbs filed a "Motion to Dismiss and Strike Counterclaims of Sarmad Harake and Eurosa, Inc." ("Gibbs' Motion") on August 28, 2020, asserting Respondents failed to state facts sufficient to show a claim of negligent misrepresentation and that Respondents' fourth counterclaim for tortious interference with economic advantage is not a claim recognized by South Carolina law. (Am. R. p. 351, Gibbs' Motion, p. 2; *see also* Am. R. pp. 445-446, Gibbs Memo. in Supp., pp. 3-4). Gibbs' Motion further sought to strike "the intentional interference with prospective contractual relations claim" that Harake discussed during his deposition. Following several extension requests, Gibbs filed its Reply to Harake Defendants' Amended Counterclaims on September 18, 2020, denying some allegations and admitting some allegations in the Answer and Amended Counterclaims. (Am. R. pp. 354-363, Reply, ¶¶ 5-86).

Both sides filed memoranda in support or opposition of their respective positions as to Gibbs' Motion. As the filing of Gibbs' supporting memorandum was close in time to the hearing (approximately 90 minutes before the hearing), Respondents had already filed their opposition memorandum by the time they received Gibbs' supporting memorandum. Gibbs' supporting memorandum contained a new ground for relief that was not stated in Gibbs' Motion: It requested Respondents' fourth counterclaim be struck pursuant to Rule 37, SCRCF, but it did so without having conferred with counsel pursuant to Rule 11, SCRCF, or certifying that such conference

would serve no useful purpose. (Am. R. pp. 446-448, Gibbs Memo. in Supp., pp. 4-6). Further, Gibbs' supporting memorandum did not identify an order that it believed Respondents had violated to justify Gibbs' request to strike a cause of action as a sanction, (Am. R. pp. 446-448, Gibbs Memo. in Supp., pp. 4-6), which is a requirement of Rule 37 – the rule Gibbs invoked.

A hearing on Gibbs' Motion, as well as other motions in this matter, was held via WebEx on September 22, 2020. During the hearing, when discussing a potential motion for protective order, Gibbs argued that such a request should have been clear when it filed its motion to dismiss. (Am. R. p. 492, lines 1-11, Hrg. Tr., p. 12:1-11). However, Gibbs' counsel noted that "what [he] really care[d] about" was whether Respondents would "agree to let [him] depose [Respondent Harake] about" the fourth counterclaim. (Am. R. p. 492, lines 12-15, Hrg. Tr., p. 12:12-15). During the hearing, Respondents' counsel agreed that should the counterclaim proceed, Gibbs would not be precluded from reopening Harake's deposition for the limited purpose of inquiring about it. (Am. R. p. 502, lines 5-12, Hrg. Tr., p. 22:5-12). The Circuit Court thereafter noted that any limits of the deposition testimony were not before it. (Am. R. p. 502, lines 13-24, Hrg. Tr., p. 22:13-24).

On September 25, 2020, the Circuit Court entered a Form 4 Order ("September 25 Order"), ruling in part, that Gibbs' Motion should be denied as to Respondents' counterclaim of negligent misrepresentation and should be granted as to Respondents' counterclaim of tortious interference with economic advantage. The September 25 Order directed the respective parties to draft proposed orders "using language consistent with" their respective arguments by November 1, 2020. (Am. R. p. 016, September 25 Order, p. 2).

Following receipt of the September 25 Order, Respondents timely filed a motion pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure on October 5, 2020 ("Motion to Alter or Amend"). Following the proposed order submissions of the parties, the Circuit Court instructed

counsel on November 17, 2020 that because Respondents' counsel had already filed a motion pursuant to Rule 59(e), SCRCP, "a new one is not necessary." (Am. R. p. 021, November 17, 2020 Email).

The Circuit Court entered its final Order on November 18, 2020 ("November 18 Order"). While the November 18 Order contained the Circuit Court's rulings on multiple motions, Respondents only sought review of the portion of the November 18 Order that ruled on Respondents' fourth counterclaim. (Am. R. pp. 024-27, 34-37, 51, November 18 Order, pp. 1-4, 11-14, 28). Although acknowledging Respondents made a verbal request during the hearing on Gibbs' Motion for permission to amend the counterclaim to change the label as to that cause of action, the Circuit Court rejected that request, noting that Respondents' motion to reconsider requested amendment and that such issue would be dealt with in ruling on that motion. (Am. R. pp. 035-36, November 18 Order, pp. 12-13). Thereafter, the Circuit Court denied Respondents' Motion to Alter or Amend on November 30, 2020 ("November 30 Order") without additional briefing or argument, providing that it "fully considered the arguments . . . as well as the motions, arguments, and briefings submitted in connection with the related hearing held September 22, 2020." (Am. R. p. 053, November 30 Order, p. 1). The Circuit Court's November 18 Order also concluded that because Respondents did not move for a protective order with regard to certain questions about the claim that eventually became the fourth counterclaim, the counterclaim should be dismissed or stricken pursuant to Rules 12(b)(6) and 12(f), SCRCP. (Am. R. pp. 036-37, November 18 Order, pp. 13-14). Respondents timely filed a Notice of Appeal as to the Circuit Court's Orders on December 17, 2020.

Following briefing and oral argument, the Court of Appeals issued Panel Opinion No. 24-UP-385 (the "Panel Opinion") on November 13, 2024, reversing and remanding the dismissal of

Respondents' fourth counterclaim. Specifically, the Panel Opinion found Respondent's fourth counterclaim contained a valid claim for relief such that Respondents did not need an opportunity to amend, and it determined the Circuit Court could not strike the counterclaim pursuant to Rules 12(f) or 37, SCRCF, given the procedural history of the case and the Circuit Court's failure to address the appropriate factors before determining a sanction. (Panel Op. No. 24-UP-385, pp. 7-11). On March 12, 2025, the Court of Appeals denied Petitioner's Petition for Rehearing and Request for Hearing *en banc*.

ARGUMENT

The Court of Appeals appropriately determined Respondents' fourth counterclaim contained a valid claim for relief such that Respondents did not need an opportunity to amend, and it determined the circuit court could not strike the counterclaim pursuant to Rule 12(f) or Rule 37, SCRCF, given the procedural history of the case and the Circuit Court's failure to address the appropriate factors before determining a sanction. (Panel Op. No. 24-UP-385, pp. 7-11). Despite Petitioner's attempts to make new arguments and create conflicts between the Court of Appeals and this Court, no such "special and important reasons" exist here to warrant review by this Court. Rule 242(b), SCACR.

I. The Court of Appeals Properly Concluded Respondents' Fourth Counterclaim Contained A Valid Claim For Relief.

The Court of Appeals applied the correct standard in coming to its decision that Respondents' fourth counterclaim contained a valid claim for relief as the standard of review does not change based on where the litigation is in its lifecycle. When reviewing a dismissal pursuant to Rule 12(b)(6), SCRCF, an appellate court applies the "same standard of review as the trial court." *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247-48 (2007) (citing *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 500 (Ct. App. 2001)). "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.* (citing *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006)). A counterclaim is treated similarly, in that the trial court and reviewing court must base its decision whether to dismiss a counterclaim exclusively “on the allegations set forth in the counterclaim.” *Charleston Cnty. Sch. Distr. V. Laidlaw Transit, Inc.*, 348 S.C. 420, 559 S.E.2d 362 (Ct. App. 2001).

“The question for the court is whether in the light most favorable to the [complainant], and with every doubt resolved in his behalf, the allegations set forth on the face of the complaint state **any valid claim for relief.**” *Sloan Const. Co. v. Southco Grassing, Inc.*, 377 S.C. 108, 112–13, 659 S.E.2d 158, 161 (2008), *holding modified on other grounds by Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 743 S.E.2d 778 (2013) (emphasis added); *see also Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007); *Gentry v. Yonce*, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999); *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Stiles v. Onorato*, 318 S.C. 297, 457 S.E.2d 601 (1995). “If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the complainant, would entitle the [complainant] to relief on any theory, then dismissal under Rule 12(b)(6) is improper.” *Doe*, 373 S.C. 390, 395, 645 S.E.2d 245, 247. A pleading should not be dismissed merely because the court doubts the complainant will prevail in the action. *Charleston Cnty. Sch. Distr.*, 348 S.C. 420, 424, 559 S.E.2d 362, 364; *Toussaint v. Ham*, 292 S.C. 415, 357 S.E.2d 8 (1987). Given that Respondents’ fourth counterclaim contains “facts alleged and inferences reasonably deducible therefrom, [when] viewed in the light most favorable to [Respondents], . . . entitle [Respondents] to relief” on a cognizable theory of recovery, *Doe*, 373 S.C. 390, 395, 645 S.E.2d 245, 247, the Court of Appeals’ decision should be upheld. *See also Grazia v. S.C. State Plastering, LLC*, 390 S.C. 562, 567, 703

S.E.2d 197, 199 (2010).

A. Respondents' Fourth Counterclaim contains allegations that state a valid claim for relief.

The label on Respondents' fourth counterclaim is not dispositive³ of whether a claim can pass a challenge pursuant to Rule 12(b)(6), SCRPC, nor is it grounds for automatic dismissal if a cause of action is pled that has not been formally recognized.⁴ Rather, as the Court of Appeals reasoned, the question is whether the fourth counterclaim states *any* valid theory of relief using the standard established by Rule 12(b)(6), SCRPC.

Here, the facts alleged in the fourth counterclaim sufficiently state a cause of action for tortious interference with contractual relations. To allege and maintain a cause of action for tortious interference with contractual relations, a party must show: (1) a contract's existence, (2) knowledge of the contract, (3) deliberate or 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) (citation omitted). Viewing the facts alleged in

³ The law is well-settled that the label assigned to a cause of action is not dispositive as to whether it has been pled sufficiently. *See Prior v. S.C. Med. Malpractice Liabl. Ins. Joint Underwriting Ass'n*, 305 S.C. 247, 249, 407 S.E.2d 655, 657 (Ct. App. 1991) (providing that the court must look beyond the labels of a cause of action to the actions themselves when examining a Complaint). Rule 8(f) of the South Carolina Rules of Civil Procedure echoes this principle by providing “[a]ll pleadings shall be so construed as to do substantial justice to all parties.”

⁴ Even though tortious interference with economic interest has not been formally recognized in South Carolina, such a cause of action may be recognized - it is not grounds for automatic dismissal. *See Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000), *holding modified on other grounds by State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004) (citations omitted); *see also Fabian v. Lindsay*, 410 S.C. 475, 765 S.E.2d 132 (2014) (noting that no particular deference to the trial court is necessary in determining whether to dismiss a claim pursuant to Rule 12(b)(6), SCRPC, and recognizing that “beneficiaries of an existing will or estate planning document may recover as third-party beneficiaries against an attorney whose drafting error defeats or diminishes the client’s intent under legal malpractice or breach of contract theories.”).

support of the fourth counterclaim in the light most favorable to Respondents (which the Court of Appeal did using the Rule 12(b)(6) and Rule 12(f), SCRCRCP, analysis), the elements of a claim for tortious interference with contractual relations were pled. Specifically, the fourth counterclaim alleged that Gibbs, Eurosa, and another investor in Paysend Processing had an agreement related to the capital investments needed for Paysend Processing and for the overall plan for growth of that company, and part of that agreement required Gibbs to invest \$1 million. (Am. R. pp. 346-347, Ans. and Am. Counterclaims, ¶¶ 192, 195, and 196). Gibbs does not deny an agreement between these parties existed; rather, Gibbs disagrees with the substance of that agreement and refers the Court to the Third Amended Complaint for what it believes to be the accurate description of the agreement. (Am. R. p. 362, Reply, ¶ 70). At the time, Petitioner was also aware of agreement between Harake and the third party related to Paysend UK, and Gibbs refused to allow the investment in Paysend Processing to be transferred to Paysend UK. (Am. R. p. 340-341, 347, Answer and Amended Counterclaims, ¶¶ 153, 155, 195-198). Yet, Petitioner unjustifiably refused to be bought out or to roll Paysend Processing into Paysend UK. (Am. R. p. 348, Answer and Amended Counterclaims, ¶ 202). Therefore, Respondents alleged Gibbs was aware that it was supposed to invest \$1 million as part of a contract and that there were other agreements between Respondents and the third party related to Paysend UK, satisfying pleading of the first two elements of tortious interference with contractual relations, existence, and knowledge of a contract. *Gecy*, 422 S.C. at 520, 812 S.E.2d at 756. Additionally, Respondents alleged Gibbs refused without justification to meet its obligation under the agreement, acted deliberately to discourage other investment, unjustifiably refused to roll Paysend Processing into Paysend UK, and refused to be bought out from the agreement in an effort to salvage the company, intentionally causing a breach. (Am. R. pp. 346-347, Answer and Amended Counterclaims, ¶¶ 193, 194, 197, and 198).

Thereafter, Respondents alleged the damages that resulted from Gibbs' actions. (Am. R. pp. 347-348, Answer and Amended Counterclaims, ¶¶ 199-204).

Having alleged sufficient facts to meet each element of a claim for tortious interference with contractual relations, and taking those facts in the light most favorable to Respondents as any court must do at the Rule 12(b)(6) stage, Respondents' fourth counterclaim was sufficiently pled. *Gentry*, 337 S.C. 1, 522 S.E.2d 137. Accordingly, the Court of Appeals' decision should be upheld.

B. There is no conflict with the Court of Appeals' decision and a prior decision of this Court.

In its Petition, Gibbs argues the Court of Appeals' opinion conflicts with prior decisions of this Court because the label on the fourth counterclaim was for a cause of action that has not been formally recognized in South Carolina; however, that is simply untrue.

Petitioner points to the case of *Doe v. Greenville Cnty. Sch. Dist.*, 375 S.C. 63, 68, 651 S.E.2d 305, 307 (2007) as evidence that this Court has ruled that a counterclaim that is not recognized should not be permitted to survive a motion to dismiss. There is no conflict with that case, though, as it does not stand for the proposition that claim that has not been formally recognized in South Carolina must be dismissed without further review. Rather, in *Greenville Cnty. Sch. Dist.*, the Court reviewed the facts alleged in the complaint as they related to each of the dismissed claims and distinguished why they did not fit other causes of action. *Id.* at 68-70, 651 S.E.2d at 307-09. That posture does not create a conflict between the Court of Appeals' decision in the instant matter and *Doe v. Greenville Cnty. Sch. Dist.*; it is simply the application of the respective facts as pled to potential claims for relief.

Rather, this Court has held that pleadings in a case should be construed liberally so that substantial justice is done between the parties. *Manning v. Dial*, 271 S.C. 79, 84, 245 S.E.2d 120, 123 (1978). Therefore, in determining whether a cause of action should be dismissed, the "question

for the court is whether in the light most favorable to the [complainant], and with every doubt resolved in his behalf, the allegations set forth on the face of the complaint state *any valid claim for relief.*” *Sloan Const. Co.*, 377 S.C. 108, 112–13, 659 S.E.2d 158, 161 (2008), *holding modified on other grounds by Shirley's Iron Works, Inc.*, 403 S.C. 560, 743 S.E.2d 778 (2013) (emphasis added); *see also Fabian*, 410 S.C. 475, 765 S.E.2d 132 (2014) (reversing dismissal pursuant to Rule 12(b)(6) and permitting a third-party beneficiary of an existing estate plan to sue the drafting lawyer of that estate plan in tort and in contract for drafting errors); *Moriarty*, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (holding that an appellate court does not have to provide any particular deference to a lower court when deciding whether to recognize a cause of action, among other things), *holding modified on other grounds by State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004) (citations omitted). Moreover, when the Court of Appeals affirmed a dismissal because South Carolina had not recognized a cause of action for intentional interference with inheritance, this Court instead found such a ruling was unnecessary if there were other reasons to dismiss the particular pleading. *Douglas ex rel. Louthian v. Boyce*, 344 S.C. 5, 9-10, 542 S.E.2d 715, 717 (2001) (affirming the dismissal because there was no duty owed by the tort attorneys to the child). Accordingly, as Petitioner has not identified a prior decision of this Court standing for the proposition that only causes of action formally recognized by the courts may be pursued past the motion to dismiss stage of litigation, there is not a conflict between the Court of Appeals’ decision in this matter and a prior decision of this Court.

Additionally, Petitioner argues that two unpublished federal cases, a United States Fourth Circuit Court of Appeals case, and *Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874, stand for the proposition that an appellate court cannot rewrite a complaint, which it contends the Court of Appeals did in this case. However, those cases are likewise inapposite and do not create an avenue

for a writ of certiorari to be appropriate here. Specifically, in *Spence*, the Court affirmed the dismissal from the circuit court because when given the opportunity to present a different theory of recovery or additional factual allegations, the pleader did not do so but instead presented the same allegations and theory of relief. *Id.* at 131, 628 S.E.2d at 882. That is simply not the procedural posture of this case or the actions taken by the Court of Appeals in reversing the dismissal of the fourth counterclaim. Likewise, *Martin v. Duffy*, *Peterson v. Burgess*, and *Beaudett v. City of Hampton*, are *pro se* prisoner cases that had vaguely identified potential legal issues, including some that were duplicative of prior cases by the same litigant. *Beaudett v. City of Hampton*, 775 F.2d 1274, 1276 (4th Cir. 1985); *Martin v. Duffy*, No. CV 4:18-317-DCN-TER, 2018 WL 11462188, at *1 (D.S.C. Feb. 14, 2018), *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); *Peterson v. Burgess*, No. CIV.A. 7:14-141-TMC, 2015 WL 4644465, at *3 (D.S.C. Aug. 4, 2015). There is nothing about these cases that changes the standard of review for appellate courts in South Carolina pursuant to Rule 12(b)(6), SCRCP, which was properly applied by the Court of Appeals.

Finally, Petitioner appears to argue that failure to use the word “intentional” is fatal to Respondents’ fourth counterclaim and makes the Court of Appeals’ decision conflict with the settled case law of this State. However, Petitioner has failed to cite a case standing for the proposition that you have to use “required words” in order to establish an alleged element, and Respondents are unaware of such a case. Rather, the settled law in South Carolina is that a court, taking all facts in the light most favorable to the pleader, may reasonably make inferences from the words used to determine whether any cause of action has been pled for purposes of a Rule 12(b)(6), SCRCP, motion. The Court of Appeals specifically considered the allegations pled in

Respondents' fourth counterclaim, agreeing the words used satisfied the elements of a claim for tortious interference with contractual relations. (Panel Op. No. 24-UP-385, pp. 7-8; *see also* Am. R. pp. 340-341, 346-348, Ans. and Am. Counterclaims, ¶¶ 153, 155, 192-204; Am. R. p. 362, Reply, ¶ 70).

II. The Court of Appeals Properly Concluded The Circuit Court Could Not Strike Respondents' Fourth Counterclaim Pursuant To Rule 12(f) Or Rule 37, SCRPC.

The Court of Appeals correctly determined that it was an error for the Circuit Court to premise its dismissal of Respondents' fourth counterclaim on a failure to file a motion for protective order following counsel's instruction for Harake not to answer a question regarding protected information during his deposition, and Petitioner fails to point to any "special and important reasons" for this Court to review this matter as a result. Rule 242, SCACR. Therefore, the Petition should be denied.

Petitioner has not cited any authority for the proposition that failing to file a motion for protective order is a valid reason to strike a counterclaim for insufficiency in pleading. Respondents likewise have neither identified any support for this theory in South Carolina law nor located a South Carolina case in which a counterclaim was stricken when a motion for protective order was not filed after an instruction not to answer. Rather, Rule 30(j)(3), SCRPC, provides that the remedy for not filing a motion for protective order is that "the deposition may be reconvened" to ask the question previously objected to as the objection would have been waived. No such request was made to reopen Respondent Sarmad Harake's deposition after Gibbs provided its so-called notice that such a motion should be filed.⁵ Therefore, there was no discovery violation.

⁵ While Petitioner attempts to argue its Motion to Compel requesting additional deposition time with Sarmad Harake should have made it "clear that consultation was futile," Respondent neither raised the instruction not to answer in consultation about whether that motion would have to be filed nor in the motion itself. (Am. R. p. 270, Gibbs Supp. Memo. Mot. to Compel, pp. 1-12).

Further, neither case cited in the Petition deals with the procedural situation presented in this case: counsel has an agreement to let each other know whether the other needed to file a motion for protective order following the respective depositions of their clients; Petitioner did not inform Respondents such motion needed to be filed prior to asserting failing to file such motion was a reason to dismiss Respondents' fourth counterclaim; no motion for protective order was filed; no request to reconvene the deposition was made by Petitioner; and the Circuit Court thereafter struck Respondents' fourth counterclaim.

Rather, the cases cited by Petitioner as a reason for this Court to grant a writ of certiorari are inapposite because they invoke Rule 37(d), SCRCF. *Richardson on Behalf of 15th Cir. Drug Enft Unit v. Twenty-One Thousand & no/100 Dollars (\$21,000.00) U.S. Currency & Various Jewelry*, 430 S.C. 594, 597, 846 S.E.2d 14, 15 (Ct. App. 2020); *Downey v. Dixon*, 294 S.C. 42, 362 S.E.2d 317 (Ct. App 1987) (noting the "single issue presented" was whether the trial court erred in ruling on the appellant's sanctions motion for the respondent's "failure to answer interrogatories or attend his deposition"). Rule 37(d), SCRCF, governs instances in which a party does not attend its own deposition or in which there has been a failure to answer written discovery at all. This record contains no such facts.

In *Richardson*, a civil forfeiture case, the defendant served discovery, the Solicitor never responded, and the Solicitor was allowed to call witnesses in a bench trial that had not been provided in discovery responses. *Id.* As a result, the Court found the defendant had the right to request sanctions without a motion to compel pursuant to Rule 37(d), SCRCF. *Id.* at 599, 846 S.E.2d at 17. Thereafter, it went on to find the trial court's failure to address the sanctions request prior to trial was enough to reverse the trial court's forfeiture order and remand to allow discovery

to be completed before a new trial. *Id.* at 601, 846 S.E.2d at 18.

Petitioner's request to strike, however, was part of its motion to dismiss, so it served as an additional challenge to the sufficiency of the pleading, which is treated as a Rule 12(b)(6), SCRCF, motion. *See Grazia*, 390 S.C. 562, 567, 703 S.E.2d 197, 199 (2010) (stating "[a] motion to strike under Rule 12(f), SCRCF, which challenges a theory of recovery in the [pleading], is in the nature of a motion to dismiss under Rule 12(b)(6), SCRCF") (citing *McCormick v. England*, 328 S.C. 627, 632, 494 S.E.2d 431, 433 (Ct. App. 1997)); *see also Menezes v. WL Ross & Co.*, 392 S.C. 584, 709 S.E.2d 114 (Ct. App. 2011) (utilizing same standard of review to evaluate a motion to strike a counterclaim under Rule 12(f), SCRCF, as when reviewing a motion pursuant to Rule 12(b)(6), SCRCF). To the extent Petitioner attempts to argue it is not challenging the sufficiency of the pleading by raising Rule 12(f), SCRCF, Petitioner still has not provided authority finding that an instruction not to answer during a prior deposition somehow warrants striking a later-amended counterclaim, especially when the pleading does not contain "redundant, immaterial, impertinent or scandalous matter." *See* Rule 12(f), SCRCF.

As the Court of Appeals found, if a sanction is to be awarded pursuant to Rule 37, SCRCF, a "court must consider four factors when determining the appropriate discovery sanction: the nature of discovery sought, the discovery stage of the case, willfulness, and the degree of prejudice." *Richardson*, 430 S.C. at 600, 846 S.E.2d at 17. If a court neglects to consider the factors, which the Circuit Court in this case failed to do, "an abuse of discretion occurs." *Id.* Accordingly, there is no reason pursuant to Rule 242, SCACR, for the Court to review the Court of Appeals' well-reasoned decision.

III. The Court of Appeals Properly Disregarded Petitioner's Arguments As To The Prejudice And Futility Of A Potential Amendment of Respondents' Fourth Counterclaim.

Petitioner spends more than a third of its Petition arguing that a basis for review by this Court is that the Court of Appeals did not affirm the Circuit Court's denial of Respondents' request for an opportunity to amend their fourth counterclaim. Yet Petitioner's arguments are based upon a false premise: that there was a motion to amend filed by Respondents.

Petitioner's attempt to expand the scope of the Circuit Court's Orders was properly disregarded by the Court of Appeals and should not be reviewed by this Court as there is no conflict between what the Court of Appeals determined and a prior decision of this Court. The Circuit Court's November 18 Order acknowledged Respondents made a verbal request during the hearing on Gibbs' Motion for permission to amend the counterclaim to change the label, but the Circuit Court rejected that request, noting that Respondents' motion to reconsider renewed that request "and the Court will address the motion to reconsider by subsequent order." (Am. R. pp. 035-36, November 18 Order, pp. 12-13). The Circuit Court's November 30 Order contained a general denial based on previous arguments made as to the Motion to Dismiss, not a separate Motion to Amend the counterclaim. (Am. R. p. 053, November 30 Order, p. 1). Since Respondents' Motion to Alter or Amend was brought pursuant to Rule 59(e), SCRCF, as a request for the Circuit Court to reconsider its dismissal of the fourth counterclaim, the Circuit Court did not consider whether there was a valid reason for amendment to be denied. As a result, this Court should disregard Petitioner's arguments in Section II of its Petition because that Section, including sub-sections A and B, contains issues and alleged facts that were not presented to the Circuit Court in order to rule on Gibbs' Motion to Dismiss and are therefore not preserved for review. Rule 210(c), SCACR; *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779 (2004)(finding that in order to

be preserved for appellate review, an issue must be “raised to and ruled on by the lower court”).

Further, it is axiomatic in South Carolina that an appellate court need not address an appellant’s remaining issues if its determination of a prior issue is dispositive of the appeal, which it was in this instance. *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999); *see also Whiteside v. Cherokee Cnty. Sch. Dist. No. One*, 311 S.C. 335, 340-41, 428 S.E.2d 886, 889 (1993). Accordingly, there was no “abuse of discretion” by the Court of Appeals in choosing not to entertain Petitioner’s arguments on a motion to amend that was never made, and Petitioner has failed to identify any case with which the Court of Appeals’ decision conflicts.

Finally, Petitioner’s argument that the Court of Appeals’ decision creates a conflict between *Skydive Myrtle Beach* and *Holland* is equally unavailing. *Skydive Myrtle Beach v. Horry Cnty.*, 426 S.C. 175, 182, 826 S.E.2d 585, 589 (2019) (finding the dismissal of a commercial lessor’s claims against the county without leave to amend was improper and noting that when a “trial court finds a complaint fails ‘to state facts sufficient to constitute a cause of action’ under Rule 12(b)(6), the court should give” the party an opportunity to amend pursuant to Rule 15(a)); *Holland ex rel. Knox v. Morbark, Inc.*, 407 S.C. 227, 754 S.E.2d 714 (Ct. App. 2014) (finding denial of a motion to amend filed pursuant to Rule 15(a), SCRCP, was prejudicial and therefore denied following the close of discovery). As an initial matter, *Skydive Myrtle Beach* and *Holland* do not address the same stage of motions practice, and the ruling by the Court of Appeals in this case does not suggest that there is any conflict between *Skydive Myrtle Beach* and *Holland*. Respondents simply sought an opportunity to amend as ordered in *Skydive Myrtle Beach* should the Court of Appeals decline to recognize a cause of action for tortious interference with economic interest under South Carolina law or decline to re-label the fourth counterclaim as one for tortious

interference with contractual relations. The Court of Appeals did not get to whether an opportunity to amend was proper because it found the fourth counterclaim as one for tortious interference with contractual relations. Therefore, no conflict was created between *Skydive Myrtle Beach* and *Holland* in this case, and Petitioner's perceived conflict is not an appropriate reason for the Court to grant the Petition.

CONCLUSION

Respondents urge this Honorable Court to deny the Petition for Writ of Certiorari. Petitioner has not identified any valid conflict between the decision by the Court of Appeals and a prior decision of this Court or any other special and important reason that would make a Writ of Certiorari proper. The case law of this State simply does not support the Circuit Court's findings as to Respondents' fourth counterclaim, and the Court of Appeals correctly reversed the dismissal of Respondents' fourth counterclaim. Accordingly, the Petition should be denied, and the matter should be remanded to Circuit Court in accordance with the decision by the Court of Appeals.

Respectfully Submitted,

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